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Division II
State of Washington

NO. 56076-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

IN RE THE PERSONAL RESTRAINT OF

DAVID ROQUE GASPAR,

Petitioner

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Timothy Ashcraft, Judge

REPLY BRIEF OF PETITIONER

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A. INTRODUCTION

Petitioner David Roque-Gaspar submits the following arguments and authorities in reply to the State's Response to his PRP. Mr. Roque-Gaspar's petition should be granted because he was ineffectively represented by counsel throughout trial and sentencing when counsel failed to call appropriate experts, failed to adequately prepare for trial, and failed to properly investigate the case prior to trial.

Moreover, current laws requiring trial as an adult of anyone over the age of 18 at the time of charging despite the fact that the crimes were during adolescence is contrary to Mr. Roque-Gaspar's Eighth Amendment rights.

B. ARGUMENT

1. Mr. Roque Gaspar's Petition establishes actual and substantial prejudice stemming from constitutional errors

After a lengthy recitation of the facts of this case, the majority of which are not in dispute, the State commences its

argument with the accepted proposition that a petitioner bringing collateral review must establish that errors in his trial outside the record prejudiced his trial. *In re Hagler*, 97 Wn.2d 818, 826, 650 P.2d 1103, 1108 (1982). However, the State omitted the fact that the Petitioner's burden is a simple preponderance of the evidence, obviously a lower burden than the State would like. Mr. Roque Gaspar must only demonstrate that it is more likely than not that claimed errors prejudiced his trial. *In re Cook*, 114 Wn.2d 802, 814, 792 P.2d 506, 512 (1990), *citing State v. Kitchen*, 110 Wn.2d 403, 413, 756 P.2d 105 (1988). Petitioner has met this burden.

Mr. Roque Gaspar was represented by counsel who failed to provide effective representation, thus depriving Mr. Roque Gaspar of his Sixth Amendment right to effective counsel. As demonstrated in his Petition and *infra*, counsel's failure to adequately prepare for trial and sentencing and his failure to present expert testimony at both trial and sentencing prejudiced Mr. Roque Gaspar's right to a fair trial. Because no expert

explained the logistics of the Reid Interview Technique, the jury was unable to comprehend the coercive nature of the police interrogation that led to a partial confession in this case through the use of that technique.

Further, by failing to provide expert testimony at the sentencing hearing, the Court was presented only with the State's erroneous interpretation of youth brain development, which led directly to a finding of adult-level culpability and a sentence far beyond that warranted for the 15-17 year old boy that Mr. Roque Gaspar was at the time the offenses were allegedly committed.

The fact that the outcome of the trial and the length of Mr. Roque Gaspar's sentence would likely have been quite different with just the addition of these two experts is sufficient to demonstrate actual and substantial prejudice pursuant to *Hagler* and its progeny. *See, e.g., In re Mercer*, 108 Wn.2d 714, 741 P.2d 559, 562 (1987). As Mr. Roque Gaspar's claims are all rooted in constitutional protections, the burden of demonstrating that any errors resulted in a complete miscarriage of justice is not

his to meet in this case.

2. The Petition is supported by substantial evidence both within and outside the record.

The State begins by criticizing Mr. Roque Gaspar for failing to provide attorney work product in the form of contents from his previous counsel's file, or a declaration from previous counsel admitting that he failed to provide Mr. Roque Gaspar with effective representation. The former is a completely unrealistic request and, as persuasive as the latter may have been, it is the rare attorney who will admit that he did not diligently represent a client, thus opening himself up to civil suits and bar discipline. This request is nearly as incredible as the demand for work product from counsel's files.

The State cites to *Personal Restraint of Morris*, where the Court criticized Mr. Morris for failing to provide a declaration from trial counsel. *In re Pers. Restraint of Morris*, 189 Wn. App. 484, 495, 355 P.3d 355 (2015)

However, it is crucial to bear in mind, as the State

makes the repeated claim throughout its brief that Mr. Roque Gaspar's failure to do the same is "telling," that the statement in *Morris* was directed specifically to a claim of failure to challenge evidence that could reasonably have constituted a strategic decision at trial *Id.*

Conversely, Mr. Roque Gaspar's claimed failures of trial counsel are those for which no strategic explanation *can* exist, including failure to call experts, failure to prepare witnesses to testify, and failure to adequately investigate pre-trial to ensure awareness of all exculpatory witnesses.

Despite the inability of Mr. Roque Gaspar to prevail upon prior counsel to open his files for review or draft a declaration outlining his errors at trial, there is in fact substantial factual basis for his claim within the record provided to the Court for the instant appeal, as was demonstrated in Mr. Roque Gaspar's PRP and will be shown again *infra.*

3. Counsel's representation was ineffective on several fronts.

"While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (CA7), cert. denied *sub nom. Sielaff* v. *Williams*, 423 U.S. 876 (1975).

Mr. Roque Gaspar's counsel was sufficiently deficient in his performance that a sacrifice to the gladiators very nearly describes his trial. Defense counsel was outmatched and overcome at every turn due in large part to his utter failure to conduct adequate case investigation, his failure to prepare his witnesses to testify, and his failure to hire proper experts to explain technical aspects of the case to the lay jury, to name but a few. Mr. Roque Gaspar relies on his PRP for argument regarding any of the issues underlying his claim of ineffective assistance of counsel that are not mentioned herein.

a. Failure to fully investigate

Here, the State makes the unsupported claim that after counsel identified three witnesses who would testify consistently with Mr. Roque-Gaspar's version of events, he was not obligated to conduct any further investigation. Petitioner knows of no standard or precedent establishing this as a rule of thumb for an investigation. Rather, Petitioner argues that counsel should investigate thoroughly whether this results in the identification of three witnesses or thirty.

Here, for instance, while A.G.'s father testified that she stayed with her Godparents on one of the nights she claimed to have been raped, Francisco Gaspar was unable to recall the name of those godparents in cross-exam, demonstrating not only that counsel had failed to prepare his witness for cross-exam, but that counsel had made no effort to locate the Godparents prior to trial. RP at 983-4. Shortly after Mr. Gaspar testified, he provided counsel with that information, demonstrating that had counsel simply spoken with Mr. Gaspar prior to trial, the identity of these

witnesses would have arisen in time to have them testify at trial. RP at 1065-6. However, due to the fact that the witnesses were not identified or disclosed to the State until mid-trial, they were not allowed to testify. RP at 1067-8.[1] This issue is part of the record and exemplifies the lack of preparation counsel demonstrated throughout the trial. Counsel clearly believed that the testimony of the Godparents was necessary, also eliminating the claim that the failure to have the testify was in any way strategic, as it appears that he would have had them testify if only he had known who they were – yet made no effort pre-trial to ascertain their identities. *Id.* As in *State v. Weber*, 137 Wn. App. 852, 858, 155 P.3d 947 (2007), cited by the State, counsel's failure to locate exculpatory evidence here was evidence of ineffective assistance.

Again, Mr. Roque-Gaspar is here criticized for not having

[1] When questioned by the court, counsel admitted that he "arguably" could have obtained this information in time to add A.G.'s godparents to the witness list. RP at 1067.

a declaration from counsel admitting to ineffective assistance. Yet, the record itself demonstrates that counsel was unaware of the existence or names of the Godparents, two things that he surely would have known had he done but the most basic of investigations prior to trial, including interviewing his own witnesses.

b. Inadequate Witness Preparation is obvious when witnesses were unable to recall basic information and counsel was surprised by aspects of defense witness testimony.

The State here claims that Mr. Roque-Gaspar failed to rebut the presumption that counsel adequately prepared witnesses for trial, then discounts the very evidence in the PRP that establishes that failure. It appears that no amount of evidence of ineffective representation would satisfy a prosecutorial body so seemingly desperate to preserve a conviction rather than discover the truth about a criminal allegation and the proceedings that follow.

Again, as Mr. Roque Gaspar explained in his initial brief,

it is clear from witness testimony that these witnesses were not interviewed prior to trial. Graciela Gaspar states in her declaration only that she provided a list of names and phone numbers to counsel, many of whom he never contacted. PRP Appendix at 111. Simply because a witness has contact with counsel does not mean that witness was interviewed or in any way prepared to provide testimony at trial.

Moreover, contrary to the State's claims, a witness' failure to recall the names of close friends clearly can be anticipated and headed off prior to trial by simple witness preparation. A written list of witnesses who will be named during testimony, for example, would be a permissible aid for a witness who may be inclined to be forgetful. That was not done in this case. In fact, it does not appear that counsel even asked his witness the names of A.G.'s Godparents prior to trial. It is crucial to the credibility of witnesses that they have a proper grasp of the facts of a case, including the names of purportedly close friends who will be key actors in that witness' testimony, and should be thoroughly

covered during trial preparation. The failure of a witness to remember this basic information is a glaringly obvious flag that such preparation was not completed. A failure to remember something as basic as the name of a friend who can provide alibi testimony renders the witness less credible in the eyes of the jury, perhaps to the point of believing that the witness is not being truthful. The clear lack of preparation of the defense witnesses is likely one reason for the conviction this case.

c. There can be no strategic reason for counsel's failure to call experts in Reid or brain development to neutralize the most prejudicial issues in this case.

The State correctly notes that expert testimony is brought in when the subject matter is beyond the understanding of an ordinary person. *In re Pers Restraint of Cross*, 180 Wn.2d 664, 690-91, 327 P.3d 660 (2014), *abrogated on other grounds*, *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018).

Here, the State claims that Mr. Roque-Gaspar should have provided declarations containing that information that an expert would have provided. While Petitioner believes that the

overwhelming science on both Reid and juvenile brain development cited in Petitioner's opening brief adequately covers the scope of what any expert in either area would testify to, attached to this brief is a declaration from Forensic Neuropsychologist Dr. Robert Stanulis, who has provided the ground that he would have covered had he been called to testify in this matter and provides his opinion that a better understanding of these subjects would have changed the course of the trial. *See, Declaration of Dr. Robert Stanulis,* Appendix A.

The State relies heavily on *State v. Rafay*, 168 Wn. App. 734, 285 P.3d 830 (2012), where expert testimony regarding coercive police interrogation techniques was disallowed, in an apparent effort to claim that such testimony would have been barred in this case as well. However, a reading of *Rafay* demonstrates that the undercover police sting operation in that case differs significantly from the usual police interrogation that results in a false confession, and that the expert's offer of proof did not explain how the expert would have addressed the

different circumstances present in *Rafay*. *Rafay*, 168 Wn. App. at 785.

The State then points to the *Rafay* Court's conclusion that "as of 2010, there was no correlational data on the use of coercive interrogation methods and the likelihood of false confessions." *Id.* at 789. It appears that the State is loathe to believe that anything may have changed in the intervening twelve years, despite the plethora of evidence now demonstrating that Reid does lead to false confessions, particularly in the case of younger offenders. *See, e.g.*, *No illusions: Developmental considerations in adolescent false confessions*, CYF News, December 2014, Appendix B[2]; *False Confessions Dog Teens*, Zusha Elinson, Wall Street Journal, September 8, 2013, Appendix C.[3]

In fact, the high risk of false confessions through use of Reid prompted one of the country's premiere law enforcement

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[2]https://www.apa.org/pi/families/resources/newsletter/2014/12/adolescent-false-confessions
[3]False Confessions Dog Teens - WSJ

consulting groups to stop using the technique in their training. Wicklander-Zulawski & Associates, who has worked with a majority of police departments in the U.S., in 2017 dropped Reid from its training sessions other than to educate officers on "the risk and reality of false confessions." *The Seismic Change in Police Interrogations*, Marshall Project, March 7, 2017, Appendix D.[4]

The effect of Reid-type interrogations on young people is not isolated to this instance or, for that matter, newly discovered. *See, e.g.*, Crane, Megan, Nirider, Laura, Drizin, Steven A., *The Truth About Juvenile False Confessions*, American Bar Association, Winter 2016, Appendix E.[5] While the 13-year old boy in the attached story was considerably younger than Mr. Roque Gaspar at the time of the interrogation at issue, the result was much the same – and the remainder of the story startingly

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[4]https://www.themarshallproject.org/2017/03/07/the-seismic-change-in-police-interrogations

[5]https://www.prisonpolicy.org/scans/aba/Juvenile_confessions.pdf

similar, likely due to the fact that Mr. Roque Gaspar had little to no police contact prior to that interrogation.

The State professes to have been unable to locate any other published case dealing with the admission of expert testimony specifically regarding the Reid Technique. This is most likely due to the fact that expert testimony of this nature is routinely admitted, thus there are few appellate cases on the issue, a possibility the State declines to consider. Instead, the State cites two additional cases, both unpublished, in which expert testimony was either barred or severely limited and argues that trial counsel could not be faulted to failing to bring in an expert when that testimony would not have been allowed.

However, the fact that the Reid technique is coercive and leads to false confessions was recognized as early as 1968 in none other than *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), where the court noted that the technique uses methods such as isolation, minimization, trickery, and negation of the suspect's story to induce a confession.

Miranda, 84 U.S. at 455-57. *Miranda* concluded that such methods work to "subjugate the individual to the will of his examiner." *Id.* at 457. Given the accepted deficiencies of the Reid Technique, it appears unlikely any trial court would exclude a properly qualified witness from educating the jury regarding the very real danger of false confessions when the technique is put to use, particularly in younger subjects.

The State next argues that Petitioner failed to show prejudice from the lack of an expert in this area. The prejudice is plain, as was explained in Petitioner's opening brief. Absent an explanation of the coercive nature of such interrogation methods, the jury had only the State's line of cross-examination by which to critique the confession and was likely to buy into the State's arguments that because Mr. Roque Gaspar was not threatened, yelled at, or held in handcuffs in a locked room, his confession must have been voluntarily made.

As Dr. Stanulis concluded, an expert would not only have been able to educate the jury about the prevalence of coercive

techniques and the fact that such techniques were employed against Mr. Roque Gaspar in this case, but would have been able to evaluate Mr. Roque Gaspar himself prior to trial, and provide an analysis of whether he was particularly vulnerable to giving a false confession; something that seems likely where, as here, Mr. Roque Gaspar was by all accounts young and naïve, with almost no prior contact with law enforcement beyond a traffic stop. *Stanulis Declaration* at 8.

The same analysis can be applied to the need for an expert to explain juvenile brain science, particularly in the sentencing phase of this proceeding. The State claims here that expert testimony was unnecessary because the fact that teens are less mature than adults is widely accepted.

This may hold some truth, and perhaps this explains why counsel did not engage an expert, even for sentencing. However, without expert testimony, as will be argued further below, the court at sentencing was presented with only the flawed "scientific analysis" from the State to apply to the question of

how Mr. Roque Gaspar's age affected his actions. As Dr. Stanulis reports, "the lack of expert input meant that decisions were made based on incorrect scientific facts." *Stanulis Declaration* at 10.

Without understanding the actual science, rather than the pseudo-scientific and wholly erroneous claims made by the State, the Court was effectively barred from meaningful consideration of Mr. Roque Gaspar's youth, regardless of how many cases were cited or what sentence defense counsel sought for his client. Lip service was paid to a consideration Mr. Roque Gaspar's youth, but there was no meaningful consideration of this factor based on a valid understanding of science, as would have occurred with expert testimony.

4. The mere consideration of *Houston-Sconiers* does not render a sentence attack-proof.

The State posits that, as long as a trial court considers the mandates of *Houston-Sconiers*, no sentence can be considered excessive under the 8th Amendment of the United States

Constitution or article 1, §14 of the Washington State Constitution. However, courts must do more than merely consider youth, as the State concedes, a *meaningful* consideration of youth that reflects his or her level of culpability must be undertaken. *State v .Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017)); *In re Pers. Restraint of Domingo-Cornelio*, 196 Wn.2d 255, 268, 474 P.3d 524 (2020).

The State next argues that there is no constitutional right to be heard in juvenile court, as the legislature has already decided that anyone over the age of 18 when the crime is either committed or reported must be tried as an adult. Moreover, the State argues, that pursuant to legislative action, certain crimes, including rape of a child in the first degree, the crime at issue in this case, are automatically moved, or declined, into adult court, thus even had Mr. Roque Gaspar been charged when he was still a minor, this case would have been moved to adult court. RCW 13.04.030(v)(c); *State v. Meridieth*, 144 Wn. App. 47, 56, 180 P.3d 867 (2008).

The State ignores two crucial issues, however. First is that the prosecutor and the defendant may agree to decline adult court jurisdiction and move the case back to juvenile court. RCW 13.04.030 (1)(e)(v)(C)(iii). The second, and most crucial factor omitted from the State's analysis comprises the crux of the defense argument here. While a legislature may promulgate laws, their mere existence does not render them constitutional; a determination of constitutionality is the province of the courts. *See, e.g., State v. Cashaw*, 4 Wn. App. 243, 251, 480 P.2d 528, 533 (1971) ("It is settled that the constitutionality of a statute is to be determined on the basis of the meaning given it by judicial decisions," *citing In re Elliott*, 74 Wn.2d 600, 446 P.2d 347 (1968)).

Moreover, Mr. Roque Gaspar did not argue that it was solely the jurisdiction of the case that rendered the sentence unconstitutional. The argument is more nuanced than this. Mr. Roque Gaspar's position is that the adult sentencing ranges imposed on defendants in adult court are unconstitutionally harsh

in those cases where the defendant was a juvenile at the time the crime was committed. Although being tried in adult court can amplify this prejudice, it is the adult sentence imposed on a person who has yet to fully mature that constitutes an excessive punishment and fails to recognize the emerging adult's capacity for rehabilitation.

Here, despite the authority provided under *Houston-Sconiers* to depart from a standard range sentence, the trial court looked at the 22 year old man in front of it and determined the case based on the sentencing range that would normally be assigned to such a person – a person who in ordinary circumstances would have committed the crime at about the same age he was when he was sentenced. While a 23 year sentence for rape may be appropriate in some circumstances for a person over the age of 18, there are no circumstances under which a 15, 16, or 17 year old *child* should be locked up for over two decades. No amount of mental gymnastics by the State can prove otherwise.

Further, despite the State's recurring refrain that the trial court considered Mr. Roque Gaspar's youth when sentencing him, there was no *meaningful* consideration of youth in this case. To consider youth meaningfully, the Court needed an accurate explanation of youth neuroscience as applied to Mr. Roque Gaspar's culpability. The explanation provided by the State was flawed at best. The State did not have an expert nor was the prosecutor qualified as such, but this did not stop him from regurgitating the position taken by prosecutors state-wide, that the fact that Mr. Roque Gaspar had time to think about the crime and the fact that he repeated the crime showed that he did not suffer from a lack of impulse control and his youth was not a factor in the crimes alleged.

The State's assessment in this case was unsound. The prosecutor was not a neuroscientist and did not have an expert's understanding of the field. The gross misunderstanding of the science to be applied in this case, without any expert testimony to counter the State's specious arguments, meant that the Court

simply did not have the means by which to meaningfully consider Mr. Roque Gaspar's youth at sentencing.

Relying on the State's representations, the trial court determined that Mr. Roque Gaspar's ability to assess the risks and consequences of his actions and his ability to control his impulses were mature. RP at 1392-3. In other words, the trial court determined that Mr. Roque Gaspar's youth did not mitigate his culpability. As is clear from a review of Dr. Stanulis' declaration, this is untrue. *Declaration of Robert Stanulis* at 4-5, 9. No meaningful consideration of Mr. Roque Gaspar's youth was undertaken here, and this case is ripe for resentencing.

5. Depriving those who committed crimes as juveniles of juvenile court jurisdiction constitutes cruel and unusual punishment within the scope of the 8th Amendment.

The State attempts to oversimplify Petitioner's argument into a sound bite, claiming that Mr. Roque Gaspar is attempting to reformulate pre-accusatorial delay. It does not appear that the State understands Petitioner's position. The State claims that

because there is no constitutional right to juvenile court, the failure to try defendants like Mr. Roque Gaspar in juvenile court cannot constitute excessive punishment.

This, however, is not the Petitioner's argument. It is not *merely* jurisdiction that is at issue here. Just as Judge Bjorgen argued in his dissent to *State v. Houston-Sconiers*, 191 Wn. App. 436, 447, 365 P.3d 177 (2015), that mandatory decline of certain crimes to adult court leads to the mandatory forfeiting of the life of a juvenile defendant, Petitioner here argues that the mandatory grant of jurisdiction to adult courts over crimes committed when the defendant was a juvenile but has aged out of the system prior to the time the crime was reported leads to the mandatory and unconstitutional forfeiture of that individual's life.

In *Houston-Sconiers*, a 31 year sentence imposed on a 17 year old was at issue. Here, it is a 23 year sentence imposed on a 22 year old. The outcomes are the same. Both defendants will be in their mid- to late forties when released, both will have spent the bulk of their young adult years in jail. Neither will be able to

access the same job opportunities as their peers. Neither will be as likely to marry and start families. In both cases, the lives of these young men are closed off, for crimes committed well before the age of majority.

The simple fact that no court has yet found this to be a constitutional violation does not prevent *this* court, in *this case*, from recognizing that the way things have always been done is in error, and that meaningful justice reform must begin with the youngest offenders, giving their generation a fighting chance to lead normal or near-normal lives not foreclosed by imprisonment, and thus not likely to perpetuate the cycle of generational incarceration.

6. A sentence that incarcerates a young person during crucial developmental years can still constitute a de facto life sentence.

Citing to *State v. Haag*, 198 Wn.2d 309, 327, 495 P.3d 241 (2021) the State argues that under the sentence handed down to Mr. Roque Gaspar, he will still be left with a meaningful life after incarceration. According to the State, Mr. Roque Gaspar will be

between 43 and 45 years old upon release and still have "at least half of his adult life remaining." *State's Brief* at 77. Despite having been incarcerated for felony rape for the last two decades – and not having the option, as he would have as a juvenile, of having his criminal record sealed – the State claims that Mr. Roque Gaspar will be able to "find employment, spend time with family, and pursue relationships."

The State, like governments everywhere, appears to labor under the delusion that there are employers willing to hire a formerly incarcerated person and that women will be tripping over themselves to meet him. The State ignores statistics that demonstrate only about a third of formerly incarcerated people are able to land jobs within four years of release. Wang, Leah, and Bertram, Wanda, *New data on formerly incarcerated people's employment reveal labor market injustices*, Prison Policy Initiative, February 8, 2022. Appendix F.[6] Without

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[6] https://www.prisonpolicy.org/blog/2022/02/08/employment/#:~:text=Post%2Drelease%2C%20months%20of%20searching,jo

meaningful employment, many of the other intangibles that make up the "meaningful life" the State claims Mr. Roque Gaspar may pursue are likewise out of reach.

The State likewise ignores *Haag's* view that

> [t]he United States Supreme Court viewed the concept of 'life' in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for 'life' if he will have no opportunity to truly reenter society or have any meaningful life outside of prison.

Haag, 198 Wn. 2d at 327, *quoting Casiano v. Comm'r of Corr.*, 317 Conn. 52, 78, 115 A.3d 1031 (2015). As the *Casiano* Court also observed, a juvenile offender "is typically put behind bars before he [or she] has had the chance to exercise the rights and responsibilities of adulthood, such as establishing a career, marrying, raising a family, or voting." *Haag*, 198 Wn. 2d at 327, *quoting Casiano*,317 Conn at 77.

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bless%20at%20any%20given%20time.

While the State is correct that there is no authority establishing that a 23 year sentence is a de facto life sentence, that does not mean that this Court cannot establish the precedent.

When Mr. Roque Gaspar is released, he will have spent most of his twenties, all of his thirties, and well into his forties behind bars. While his peers will have been obtaining an education and establishing themselves in chosen careers, Mr. Roque Gaspar will have been stuck in a 5’ x 7’ stall when not on a prison work shifts – shifts that provide very little experience that can translate to a career-level job in the real world.

Moreover, with so much time left to serve, Mr. Roque Gaspar will be unable to access the scarce educational resources available to some inmates until the last few years of his sentence. Even then, access to education remains severely limited, and it is likely Mr. Roque Gaspar will be unable to pursue sufficient technical training or higher education, such that he could leave prison qualified for a career of his choosing.

Petitioner is, frankly, baffled that the State can look at a man entering prison in his early twenties and not leaving until his mid-forties and bring a serious argument that this person will not have been subject to a forfeiture of his life, when some of his most crucial early adulthood development will be spent while incarcerated. Perhaps it would behoove counsel for the State to review her own life between the ages of 20 and 45 and, taking into consideration all of the events that occurred in that time frame, imagine being entirely foreclosed from accessing any of those opportunities, whether it be advanced education, starting a family, or investing for retirement. When Mr. Roque Gaspar is placed back into the community in his mid-forties he will have lost all of that time.

The crucial factor here is not the length of the sentence as much as it is the fact that Mr. Roque Gaspar was an adolescent when the crimes were committed, and, despite the acknowledged ability of adolescents and emerging adults to grow and change, society appears to consider men and women in Mr. Gaspar's

position irredeemable, their personalities immutable, and their capacity for change and growth negligible, all because the crimes were not reported when they were still adolescents. Such a result flies in the face of all reason and runs afoul of 8th Amendment protections.

7. The sentencing hearing was based on incorrect explanations of neuroscience and deprived the trial court of any opportunity to meaningfully consider Mr. Roque Gaspar's age and the mitigating qualities of youth or race.

As the State admits, trial courts are required to "*meaningfully* consider" the individual circumstances of the particular youthful offender and the offense. *State v. Delbosque*, 195 Wn.2d 106, 121, 456 P.3d 806 (2020). The Court must also "tak[e] care to thoroughly explain its reasoning" in imposing a sentence. *State v. Gilbert*, 193 Wn.2d 169, 176, 438 P.3d 133 (2019); *also see*, *State v. Ramos*, 187 Wn.2d 420, 443-44, 387 P.3d 650 (2017) ("[A] court conducting a *Miller* hearing must do far more than simply recite the differences between juveniles and adults and make conclusory statements that the offender has not

shown an exceptional downward sentence is justified. The sentencing court must thoroughly explain its reasoning, specifically considering the differences between juveniles and adults identified by the *Miller* Court and how those differences apply to the case presented.”).

The State claims that there was no error in the sentencing in this case, because the court considered the facts of the case and concluded that impulsivity and appreciation of the consequences of his actions were not a factor in the crimes committed by Mr. Roque-Gaspar.

However, the court came to these conclusions based on erroneous claims by the State regarding the state of juvenile brain science, as argued *supra.* The declaration of Dr. Stanulis outlines how some of the conclusions proffered by counsel for the State, who is not a neuroscientist, were oversimplified and deeply flawed. Although the defense appeared to understand that the State’s facts were in error, and made a brief attempt to counter them, it appears that defense counsel did not comprehend

juvenile brain science any better than did the State. The Court then, relying upon the State's claim, pronounced sentence.

Not only was counsel deficient in providing an accurate analysis of brain science through an expert, but counsel also made little other argument to mitigate in favor of a downward departure, another area in which counsel's performance was deficient.

A recent, albeit unpublished Division I case bears striking similarities to the instant matter. In *In re Pers. Restraint of Ross*, No. 83436-3-I, 2022 Wash. App. LEXIS 519, (Mar. 14, 2022),[7] Appendix G, the Court found deficient performance when counsel argued that the court should impose an exceptional sentence on the basis of youth but provided no factual support for the argument. Counsel did not ask Mr. Ross' family members to testify about his "home environment or family circumstances, immaturity, impetuosity, ability to appreciate risks and

[7] Unpublished case referenced as persuasive authority only pursuant to GR 14.1

consequences, or any other factors relating to the mitigating circumstances of youth." *Ross*, at 10.

Similarly, here, counsel for the defense argued for a downward departure based on youth, but gave nothing more than a stammered, vague argument that, claiming

> The fact that a youth -- there's a difference -- the fact that there's a difference between youth and adults when it comes to risk and consequence assessment, impulse control, and tendency towards antisocial behavior, that doesn't mean that there is no risk and consequence assessment or impulse control with juveniles. It just means it's different . It's less. It ' s -- a juvenile does not have the same behavioral characteristics as an adult . I mean, the -- one 's personality isn't fixed when one is between the ages of 14 and 16 . And it ' s and in a case like this where you're talking about sexual behavior, somebody between the ages of 14 and 16 may not necessarily appreciate the significance of what they're doing.

RP at 1399-1400.

As in *Ross*, counsel offered no facts to back up this statement. None of Mr. Roque Gaspar's friends or family members were called to testify in mitigation. There was not even an independent evaluation of Mr. Roque Gaspar to determine if

aspects of his personality indicate he may have less impulse control than others his age.

Youth was given minimal attention at sentencing, and what discussion occurred was far from a *meaningful* consideration of the factors of youth. The science as explained to the Court was so horribly erroneous as to prevent any consequential debate. This is precisely why an expert's testimony would have been valuable, and demonstrates that, armed with a correct understanding of the scientific factors at play, the trial court is likely to have imposed a sentence in line with Mr. Roque Gaspar's age and abilities at the time the crimes were committed, rather than a mid-range adult sentence based on the erroneous presumption that Mr. Roque Gaspar's frontal lobe underdevelopment at the time of the crimes played no role in their commission. The improperly explained and applied science, combined with defense counsel's failure to add any other mitigating factors on his client's behalf, demonstrates why a resentencing is so necessary here.

Moreover, case law handed down since the filing of the instant Petition demonstrates that there were additional factors which were not considered at sentencing. In *In Re Personal Restraint of Miller*, 21 Wn. App. 2d 257, 505 P.3d 585 (March 8, 2022), this court found that the sentencing court, in addition to considering youth, should consider the disparities brought about when the defendant is a person of color, particularly a juvenile of color. *Miller*, 12 Wn. App.2d at 266.

The study relied upon by the *Miller* Court, GENDER & JUSTICE COMM'N, WASH. COURTS, 2021: HOW GENDER AND RACE AFFECT JUSTICE NOW 453 (Sept. 2021), attached at Appendix H,[6] is illuminating in Mr. Roque Gaspar's case as well. For instance, white defendants were more likely to receive diversion than Black, Latinx, Asian and Native American defendants, regardless of prior convictions. *Id.* at 702 n. 78.

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[6] https://www.courts.wa.gov/subsite/gjc/documents/2021_Gender_Justice_Study_Report.pdf

Moreover, there are higher rates of truancy in Black and Latino students, *Id., at* 437, and Black and Latino drivers are more likely to be searched than their white counterparts. *Id.* at 637. The effects of these disparities accumulate and result in more severe charges, higher likelihood of incarceration, and longer sentences for people of color, including Latino males. *Id.* at 722.

Thus, the *Miller* Court concluded, "trial courts should consider, in addition to issues common with all youths set forth in *Houston-Sconiers*, these potential biases when sentencing children of color." *Miller*, 21 Wn. App. 2d at 267.

Mr. Roque Gaspar is a first generation American of Mexican descent, a heritage that is clear from his appearance. The simple fact that his skin color likely played a role in his conviction can neither be denied nor remedied. However, what can be remedied on remand is an instruction that, in addition to considering Mr. Roque Gaspar's youth in resentencing, that the court consider the potential biases inherent in Mr. Roque Gaspar's racial heritage.

8. Prejudice to Mr. Roque Gaspar is plain

The State claims that Mr. Roque Gaspar has not shown that a court would have imposed a lesser sentence had the Court been provided with an accurate summary of juvenile neuroscience. It seems clear from the record in this case that the trial court was open to the possibility of a downward exceptional sentence but was argued out of imposing that sentence by the State's blatant misstatements regarding juvenile brain development. In point of fact, it was the trial court, rather than defense counsel, who raised the *Houston-Sconiers* factors in the sentencing hearing.

Defense counsel did not even brief the factors or the most recent law, let alone make any attempt to explain how Mr. Roque Gaspar's age at the time the crimes were allegedly committed made him less culpable than he would have been in his 20s or 30s. Defense counsel merely pointed to Mr. Roque Gaspar's age at the time of the crimes and claimed a juvenile sentence would be far less had he been sentenced at 17. This was counsel's

sole justification for a downward exceptional sentence. Counsel provided little in the way of authority, and nothing in the way of testimony, including expert testimony that would have debunked the State's wildly inaccurate claims that pre-planning of the crimes meant that impulsivity did not play a role in the crimes charged.

As Dr. Stanulis noted in his declaration, an expert would have shown the inaccuracies in the State's argument and "explained how the conclusions about the effect of age and neurodevelopmental status being drawn from the interpretation of his behavior during the instant offense(s) were scientifically incorrect." *Declaration of Dr. Stanulis* at 10. Moreover, an expert would have performed an individual evaluation of Mr. Roque Gaspar and could have provided a specific opinion regarding his brain development and the bearing of his maturity, or lack thereof, on the crime.

It is impossible to look at the sentencing transcript and the almost non-existent arguments of defense counsel, coupled with

the inaccuracies and misunderstanding of neurodevelopment, and believe that, with these issues corrected, Mr. Roque Gaspar would face exactly the same sentence that was handed down in the initial sentencing hearing. Prejudice and the need for resentencing is obvious.

C. CONCLUSION

David Roque Gaspar was accused and tried for raping his younger cousin. Sadly, Mr. Roque Gaspar's trial counsel appeared oblivious not just to the need to prepare his witnesses for trial and thoroughly investigate the case, but to try the case as though Mr. Roque Gaspar was still the juvenile he had been at the time the crimes allegedly occurred. To this end, counsel failed to hire an expert to explain to the jury how Mr. Roque Gaspar's will was overborne by detectives during the interrogation – an interrogation that may be technically voluntary under the law but because of the techniques used nevertheless elicited a false confession.

Counsel likewise failed to have an expert either in trial or at sentencing to explain juvenile brain development to the jury and to the Court. Instead, the Court was provided with arguments that misstated the science of juvenile neuroscience and neurodevelopment, arguments that defense counsel was not equipped to discredit. An expert in juvenile neuroscience, however, could have accurately explained that science to the Court and persuaded the Court that Mr. Roque Gaspar should have been sentenced to a downward exceptional sentence.

Now, Mr. Roque Gaspar is serving a mid-range sentence for a crime committed as a juvenile for the sole reason that he was over the age of 18 when those crimes were brought to light. While Petitioner recognizes the need for, and supports, allowing victims to report allegations of childhood abuse years after the abuse occurred, it is past time for the justice system to recognize the disparate cost to those alleged to have committed those crimes in cases of delayed reporting.

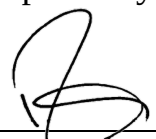
Had Mr. Roque Gaspar been charged and tried as a

juvenile he would have been subject to a juvenile sentence; a sentence that was appropriate for a still-developing body and mind, and which would have pointed Mr. Roque Gaspar to rehabilitation, rather than subjecting him to retribution. By trying Mr. Roque Gaspar as an adult and subjecting him to adult penalties, society has communicated to Mr. Roque Gaspar that he is irredeemable. Like any emerging adult his age, Mr. Roque Gaspar possesses an infinite capacity for change and growth. He should have been sentenced with this in mind, and the failure of the justice system to recognize the pure cruelty associated with trying as adults young men who committed crimes as children is a clear violation of the 8th Amendment.

This document contains 6905 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 24th day of June 2022.

Respectfully submitted,



Derek M. Smith, Attorney for Petitioner
WSBA No. 26036

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APPENDIX A

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DECLARATION OF ROBERT G. STANULIS Ph.D.

1. I am over the age of eighteen (18) and competent to make this declaration.
2. I am a Forensic neuropsychologist who has been qualified as an expert in the following areas that are relevant to this case: child and adolescent brain development and its effect on forensic issues, false confessions and police interrogation techniques, investigation of sex abuse cases, and risk assessment of sex offenders. My CV is attached and incorporated by reference to establish my credentials as an expert for purposes of this declaration.
3. I was asked to review Mr. Roque-Gaspar's case in order to render an opinion regarding the interrogation and sentencing of Mr. Roque-Gaspar with respect to whether expert testimony at these stages of the trial would have influenced the course of the trial.
4. My opinions are based on file review only. All opinions expressed are to a reasonable degree of neuropsychological probability.
5. Mr. Roque-Gaspar was arrested and charged with sex offenses that he allegedly committed at around age 15. He was convicted and sent to prison. My review finds several areas where an expert was necessary to inform the Trier of Fact.
6. The first issue is that of adolescent brain development. The prosecution argued that aspects of the alleged behavior during the instant offense(s)

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negated this issue. This is scientifically incorrect. Some of this discussion centered around what Mr. Roque-Gaspar knew. It is important to note that the issue of adolescent brain issue and its legal implications centers around not knowledge or behavior, but around the ability to "appreciate." (For a legal discussion see Oregon v. J. C.N.-V. Oregon Supreme Court 2015). The human brain is not fully physically developed until about age 25. The last areas of the brain to develop is in the frontal lobes which are responsible for executive functions. Simply put one cannot do something the brain has not developed enough to do. A 1 month old baby cannot talk because of lack of brain development and a 15 (and 20 year-old) cannot appreciate their actions because the brain is not developed.

7. On the following page is a diagram illustrating the developmental regulation of executive functions by the prefrontal cortex, which remains under construction during adolescence.

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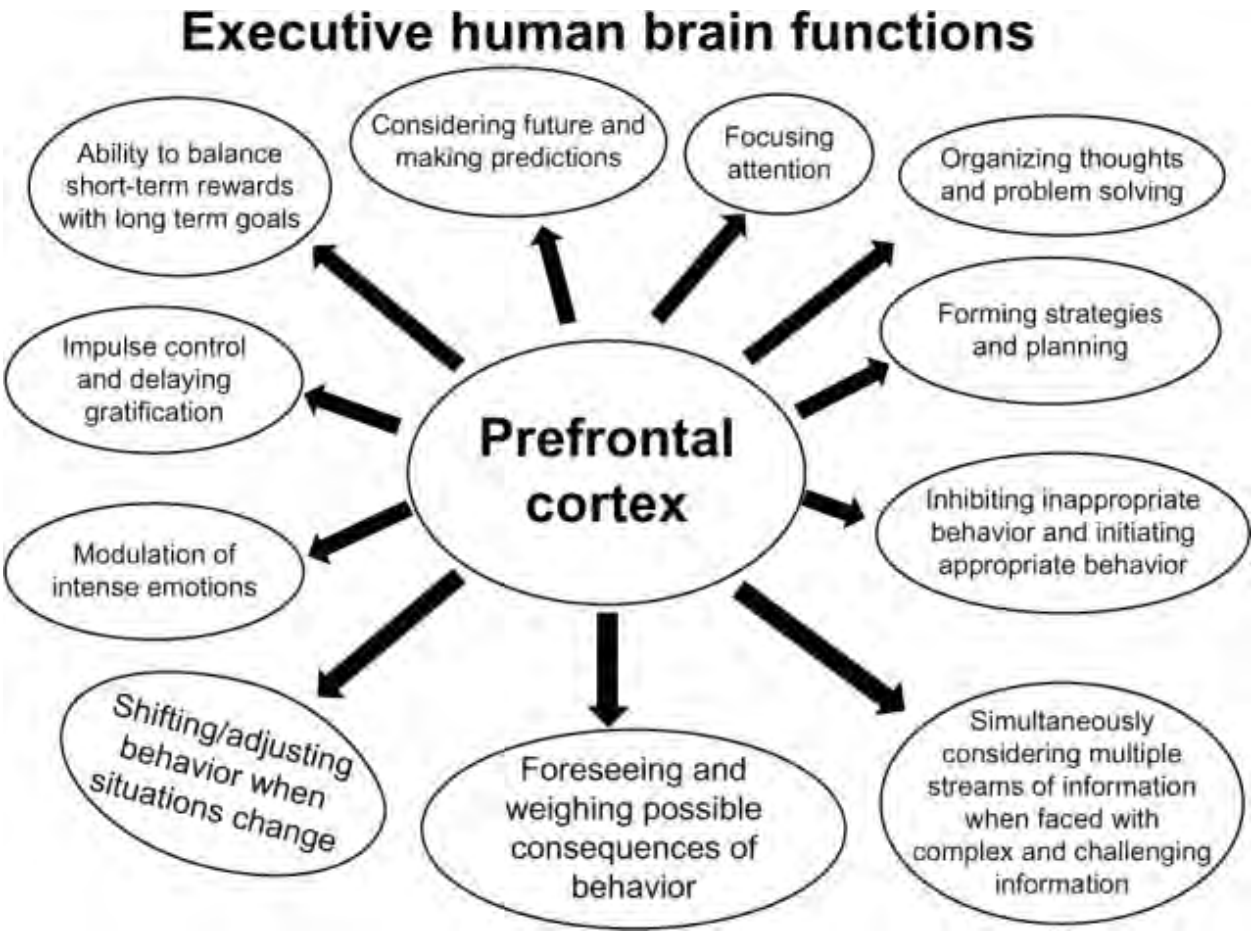
Maturation of the adolescent brain



ncbi.nlm.nih.gov

8. Several executive brain functions are governed by the prefrontal cortex, which remains in a state of active maturation during adolescence. These complex brain functions are regulated by the prefrontal cortex as illustrated in this figure (based on the original discoveries by Gedd and Steinberg).[1,21–23,25] Due to immature functional areas in the prefrontal cortex, adolescent teens may take part in risk seeking behavior including unprotected sex, impaired driving, and drug addiction.

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9. This science of brain maturation is well-known and is utilized in legal settings and other settings. Based on this science, car rental companies didn't rent to under 25-year-olds, and insurance companies advocated for driver license restrictions. The Court system has taken notice of the science by not allowing execution of under 18-year-olds and restricting who is eligible for true life sentences.
10. Other policy decisions that rely on the neurodevelopmental research include changes to interrogation techniques, not allowing investigators to lie to adolescents, and getting rid of automatic remand to adult court. Some states have explored increasing the age of juvenile court into the 20s or having earlier review for parole.
11. Mr. Roque-Gaspar's neurodevelopment was clearly incomplete at the time of the alleged instant offense(s) as a result of age alone. At age 15, he lacked neurodevelopment of the frontal lobe systems that control executive functions.
12. This lack of neurodevelopment is also very relevant to the issue of risk assessment. It is well-known that juvenile sex offenses do not predict whether the individual will commit offenses as an adult. The inability to make such predictions (there are no validated risk assessment instruments for assessing the risk that juveniles will go on to commit adult offenses, in part because the

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base rate of going to be an adult offender is very small), is in part due to the fact that juvenile offender's behavior is the product of incomplete neurodevelopment. In contrast, there are a number of risk assessments that are validated on adult offenders.

13. It is also important to note that Mr. Roque-Gaspar's neurodevelopment was not complete at the time of his interrogation either.

14. One feature of incomplete neurodevelopment is the effect of emotion on brain function. In adolescents (like Mr. Roque-Gaspar was at the time of the alleged offense(s) and interrogation,) emotional state affects cognition far more than in an adult. In a "cold" emotional situation, adolescence can often perform similar to adults. However, when the situation is emotionally "hot" cognitive performance declines. Brain research indicates that this is because the frontal lobes that are responsible for emotional control are less active relative to areas that process emotions. (This has been likened to the emotions as the engine and the frontal lobes as the brakes).

15. Hence at the time of the alleged instant offense(s), the impact of lack of frontal lobe modulation would serve to significantly impact the defendant's ability to control and appreciate his behavior.

16. At the time of the interrogation, this same process would maximize the effect of the interrogation techniques on his ability to think and act rationally. This

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effect is the science behind the idea that the same behavior in an adolescent as an adult still is a situation where the adolescent is less culpable than the adult. This is why sentences for adolescents are mitigated relative to adults when both commit the same exact behaviors.

FALSE CONFESSIONS AND NEURODEVOLOPMENT

17. False confessions are one of the leading causes of wrongful convictions. The Innocence Project notes that of the 375 DNA exonerations 29% involved false confessions. 33 of 81 murder DNA exonerations confessed themselves, 20/81 had co-defendants that falsely confessed, and another 30 confessed themselves and had a co-defendant confess as well. Of note, confessions are extraordinarily powerful evidence. For example, The Centre for Wrongful Convictions "identified 19 cases in which confessors to rape and/or murder were tried and convicted despite having been excluded by DNA evidence of key biological materials. ("When Self-Report Trumps Science: Effects of Confessions, DNA, and Prosecutorial Theories on Perceptions of Guilt" Appleby, S.A., Kassin, S., Psychology Public Policy, and Law, 2016.) Simply put, most people don't believe that anyone would confess to a crime they did not commit. The scientific evidence however indicates that false confessions are far more prevalent than most believe possible.

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18. False confessions are particularly prevalent in adolescents. Adolescents ae simply more vulnerable to the interrogation techniques known to cause false confessions. The rate of false confessions in true DNA exoneration is estimated to be about one third, with juveniles two to three times more likely than adults to falsely confess.

19. In this case, the detective admitted to being trained in and using the Reid technique. (Please note Reid is a trademark for a system of interrogations that currently acknowledges that false confessions can occur, especially when the Reid technique is not fully and faithfully followed.) The techniques that are part of the Reid technique were recognized as being particularly likely to cause a false confession in adolescent, resulting Britain first outlawing the use of the Reid technique in adolescence, and later at any age. The Reid-type tactics ae now no longer used at all in many countries and have been replaced by a different technique (the PEACE technique) that does not use guilt certain interrogation, lies, false evidence ploys, minimization or other techniques known to potentially lead to false confessions.

20. In 2017, one of the United States largest police consulting firms, announced it would no longer teach the Reid technique because of the techniques risk of causing false confessions. In addition, four states now prohibit lying to adolescents during police interrogations.

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21. Review of the Interrogation transcript in this case shows quite clearly that several techniques known to cause false confessions were utilized. The interrogator admitted to being trained in the Reid technique. From the detective's viewpoint, Mr. Roque Gaspar's guilt was certain, and minimization techniques were used. Mr. Roque-Gaspar later testified that the interrogation techniques were so coercive that he felt it necessary to manufacture an admission.

22. An expert was necessary to educate juries to the fact that false confessions and admissions occur more frequently than they likely knew that Mr. Roque-Gaspar was subjected to techniques known to lead to false confessions, that he was particularly vulnerable by his age and neurodevelopmental status alone, and that his manufacturing a story to meet the demands of interrogation is known to be common. In addition, an expert like myself would have evaluated Mr. Roque-Gaspar to see if he had other known personal characteristics that make him particularly vulnerable to a false confession.

23. Sentencing is another area were the original defense attorney failed to call a necessary expert. An expert would have pointed out that individual who commit juvenile sex offenses rarely go on to be adult offenders. The PSI risk assessment was not designed for sex offenders, and there is no evidence that a psycho-sexual evaluation was done, yet the PSI writer concluded based

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apparently on the instant offense(s) alone that Mr. Roque -Gaspar was "sexually deviant." This conclusion cannot be supported in the absence of a psycho-sexual evaluation as many individuals, especially juveniles, commit sex offense but are not sexually deviant. (An analogy committing a crime is by definition an anti-social act, but one act does not meet the criteria for anti-social personality disorder.)

24. Also of note was the failure to challenge the idea that Mr. Roque-Gaspar's behavior during the alleged instant offense(s) somehow meant that his young age or neurodevelopment wasn't a factor. In *Roper v. Simmons*, the US Supreme Court noted that the same criminal act by adolescent as an adult did not lessen the need to take neurodevelopment into account. While Mr. Roque Gaspar was 15 at the time of the instant offense(s) , well below the age of 18 which the Supreme Court drew as the line below which categorical exclusion of certain sentences was warranted on the basis of age and neurodevelopmental status alone.

25. Finally, the arguments and discussion about age and neurodevelopment in the sentencing transcript indicate that the neuroscience was not known or understood in many important ways. This incorrect view of the neuroscience highlights the need for an expert to educate the trier of fact. (an example is the discussion about how behaviors at the time of the instant offense(s) proved

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that neurodevelopmental issues did not exist in this case. An expert would have explained that those behaviors did not mean that Mr. Roque Gaspar's brain was fully developed and explained how the conclusions about the effect of age and neurodevelopmental status being drawn from the interpretation of his behavior during the instant offense(s) were scientifically incorrect.)

26. Simply put, the lack of expert input meant that decisions were made based on incorrect scientific facts. If the legal community did not know the science, it can be safely assumed the jury would not know the science discussed above either.

27. If further clarification, or elaboration of this report is necessary, please feel free to contact me. As always, this report is subject to change, elaboration, or clarification as necessary or as new information become available.

I declare under the laws of perjury of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Signed in Portland, Oregon, this 16th Day of June, 2022

DocuSigned by:
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BF6EB224777A4D8...

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Vice-President, Board of Directors for the Bunker Project (Veterans Non-Profit to Advocate and Provide Rehabilitation and Education Services) Term of Office Began August 14. 2014 -Present

Veterans Advisory Board, Western Oregon University (Term started September 2013 -2018)

PUBLICATIONS AND PRESENTATIONS

"Investigation of Sexual Abuse: Brain Development, Memory, and Interview Techniques" Stanulis R.G.; Presentation WACDL 2021 Annual Conference Lake Chelan June 12, 2021.

"Neuroscience and Free Will: Is Free Will An Illusion?" Stanulis R.G; Presentation Justice Alliance Meetings January 2018; Companion Presentation to "Free Will and the Criminal Justice System" presented by Judge Stone

"Veterans Combat Injuries, Military Training & Criminal Justice" Stanulis R.G.; Book Chapter in "Still at War: A Guide for Defenders, Prosecutors and Judges Dealing with Oregon's Veteran Defendant Crisis:" Oregon Veterans Defense Resource Center, Editor Barton, J.W. 2017

"Validity of Confessions in Cases of Abusive Head Trauma" Stanulis R.G.; Part of Panel "Retinal Hemorrhages (RHs) Associated with Pediatric Abusive and Non-Abusive Head Injury - Systematic Reviews and Their Evidence Base: A Review" with Lantz, P.E.; Cuellar, M.; McDonald A.G. and Schoppe, C. American Academy of Forensic Science, Annual Meeting February 13, 2017

Stanulis R.G.: Panel Discussant: "False Confessions: Commonalities Between Two Different Countries: China and the U.S." Zang, Y; Tighe, S. American Society of Criminology, Annual Meeting, New Orleans, November 2016.

Stanulis R.G. Panel Discussant: "Let them Eat Lead" Sheldon R,; and "Beyond the Water: The Real Problem in Flint Michigan" Brown W.B., Kaplan S.; American Society of Criminology, Annual Meeting New Orleans, November 2016

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APPENDIX B

AMERICAN PSYCHOLOGICAL ASSOCIATION

CYF News (/pi/families/resources/newsletter/) | December 2014 (/pi/families/resources/newsletter/2014/12/)

No illusions: Developmental considerations in adolescent false confessions

Are teens at risk for falsely confessing to crimes, and if so, what can we do about it?

By Jason Mandelbaum, PhD (https://www.apa.org/search?query=&fq=ContributorFilt:%22Mandelbaum, Jason%22&sort=ContentDateSort desc) , and Angela Crossman, PhD (https://www.apa.org/search?query=&fq=ContributorFilt:%22Crossman, Angela%22&sort=ContentDateSort desc)

One of the domains within which adolescents' perceptions, behaviors and tendencies may make them especially vulnerable is the legal arena, especially the interrogation room. When teens are suspected of committing crimes, they, like their adult counterparts, may be subjected to lengthy interrogations that include pressure, reinforcements, repetitive requests for information, fear inducement, befriending and a host of other direct and indirect methods of eliciting a confession. There are no laws protecting juveniles from interrogation tactics that are legal with adults, and studies indeed suggest that police tend to use the same types of questioning strategies with youths and adults alike (Redlich, Silverman, Chen, & Steiner, 2004).

These interrogation tactics, though effective at eliciting confessions, are also known to induce false confessions, with children and adolescents being especially vulnerable. Indeed, several examples of egregious cases of false confessions have appeared in the news: 14-year-old Michael Crowe confessed to the murder of his twelve-year-old sister, Stephanie (it was later determined that transient in the neighborhood committed the crime); 11-year-old Lacresha Murray confessed to beating a toddler to death and was convicted of murder (she was later exonerated because evidence indicated the injuries occurred before Lacresha was with the toddler). Empirical evidence confirms the anecdotal cases. In an evaluation of 328 exoneration cases, 44 percent of juveniles

falsely confessed, compared to 13 percent of adults. Among the youngest cases, involving 12- to 15-year-olds, 75 percent falsely confessed (Gross, Jacoby, Matheson, Montgomery, & Patil, 2005). In laboratory experiments with mock crimes (Redlich & Goodman, 2003), self-report studies of confession behavior (Gudjonsson, Sigurdsson, Sigfusdottir, & Young, 2012), and hypothetical vignettes (Goldstein, Condie, Kalbeitzer, Osman, & Geier, 2003), adolescents are consistently more likely to falsely confess than adults.

Given adolescents' greater vulnerability to false confessions, it is imperative, from a policy perspective, to determine why. Such insight is critical to identifying how best to eliminate the interrogation tactics that are especially likely to lead to dramatic errors in youths' responses.

Adolescents Waiving their Miranda Rights

One of the safest strategies for innocent suspects (including youths) to avoid a false confession is to invoke their Miranda rights and remain silent when arrested. Yet, adolescents are more likely than adults to waive their Miranda rights. This is due to adolescents' greater misunderstanding some aspects of the Miranda warning (e.g., Viljoen, Klaver, & Roesch, 2005), adolescents' not fully comprehending how to invoke their rights (Oberlander & Goldstein, 2001) and adolescents' increased likelihood of compliance or susceptibility to coercion (Carver & Scheier, 1981). Adolescents are more likely to base their decisions on immediate, rather than longer range consequences (Grisso et al., 2003) and young adolescents are less likely than older adolescents to consider the seriousness of the charges or the amount of evidence against them when making Miranda waiver decisions (Abramovitch, Peterson-Badali, & Rohan, 1995).

Adolescents and the Illusion of Transparency

An interesting, relatively recent explanation for at least some of adolescents' increased risk for waiving their Miranda rights and for false confessions is their vulnerability to the "illusion of transparency." This refers to a tendency to overestimate the extent to which others can accurately determine their internal states (Gilovich & Savitsky, 1999). In a

potential deception/truth-telling context, this illusion is the combination of internal feelings of transparency with the inability of others to determine one's veracity. Feelings of transparency refer to feelings that one's internal states are easily apparent to others. In addition, self-presentation behaviors begin to appear around the age of 8 years (Banerjee, 2002) and increase markedly during early to middle adolescent years, concurrent with growing self-consciousness (Elkind & Bowen, 1979). Thus, adolescents experience heightened awareness of their own emotions and attentiveness to how they are perceived by others. These feelings may lead them to believe, more so than at other ages, that their internal states are being scrutinized and can be understood by others, despite the fact that others are quite limited in their ability to discern individuals' true feelings, and, of relevance to the present report, the veracity of their statements.

With regard to the illusion of transparency and suspects' willingness in general to waive Miranda rights, Kassin and Norwick (2004) found that guilty (36 percent) adult experimental suspects were substantially less likely than innocent adults (81 percent) to waive their Miranda rights. In fact, over 72 percent of innocent suspects who waived their right to silence provided an explanation consistent with an illusion of transparency (e.g., "I didn't have anything to hide"). Thus, innocent adults may be more willing to waive their rights and talk to police, believing their truthfulness will be evident. Our new work suggests that these tendencies are exaggerated in youth, possibly uniquely in adolescence. Like in adults, the illusion was stronger when youths told the truth than when they lied. Also, older participants (i.e., 11-17 years) predicted that their truths would be more transparent than their lies, while younger participants (i.e., 8-10 years) predicted approximately the same degree of transparency for truth and lies. Such developmental trends are consistent with adolescents' greater concern with self-presentation and heightened self-consciousness, which likely directs their attention to their own behavior and statements.

Recommendations and Conclusions

To help adolescents avoid the dangers associated with an illusion of transparency, they should be made aware of the phenomenon. Research on speech anxiety (Savitsky & Gilovich, 2003) suggests that knowing about the illusion can reduce individuals' over-predictions of their own transparency when truthful. One could imagine that telling

innocent suspects that their veracity is not apparent to others, and that observers are not skilled at detecting veracity, might reduce the number of innocent people naively waiving their right to silence. Perhaps this should be part of the Miranda warning itself, although whether it would work with youth suspects is not clear. Even with such an instruction, however, additional risks that contribute to false confessions (e.g., misunderstanding of the Miranda warning) still exist, especially among youths. More research on the impact of these factors in combination, among vulnerable youths, is required to better inform interventions that might protect adolescents from themselves.

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APPENDIX C

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False Confessions Dog Teens

Protocols Proposed to Protect Youth Who Admit to Crimes They Didn't Commit

By Zusha Elinson Follow

Updated Sept. 8, 2013 8:28 pm ET

In 2011, a 16-year-old confessed to being the getaway driver in a fatal shooting of a Los Angeles man, leading prosecutors to charge the teen and three others with murder.

But defense lawyers found convenience-store video showing the suspects were nearly four miles from the murder scene a minute before the man was shot. The lawyers argued that a detective had coerced the teen, who was drunk, into confessing to a crime he didn't commit. Prosecutors last December dropped the charges—and the possibility the four would spend life in prison.

Juveniles are more likely than adults to confess to crimes they didn't commit, a growing body of evidence suggests. Thirty-eight percent of exonerations for crimes allegedly committed by youth under 18 in the last quarter century involved false confessions, compared with 11% for adults, according to a new database of 1,155 individuals who were wrongly convicted and later cleared of all charges.

The Supreme Court noted in a 2011 opinion on interrogating juveniles that studies suggest the risk of false confessions is "more acute" among youth.

"Juveniles are particularly vulnerable: they tend to impulsive, they tend to be more focused on short-term gratification like 'If I confess can I go home?' " said Steven Drizen of the Center on Wrongful Convictions at Northwestern University School of Law, which is compiling the new database, called the National Registry of Exonerations, working with the University of Michigan Law School. "They tend to be more deferential to authority; that might not seem like it's the case in the real world, but in the interrogation room it is."

Courts, state legislators and police are beginning to grapple with how to conduct juvenile interrogations in light of exonerations and research into how the teen brain works. The International Association of Chiefs of Police made recommendations for the first time last year on how to question juveniles to avoid false confessions, including recording interviews and avoiding long interrogations, deception, leading questions and promises of leniency.

In California, a bill headed for a final vote in the legislature would require all interrogations of juvenile murder suspects be videotaped so judges and juries can see confessions. "It will make law enforcement act more appropriately toward juveniles and, secondly, if they are too coercive or cross a line we will be able to see what happened," said Sen. Ted Lieu, a Democrat who sponsored the bill.

That viewpoint doesn't sit well with Alameda County Sheriff Gregory Ahern, president of the California State Sheriffs' Association, which opposes the bill. "Law enforcement works very hard to validate their interviews—we're very transparent on how we take statements," said Mr. Ahern. "To make those requirements in each and every case doesn't seem to be reasonable to us at this time."

Daniel Taylor, cleared this year of a 1992 double murder in Chicago after spending 20 years behind bars, said he confessed as a 17-year-old because he was afraid police would continue to hit him in the side with a flashlight. "I just wanted to make it stop," said Mr. Taylor, now 38. "If I'd known what I know now, I would've taken a beating and kept my mouth shut."

Records showing Mr. Taylor was in police lockup for disorderly conduct at the time of the murder helped win his exoneration. He said police shouldn't be allowed to be as aggressive or use the "level of trickery" with teens that they do with adults. (In Illinois, 17-year-olds are considered adults in the criminal justice system, although in most states they are considered juveniles.)

A spokesman for the Chicago Police Department said "a number of advancements have been made in investigative techniques since 1992 including that we now videotape every murder

interview," but didn't respond to Mr. Taylor's comments.

A Florida man, Anthony Caravella, spent almost 26 years in prison for a 1983 rape and murder, but he was exonerated in 2010 due to DNA evidence.

Earlier this year, a jury awarded him $7 million in damages against officers whom the jury found had coerced his confession when he was age 15 and had an IQ of 67. Lawyers for the officers argued they had followed proper procedures.

On the night that 25-year-old Wilbert Gaitan was killed in Los Angeles, police said they pulled over the 16-year-old and his friends, members of a gang called the Drifters, and found a gun in the car. During the interrogation, Detective Matthew Gares introduced key details of the crime, including that it occurred on 11th Street and other facts. "Tell me about shooting the guy on the bike," he said, according a transcript.

The 16-year-old pleaded that he wanted to "go home to my daughter and hug her" and said he was too drunk to remember what happened. He said he recalled driving to a different location. Finally he gave in, saying "We were right there on 11th...We got out of the car and they shot."

But the convenience-store video changed prosecutors' minds about the confession, said Jean Guccione, a spokeswoman for the Los Angeles County district attorney. "If the time stamp is correct, it would've been virtually impossible for them to be at the murder scene," she said. "We think it may have been a false confession, but we don't believe it was a coerced confession."

Darryl Exum, the teen's lawyer, said the detective fed his client information to get the admission. "He was 16 and he was [at] twice the legal limit," of alcohol, said Mr. Exum. "If they had asked my client if he had killed President Kennedy, he would've said yes."

A Los Angeles Police Department spokesman declined to answer questions about the case from The Wall Street Journal.

During a preliminary hearing in July 2012, Mr. Gares said he was trying to get the truth out of the 16-year-old. "They need to know that you got them," said Mr. Gares. "It's different interviewing gang members and interviewing an average citizen." Mr. Gares didn't return a message seeking comment.

The four ended up pleading guilty to conspiracy to commit assault based on text messages prosecutors said meant they were hunting for rival gangs that night. The 16-year-old was

sentenced to nine years and one of the adults to 13 years. The others were sentenced to time served.

"The average American doesn't understand, 'How could you confess to something you didn't do?' " said James Blatt, an attorney for one of the defendants who discovered the video. "When you're a good interrogator, you can break 'em."

Write to Zusha Elinson at zusha.elinson @wsj.com

APPENDIX D

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NEWS

The Seismic Change in Police Interrogations

A major player in law enforcement says it will no longer use a method linked to false confessions.

By ELI HAGER

You may have never heard of the Reid technique, but chances are you know how it works. For more than half a century, it has been the go-to police interrogation method for squeezing confessions out of suspects. Its tropes are familiar from any cop show: the claustrophobic room, the repeated accusations of guilt, the presentation of evidence — real or invented — and the slow build-up of pressure that makes admitting a crime seem like the easiest way out.

That's why it jolted the investigative world this week when one of the nation's largest police consulting firms — one that has trained hundreds of thousands of cops from Chicago to New York and federal agents at almost every major agency — said it is tossing out the Reid technique because of the risk of false confessions.

Wicklander-Zulawski & Associates, a consulting group that says it has worked with a majority of U.S. police departments, said Monday it will stop training detectives in the method it has taught since 1984.

"Confrontation is not an effective way of getting truthful information," said Shane Sturman, the company's president and CEO. “This was a big move for us, but it's a decision that's been coming for quite some time. More and more of our law enforcement clients have asked us to remove it from their training based on all the academic research showing other interrogation styles to be much less risky."

Research and a spate of exonerations have shown for years that Reid interrogation tactics and similar methods can lead to false confessions. But the admission by such a prominent player in law enforcement was seismic.

"This is big news in the interrogation world," said Steven A. Drizin, a law professor at Northwestern University and an expert on police interviews.

Joseph P. Buckley, the president of John E. Reid & Associates, which licenses the Reid method, said Wednesday that Wicklander-Zulawski’s announcement was “very misleading and disingenuous.” He said the technique has consistently held up in court and that it is not “confrontational” except when evidence already suggests the suspect’s guilt.

Wicklander-Zulawski said it would use the Reid technique only to educate police on the risk and reality of false confessions.

The method, the company said, "has remained relatively unchanged since the 1970s, and it… does not reflect updates in our legal system."

Buckley said that Wicklander-Zulawski has been teaching the 1984 version of the Reid technique, which does not include “any of the updates or new material that we developed” since then — making it unfair to suggest that Reid itself is outdated.

The technique was first introduced in the 1940s and 50s by polygraph expert John Reid, who intended it to be a modern-era reform — replacing the beatings that police frequently used to elicit information. His tactics soon became dogma in police departments and were considered so successful in garnering confessions that, in its famous 1966 Miranda decision, the U.S. Supreme Court cited it as a reason why suspects must be warned of their right against self-incrimination.

But the advent of DNA evidence and advocacy by the Innocence Project in the 1990s showed that about one-third of exonerations involve confessions, once believed to be an absolute sign of guilt. Academics have theories why someone would falsely confess to a crime, including having a mental disability, being interviewed without a lawyer or parent in the room, or suffering through hours or days in jail before questioning.

But the most common factor is the Reid method and its imitators, experts say, since it can create confirmation bias in the minds of investigators while overwhelming a suspect to such an extent that the truth no longer seems like the best option.

"At some point, the technique itself has to take responsibility," said Saul Kassin, a professor of psychology at John Jay College of Criminal Justice and an expert on police interviews. "What Wicklander-Zulawski has realized is that once you start down the road of using trickery and deception, the misuses are inherent in that. There are no clear lines of, *'This is a good amount of trickery, and this isn't.'*"

Experts are cautiously hopeful that Wicklander-Zulawski's decision will mark a turning point for interrogation tactics around the country and hope in-house police training shops will follow suit.

"We don't know yet how much of the old methods they are going to shed. Will they also stop teaching police officers that they can detect liars from truth-tellers based on body language and verbal cues, which study after study shows are unreliable?" Drizin said.

To Maurice Possley, a journalist who helps maintain a comprehensive registry of exonerations at the University of Michigan and has written for The Marshall Project, it's a big deal either way. "This is not defense attorneys or wrongly convicted defendants saying it," he said. "A major player in the field of law enforcement has stated that this method leads to false confessions."

This story was updated and edited from its original post to include a response from John E. Reid & Associates.

APPENDIX E

The Truth About Juvenile False Confessions

by Megan Crane, Laura Nirider, Steven A. Drizin

Let's start with a thought experiment. Picture yourself as a thirteen-year-old boy, sitting in your middle school in the midst of class. Without warning, your principal enters your classroom, tells you to come with him, and brings you to a small room in the school's front office. There, three police officers—each wearing a holstered gun—are waiting for you. One officer leaves the room and closes the door behind him, but the detective, the sergeant, and the principal remain in the room with you. They sit you down. They surround you.

The detective reads you the *Miranda* rights and immediately proceeds to accuse you of inappropriately touching your neighbor's three-year-old sister. She does not ask if you did this. Instead, she says that she knows you did this; she has no doubt of your guilt because the evidence proves it; and now you just need to *help yourself* by telling her the truth. (In reality, this detective has no evidence; she has not conducted any investigation and has no reliable reason to presume your guilt.)

Shocked, you respond by stammering out the truth: you did not inappropriately touch that little girl. In fact, you say this over ten times. The detective refuses to listen and tells you that if you take a lie detector test, it will "come back deceptive because you're lying." Her accusations become increasingly specific and more detailed, providing you with her exact theory about how the alleged crime occurred.

When you start crying, she tells you that the only way you can help yourself is to confess. She offers that you probably touched the little girl for reasons that are completely "understandable"—maybe you were just "curious"—but if not, then

you must have done it for a less understandable reason: touching her "excited" you. If you were just curious, she says, you should say so now in order to "get this over with so we can get you the help you need." She emphasizes that you "need help" and "the best thing for you right now is to be honest." She makes clear that if you don't confess, on the other hand, it will look as though you targeted the little girl out of a more sinister desire for sexual gratification.

Ultimately, you break. You agree that maybe you did touch her for three or four seconds out of curiosity—not for excitement. Your so-called confession includes only facts that the detective provided, and none that you offered yourself. You admit guilt because you are scared and just want to go home.

But you don't go home. You are handcuffed and taken to the police station. Your case goes to court. Luckily, you have an attorney who is willing to do some work for your case. He files a motion to suppress your confession, arguing that you were coerced by police. But the judge doesn't see it that way. He concludes that you confessed voluntarily because the detective's voice and manner were "gentle" and "calm," her questions were "short," and—incredibly—because the detective was a female. You lose your case and are declared a juvenile delinquent and ward of the state.

This is not a story. This is a reality. This boy is real. He lives in California. We'll call him John, age 13. John was labeled a juvenile delinquent, a ward of the state, and a sexual deviant. John lost over two years of his life to a humiliating and terrifying legal battle before the case against him was finally thrown out by the California Court of Appeals—all because a police interrogation at school forced him to falsely confess to a crime he did not commit.

This story may shock you—and it should. The tactics used by police to steamroll a child into confessing to a crime can offend our most basic notions of fairness and justice, not to mention the presumption of innocence that our criminal justice system is supposed to provide. But, while shocking, the sad truth is that this story is all too common.

Most readers are probably familiar with the tragic case of Brendan Dassey, featured in the Netflix series *Making a Murderer*. Brendan was sixteen years old and intellectually limited when he falsely confessed during police interrogation to helping his uncle assault and kill a young woman. The tactics used against him essentially mirrored those depicted above. Like John, Brendan was pulled out of class to be interrogated. Like John, Brendan was relentlessly accused of lying, when in fact it was the police who falsely claimed that they had evidence proving that he committed a

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The Juvenile Brain

The prefrontal cortex of the brain, *shaded in gray*, controls judgment, problem-solving, and decision-making. It also helps to regulate impulsive behavior. This area of the human brain is not fully developed until one's early twenties. Scientists link this developmental timeline to vulnerabilities of juveniles in school and police interrogations, including their propensity to confess to criminal activities they may not have actually committed. It is estimated that false confessions play a role in one-third of all wrongful convictions that have been uncovered by DNA evidence, and juveniles are two to three times more likely to confess to crimes they did not commit than their adult counterparts.

Image source: Database Center for Life Science, Japan.

Brendan Dassey was 16 when he was questioned by police in school and confessed to helping his uncle assault and kill a young woman. His case was profiled in the popular 2015 television series "Making a Murderer." Photo: AP Photo/ Dan Powers, Pool.

crime. Like John, the police fed him the facts about the crime that later made his confession look reliable and corroborated. Like John, the police indicated that confessing would help Brendan. And, like John, Brendan—who, after confessing to murder, asked if he would get back to school in time for a school project—did not understand the serious and long-term consequences of his statements.

Brendan and John are not alone. According to the Innocence Project, false confessions played a role in nearly 30% of all wrongful convictions that have been uncovered by DNA evidence. According to the National Registry of Exonerations, which compiles data on wrongful convictions, 221 exonerations since 1989 involved proven false confessions, and we know this number is under representative because it does not account for confessions not yet proven false nor confessions that did not result in a conviction. And studies of wrongful convictions show that children and adolescents, in particular, falsely confess with startling frequency; indeed, children are two to three times more likely to falsely confess during interrogation than adults. In a study of 125 proven false confessions, 63% of false confessors were under the age of twenty-five and 32% were under eighteen, a strikingly disproportionate result. Another study of 340 exonerations found that 42% of juveniles studied had falsely confessed, compared with only 13% of adults. And a laboratory study astonishingly found that a *majority* of youthful participants complied with a request to sign a false confession without uttering a single word of protest.

Why do false confessions happen so often to children? The answer lies in an all-too-toxic combination: the common use of psychological interrogation techniques like those illustrated above—designed for seasoned adult criminals—that exploit the developmental vulnerabilities of kids. As any teacher will recognize, youths' brains are not yet fully developed in areas relating to judgment and decision-making, giving rise to classic "teenager" traits like impulsivity, vulnerability to pressure and suggestibility, as well as a tendency to be motivated by short-term rewards. Inside the interrogation room, these traits can make kids respond to the pressures of interrogation by deciding that a confession is the only way out of a difficult situation—regardless of its truth.

The Pressure Cooker of Psychological Interrogation

Most police officers have been trained to conduct interrogations using the Reid Technique, a set of psychological tactics similar to those used on John. The Reid Technique was developed and marketed by John E. Reid & Associates for one purpose—to extract confessions—and for that reason, Reid itself cautions that its technique should only be used when the police are confident the suspect is responsible for the crime being investigated. At its core, the technique is a guilt-presumptive, accusatory, manipulative process—and it packs a powerful psychological punch.

Here's how the Reid Technique trains officers to obtain confessions.

Phase 1: Behavioral Analysis, A.K.A. the "Human Lie Detector"

- Engage in nonconfrontational open-ended period of questioning in which the officer is trained to believe he or she can operate as a "human lie detector" by observing and interpreting verbal and behavioral cues.
- Observe a suspect's behaviors as he or she answers questions.

According to Reid, certain behaviors—slouching, lack of eye contact, crossing one's arms, even scratching one's nose—may indicate that the person being questioned is lying. Similarly, the method teaches that certain verbal responses can indicate deception, including "I don't know" and "I can't recall."

If you find these claims unconvincing, you are not alone. Time and again, studies have debunked these claims: there is no unique behavior that can reveal deception. In fact, many of the behaviors identified by Reid as "deceptive" are normal adolescent behaviors, especially when a teen is being questioned by adults or other authority figures—like slouching and looking down at the floor. Officers' mistaken belief that a suspect is lying and thus must be guilty is the first step down the road to wrongful conviction.

Phase 2: Interrogation

- Isolate: Isolate suspect in a small room to increase anxiety. (Although this is often done even before the behavioral analysis interview described above.)
- Confrontation: Reenter the room and immediately accuse the suspect of the crime. Exude unwavering confidence in guilt. Be persistent. Repeatedly and relentlessly accuse.
- Denials: Reject all denials and cut off all claims of innocence.
- Make suspect feel as though he has been "caught": The officer may use props like a thick file of papers that he claims includes the evidence proving the suspect's guilt. He may even lie to a suspect, telling the suspect he has evidence—e.g., a fingerprint, a video, or an eyewitness—connecting the suspect to a crime when no such evidence exists.
- Minimizations or rationalization: The officer offers a moral or legal justification which will make it more tolerable for the suspect to admit guilt, like the detective's suggestion that John was just "curious."
- False choice between lesser of two evils: Officers ask the suspect a question that forces the suspect to choose between two bad choices, one that makes the suspect look like a monster and one that portrays the crime and the offender in a less heinous light. In John's case, his interrogator essentially gave him a choice between being treated like a curious teenager versus a sexual predator, and implied that he would be treated more leniently if he said he touched the girl out of mere curiosity.
- Promises of help: Officers suggest that the only way the suspect can help himself is to confess. For John, the detective told him she would get the help he needs. In Brendan's case, his interrogators told him that confessing will "set him free" and that everything would be "okay" if he confessed.
- Promises of leniency: Interrogators often suggest that the suspect will get help as opposed to punishment, and imply that he or she will be allowed to go home or back to class—so long as the suspect confesses to the more "justified" version of the crime.

By deploying these tactics at the right psychological pressure points, experienced interrogators can be extraordinarily effective in causing a suspect to produce self-incriminating information. Sadly, far too often, that information can be false.

Phase 3: Confession

- Elicit detailed narrative of the criminal act
- Record confession in writing or on video

A guilty suspect should be able to provide details of the crime that have not been revealed to the public and should also be able to lead police to information or evidence that was previously unknown to the police. The innocent suspect, however, does not possess this "inside knowledge" of the crime. Recorded interrogations prove that interrogators regularly provide suspects this information during the interrogation, intentionally or not. Such "contamination" usually occurs when interrogators ask leading questions that include information about the crime, such as "you committed this offense with Joe, right?" or "you paid $20 for the marijuana, didn't you?" For the innocent suspect, this kind of information disclosure allows him or her to incorporate accurate details about the crime into his or her confession. The result is a false confession which sounds disturbingly—and convincingly—true.

Today, many experts agree that the Reid Technique is psychologically coercive and can lead to false confessions, even when used on adults. Even the U.S. Supreme Court understands this—indeed, they recognized this reality back in 1966. In the landmark 1966 decision *Miranda v. Arizona*, the Court cited the Reid Technique to conclude that the "heavy toll" of custodial interrogation may result in false confessions. More recently, the Court went even further in 2009, in *Corley v. United States*, stating that "there is mounting empirical evidence that these pressures [of psychological interrogation generally, not specific to Reid Technique] can induce a *frighteningly high percentage of people* to confess to crimes they never committed."

Kids: Interrogate with Special Care

Given the widespread recognition that the Reid Technique is psychologically coercive, there is now a general consensus that special care must be used on kids and teenagers in the interrogation room. Indeed, in 2011's *J.D.B. v. North Carolina*, the Supreme Court held that

Juveniles, *Miranda* Rights, and Confessions Before the Supreme Court

Haley v. Ohio (1948)

Following the midnight arrest and five-hour interrogation of a 15-year-old boy by a team of detectives, the U.S. Supreme Court threw out the boy's confession and reversed his conviction, concluding that teens like Haley are no match for adult interrogators: "Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest." The Court noted the importance of ensuring that a young person has access to adult counsel: "[A teenager] needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him."

Gallegos v. Colorado (1962)

The U.S. Supreme Court threw out the confession of a 14-year-old boy when it was obtained through an on-and-off interrogation lasting five days, even though the interrogation itself was not particularly heavy-handed. In so concluding, the Court found that a teen "is unlikely to have any conception of what will confront him [during an interrogation] . . . or how to get the benefits of his constitutional rights." The Court again suggested that only "adult advice" could give the boy "the protection which his own immaturity could not."

In re Gault (1967)

This landmark case provided juveniles with many of the same due process protections already afforded to adults. In concluding that the Fifth Amendment right against self-incrimination must apply to juveniles, the U.S. Supreme Court explained that "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children."

J.D.B. v. North Carolina (2011)

Recognizing that a young person may feel bound to submit to questioning when an adult would not, the U.S. Supreme Court held that officers must consider an individual's age when determining whether he or she is in custody and, in turn, whether *Miranda* rights must be read.

the "*risk [of false confessions] is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile.*" Advances in neuroscience support this statement by explaining what "every parent knows" that teenagers are fundamentally different from adults in ways that are critically important to their treatment in the criminal justice system.

The brain's prefrontal cortex is responsible for judgment, problem-solving, and decision-making, and it regulates impulsive behavior by applying brakes to other parts of the brain that are activated by fear and stress. The prefrontal cortex, however, does not develop fully until one's early twenties, making children and teenagers uniquely vulnerable in the interrogation room for many reasons. Caught at this awkward middle stage of neurological development, children and teenagers are particularly vulnerable to external influence, such as that exerted by the interrogator; they experience a heightened reaction to stress, which is inherent to any interrogation for all suspects; they tend to focus on immediate rewards rather than long-term consequences, such as the idea that a kid can go home if he confesses; and they struggle to assess risks, a skill required to weigh the potential consequences of confessing to a serious crime. Add to all this kids' "limited understanding of the criminal justice system and the roles of the institutional actors within it," *J.D.B.*, and it is no longer puzzling why kids falsely confess at an alarming rate.

Even John E. Reid & Associates and other law enforcement organizations now recognize that kids need special protections in the interrogation room. In partnership with the Center on Wrongful Convictions of Youth, the International Association of Chiefs of Police (IACP) published a groundbreaking guide in 2012 concerning how to interrogate juvenile suspects. In *Reducing Risks: An Executive's Guide to Effective Juvenile Interview and Interrogation*, the IACP emphasizes that "[o]ver the past decade, numerous studies have demonstrated that juveniles are particularly likely to give false information—and even falsely confess—when questioned by law enforcement." Similarly, Reid explains on its website that "[i]t is well accepted that juvenile suspects are more susceptible to falsely confess than adults," and warns that "every interrogator must exercise extreme caution and care when interviewing or interrogating a juvenile."

The Reality of False Confessions Today

There has been progress: We now know how easily these psychologically coercive techniques can overbear the will of a child. Yet current cases and research indicate that most officers still employ these tactics when questioning juvenile suspects. In a 2014 survey of law enforcement, almost all officers reported frequently using the same interrogation techniques on minors as on adults.

Even worse, in spite of its recognition that "extreme caution and care" are required with juvenile suspects, Reid & Associates appears to be expanding the

use of its technique on kids. In addition to training police interrogators, the company is now marketing its technique to school administrators across the country for use on children at school. (So far, this training has occurred in at least twelve states.) The tactics taught to school administrators are virtually identical to those taught to police and fail to account for kids' vulnerabilities. This is particularly troubling because kids questioned at school have fewer rights than kids questioned by police; principals are usually not required to read a student their *Miranda* rights, for instance, and kids may have more difficulty walking out of a schoolhouse interrogation than a stationhouse interrogation because, as the *J.D.B.* Court recognized, "presence at school is compulsory" and "disobedience at school is cause for disciplinary action." Bottom line: using sophisticated and psychologically potent techniques like the Reid Technique on students is, "throwing caution to the wind." Plainly speaking, it is a recipe for disaster.

Aftermath of a False Confession

In the wake of *Making a Murderer*, we've heard many people wonder why Brendan is still in prison when his confession was so clearly coerced and false. It's true—and tragic—that Brendan's case is still unresolved. Each level of the Wisconsin state court system rejected his argument that his confession was involuntary and coerced by police, and his case is now before the federal courts. He remains in adult prison, sentenced to spend his life behind bars.

But this, too, is sadly not unique. Confessions are incredibly powerful evidence. A full 81% of proven false confessors whose case went to trial were convicted—and that figure does not account for those false confessors who pled guilty before trial. (Of the first 125 DNA exonerees who falsely confessed, 11% pled guilty.) People, including judges and juries, are very reluctant to believe that a confession might be false—and the result, too often, can be a wrongful conviction.

Confessions can also contaminate other evidence in a case. A confession can cause police to view other evidence with bias that assumes the confessor's guilt, encourage detectives to ignore exculpatory evidence and alternative suspects, and to end an investigation as soon as they have a confession. Confessions also often impact a defense lawyer's performance because he or she may assume the client's guilt and, in turn, may forego investigating the client's innocence and rush to cut a deal for the client with the prosecutor. While laws in several states now require interrogations to be recorded, such laws by themselves are often not enough to persuade a jury that a confession was coerced unless an expert takes the stand to parse each tactic and explain its effect on the suspect. Troublingly, many courts do not permit such experts to testify.

We are now in a new post-*Making a Murderer* era. The show masterfully presents Brendan's interrogation in a way that makes the falseness of his resulting statement clear; indeed, the show has made the idea of a false confession accessible to a wide-ranging audience for the first time. With any luck, judges will recognize that tactics which may be legitimate when used on adults may be coercive when applied to children and suppress confessions that result from such tactics. With any luck, jurors' and judges' perceptions of confessions may change in the future. They will stop placing blind faith in the reliability of confessions and demand greater corroboration of confessions.

Even further, teachers and parents can also change how this story plays out for their children and students. Teachers should fight the use of the Reid Technique in their schools, and parents should demand that they be notified *before* a principal plans to interrogate their child. Information is power, and *Making a Murderer* has made the public a lot more informed about how interrogation tactics can increase the risk of juvenile false confessions. In short, the tide may be turning. For children like Brendan, John, and so many others: Here's hoping. **IN**

Discussion Questions

1. Do you think it is appropriate for school administrators to adopt police interrogation techniques when questioning students? Why?
2. Do you think that *Miranda* rights should apply when speaking with police on school grounds? When speaking with school officials? Why?
3. Why do you think that confessions, even if false, are so persuasive to juries, and accepted in courts?
4. How might schools, police, and communities ensure that no juvenile falsely confesses to a crime? What practices and safeguards might be put in place?

Suggested Resources

- Center on Wrongful Convictions of Youth, Bluhm Legal Clinic at Northwestern University Pritzker School of Law http://www.law.northwestern.edu/legalclinic/wrongfulconvictionsyouth/
- International Association of Chiefs of Police, *Reducing Risks: An Executive's Guide to Effective Juvenile Interview and Interrogation*, 2012. Available: http://www.theiacp.org/Portals/0/pdfs/ReducingRisksAnExecutiveGuidetoEffectiveJuvenileInterviewandInterrogation.pdf
- *Making a Murder*, Directors Moira Demos and Laura Ricciardi, Synthesis Films & Netflix, 2015.

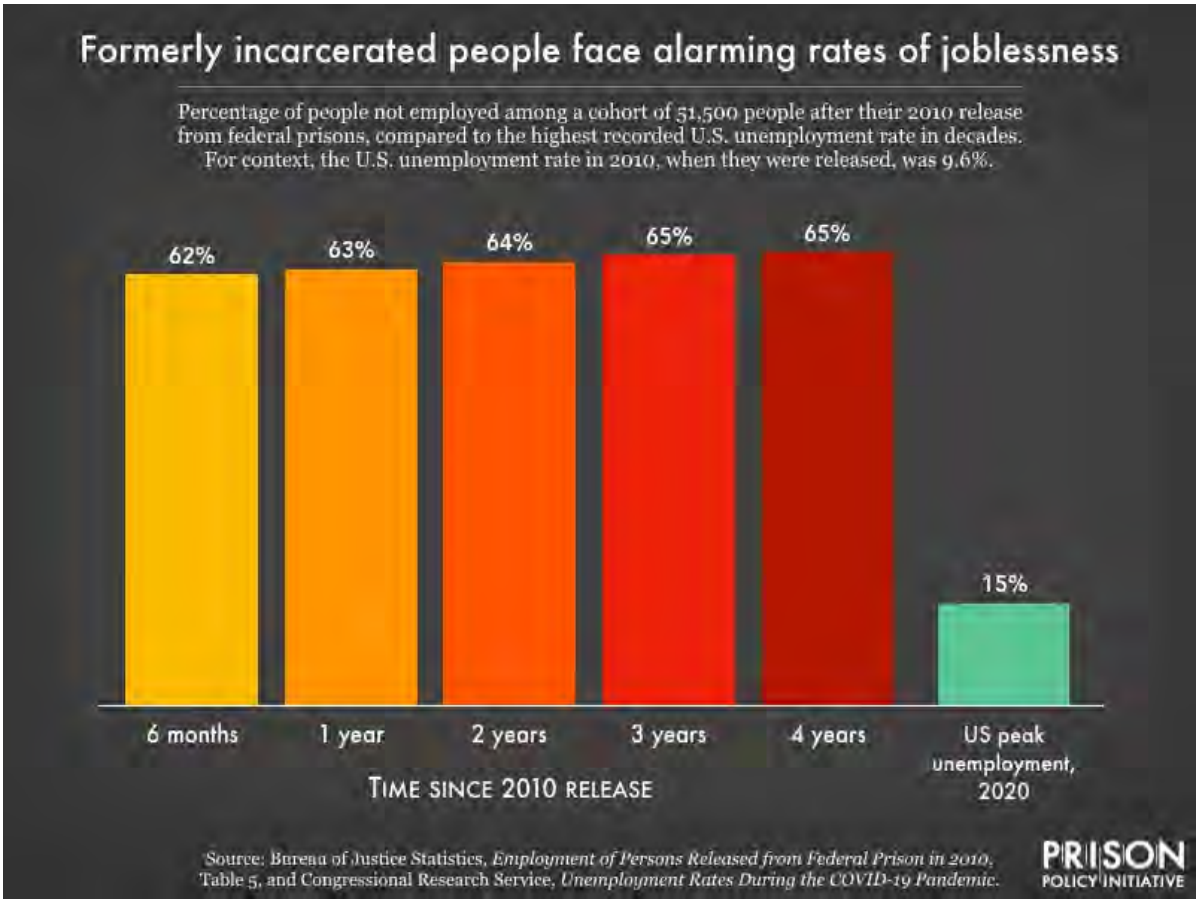
APPENDIX F

New data on formerly incarcerated people's employment reveal labor market injustices

Newly released data doubles down on what we've reported before: Formerly incarcerated people face huge obstacles to finding stable employment, leading to detrimental society-wide effects. Considering the current labor market, there may be plenty of jobs available, but they don't guarantee stability or economic mobility for this vulnerable population.

by Leah Wang and Wanda Bertram, February 8, 2022

How many formerly incarcerated people are jobless at the moment? A good guess would be 60%, to generalize from a new report released by the Bureau of Justice Statistics (BJS). The report shows that of more than 50,000 people released from federal prisons in 2010, a staggering 33% found no employment at all over four years post-release, and at any given time, no more than 40% of the cohort was employed. People who did find jobs struggled, too: Formerly incarcerated people in the sample had an average of 3.4 jobs throughout the four-year study period, suggesting that they were landing jobs that didn't offer security or upward mobility.



As the data show, not only is reentry difficult in the first months of release from prison, but the struggle to find a job actually grew over time for the study cohort of people leaving federal prison in 2010. We show these increasing jobless rates next to one of the most dire economic moments of recent years — when the US unemployment rate reached its highest point of around 15% in mid-2020. [1]

We warn readers that we can't call the 60% jobless rate an "unemployment rate" — joblessness is different from unemployment, which refers to people *actively looking for work.* We calculated the first and only national *unemployment rate* for formerly incarcerated people in our 2018 report *Out of Prison and Out of Work*, and we can't update that analysis, because we based it on data that the government only collected once. [2] Nevertheless, the new BJS data suggest that employment rates among people who have been to prison aren't improving.

Formerly incarcerated individuals tend to experience joblessness and poverty that started long before they were ever locked up. When they're released from prison, the pressure is on to get a job: People on parole (or "supervised release") often must maintain employment or face reincarceration, [3] while struggling to access social services, and trying to make ends meet in a job market more hostile to them than ever before. This combination of pressures amounts to a perpetual punishment. And it's not just formerly incarcerated individuals who are punished: Policies that weaken their ability to turn down jobs with low wages may depress wages for other workers in their industries, as we'll explain in this briefing.

High jobless rates precede incarceration, too

According to the Bureau of Justice Statistics report, employment rates among the study's cohort declined in the three years leading up to their admissions to federal prison. So while the overall US unemployment rate around this time *peaked at 10%* in 2009 (and was only outpaced recently in 2020), 60% or more of formerly incarcerated people found themselves jobless *before* their incarceration, with variation by sex, race and ethnicity.[4] What explains such pervasive pre-incarceration joblessness?

Some of this decline in employment before incarceration could be explained by people being held in jail before they're sentenced — the report does not say how many fall into this category. Still, these findings hint at two other, equally troubling connections between employment status and incarceration, though the new data don't speak to them specifically: For one, loss of employment might be what is leading some to turn to criminal behavior, a reality that could be addressed through policy interventions. Further, there are unfortunate ramifications for people who were held in jail pretrial but not ultimately convicted or sentenced — they, too, may have lost their jobs. (And as we've stressed before, even a short stay in jail can be disruptive and even dangerous.)

As the new data show, one way or another, formerly incarcerated people have been routinely shut out of the workforce and denied access to opportunity. Criminal legal system involvement only makes their chances of finding a job worse, and these economic losses compound over time, making communities hit hardest by mass incarceration even worse off.

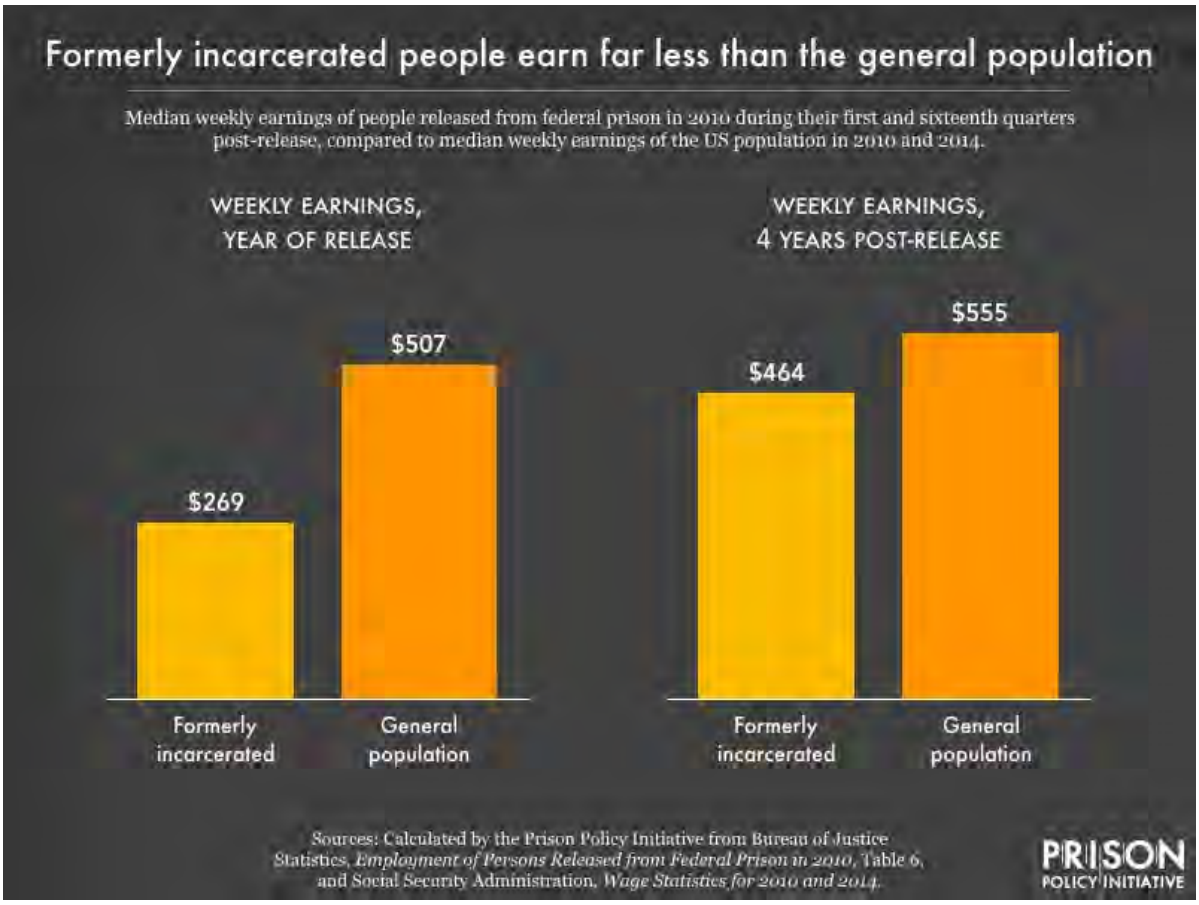
Harsh parole conditions, a lack of social welfare programs, and a tough job market are forcing formerly incarcerated people — already a low-income, majority-minority demographic — into the least desirable jobs. But not everybody is losing: Businesses have found a way to capitalize on the desperation of applicants with conviction histories and exploit the fact that these these individuals have less bargaining power to demand changes in conditions of employment, such as better wages benefits and protections. This results in lower overall wages and more harmful working conditions in certain industries.

Post-release, months of searching and moving between jobs is common

The overall employment rate over four years after the study population was released hovered between 34.9% and 37.9% — in other words, about *two-thirds* of the population were

jobless at any given time.

For those who did find employment after release, their earnings were lower than the general population: In the first few months, formerly incarcerated people were earning just 53% of the median US worker's wage. And after four years of seeking and obtaining irregular employment, the study population was making less than 84 cents for every dollar of the US median wage (which, in 2014, was about $28,851 annually).



Earnings were lowest for Black and Native American people released from federal prison; [5] in fact, racial and ethnic disparities in earnings seemed to grow over time. These findings probably reflect an unfortunate "racialized re-entry" process for people leaving prison, where the stigma of incarceration itself and differences in social networks for job-seekers vary across racial and ethnic groups. Researchers of this concept noted that white people getting out of prison actually appeared more disadvantaged and less employable "on paper" due to higher rates of substance use and longer sentences, but *still* ended up with better employment and income than Black and Hispanic people leaving prison.

After four years, those with jobs were making just 84 cents for every dollar of the US median wage.

Employment may be one of the most important benchmarks of reentry, yet it took formerly incarcerated people an average of *over six months* to find their first job after release. As such, many did not maintain employment over the entire four-year study period, and the average person in the study had 3.4 jobs over that time. If that sounds erratic, it is: The average person is employed for 78%

of the weeks between ages 18 and 54, while people in the study's cohort were employed just 58% of the time post-release. When people are moving from job to job, families and the economy suffer, and people risk violating their post-release supervision and being returned to incarceration.

Lastly, though it's not clear exactly why, people who served less than a year in federal prison actually had a harder time finding and maintaining employment post-release, and spent more time without a job than the other groups.[6] Given this devastating impact on their long-term employment prospects, it's evident that people who are given short sentences — and who pose no safety risk — should not be incarcerated to begin with.[7]

The struggle to find a good job

The fact that most people released from prison have spotty, sporadic employment may mean that the jobs they're getting are difficult jobs to keep, even for an extremely motivated worker. These could be temporary jobs, jobs where workers aren't protected from wrongful termination, or dangerous or low-wage jobs that are unsustainable.

The average working person is employed for 78% of the time, versus just 58% of the time for formerly incarcerated people.

According to the BJS report, the major industries employing formerly incarcerated people include waste management services, construction, and food service. A 2021 study released by the U.S. Census Bureau affirms this finding. The study analyzed thousands of people with felony convictions, tracking their employment and income in the years around the Great Recession (2006-2018), and found that rebounds in construction and various service industries after the recession were associated with a bump in employment and income levels for these individuals. However, the people in that study saw their employment levels plateau after a few years, even in areas where construction and manufacturing thrived.

It's true that industries like manufacturing and construction tend to boost employment and reduce recidivism for those leaving prison. But while these jobs did, at one time, allow people to build wealth and support a family, they don't as much anymore, meaning that they are likely not alleviating poverty among formerly incarcerated people. The fact that formerly incarcerated people are not obtaining steady, reliable work is likely related to the industries in which they're most commonly employed.

When the workforce is under mass supervision, key industries lose employee bargaining power

Looking more closely at the "low-skill" jobs that formerly incarcerated people tend to get can help us understand how mass incarceration and supervision may be hurting whole

sectors of workers. In construction and manufacturing, union membership has declined significantly over the last twenty years.[8] During the same period — between 2000 and 2019 — the number of people on parole grew by more than 150,000, and the number of people with felony convictions swelled from 13.2 million to an estimated 24 million.

While it's impossible to draw a causal relationship between these two trends — given the numerous factors at play — there is serious potential for exploitation of formerly incarcerated people. For example, *The New York Times* has reported that New Yorkers with conviction histories are shuttled into non-union construction jobs with low to no benefits. Formerly incarcerated employees placed at such companies have described being "taken aback" at the low wages, and many have had to work other jobs to supplement their pay from their day jobs in construction.

A rising number of people with felony convictions — which is the result of, among other things, overly punitive sentencing — may be depressing wages and hurting working conditions for *all* workers in certain industries. Formerly incarcerated workers are not to blame, especially as many have likely been working in these industries for the better part of their adult lives. Prison does nothing to improve their qualifications as workers; meanwhile, the struggle of reentry makes them more desperate for job offers, as the new data make abundantly clear.

Formerly incarcerated people need greater opportunity from today's labor market

The new BJS data confirm that formerly incarcerated people still suffer from sky-high jobless rates (despite evidence that virtually all want to work), and that those who *do* find work are getting unstable jobs. Formerly incarcerated people are typically poor before they go to prison, and joblessness during reentry can push them into even deeper poverty and have a permanent impact on their wealth accumulation.

These devastating statistics have implications for workers without criminal records as well. When industries can use vulnerable workers to replace or supplement workers who demand decent wages and benefits, the price of labor declines. When burdensome supervision requirements, unnecessary occupational licensing restrictions, and a lack of social welfare programs combine to make formerly incarcerated people desperate for work, all workers suffer.

Indeed, during the labor shortages we've seen in 2021 and 2022, employers are turning to currently or formerly incarcerated people as a convenient solution. (And sadly, a rising awareness of formerly incarcerated people's unjust barriers to employment has allowed some of these employers to frame their actions as enlightened.) These shifts may manifest in depressed wages, benefits, and worker protections sector-wide.

People leaving prison need expanded access to job opportunities so that successful reentry can begin immediately and provide stability, not uncertainty. Policy solutions like

occupational licensing reform and automatic record expungement, as well as "banning the box" on all initial employment applications, are respectable first steps. Even better would be including those with conviction histories as a protected class[9] in employment non-discrimination statutes. In-prison training programs for jobs in construction and similar industries may also boost employment and wages in some areas, according to some research, but it's not a universal solution, nor does it solve underlying problems of low educational attainment and economic immobility.

It's critical that lawmakers support workers with and without criminal records who are working together to end the exploitative practices that hurt them all. Without leveling the playing field for formerly incarcerated people, not only will their jobless rates remain high, but self-serving employers will continue to benefit from a disposable labor pool, with detrimental impacts on everyone.

Footnotes

1. For a more appropriate comparison, it would be reasonable to use the Bureau of Labor Statistics' U-6 rating, which is a more inclusive measure of unemployment that includes people marginally attached to the labor force and those who want full-time work but have been forced to accept part-time work. Of available data going back to 1994, the average annual U-6 rating peaked in 2010 at 16.7%, and in 2020 the U-6 rating averaged 13.6%. More on alternative measures of unemployment can be found *here*. ↩

2. For more on how the jobless and unemployment rates compare, see the appendix of our 2018 report. ↩

3. Requirements that people on community supervision maintain or look for a job exist in several jurisdictions, including the federal supervised release system, Washington D.C., Louisiana (see footnote 4 of the Columbia University Justice Lab's report *Less Is More in New York*), and Massachusetts. ↩

4. Pre-incarceration joblessness was consistently highest for Black, Native American and people of "Other" race or ethnicity. In the quarter prior to admission to prison, Black people were 87% jobless. Women had slightly higher levels of employment than men both before and after serving time in federal prison; however, they consistently earned lower wages. ↩

5. The methodology of the BJS report may have led to skewed findings about employment outcomes for Hispanic people: Researchers used Social Security information to link prison records to employment records. While all other race and ethnicity groups had 91% or more released people's records successfully linked, only 45% of Hispanic people in the release cohort had their prison records linked to employment data for analysis. Therefore, the study doesn't describe the typical employment experience of numerous Hispanic people who make up a large swath of US residents that never receive Social Security benefits. ↩

6. For those who served 1 year or less in federal prison prior to their 2010 release, it took the longest time on average to secure their first job (2.9 quarters, or almost 9 months). Additionally, their first job had the shortest average duration (18 months) and their overall employment rate over four years post-release was the lowest compared to those who served longer sentences. See Table 4 of the BJS report. ↩

7. Another recent paper provides evidence that diverting people from incarceration may mitigate some of the harsh impacts on employment discussed in this briefing: Researchers compared the employment outcomes of people released from prison compared to people with felony convictions only (some of whom went on to spend time in prison). Those in the prison-release cohort had lower employment and income levels over several years compared to those with felony convictions. ↩

8. In 2000, 18.3% of people employed in the construction industry and 14.8% of people employed in the manufacturing industry were members of a union, according to the Bureau of Labor Statistics's Union Members In 2000 report. In 2019, by contrast, 12.8% of people employed in construction and 9% of people employed in manufacturing were members of a union, according to Union Members — 2019. (Bureau of Labor Statistics "Union Members" reports from the intervening years show a slow downward trend in union membership in these industries.) These represent slightly steeper declines than the overall U.S. workforce saw during that same period (13.5% in 2000 versus 10.3% in 2019). However, it's worth noting food service doesn't show the same decline; union membership rates in food service have hovered around 1% for the last couple decades. ↩

9. A couple of relevant state-level victories were summarized in a new report from the Collateral Consequences Resource Center: Illinois, Louisiana, New Mexico and Maine were among states that passed legislation in 2021 making it much harder for employers to discriminate against those with criminal records. ↩

Leah Wang is a Research Analyst at the Prison Policy Initiative. (Other articles | Full bio | Contact) *Wanda Bertram is the Communications Strategist at the Prison Policy Initiative.* (Other articles | Full bio | Contact)

2 responses:

1. *John Neff* says:
February 8, 2022 at 11:41 am

Almost 20 years ago I did a study using data on Iowa clients under community supervision. The unemployment rates and under employment (seasonal) rates were large and there was a large fraction on disability.

At that time they were in a Social Security District where lost their social security benefits and they had to get assistance to get them restored.

Retribution does not end when they complete their sentence.

2. *JusticeForSammi* says:
February 14, 2022 at 11:50 am

The younger you are when you get out of prison, the more likely you are to "reinvent" yourself in the job market. I knew of two people who spent a lot of time locked up as youths and young adults. One ended up becoming a psychiatrist, the other one got a good job at a moving company and later married and had a family.

Unfortunately, with a felony on their record and many years out of the work force, it is often very hard for those parolees over 30 to find employment that pays a living wage.

I agree with the last comment, punishment doesn't end when someone is released.

APPENDIX G

Neutral
As of: June 2, 2022 10:49 PM Z

In re Pers. Restraint of Ross

Court of Appeals of Washington, Division One

March 14, 2022, Filed

No. 83436-3-I

Reporter
2022 Wash. App. LEXIS 519 *; 2022 WL 766039

In the Matter of the Personal Restraint of AZARIAH ROSS, *Petitioner*.

Notice: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at In re Pers. Restraint of Ross, 2022 Wash. App. LEXIS 621 (Wash. Ct. App., Mar. 14, 2022)

Prior History: [*1] Appeal from Pierce County Superior Court. Docket No: 12-1-03302-3. Judge signing: Honorable Elizabeth P Martin. Judgment or order under review. Date filed: 10/12/2015.

State v. Ross, 2 Wn. App. 2d 1063, 2018 Wash. App. LEXIS 663 (Mar. 20, 2018)

Core Terms

sentence, youth, downward, firearm enhancement, trial court, counts, convictions, mitigating, unlawful imprisonment, resentencing, robbery, moot, deficient performance, statutory maximum, defense counsel, ineffective assistance of counsel claim, ineffective, resentence, argues

Counsel: For Petitioner: Spencer James Babbitt, Attorney at Law, Seattle, WA.

For Respondent: Erica Eggertsen Ruyf, Prosecuting Attorney Pierce County, Pierce County Prosecuting Attorney, Tacoma, WA.

Judges: Authored by Bill Bowman. Concurring: Linda Coburn, Beth Andrus.

Opinion by: Bill Bowman

Opinion

¶1 BOWMAN, J. — A jury convicted Azariah Chenaz Ross of 16 felony crimes that he committed just after his 18th birthday. The court sentenced Ross to 564 months of confinement. In this personal restraint petition (PRP), the parties agree that we must remand several of Ross' convictions because the sentences exceed the statutory maximum penalty. But Ross argues that we should remand to resentence him on all of his convictions because he did not receive effective assistance of counsel. According to Ross, his attorney performed deficiently because she did not make legal argument or provide a factual basis to support her request for an exceptional sentence downward based on Ross' youth. We agree with Ross, grant the petition, and remand for resentencing.

FACTS

¶2 Ross and several [*2] other young men committed a string of home invasion robberies in 2012. Ross turned 18 years old soon after the first

robbery.[1] The State charged Ross with 52 crimes, and the case went to jury trial in 2015.

¶3 The jury returned its verdict on September 1, 2015. It was unable to reach a verdict on several counts, and the court declared a mistrial as to those charges.[2] The jury also acquitted Ross of 4 charges, but convicted him of 16 crimes—3 counts of first degree robbery, 2 counts of first degree burglary, 6 counts of unlawful imprisonment, 1 count of theft of a firearm, and 4 counts of first degree trafficking in stolen property. The jury also found 11 firearm sentencing enhancements by special verdict.

¶4 Ross was 21 years old by the time the court sentenced him on October 12, 2015. The court calculated his offender score as "9+" for each offense. The standard range for each robbery conviction was 129 to 171 months plus a 60-month firearm enhancement. The standard range for each burglary conviction was 87 to 116 months plus a 60-month firearm enhancement. The standard range for each unlawful imprisonment conviction was 51 to 60 months plus an 18-month firearm enhancement. And the standard [*3] range for each trafficking in stolen property conviction was 63 to 84 months.[3]

¶5 Two of the robbery victims addressed the court at Ross' sentencing hearing. The State recommended the court impose high-end sentences on all counts because some of the crimes would go unpunished due to the multiple current offenses and Ross' high offender score.[4] It did not seek an exceptional sentence upward because it recognized that the mandatory firearm enhancements were extensive.

¶6 The defense asked the court to depart from the standard range and impose an exceptional sentence downward. Counsel asked the court to sentence Ross to serve only the mandatory 408 months of firearm enhancements. In support of her request, defense counsel argued the firearm enhancements alone were extensive, and several outstanding charges remained that the State intended to retry. She also noted that "Mr. Ross was a young man when this happened," and that he was suffering from a "serious chemical dependency."[5] Defense counsel provided no further argument in support of her request based on Ross' "young" age. The court noted that it could "see [Ross] has family members here" and asked defense counsel if anyone "wish[ed] to address [*4] the Court on behalf of the defendant." Counsel said, "No."

¶7 The court imposed high-end concurrent sentences on all but the first degree robbery counts, including 60-month terms for each unlawful imprisonment conviction. On the robbery convictions, the court imposed middle-range sentences of 156 months. Combined with the firearm enhancements, the court sentenced Ross to a total term of 564 months' confinement.

¶8 Division Two of our court considered and rejected Ross' claims of error, which were unrelated to this PRP, on direct appeal. *State v. Ross*, No. 48321-1-II (Wash. Ct. App. Mar. 20, 2018) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2048321-1-II%20Unpublished%20Opinion.pdf. He then timely filed this PRP.

ANALYSIS

¶9 The parties agree that we must remand several of Ross' convictions for resentencing because the sentences exceed the statutory maximum penalties. But Ross argues that we should remand to resentence him on all of his convictions because his trial lawyer performed deficiently in seeking an exceptional

[1] The crimes Ross committed as a juvenile are not at issue in this PRP.

[2] The State indicated it would retry the counts on which the jury could not reach a verdict, and Ross ultimately pleaded guilty to 32 other offenses in 2016. The court imposed a concurrent 171-month sentence. The 2016 conviction is not at issue in this PRP.

[3] The court treated the theft of firearm and first degree burglary convictions as the same criminal conduct.

[4] *See* RCW 9.94A.535(2)(c).

[5] The State agreed there was "good evidence" that Ross' "drug use contributed to the offense, so I think drug treatment and drug-related conditions should be imposed."

sentence downward based on his youth without providing legal or factual support.[6] The State contends Ross' ineffective assistance of counsel claim is moot because the [*5] trial court has discretion on remand to determine whether to resentence Ross for the remaining counts. Alternatively, the State asserts Ross received effective representation at his sentencing hearing. We agree with Ross.

Standard of Review

¶10 Relief through a PRP is extraordinary. *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 132, 267 P.3d 324 (2011). A petitioner may seek relief through a PRP when he is under unlawful restraint. RAP 16.4(a); *In re Pers. Restraint Petition of Cashaw*, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994). A personal restraint petitioner must prove either a constitutional error that results in actual and substantial prejudice by a preponderance of the evidence or nonconstitutional error that "'constitutes a fundamental defect which inherently results in a complete miscarriage of justice.'" *In re Pers. Restraint Petition of Davis*, 152 Wn.2d 647, 671-72, 101 P.3d 1 (2004) (quoting *In re Pers. Restraint Petition of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990)).

Statutory Maximum Sentence

¶11 Ross and the State agree that Ross' sentences for unlawful imprisonment exceed the statutory maximum penalty for those crimes. We review de novo whether a sentence is legally erroneous. *State v. Dyson*, 189 Wn. App. 215, 224, 360 P.3d 25 (2015).

¶12 Ross' six convictions for unlawful imprisonment are all class C felonies. RCW 9A.40.040(2). The statutory maximum for a class C felony is 60 months. RCW 9A.20.021(1)(c). Here, the trial court imposed a sentence of 60 months on each unlawful imprisonment count, but it also imposed an 18-month firearm enhancement and 12 months of community [*6] custody for a total sentence of 90 months per conviction.

¶13 RCW 9.94A.533(3)(g) requires the court to reduce a base sentence if adding a firearm enhancement extends the total sentence above the statutory maximum. And RCW 9.94A.701(10) requires that the court reduce the community custody term "whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime." *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012) (citing former RCW 9.94A.701(9) (2010)). We agree with the parties that Ross' sentences for unlawful imprisonment exceed the statutory maximum penalty and remand for resentencing on those counts.

Ineffective Assistance of Counsel

¶14 Still, Ross argues that the trial court should resentence him on all of his convictions because his lawyer was ineffective at the sentencing hearing. According to Ross, his lawyer asked the court to impose an exceptional sentence downward based on his youth but failed to support the request with legal authority or a factual basis. The State contends that the issue is moot or, in the alternative, that counsel did not perform deficiently.

¶15 An ineffective assistance of counsel claim presents mixed questions of law and fact that we review de novo. *State v. K.A.B.*, 14 Wn. App. 2d 677,

[6] Ross also claims counsel was deficient for not asking the court to impose an exceptional sentence by running the firearm enhancements concurrently with one another or with the base term of confinement. But firearm enhancements must run consecutively for adult offenders. RCW 9.94A.533(3)(e); *see State v. Mandefero*, 14 Wn. App. 2d 825, 830-31, 473 P.3d 1239 (2020) (holding that firearm enhancements remain mandatory and consecutive for adult offenders under *State v. Brown*, 139 Wn.2d 20, 29, 983 P.2d 608 (1999), *overruled in part by State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017)). An attorney does not perform deficiently by not seeking relief for which the defendant is not entitled. *State v. King*, 24 Wn. App. 495, 501, 601 P.2d 982 (1979) (counsel not ineffective for failing to present a defense unwarranted by the facts).

707, 475 P.3d 216 (2020) (citing *State v. Linville*, 191 Wn.2d 513, 518, 423 P.3d 842 (2018)). The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee [*7] effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To establish ineffective assistance of counsel, Ross must show that (1) defense counsel's conduct was deficient and that (2) the deficient performance resulted in prejudice. *Grier*, 171 Wn.2d at 32-33.

A. Mootness

¶16 The State argues that Ross' ineffective assistance of counsel claim is moot because if we remand for resentencing on the unlawful imprisonment counts, the trial court will then have discretion to conduct a full resentencing.

¶17 As a general rule, we do not consider moot cases. *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012). "'A moot case is one which seeks to determine an abstract question which does not rest upon existing facts or rights.'" *State v. Sansone*, 127 Wn. App. 630, 636, 111 P.3d 1251 (2005) (quoting *Hansen v. W. Coast Wholesale Drug Co.*, 47 Wn.2d 825, 827, 289 P.2d 718 (1955)). But a case is not moot if the court can still provide effective relief. *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983).

¶18 A trial court has discretion on remand to revisit issues that were not the subject of an earlier appeal. *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). But an appellate court's mandate can limit the scope of a trial court's discretion to resentence on remand. *Kilgore*, 167 Wn.2d at 42. If the remand mandate does not limit the trial court to only ministerial corrections, the court *may* conduct a full resentencing. *State v. Toney*, 149 Wn. App. 787, 792-93, 205 P.3d 944 (2009). But if we determine that Ross is entitled to a full resentencing, the trial court *must* resentence him. *See State v. Stein*, 140 Wn. App. 43, 55, 165 P.3d 16 (2007) (Under the law of the case doctrine, [*8] our decision is binding on further proceedings in the trial court on remand). As a result, we can still provide Ross effective relief, and his ineffective assistance of counsel claim is not moot.

B. Deficient Performance

¶19 An attorney's performance is deficient if it falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88. A defendant alleging ineffective assistance must overcome a strong presumption that counsel's performance was reasonable. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). If we can characterize counsel's actions as legitimate trial strategy or tactics, performance is not deficient. *Kyllo*, 166 Wn.2d at 863. But an attorney performs deficiently when "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The relevant question is not whether counsel's choices were strategic, but whether they were reasonable. *Grier*, 171 Wn.2d at 34.

¶20 In the context of investigating mitigating factors, we objectively review counsel's performance for "'reasonableness under prevailing professional norms,'" including "'a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time.'" *In re Pers. Restraint of Davis*, 188 Wn.2d 356, 371, 395 P.3d 998 (2017)[7] (quoting *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)). "'[R]easonable conduct for an attorney includes carrying out the duty to research the relevant law.'" *In re Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 101-02, 351 P.3d 138 (2015) (quoting *Kyllo*, 166 Wn.2d at 862). Failing [*9] to cite controlling case law may amount to ineffective

[7] Internal quotation marks omitted.

assistance. *State v. Hernandez-Hernandez*, 104 Wn. App. 263, 266, 15 P.3d 719 (2001) (citing *State v. Ermert*, 94 Wn.2d 839, 850, 621 P.2d 121 (1980)). And failure to prepare and present facts necessary to support a legal strategy may amount to deficient performance. *See K.A.B.*, 14 Wn. App. 2d at 706 (counsel's failure to take steps necessary to meaningfully prepare and present a diminished capacity defense was ineffective assistance).

¶21 A defendant's youth may offer a substantial and compelling reason to depart from the standard sentencing range. *State v. O'Dell*, 183 Wn.2d 680, 695-96, 358 P.3d 359 (2015). Age may mitigate a defendant's culpability, "even if that defendant is over the age of 18." *O'Dell*, 183 Wn.2d at 695. This is true because "many youthful defendants older than 18 share the same developing brains and impulsive behavioral attributes as those under 18." *In re Pers. Restraint of Monschke*, 197 Wn.2d 305, 313, 482 P.3d 276 (2021). But "age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence." *O'Dell*, 183 Wn.2d at 695; *Monschke*, 197 Wn.2d at 325-26 ("every individual is different" and "[n]ot every 19- and 20-year-old will exhibit [youthful] mitigating characteristics").

¶22 A defendant bears the burden of proving by a preponderance of the evidence that there are substantial and compelling reasons justifying an exceptional sentence downward. RCW 9.94A.535(1); *State v. Gregg*, 196 Wn.2d 473, 478, 474 P.3d 539 (2020). A defendant over the age of 18 shows that youth is a mitigating factor if it in any [*10] way impaired his "capacity to appreciate the wrongfulness of his … conduct, or to conform his … conduct to the requirements of the law." RCW 9.94A.535(1)(e); *In re Pers. Restraint of Light-Roth*, 191 Wn.2d 328, 335-36, 422 P.3d 444 (2018) (citing *State v. Ha'mim*, 132 Wn.2d 834, 846, 940 P.2d 633 (1997), *abrogated by O'Dell*, 183 Wn.2d at 698-99).[8]

¶23 A defendant "need not present expert testimony to establish that youth diminished his capacities for purposes of sentencing"; lay testimony may suffice. *O'Dell*, 183 Wn.2d at 697. For example, in *O'Dell*, the defense presented lay testimony from relatives, friends, and a family pastor attesting to O'Dell's immaturity and lack of identity. *O'Dell*, 183 Wn.2d at 697. And in *State v. Mandefero*, 14 Wn. App. 2d 825, 829, 473 P.3d 1239 (2020), the defense relied on testimony from two community members to argue that Mandefero's youthful impetuousness and recklessness diminished his culpability.

¶24 Here, defense counsel argued that the court should impose an exceptional sentence downward because "Ross was a young man when this happened." But she offered no factual support for her argument. Even though several of Ross' family members attended his sentencing hearing, defense counsel offered no testimony about Ross' home environment or family circumstances, immaturity, impetuosity, ability to appreciate risks and consequences, or any other factors relating to the mitigating circumstances of youth.[9]

---

[8] *O'Dell* did not amount to a substantial change in the law. *See Light-Roth*, 191 Wn.2d at 336 (recognizing that *Ha'mim* "did not preclude a defendant from arguing youth as a mitigating factor but, rather, it held that the defendant must show that his youthfulness relates to the commission of the crime"). But the case clarified that the legislature did not necessarily consider "the relationship between age and culpability when it made the [Sentencing Reform Act of 1981, chapter 9.94A RCW,] applicable to all defendants 18 and older." *O'Dell*, 183 Wn.2d at 693. And *O'Dell* "broadened our understanding of youth as it relates to culpability." *Light-Roth*, 191 Wn.2d at 337.

[9] In his PRP, Ross provides declarations from his mother, father, and two older sisters who had firsthand knowledge about Ross' upbringing, personality traits, and childhood influences. Ross' mother described him as "a very compassionate and loving young man who would give the shirt off of his back to anyone in need," but also "a young and immature boy who wanted to please others and follow others," who suffered from "expos[ure] to drugs and drinking by peers who also had lack of parental supervision due to working parents." His older sister described Ross as a quiet and thoughtful kid, but one who "saw things no child should see and bec[a]me wrapped up in the juvenile justice system." Ross' father described him as "insecur[e]" and "unusually susceptible to peer pressure," but also a "caring, compassionate young man" who, since his arrest, has made mature, responsible decisions. And another sister agreed that Ross' circumstances resulted from "his immaturity, impulsiveness, addiction, and susceptibility to peer pressure," but that "[s]ince being incarcerated, he has shown tremendous growth."

¶25 Defense counsel also did not offer any legal support [*11] for her argument. She did not cite the court to RCW 9.94A.535(1)(e). Nor did she bring to the court's attention *O'Dell*, which our Supreme Court decided just months earlier,[10] clarifying that under RCW 9.94A.535(1)(e), a trial court has the authority to depart from a standard-range sentence based on youth. 183 Wn.2d at 698-99.

¶26 The State argues counsel's performance was not deficient because she made a strategic decision to seek an exceptional sentence down based not only on youth, but on youth "combined with his drug use." According to the State, it was reasonable for counsel "to emphasize drug addiction's impact on a young man instead of more exclusively focusing on youth." But the State does not explain how counsel's failure to offer any legal or factual support for her request based on youth advanced the argument that Ross was also struggling with drug addiction. The two theories were not mutually exclusive. *See State v. Hamilton*, 179 Wn. App. 870, 880-81, 320 P.3d 142 (2014) (deficient performance in not bringing a suppression motion that would not have jeopardized defense strategy at trial). There is no reasonable explanation for why counsel requested an exceptional sentence downward based on youth, but then did not provide the trial court with compelling legal authority or a factual basis for her request. [*12] We conclude Ross' trial counsel performed deficiently.

C. Prejudice

¶27 Still, Ross must show that counsel's deficient performance caused him actual and substantial prejudice. *Davis*, 152 Wn.2d at 671-72. We apply the same prejudice standard to ineffective assistance of counsel claims brought in a PRP as we do on appeal. *In re Pers. Restraint Petition of Crace*, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012) ("[I]f a personal restraint petitioner makes a successful ineffective assistance of counsel claim, he has necessarily met his burden to show actual and substantial prejudice."). So Ross must show there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 693.

¶28 It is unclear from the record whether the sentencing court was aware of its discretion to impose an exceptional sentence based on Ross' youth. In response to Ross' request for a downward departure from the standard range, the prosecutor told the court:

> Your Honor, I think it's telling that [defense counsel] did not cite any particular basis for an exceptional sentence downward. RCW 9.94.535 does require a mitigating circumstance that does differentiate the crimes from other crimes of a similar nature, and it does not permit [an] exceptional sentence downward for, say, facts that are [*13] personal to the defendant.
>
> There is nothing that distinguishes these crimes from others of the same general nature that would permit the Court to impose an exceptional sentence downward.

The court responded only, "I am familiar with the case law. Thank you."

¶29 Before sentencing Ross, the court acknowledged that he "was about 18 years old when he committed these crimes." But nothing in the record shows that the court was aware of *O'Dell* and its recent holding that youthfulness, even in young adults, could amount to a mitigating circumstance justifying an exceptional sentence downward.

¶30 The record does show, however, that the court was amenable to considering mitigating circumstances when fashioning an appropriate sentence. The court placed great emphasis on the "nature of th[e] crimes" and on the trauma and fear suffered by the victims, yet it also recognized that "the firearm enhancements are substantial," and

[10] The Supreme Court published *O'Dell* on August 13, 2015. The trial court sentenced Ross on October 12, 2015.

imposed mid-range sentences for the robberies despite the State's request for high-end sentences. And we cannot appreciate the effect Ross' family members would have had on the court's decision because they did not provide declarations or testify at sentencing. Under these circumstances, [*14] we conclude that there is a reasonable probability that but for defense counsel's deficient performance, the result of the proceeding would have been different.

¶31 We grant Ross' petition, vacate his sentence, and remand for a full resentencing.[11]

ANDRUS, A.C.J., and COBURN, J., concur.

End of Document

[11] Because we remand for ineffective assistance of counsel, we do not reach Ross' argument that the trial court abused its discretion by not meaningfully considering his youth at sentencing or his request for a reference hearing.

APPENDIX H

2021: HOW GENDER AND RACE AFFECT JUSTICE NOW

WASHINGTON COURTS
ADMINISTRATIVE OFFICE OF THE COURTS

GENDER AND JUSTICE COMMISSION

Promoting Gender Equality in the Justice System

Final Report

GENDER AND JUSTICE COMMISSION
GENDER EQUALITY IN THE JUSTICE SYSTEM

www.courts.wa.gov/genderjustice

SJI
State Justice Institute

0062

2021 Gender Justice Study

September 2021

This report was developed under Project Grant number SJI-18-N-029 from the State Justice Institute. The points of view expressed are those of the authors and do not necessarily represent the official position or policies of the State Justice Institute.

The Washington State Supreme Court Gender and Justice Commission, as a body, endorses all the Goals and Recommendations listed in the 2021 Gender Justice Study. We also support the general approach of viewing gender issues in the context of racial, ethnic, and poverty issues. The points of view expressed in each chapter, however, are those of the authors of that chapter and do not necessarily represent the official position or policies of the Gender and Justice Commission.

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

Dr. Dana Raigrodski, LLB, SJD, Gender Justice Study Co-Chair

Sierra Rotakhina, MPH, Gender Justice Study Project Manager

Kelley Amburgey-Richardson, JD, Senior Court Program Analyst, Washington State Supreme Court Gender and Justice Commission

Cover images include (1) members of the Washington State Supreme Court at the time of report publication and (2) African American women seated on steps of building at Atlanta University, Georgia [1899 or 1900]. Included in California Women's Museum materials about the National Association of Colored Women (NACW). The NACW's founding principle, "Lifting as We Climb," is discussed on page 9 of this report.

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GENDER AND JUSTICE COMMISSION
GENDER EQUALITY IN THE JUSTICE SYSTEM

Cover design © Debi Bodett

Goals to Reduce Problems We Found in Every Area of Inquiry

In 1989, the Washington Supreme Court's Task Force on Gender and Justice in the Courts produced a groundbreaking report on the impact of gender on selected areas of the law. It concluded that gender did affect the availability of justice. We – the Washington State Supreme Court Gender and Justice Commission – are a product of that report and its recommendations. Now, in 2021, we have completed our follow-up study.

Our legal and social science research, our data collection, and our independent pilot projects all led us to the same frustrating conclusion about the effect of gender in Washington State courts: trustworthy, factual data about the effect of gender in Washington courts is hard to find, and it is especially hard to find for Black, Indigenous, other people of color, and LGBTQ+[1] people.

Still, based on the data in which we have a high degree of confidence, two points stand out: (1) gender matters – it does affect the treatment of court users (including litigants, lawyers, witnesses, jurors, and employees); and (2) the adverse impact of these gendered effects is most pronounced for Black, Indigenous, other women of color, LGBTQ+ people, and We developed five overall goals for future action based on these results. These goals prioritize work on the areas of highest need. In many cases, that led us to adopting gender neutral goals – because that seemed like the best way to gain the best outcomes for those with the greatest need. It turns out that this approach will further the interests of more than just any single subpopulation of Washington residents – it should benefit us all. We look forward to our common work on these critical areas:

1. Improve data collection in every area of the law that this report covers: ensure collection and distribution of accurate, specific data, disaggregated by gender, race, ethnicity, and LGBTQ+ status, in the criminal, civil, and juvenile areas of law covered here.

[1] Lesbian, gay, bisexual, transgender, queer or questioning

2. Improve access to the courts in every area of the law that this report covers: expand remote access, adopt more flexible hours, increase access to legal help, reduce communication barriers, and ensure that courts treat all court users in a trauma-responsive manner.
3. Address the impacts of the vast increase in convictions and detentions over the last generation: (a) recognize and remedy the increase in conviction rates and incarceration length for women, especially Black, Indigenous, and other women of color, and (b) recognize and remedy the consequences that the increased incarceration of Black, Indigenous, and other men of color over the last generation has had on women and other family members.
4. Reduce reliance on revenue from court users to fund the courts.
5. Identify the best evidence-based curricula for judicial and legal education on gender and race bias.

Washington State Supreme Court Gender and Justice Commission

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Chief Justice Steven C. González

Chief Justice Steven C. González was appointed to the Washington Supreme Court effective January 1, 2012. Before joining the Supreme Court, he served for ten years as a trial judge on the King County Superior Court hearing criminal, civil, juvenile, and family law cases. Chief Justice González is passionate about providing open access to the justice system for all and was previously appointed to the Washington State Access to Justice Board that was established in response to a growing need to coordinate access to justice efforts across the state. He also served as Chair to the Supreme Court's Interpreter Commission for eight years, supporting efforts to enhance language access across our state, including most recently amendments to general rules that address remote interpreting as courts responded to the COVID-19 pandemic and established protocols for team interpreting.

Justice Sheryl Gordon McCloud

Justice Sheryl Gordon McCloud was elected to the Washington Supreme Court in 2012 after a career of helping clients fight for their constitutional and individual rights. As a Justice, she serves as a Chair of the Gender and Justice Commission, as a member of the Supreme Court's Rules Committee, and as the liaison to the Supreme Court's Pattern Instructions Committee (on which she previously served as a lawyer-member). She is also on the Washington State Bar Association's Council on Public Defense. She speaks regularly at legal and community events throughout the state on topics ranging from ethics to criminal justice. Justice Gordon McCloud brought a wealth of appellate experience with her; she handled hundreds of cases before the Washington Supreme Court and other appellate courts before she became a judge. She also taught at the Seattle University School of Law and has published several articles. Her legal expertise was recognized by her peers before she joined the bench. For example, she received the Washington Association of Criminal Defense Lawyers' highest award, the William O. Douglas Award, for "extraordinary courage" in the practice of law. Her commitment to justice is still recognized by her peers now that she has a track record of work as a Justice. In 2015, Washington Women Lawyers King County Chapter honored her with its President's Award. In 2018, the Cardoza Society of Washington State presented her with its L'Dor V'Dor Award.

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Washington State Supreme Court Gender and Justice Commission

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Washington State Supreme Court

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Chief Judge Cindy K. Smith
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2019 – 2022 (2nd Term)

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For a list of current members, visit the Gender and Justice Commission's website.

2021 Gender Justice Study Advisory Committee Members

Member	Affiliation
The Honorable Sheryl Gordon McCloud, Co-Chair Gender Justice Study	Washington State Supreme Court
Dr. Dana Raigrodski, Co-Chair Gender Justice Study	University of Washington School of Law
Director Jim Bamberger	Washington State Office of Civil Legal Aid
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The Honorable Raquel Montoya-Lewis	Washington State Supreme Court
Karen Murray	Former Public Defender: King County Department of Public Defense, Associated Counsel for the Accused

The Honorable Kathleen O'Connor	Former Spokane County Superior Court Judge
Becky Roe	Schroeter Goldmark & Bender
The Honorable Steve Scott	Judicial Dispute Resolution, Former King County Superior Court Judge
Representative Tarra Simmons	Washington State House of Representatives Public Defender Association, Director of the Civil Survival Project
Secretary Stephen Sinclair	Washington State Department of Corrections (Served on the Advisory Committee from August 2019-June 2021 while Secretary of DOC)
The Honorable Michael Spearman	Former Washington State Court of Appeals Division I Judge
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Senator Judy Warnick	Washington State Senate
Secretary Kim Wyman	Washington State Secretary of State
Treasurer Mike Pellicciotti	Washington State Treasurer (Served on the Advisory Committee from August 2019-November 2020 while a State Legislator)

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Administrative Office of the Courts
Association of Washington Superior Court Administrators
Board for Judicial Administration
District and Municipal Court Management Association
Tribal State Court Consortium
Washington Pattern Instructions Committee
Washington State Association of County Clerks
Washington State District and Municipal Court Judges' Association
Washington State Law Library
Washington State Superior Court Judges' Association
Washington State Supreme Court Interpreter Commission
Washington State Supreme Court Minority and Justice Commission

Land Acknowledgement

Our Gender and Justice community is spread throughout the state of Washington and around the country. We ask that all of you reflect on the lands on which we work and reside, and acknowledge all of the ancestral homelands and traditional territories of Indigenous peoples who have been here since time immemorial.

There are numerous tribes, some of which are federally recognized, that share traditional homelands and waterways in what is now Washington State. The Washington State Supreme Court Gender and Justice Commission in Olympia, Washington presides on the traditional unceded, ancestral lands of the Medicine Creek Treaty Tribes, the Nisqually and Chehalis tribes, and the Squaxin Island tribes, among other Coast Salish neighbors. We acknowledge our shared responsibility to their homelands and express our gratitude to do
our work where they have traditionally done theirs.

Acknowledging the ceded and unceded land on which we all stand could not be more important in our current historical moment. We encourage you to consult Native Land to learn more.

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- Evaluation of Washington State Domestic Violence – Moral Reconation Therapy (DV-MRT) Programs Process and Outcomes
- Incarceration of Women in Washington State: Multi-Year Analysis of Felony Data
- Evaluation Report: On-Site Childcare Programs in County Courthouses & Their Effect on Access to the Justice System
- Jury Diversity: A Survey of Washington State Trial Courts - Analysis of Court Demographic Data Collection and Juror Accommodations

I. 2021: How Gender and Race Affect Justice Now

The main job of the courts is to resolve disputes – and to resolve them peacefully, fairly, and in accordance with the law and with justice. When we are at our best, we accomplish that by providing a fair and open forum, using neutral rules of procedure and equal application of the law, while ensuring respectful treatment of all participants.

But our courts have not always been at our best.

Early History of Gender Bias in Washington

Beginning with Washington's statehood, our law officially excluded women, Black people, Native Americans, and others from full participation in the courts. The same was true across the United States: women, Black people, Native Americans, naturalized immigrants from China, and others, were all officially excluded from full participation in the court system. This exclusion was clear from laws as varied as those that excluded these groups from jury service, to laws that refused to provide a legal remedy for harms – such as rape – to some of these groups. Even after official, legally sanctioned, exclusion ended, it remained the rule in practice. For example, although Congress passed "woman's suffrage" in 1919, it left out a lot of women: Black people including women, were still barred from full participation by slavery's legacy and Jim Crow laws; Native Americans including women, Chinese Americans including women, Japanese Americans during World War II including women, were all barred from full participation by both official laws and exclusionary practices. And the list of excluded groups goes on. In other words, historically, courts were biased against women; the bias was not always as apparent for white women; but it was very apparent for Black, Indigenous, and women of color.

The 1989 Study of Gender Bias in the Judicial System in Washington

So in 1989, Washington's predecessor to the Gender and Justice Commission conducted a study of how our courts were progressing on the historical exclusion and devaluation of women. That study was one of the first of its kind in the nation, and it offered a model for other jurisdictions to follow. The Washington State Legislature funded that study, and scores of volunteers from lawyers, judges, and academics, to legislators, statisticians and justice system partners,

researched the status of women in Washington's courts. On the substantive law side, those researchers clearly heard the voices of women who had suffered from the courts' treatment of domestic violence and rape; of women who had received unjust decisions in family law matters including child support, maintenance, property division, and child custody cases; and from women who felt they were denied full recovery of damages and fees in discrimination cases. On the procedural side, those researchers heard the voices of women whose credibility and dignity were insulted when they came to court as litigants, experts, witnesses, or legal professionals. As a result, that study focused on those "gendered" areas of the law. The study concluded that the courts were biased against women in those areas and concluded with recommendations for change. The Supreme Court established a permanent Gender and Justice Commission to continue this important work.

More than 30 years have passed. As then-Chief Justice Madsen said when she passed the torch of leadership of our Commission on to Justice Gordon McCloud and Judge Paja, it's time to reassess.

This 2021 Study of Gender Bias in the Judicial System in Washington, and Our Focus on Race

We still hear those same voices. But now we also hear additional voices. For example, we hear the voices of missing and murdered Indigenous women and people; we hear the voices of domestic violence victims who have difficulty getting legal help, navigating the court system, and waiving legal fees; we hear the voices of those burdened with legal financial obligations and years of compounded interest from long past criminal matters, especially voices from the families of Indigenous, Black, and other people of color who bear a disproportionate burden of those obligations; we hear the voices of those remaining in prison due to increased convictions and harsher sentencing laws; and we hear voices from the LGBTQ+ community. So when we reassessed, we addressed not just whether the clearly "gendered" laws, but also whether other "non-gendered" laws – such as those concerning access to the courts, navigating the court system, user fees, legal financial obligations, bail, trials, and sentencings – nevertheless had a gendered impact.

This report is a data-based study of those questions, focusing on the 30 years since our last report. Once again, we are pathbreakers: this is one of the first such follow up studies in the nation. Once again, we benefitted from the work of hundreds of lawyers, judges, law students, social scientists, and community groups, and we came to terms with critical review by experts from multiple disciplines and all branches of government. We heard from stakeholders on terminology choices. We struggled with research showing that highlighting disparities in the justice system can unintentionally emphasize stereotypes rather than disrupt them. We acknowledged the significant overlap among the study topics, and concluded that someone navigating the justice system most likely experiences those overlaps as compounded barriers to justice. And of course, in the middle of our research, pilot projects, and writing, the COVID-19 pandemic hit in early 2020. The data on the impacts of COVID-19 is still developing, but it is already clear that this event impacted every aspect of life, including the justice system. You can read more about our processes in Section V.

Once again, we sought the best data possible to capture this moment in time. Here's what the data tells us – and what it doesn't tell us.

The Data Shows That Gender Impacts Outcomes in Washington Courts – and That Impact Is Most Clear for Black, Indigenous, and Other People of Color

Some themes arise from multiple sections. First, the data shows that there have been several major changes for the better over the last 30 years. The Washington State Legislature has changed laws concerning domestic violence, commercial sexual exploitation, and marriage dissolutions; the people have changed the law on marriage equality; prosecutors' offices have changed their approach to domestic violence and sexual assault; judicial education on gender and race bias has dramatically increased, and rules for lawyers and judges about treating women and other populations with respect have been adopted; and the diversity of the bench has grown.

But other gender-based disparities remain or have increased. And these gender disparities have their harshest impacts on Black, Indigenous, and other people of color, as well as members of the LGBTQ+ community.

This is a brief summary of some of our key factual findings:

Gender, The Legal Community, and Barriers to Accessing the Courts

- The costs of accessing Washington courts—such as user fees, childcare, and lawyers—create barriers. This has the greatest impact on single mothers; Black, Indigenous, and women of color; LGBTQ+ people; and those with disabilities.
- Lack of affordable childcare limits the ability of low-income women to get to court, underscoring the need for flexible court schedules and online access to court.
- Lack of court interpreters and translated materials disadvantages people with distinct communication needs. This is a particular concern for those seeking protection from domestic violence, including immigrant women and families.
- Black, Indigenous, and women of color are not well represented in jury pools. Higher juror pay and research on challenges for female jurors are needed.
- Women, particularly Black, Indigenous, and other women of color, continue to face bias and pay disparities in the legal profession. Women and men of color are also underrepresented in judicial and law firm leadership positions.

Gender, Civil Justice and the Courts

- The highest rates of workplace discrimination and harassment affect Black, Indigenous, and women of color; women doing farm work, domestic labor, and hospitality work; people with disabilities; and LGBTQ+ workers.
- Those most impacted by workplace discrimination and harassment have difficulty reporting incidents and finding lawyers. They may receive unequal court outcomes by gender, race, and ethnicity.
- A 2021 workplace survey of employees in Washington courts, superior court clerks' offices, and judicial branch agencies found that employees who identified as American Indian, Alaska Native, First Nations, or other Indigenous Group Member (86%), bisexual (84%), gay or lesbian (73%), and women (62%) reported the highest rates of harassment.
- Current practices for valuing life for wrongful death and other tort claims devalue the

lives of women and Black, Indigenous, and people of color.

- Data suggests that gender and other biases in family law proceedings can impact custody, child support, and maintenance decisions.

Gender, Violence, Youth and Exploitation

- Domestic violence and sexual assault mostly harm women and LGBTQ+ people—particularly those who are Black, Indigenous, people of color, immigrants, or living in poverty. They face barriers to reporting such gender-based violence.
- Despite improvements in the law and its enforcement, barriers to justice remain for victims of gender-based violence. The large numbers of missing and murdered Indigenous women and people remain a key concern.
- The law requiring mandatory arrests in domestic violence cases may have unintended adverse effects on women, people of color, immigrants, those living in poverty, and LGBTQ+ people.
- Girls, LGBTQ+ people, and youth with disabilities take different pathways into the juvenile justice system than youth who are not a part of these populations, and have different needs inside the system.
- Boys are targeted for commercial sexual exploitation in larger numbers than previously known. But women, youth of all genders, LGBTQ+ people, those in poverty, and Black, Indigenous, and communities of color are the main targets.
- The justice system response to commercial sexual exploitation has greatly improved but still treats many in the sex industry, including exploited populations, as criminals.

The Gendered Impact of the Increase in Convictions and Incarceration

- While men of color have suffered the brunt of mass incarceration, the number of women incarcerated in Washington grew exponentially and largely in the shadows between 1980 and 2000. Their numbers continue to increase while the very high incarceration rates for men decrease.

- Our pilot project found that Black, Indigenous, and women of color are convicted and sentenced at rates two to eight times higher than white women.
- Jail and prison programs and policies are developed for men and often do not meet the needs of women or transgender and gender-nonconforming people.
- Incarcerated mothers are more likely than fathers to be primary caregivers. Mothers are thus more likely to lose their children to out-of-home care during their incarceration.
- Racial disparities in arrests negatively influence pretrial bail decisions, which influences plea deals, affects charging decisions, and creates a higher likelihood of incarceration and longer sentences for both men and women of color.
- There is little data on the gender impacts of legal financial obligations (LFOs). The available research suggests that while men face higher LFOs, women face greater challenges trying to pay both their own LFOs and those of people close to them.

In sum, the high-quality data that we gathered and developed sometimes clearly shows, and sometimes suggests, that gender affects justice system outcomes. Specifically, we conclude that in general, in Washington, Black, Indigenous, and other women of color suffered more from unequal treatment and outcomes than did white women.

Trustworthy Factual Data Is Lacking or Hidden

But that quality of data was not available to us in many critical areas.

For example, national and state reports show that Latinx prison and jail populations are disproportionately high. But those numbers include all genders combined. We were unable to draw conclusions about how pervasive that effect was in Washington for Latinx men or women in particular. In fact, certain Washington data improperly suggested that the incarcerated Latinx population was not disproportionately high.

Similarly, there is little to no accessible Washington data on whether gender and other demographic factors impact prosecutors' exercise of discretion in charging and plea bargaining or on bail and sentencing recommendations. And even though the Washington State Legislature charged state agencies with collecting certain data on rates of convictions, length of sentences,

use of sentence enhancements, and related matters, the quality of the data collected was, in our opinion, poor. The data was not gathered in a uniform manner, based on a uniform way; it was not clearly coded and explained; and it seemed to confuse race with ethnicity in a way that dramatically undercounted certain ethnic groups, particularly Latinx and Native Hawaiian and Other Pacific Islanders. We therefore conclude: (1) the trustworthy factual data that does exist and that is accessible shows that gender impacts the availability and quality of outcomes in Washington courts; (2) but trustworthy data on gender, particularly for Black, Indigenous, other people of color; LGBTQ+ people; and people in poverty, is often limited, low quality, and hard to access, even when it is held by public agencies; (3) the data we could find and could depend upon shows that gender bias usually, but not always, has its most adverse impact on women; and (4) that adverse impact is not always apparent unless you disaggregate the data by subpopulations such as race, ethnicity, women in poverty, etc.

There is a Pressing Need for More Washington-Specific Data

This shows that we need more standardized, accurate, and consistent data collection in Washington State for all the topics covered in this report. Throughout this report we supplemented the often-limited Washington-specific research and data with national sources. It is not always clear if national sources are generalizable to Washington. Collecting and analyzing local data would be more accurate and meaningful in advancing equity in Washington.

We undertook our own pilot projects, designed specifically for this study, to try to fill some of these gaps. We surveyed employees at all levels of the judicial branch about their experience with discrimination and harassment, including sexual harassment, in the workplace. Results show that a large percentage of respondents report such continuing discrimination, and that the majority of it was on the basis of race, LGBTQ+ status, and gender. We disaggregated jury pool data, and found that jury service was far more limited for Black, Indigenous, and women of color. We conducted a study of the effectiveness of a domestic violence treatment method that did not rely on a high fee for service model – and we concluded that this less expensive model, called Domestic Violence – Moral Reconation Therapy (DV-MRT), is effective and sustainable. We examined the accessible data on incarcerated women in Washington and concluded that the

numbers were growing, and that women of color bore the brunt of that growth. And we studied two courthouse childcare centers set up to serve those attending court and determined that they aided accessibility. Specifically, that evaluation found that women were more likely than men to say that the childcare program improved their access to the courts. We also concluded that the childcare centers could have a larger impact with increased capacity and outreach.

The results of this research and these pilot projects reinforced our conclusions that gender, combined with race, ethnicity, and poverty, adversely impacts outcomes in our court system. Those results also influenced our proposed recommendations.

Proposals for the Future

We believe, based on the limited data we found, when evaluated in light of historical injustices against women, particularly Black, Indigenous, and other women of color and LGBTQ+ people, that these are not isolated problems. They are remaining systemic problems.

That means they call for systemic solutions.

And certain solutions did emerge from our research and our pilot projects. Some even emerged unexpectedly, due to lessons learned from the trial courts struggling to keep their doors open and their courts accessible during the COVID-19 pandemic. Those solutions are our five overarching goals, listed at the beginning of this report. The path to those solutions are the specific recommendations that we listed at the end of each substantive chapter.

Many of these recommendations pose little to no costs to the justice system. They include: improving data collection; ensuring clear and transparent coding and comparisons of collected data; making such data accessible to researchers; allowing remote access to court proceedings through computer- and cell phone-based programs; giving clear directions about how to access courts, in person or virtually, particularly for often-overlooked matters such as protection orders; creating more flexibility in court hours to allow access without missing work; and changing certain forms to get more high-quality data in the near future while undertaking the task of developing more accurate, trustworthy, and transparent data sharing overall.

Some of our recommendations are likely cost-neutral, for example: expunging uncollectible debt; increasing opportunities for pre-arrest diversion and post-arrest deferrals; allowing remote access for many court proceedings; recognizing that caregiving can be considered a mitigating factor at sentencing; and discontinuing the use of certain non-violent victimless crimes in criminal history at sentencing.

Some of our recommendations will carry a noticeable financial cost: reducing court dependence on user fees; making all legal financial obligations discretionary; and considering elimination or reduction of the use of collection agencies.

And many will take a long time. For example, we recognize that our key recommendation, about making data collection mandatory, high quality, and transparent across all branches and agencies, means taking a big step. But we want to start that journey.

Lifting As We Climb

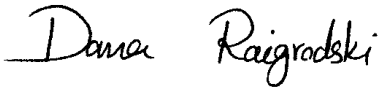
In the late 1800's, the National Association of Colored Women – a coalition of local groups – formed to fight for gender equality. They focused on the impact of gender disparities, particularly on Black women. And they developed a platform that addressed the issue directly, by fighting for the right to suffrage for all women. They also adopted a slogan that was as forward-thinking and inclusive as it was defiant: Lifting As We Climb. They obviously recognized that expanding justice for all would necessarily include justice for the most deprived. Thank you; we build on your successes.

We assembled hundreds of volunteer lawyers, judges, law students, professors, experts from multiple disciplines and all branches of government, social scientists, community groups, and stakeholders with lived experience in the subjects studied to lift the accessibility and quality of justice in Washington for all women. We placed an emphasis on women who are Black, Indigenous, other people of color, immigrants, in poverty, and on people in the LGBTQ+ community. Those volunteers have devoted thousands of hours to the legal and social science research that went into this report. Justice partners have opened themselves up to rigorous analysis of, and potential criticism of, current practices from existing childcare facilities at courthouses, to searching inquiries about harassment in employment within the judicial branch

to domestic violence perpetrator treatment. Representatives from the Executive, Legislative, and Judicial branches, the law schools, legal professionals, and others volunteered their time to our oversight Advisory Committee. We celebrated our joys at the depth of the research produced, our principled differences about how to address the problems that the research highlighted, and our attempts to draw conclusions only from the trustworthy and accessible data. Together, we continue to lift as we climb.

Sincerely,

Justice Sheryl Gordon McCloud
Washington Supreme Court
Gender and Justice Commission
Co-Chair and Gender Justice Study
Co-Chair



Dr. Dana Raigrodski
Washington State Supreme Court Gender and Justice Commission, Gender Justice Study Co-Chair

II. 2021 Gender Justice Study Results

Part I

Gender, The Legal Community, and Barriers to Accessing the Courts

Part II

Gender, Civil Justice, and the Courts

Part III

Gender, Violence, Youth, and Exploitation

Part IV

The Gendered Impact of the Increase in Convictions and Incarceration

Part I

Gender, The Legal Community, and Barriers to Accessing the Courts

Chapter 1

Gender and Financial Barriers to Accessing the Courts

Mary Welch, JD

Sophia O'Hara; Julie Tergliafera, MPH

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I. Summary

Equitable access to the courts is essential to achieve justice for all. Financial barriers may deprive low-income people of such equal access to the courts.

To be sure, there is limited Washington-specific data on the populations that these financial barriers impact most. However, based on clear evidence of huge historical income and pay inequities, these barriers likely have the greatest impact on single mothers; Black, Indigenous, and women of color; LGBTQ+ people; and those with disabilities. Such evidence includes data showing that 39.4% of single women with children in Washington live in poverty, and that such single-female-head-of-household families are the ones most likely to live below the poverty line. This income inequality is amplified for Black, Indigenous, and women of color in Washington: 19.2% of white women in our state live below 150% of the poverty line, compared to 41.3% of Hispanic women, 38.4% of Native American women, 35.8% of Black women, 28.1% of women of two or more races, and 21.2% of Asian and Pacific Islander women.

The financial barriers take many forms. Court user fees, such as filing fees, constitute one such barrier – and it is not always easy for a self-represented litigant to figure out how to reduce or waive these. Surcharges (such as the family court service surcharge) can create additional costs on top of the basic filing fee. Many of these surcharges apply only in family law matters, increasing the filing costs of family law cases compared to other civil cases. There are indicators that more women file family law cases than men, suggesting these surcharges specific to family law cases may impact women more.

The law certainly gives courts the power to waive many fees for litigants who are indigent – though obtaining such waivers can be time-consuming and difficult. The fee waivers also do not cover all fees – particularly in a contested family law case. For example, some litigants must pay for guardians ad litem (GAL), parenting seminars, facilitators, and court-ordered drug testing and evaluations. All of these fees and costs must be paid or waived before a litigant can complete a family law case. It is also unclear how fee waivers are being applied to name change recording fees across the various courts. In cases where the name change fees are not waived, such fees may have a disparate impact on indigent transgender and non-binary individuals.

There are also barriers in addition to the costs required for initial access to the court system. These barriers include the fees ordered in cases (such as family law cases), the price of missing work, the cost of childcare, the expense of a lawyer, the money spent copying pleadings, the cost of transportation to and from the courthouse, and other additional costs. For example, evidence from Washington shows that childcare and similar caregiving responsibilities pose barriers to accessing the courts, and that this is particularly true for women. Similarly, a 2015 Washington study found that 76% of low-income individuals with legal problems do not get adequate legal help.

Changes are needed to remove these barriers. Some of the most important changes need to improve all court users' ability to conduct court business are: using low-cost remote means to "come to court," supporting accessing to childcare resources, and ensuring that user fees and other court related fees can be waived for those who can't afford them.

II. Statutory User Fees

For the purpose of this report, "court user fees" are anything that a civil litigant must pay, or have waived, in order to have a case adjudicated. If not waived, court user fees may prevent indigent litigants from accessing the court system. Access to the courts is a fundamental right.[1] Court user fees include filing fees and surcharges imposed by statute or local ordinances.

A. Legal overview

1. Brief historical overview

The issue of user fees creating a barrier to court access is not new. In 1495, King Henry VII "will[ed] and intend[ed] indifferent justice to be had and ministered according to his common laws to all his true subjects as well to poor as rich."[2] The English Parliament responded with 11

[1] *King v. King*, 162 Wn.2d 378, 394 n.15, 174 P.3d 659 (2007).
[2] Scott F. Llewellyn & Brian Hawkins, *Taking the English Right to Counsel Seriously in American "Civil Gideon" Litigation*, 45 U. MICH. J.L. REFORM 635, 641–42 (2012) (*quoting* An Act to Admit Such Persons as Are Poor to Sue in Forma Pauperis, 1495, 11 Hen. 7, c. 12 (Eng.), *reprinted in* 2 STATUTES OF THE REALM 578 (1816) (with some modifications for modernization)).

Hen 7, c. 12 (1495), which enacted a statutory right to counsel and waiver of court fees for indigent civil plaintiffs.[3] Many states have looked to 11 Hen 7, c. 12 as a model when adopting fee waiver laws and for guidance when interpreting such laws.[4] The Washington Supreme Court cited this law in *O'Connor v. Matzdorff* as support for the idea that courts have inherent power to waive court fees.[5] By at least 1854, Washington State had enacted user fees by statute, which then included $10 to file a declaration or a petition, $25 for the clerk to docket a cause, and $50 for issuing a subpoena for a witness.[6]

2. Court user fees in Washington State

Civil litigants are required to pay, or get waived by court order, a filing fee to initiate a case. The statutory basis for the majority of the mandatory fees in superior court can be found at RCW 36.18 *et seq*. and for district court at RCW 3.62.060. RCW 36.18.080 requires that fee schedules be posted in the office of every county officer who is entitled to collect fees. Fee schedules can also be found on websites for the county clerks (for superior courts) and district courts.[7]

User fees in superior court include the filing fee for a petition or a complaint and additional surcharges required by statute. The basic filing fee, not including surcharges, to start a civil action for, among other things, restitution, adoption, or name change is $200.[8] An unlawful detainer action is less expensive with an initial filing fee of $45.[9]

Surcharges in addition to the basic filing fee include the courthouse facilitator fee;[10] the judicial stabilization trust account filing fee surcharge;[11] a family court service surcharge;[12] and a domestic violence prevention surcharge.[13] Many of these surcharges, with the exception of the

[3] *Id.*
[4] *Id.* at 650–51.
[5] *O'Connor v. Matzdorff*, 76 Wn.2d 589, 599–600, 458 P.2d 154 (1969).
[6] LAWS OF 1854, § 1.
[7] *See, e.g.*, *Superior Court & Clerk's Office Fee Information*, KING CNTY. (Dec. 21, 2016), https://www.kingcounty.gov/courts/clerk/fees.aspx; *Court Fees*, KING CNTY. (June 23, 2020), https://www.kingcounty.gov/courts/district-court/court-dates-and-fees/court-fees.aspx.
[8] RCW 36.18.020(2)(a).
[9] *Id.*
[10] RCW 26.12.240.
[11] RCW 36.18.020(5)(c).
[12] RCW 26.12.260(3).
[13] RCW 36.18.016(2)(b).

judicial stabilization trust account surcharge, apply only in family law matters. The addition of these surcharges greatly increases the cost of filing a family law case. For example, the total cost of filing a dissolution in superior court is $314. The basic filing fee for a dissolution is $200 pursuant to RCW 36.18.020(a). Surcharges make up the remaining $114.

In contrast to a family law case, a non-family law civil case costs $240 to file. This includes the same basic filing fee of $200 but the only surcharge is the $40 judicial stabilization trust account required by RCW 36.18.020(5)(c). There are indicators that more women file family law cases than men, though exact statistics do not exist. Nationally, more women initiate divorce proceedings than men,[14] however no research exists on the number of women who pay to file for divorce versus the number of men. Also, a 2008 study of Family Law Facilitators in Washington found that 69% of those who use Family Law Facilitator services during 2007 were women.[15]

A few civil cases do not have a filing fee or surcharges. Domestic violence protection orders, vulnerable adult protection orders, and sexual assault protection orders can be filed free of charge.[16] There is a clear legislative intent to ensure that a filing fee should not be a barrier when a petitioner must access the courthouse seeking protection. In fact, the American Bar Association's working paper on court fees says, "Fees should only be imposed if, among other things, the individual is able to pay. If a person who has been required to pay a fee subsequently cannot afford to pay, the fee should be waived entirely or reduced to an amount the person can pay."[17]

While district court filing fees and surcharges are less expensive than superior court, they are still a barrier to a litigant who is impoverished. District court does not have jurisdiction over family law matters so there are fewer surcharges. But, as in superior court, surcharges are added to filing fees.[18] The cost to file a civil case in district court is $83, of which $43 is the base fee and

[14] Michael J. Rosenfeld, *Who Wants the Breakup? Gender and Breakup in Heterosexual Couples*, *in* SOCIAL NETWORKS AND THE LIFE COURSE 221–243 (Duane F. Alwin, Diane H. Felmlee & Derek A. Kreager eds., 2018).
[15] THOMAS GEORGE & WEI WANG, WASHINGTON'S COURTHOUSE FACILITATOR PROGRAMS FOR SELF-REPRESENTED LITIGANTS IN FAMILY LAW CASES 86.
[16] RCW 26.50.040; RCW 74.34.310; RCW 7.90.055.
[17] AM. BAR ASS'N, WORKING GRP. ON BUILDING PUB. TRUST IN THE AM. JUST. SYS., REPORT TO THE HOUSE OF DELEGATES 10 (2018), https://finesandfeesjusticecenter.org/content/uploads/2018/12/Ten-Guidelines-on-Court-Fines-and-Fees.pdf.
[18] RCW 3.62.060. *See also* RCW 7.75.035(1) (allowing for surcharge of $10 on top of filing fee in district court).

the remainder is made up of surcharges.[19] While these surcharges may seem negligible to some, they are prohibitive for litigants who are indigent, such as a single mother whose sole source of income is a Temporary Assistance for Needy Families (TANF) grant of less than $600 per month, an individual with disabilities who is receiving Supplemental Security Income (SSI), or an older woman receiving a limited income from social security.

For name change petitions heard in district court, the fee is $201.50 which includes an $83 filing fee, a $10 administrative fee, a $103.50 county recording fee[20] per named individual, and a $5 fee to obtain one certified copy of the name change order.

There has been a failure to gather data regarding which demographic groups pay more in user fees. This notable absence makes meaningful differences in how demographic groups are either served or neglected by in the justice system invisible. In order to tackle racism and other systemic forms of oppression, disaggregated data is necessary to accurately capture present inequities and meaningfully endeavor to remedy them. Data collection and analysis must be intersectional and simultaneously consider race, sexual orientation, gender, socio-economic status, immigration status, etc. in order to accurately depict the different experiences of particular demographic groups based on prejudice and discrimination. It is unknown at this time which demographic groups pay more in user fees, or which demographic groups may be unable to access the court because of user fees. However, poverty rates among subpopulations suggests that flat fees may disproportionately impact some groups, especially women (particularly Black, Indigenous and women of color); LGBTQ+[21] communities; and individuals with disabilities. In addition, people with multiple marginalized identities may experience an amplification of financial strain impacting their access to the courts. These income disparities are discussed in detail below.

In recognition of potential disparities in access to justice posed by fines, fees, and surcharges, the National Center for State Courts (NCSC) published its Principles on Fines, Fees, and Bail practices, stating that "courts should be entirely and sufficiently funded from general governmental

[19] *Id.*
[20] RCW 4.24.130(4).
[21] Lesbian, gay, bisexual, transgender, queer, or questioning

revenue sources to enable them to fulfill their mandate," and that "fees and surcharges should be established only for 'administration of justice' purposes."[22]

Other states are reviewing issues related to statutory user fees. In Illinois, a Statutory Court Fee Task Force was established to evaluate court fees, fines, and surcharges across the state and to propose recommendations to the state legislature. The report was published in 2016. In it, the Task Force noted a trend across the state of increased civil, criminal, and traffic court fees in a movement towards a "self-funded court system."[23] However, these increases outpaced inflation and showed wide inconsistencies between counties. The Task Force noted that inconsistency among locations and lack of transparency for the user could raise questions of fairness, challenging the legitimacy of the court system. While some civil fees are used to cover the basic costs of providing a service, such as the filing fee, others fund services that may not even be used by the person paying the fee. Therefore, flat fee schedules used to fund public services can be seen as a form of regressive tax and are likely to disproportionately impact court users who are low-income. While Illinois does have a fee waiver system, the Task Force points out that some court users may be low-income yet above the indigency threshold, and therefore denied a waiver. The Task Force generally concluded that, "courts should be substantially funded through general government revenue," and that court fees should be used to cover the costs of specific actions. Court fees should be consistent across the state and backed with a clear rationale, and they should be reviewed regularly for adjustment or removal. Specifically, the Task Force recommended a state legislative schedule for court fees, to provide a basis for statewide consistency; and further recommended that an additional fee waiver benchmark should be created, to provide partial fee waivers for those court users above the fee waiver limit but still vulnerable to financial hardship.[24]

The Task Force did not conduct a study of the specific impact of civil court fees and surcharges on court users, and to our knowledge no such study exists, either in Washington or in the nation.

[22] NAT'L TASK FORCE ON FINES, FEES & BAIL PRACTICES, PRINCIPLES ON FINES, FEES AND BAIL PRACTICES (2017), https://www.ncsc.org/__data/assets/pdf_file/0020/14195/principles-1-17-19.pdf.
[23] STATUTORY CT. FEE TASK FORCE, FINDINGS AND RECOMMENDATIONS FOR ADDRESSING BARRIERS TO ACCESS TO JUSTICE AND ADDITIONAL ISSUES ASSOCIATED WITH FEES AND OTHER COURT COSTS IN CIVIL, CRIMINAL, AND TRAFFIC PROCEEDINGS (2016), https://courts.illinois.gov/2016_Statutory_Court_Fee_Task_Force_Report.pdf.
[24] *Id.*

Therefore, there is a lack of evidence regarding the impact of court fees: How often do they represent a negative financial impact on court users, or a barrier to accessing the court? How is their impact felt differently by various demographic groups? How often are fee waiver requests for those above 125% Federal Poverty Level denied? However, the evidence regarding poverty rates among subpopulations noted above suggests there may be a disproportionate impact by gender, race, sexual orientation, and disability.

3. Fee waivers and case law

Both the U.S. Supreme Court and the Washington Supreme Court have recognized that fee waivers are essential for litigants who are indigent in civil cases. In 1971, the U.S. Supreme Court held in *Boddie v. Connecticut* that there is a due process right to a civil fee waiver where a state requires court involvement for changes to a "fundamental human relationship."[25] In *Boddie,* several women who were indigent and were receiving public assistance were unable to pursue divorce proceedings because they were unable to pay the filing fees. But the court system was the only way these women could obtain a divorce. *Boddie* held "a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so."[26] In Washington State there is statutory authority for the court to waive the filing fee: "The court may waive the filing fees provided for under RCW 36.18.016(2)(b) and 36.18.020(2) (a) and (b) upon affidavit by a party that the party is unable to pay the fee due to financial hardship."[27]

General Rule (GR) 34 was adopted in 2010. The Washington Supreme Court stated in *Jafar v. Webb* that GR 34, Washington's fee waiver rule, "is broader than these base constitutional principles and requires fee waivers for indigent litigants in all cases."[28] Under Washington law, a

[25] *Boddie v. Connecticut,* 401 U.S. 381–83, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).
[26] *Id.* at 383.
[27] RCW 36.18.022.
[28] *Jafar v. Webb*, 177 Wn.2d 520, 530, 303 P.3d 1042 (2013).

trial court must waive all court fees when a litigant has been determined to be indigent under GR 34.[29]

Pursuant to GR 34, an "individual, on the basis of indigent status … may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable trial court." There are several ways to show indigency under the rule. An individual is indigent if they are receiving assistance from a needs-based, means-tested program such as TANF, SSI, food stamps, or federal poverty-related veteran's benefits. An individual can also show they are indigent if their household income is at or below 125% of the federal poverty level or, if the household income is above 125%, they have recurring basic living expenses that make them unable to pay the filing fees and surcharges. They may also show that there are compelling circumstances demonstrating an inability to pay.

The comment to GR 34(a)(2) states:

> This rule establishes the process by which judicial officers may waive civil filing fees and surcharges for which judicial officers have authority to grant a waiver. This rule applies to mandatory fees and surcharges that have been lawfully established, the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief. These include but are not limited to legislatively established filing fees and surcharges (e.g., RCW 36.18.020(5)); other initial filing charges required by statute (e.g., family court facilitator surcharges established pursuant to RCW 26.12.240; family court service charges established pursuant to RCW 26.12.260; domestic violence prevention surcharges established pursuant to RCW 36.18.016(2)(b)); and other lawfully established fees and surcharges which must be paid as a condition of securing access to judicial relief.[30]

[29] *Id.* at 527.
[30] GR 34(a)(2) cmt.

The Washington Supreme Court stated in *Jafar*:

> The plain meaning of GR 34 establishes that a trial court must waive all fees once a litigant is determined to be indigent under the rule. The language of the rule provides expressly for "waiver," and no language exists that "waiver" is anything except waiver of all fees.[31]

However, fee waivers must be requested from the court; they are not offered.[32] Nationally, almost half of people who access the courts do so without a lawyer and 80% of family law cases have at least one party without a lawyer.[33] This means that those who cannot afford a lawyer are often left to try and navigate the fee waiver system either on their own or with the help of a Family Law Facilitator. Family Law Facilitators in Washington do not come without their own fees.[34] Family Law Facilitators charge between $15 and $30 for each session for their services. In some counties, such as Yakima County, facilitators are fully funded by the facilitators' fees. Facilitator fees can also be waived with a fee waiver signed by the court. We were unable to find Washington demographic data on pro se litigants (litigants without a lawyer).

While petitioners in name change cases filed in district court may request a fee waiver, the processes seem to be less well known among the district court clerks and far less streamlined. Since most district courts do not hear name change petitions same day, it is not clear when the court will rule on the fee waiver and some clerks will not allow for filing without the petitioner paying the fee.

Most district courts require petitioners to use their court form, rather than the form readily available on the court website. Additionally, many district courts will not waive the recording fee

[31] *Jafar*, 177 Wn. at 529–30.
[32] *Instructions for Motion and Order to Waive Filing Fees -- Seattle Location*, KING CNTY. SUPERIOR CT. CLERK'S OFF. (Feb. 2020), https://kingcounty.gov/~/media/courts/Clerk/forms/waive-ff-inst-sea.ashx?la=en; *Your Family Law Case:If You Cannot Afford the GAL Fee*, WASHINGTONLAWHELP.ORG (June 27, 2016), https://www.washingtonlawhelp.org/resource/your-family-law-case-if-you-cannot-afford-the-gal-fee.
[33] Marsha M. Mansfield, *Litigants Without Lawyers: Measuring Success in Family Court*, 67 HASTINGS L.J. 1389 (2016).
[34] *Family Law Facilitators*, KING CNTY. (Dec. 22, 2020), https://www.kingcounty.gov/courts/superior-court/family/facilitator.aspx.

of $103.50, which is authorized by statute, RCW 4.24.130(4). Since the recording is a requirement of the name change petition process, it appears it should be waived under *Jafar* and GR 34.

4. Additional user fees in domestic relations cases

Statutory filing fees and surcharges are not the only user fees a litigant may be required to pay in order to have their cases adjudicated. There are many other fees that may be required in domestic relations cases. These extra fees can prevent a party from being able to finalize their court case, though current research does not show how often this may occur. Fees may include the cost of a guardian ad litem (GAL), a mandatory parenting class, mandatory mediation, fees related to a mandatory review of final pleadings by a courthouse facilitator, court ordered drug tests, domestic violence and substance abuse evaluations, or other fees such as ex-parte fees, certified copies, and the cost of a transcript of a hearing if a party is seeking revision or reconsideration. If parties wish to present their pleadings to the court without attending a hearing, an ex parte fee is required. Service fees are also charged for copies or certified copies, but not for adjudication.

GALs are often appointed in cases where issues have been raised about a party's parenting or allegations of substance abuse and domestic violence. A GAL's fees can be prohibitive, with an initial retainer of thousands of dollars in some cases (see Table 2 in Appendix I of this chapter for county-by-county figures). Though there are no records of how many litigants are financially burdened by these fees, anecdotal evidence suggests that, among people calling legal resource hotlines in Washington, one of the largest complaints was the huge burden placed on families by GAL fees. A judge will usually order that the parties split the cost, but in some situations, one party may be better situated financially and will bear the initial cost. Most GALs will not begin work until they receive a retainer. Thus, the progress of a case can be significantly delayed due to parties' inability to pay. Some counties, however, have resources to appoint a GAL at county expense so that the parties do not pay this cost (see Table 2). A few counties have Family Court Services which conduct evaluations when the court orders an evaluation.

Most, if not all, counties in Washington require parties seeking a parenting plan to take a parenting seminar. The cost of the seminars varies from county to county, but can be costly. Fore

example in Benton & Franklin Counties the cost is $115 (see Table 2). Some parenting seminars have a reduced rate based on income. For example, one parenting seminar in NW Washington costs $125 but if your monthly income is from $0-1,500, the cost is reduced to $20.[35] Some counties allow a party to waive the parenting seminar for good cause, but in most counties this requires the party to file a motion and declaration, note up a hearing, serve the other side, and then attend the hearing. The time and effort required to ask for a waiver of the parenting seminar can simply be too much for a litigant with a full-time work schedule or with childcare responsibilities. More research into this topic area is needed to know how many litigants avoid a waiver due to time and monetary constraints.

Mediation is another costly step that is also mandatory in some courts. The cost of mediation varies depending on where a party lives. Some dispute resolution centers offer a sliding scale fee depending on income. If a party must use a private mediator, the cost increases.[36] As with the parenting seminar, the mediation can be waived for good cause, but a party must go through the process outlined above to get a court order waiving mediation (see Table 2 for more county-by-county mediation information).

Many courts add yet another expense that a pro se litigant must pay before finalizing a case. These courts require a pro se litigant to have the proposed final orders reviewed by a legal professional such as a courthouse facilitator, a private attorney, a Limited License Legal Technician, a family court navigator, or a volunteer attorney. The exact process varies from county to county. But in many counties a pro se litigant cannot have their case finalized if they do not complete this step (see Table 2 for more information on facilitator fees).

Some counties allow a waiver of this review requirement, while others do not. For example, Thurston County allows the court to waive this requirement with a court order.[37] On the other hand, Chelan County prohibits a clerk from noting up a case on the non-contested calendar for finalization unless the pro se party seeking the hearing has their pleadings pre-approved by one

[35] RESOLVE IPC, SUCCESSFUL CO-PARENTING & SKAGIT MEDIATION (2021), https://resolveinterpersonalconflict.com/program-description.
[36] Mediators approved by San Juan County Superior Court charge $75–$240 per hour. *See* FAMILY LAW MEDIATORS FOR SAN JUAN COUNTY SUPERIOR COURT (2019), https://www.sanjuanco.com/DocumentCenter/View/97.
[37] Thurston County Superior Court Local Rule (LSPR) 94.04(c)(2).

of the legal professionals.[38] In Skagit County local rules require all pro se litigants to meet with the courthouse facilitator, who reviews the final documents prior to presentation to a judicial officer at a hearing or trial.[39] Court practices for all of these additional user fees vary from county to county and this is not a complete list.

Additional user fees required by a court prior to finalizing a case must be waived if a litigant is indigent and has a GR 34 Order re Waiver of Civil Fees and Surcharges. "The plain meaning of GR 34 establishes that a trial court must waive all fees once a litigant is determined to be indigent under the rule."[40] These added user fees create even more barriers to access to the court. When a court waives the filing fee and surcharges, but still requires an indigent litigant to incur other costs in order to finalize a case, the court is denying this indigent litigant access to the courthouse in violation of the law established by the Court in *Jafar*.

III. Access to Legal Representation

While the Supreme Court has recognized a right to counsel for criminal defendants, until recently no such protection existed for individuals accessing the civil justice system. In April 2021, the Washington State Legislature passed a bill which provides for free legal representation for tenants who are indigent and facing eviction.[41] While this is a huge step forward for access to justice in Washington, the new bill is limited and does not extend to litigants in family law or other matters. The Washington Supreme Court stated that:

> It may be that the legislature should expend resources to address the complexity that often accompanies dissolution proceedings. 'A wise public policy ... may require that higher standards be adopted than those minimally tolerable under the Constitution.' However, the decision to publicly fund actions other than those

[38] Chelan County Superior Court Rule (LSPR) 94.04(B)(3).
[39] Skagit County Superior Court Rule (SCLSPR) 94.04.2(k).
[40] *Jafar v. Webb*, 177 Wn.2d 520, 527, 303 P.3d 1042 (2013).
[41] ENGROSSED SECOND SUBSTITUTE S.B. 5160, 67th Leg., Reg. Sess. (Wash. 2021).

> that are constitutionally mandated falls to the legislature. Outside of that scenario, it is not for the judiciary to weigh competing claims to public resources.[42]

The American Bar Association, noting a gap in access to civil justice for low-income Americans, resolved in 2006 that:

> [T]he American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.[43]

However, implementation of the right to counsel in civil proceedings varies across the country. The Legal Services Corporation (LSC) funds civil legal aid for low-income individuals across the country but notes that due to inadequate funding, in many cases it is only able to provide advice or one-off support to clients, rather than full representation.[44] Nationally, "86% of the civil legal problems reported by low-income Americans in the past year received inadequate or no legal help."[45] In 2009, LSC noted that for every client served, another client seeking legal help was turned away.[46] The picture appears to be similar in Washington: a 2015 report found that 76% of low-income individuals with legal problems do not get adequate legal help.[47] While there are a

[42] *King v. King*, 162 Wn.2d 378, 397–98, 174 P.3d 659 (2007) (*quoting Lassiter v. Dep't of Soc. Servs. of Durham Cty., N.C.*, 452 U.S. 18, 33, 101 S.Ct. 2153, 68 L. Ed. 2d 640 (1981)) (internal citations omitted).
[43] WORKING GROUP ON CIVIL RIGHT TO COUNSEL, ABA TOOLKIT FOR A RIGHT TO COUNSEL IN CIVIL PROCEEDINGS ii (2011), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_toolkit_for_crtc.pdf.
[44] LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2017), https://www.lsc.gov/our-impact/publications/other-publications-and-reports/justice-gap-report; see "Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families" for more information on how federal restrictions on legal aid prohibiting organizations that receive federal LSC funding from representing incarcerated litigants in court proceedings impacts incarcerated parents and their children.
[45] *Id.* at 6.
[46] CIV. GIDEON TASK FORCE, ACCESS TO JUSTICE: ASSESSING IMPLEMENTATION OF CIVIL GIDEON IN MINNESOTA (2011), https://www.mnbar.org/docs/default-source/atj/msba-civil-gideon-task-force---access-to-justice---assessing-implementation-of-civil-gideon-in-minnesota-(final)6565E5B78320.pdf?sfvrsn=2. It appears that LSC no longer tracks "client turn-down" rates, or the number of potential clients who qualify for legal aid but who the organization is unable to help.
[47] OFF. OF CIV. LEGAL AID, 2015 WASHINGTON CIVIL LEGAL NEEDS STUDY UPDATE (2015), https://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf.

variety of reasons why low-income people face their legal problems alone, the cost of representation is one factor. 30% of low-income individuals in Washington who tried unsuccessfully to get legal help reported that cost was the main barrier.[48] LSC civil aid in Washington is administered by the Northwest Justice Project, whose lawyers provided support in 13,925 cases in 2018.[49] However, this is only a portion of the individuals who sought legal assistance and there is a lack of evidence regarding how many individuals who qualify for civil legal aid in Washington are unable to obtain it, and how many individuals over the income threshold still find the cost of representation to be prohibitive.

In addition, RCW 26.09.231 requires parties involved in dissolutions (divorces) with children to complete a Residential Time Summary Report (RTSR) (see "Chapter 7: Gender Impact in Family Law Proceedings" for more information). The Washington State Center for Court Research of the Administrative Office of the Courts (WSCCR) analyzed these data in a 2018 report and found that in 77.8% of dissolutions neither party had legal representation, in 14.2% of cases only one party was represented, and in 8.0% of cases both parties were represented.[50] Further analysis by WSCCR not included in their 2018 report, found that in dissolution cases among opposite-sex couples where only one party had legal representation the mother was slightly more likely to have a lawyer than the father (Table 1).[51]

[48] *Id.*

[49] NW. JUST. PROJECT, 2018 ANNUAL REPORT (2018), https://nwjustice.org/annual-reports.

[50] A. PETERSON, A, WASH. STATE CTR. FOR CT. RSCH., ADMIN. OFF. OF THE CTS., RESIDENTIAL TIME SUMMARY REPORT 2016 2 (2019), https://www.courts.wa.gov/subsite/wsccr/docs/ResidentialTimeSummaryReport2016.pdf.

[51] Personal Communication with Dr. Andrew Peterson, Washington State Center for Court Research (Mar. 3, 2021) (based on analysis of Residential Time Summary Report data).

Table 1. Type of Attorney Representation in Opposite-Sex Dissolution Cases Involving Children in Washington State from Residential Time Summary Reports, 2016

	Frequency	Percent
Both parties self-represented	2,189	76.3%
Father self-represented, mother with attorney	258	9.0%
Mother self-represented, father with attorney	205	7.2%
Both with attorney	216	7.5%

Footnotes for Table 1.

Only 31.2% of dissolutions with children filed in Washington State in 2016 were accompanied by a completed Residential Time Summary Report, so these data should be interpreted with extreme caution.

Source: Personal Communication with Dr. Andrew Peterson, Washington State Center for Court Research, March 3, 2021 (based on analysis of Residential Time Summary Report data).

It is important to note that there are major limitations of these data including inconsistencies within individual filings, a lack of verification of the accuracy of the information included on the form, and most notably, only 31.2% of dissolutions with children filed in Washington State in 2016 were accompanied by a completed RTSR form. This varied dramatically from county to county with some counties including zero RTSRs with their cases. This makes it impossible to determine if the data are a meaningful representation of dissolution cases in Washington.

Legal representation matters. Decades of research regarding the differences in client outcomes for pro-se litigants or represented litigants have shown that in some areas, legal representation has shown strong positive outcomes, while in others, the impact is smaller or nonexistent. Methodological limitations make it hard to generalize across studies, as it is very difficult to create the conditions for a randomized, controlled trial. However, a meta-analysis (excluding

family law cases) found overall positive outcomes associated with legal representation, especially in cases that are considered legally "complex."[52] Other reviews have concluded that the evidence supporting positive effects of legal representation is strong in the areas of housing, employment, family law, small claims, tax, bankruptcy, and personal injury; while the evidence is weaker in cases where the litigant is seeking government benefits, and there appears to be no impact or even a negative impact in juvenile cases. The authors note that there may be differences in which types of cases receive representation which could bias these results.[53] The Washington RTSR study referenced above found that "when one parent had an attorney and the other was self-represented (14.2% of cases), the parent with an attorney received, on average, more residential time than a similarly situated parent with no attorney.[54]

The potential positive outcomes of legal representation for low-income families are wide-ranging. For example, depending on the type of legal case, access to representation can increase access to money, decrease likelihood of rearrest, prevent domestic violence, reduce evictions and prevent homelessness, and improve health by decreasing stress.[55] For immigrants in deportation proceedings, access to legal representation can mean the difference between living with ones' family or having a loved one sent away: a study in Northern California found that 33% of represented immigrants in deportation proceedings won their cases, while only 11% of unrepresented immigrants did.[56] Finally, for courts, legal representation can have a positive procedural impact. In a multi-state survey of state court judges (with almost half from Washington), judges reported that self-representation often had a negative impact for the court

[52] Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51 (2010).
[53] Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881 (2016).
[54] PETERSON, *supra* note 50, at 2. Dr. Peterson notes the extensive limitations of Residential Time Summary Report data. These data should be interpreted with caution.
[55] Laura K. Abel & Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid*, 9 SEATTLE J. SOC. JUST. 139 (2010).
[56] Jayashri Srikantiah, David Hausman & Lisa Weissman-Ward, *Access to Justice for Immigrant Families and Communities: A Study of Legal Representation of Detained Immigrants in Northern California*, 11 STAN. J. C.R. & C.L. 207 (2015).

as errors and confusion on the part of pro se litigants slowed down proceedings and took more staff time.[57]

The evidence from Washington State shows a high need for access to representation. The University of Washington's Washington Evictions Study report showed very low representation rates for tenants: only 8% of tenants in evictions proceedings from 2004-2017 had legal representation "at some point" in their court proceeding (in other words, there was an attorney named in their case file—which does not necessarily mean the attorney was physically present to represent them in court). Rates of representation vary widely across the state, with higher rates in King County and lower rates in Pierce, Clark, Spokane, and Whatcom.[58] However, although King County has higher than average rates of legal representation for tenants, a Seattle study found that only about half of tenants appearing in response to eviction proceedings had legal counsel; and while 23.4% of tenants with legal counsel were able to remain in their home, only 14.6% of tenants without legal counsel were.[59]

There is some limited evidence to suggest that representation can increase the odds of positive outcomes for female victims of sexual violence or intimate partner violence (IPV). A study of couples in King County with minor children filing for divorce between 2000-2010 and who have a history of IPV found that over half (62%) of female IPV victim parents had legal representation, either through a legal aid attorney or a private attorney. Analysis showed that when the IPV victim parent had legal representation, that parent was more likely to achieve positive outcomes such as denial of visitation to the abusing parent, treatment ordered for the abusing parent, and to receive sole decision-making. The authors conclude that, "attorney representation, particularly representation by legal aid attorneys with expertise in IPV cases, resulted in greater protections being awarded to IPV victims and their children."[60]

[57] LINDA KLEIN, REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF THE ECONOMIC DOWNTURN ON REPRESENTATION IN THE COURTS 15 (2010), https://legalaidresearchnlada.files.wordpress.com/2020/02/aba-coalition-justice-survey-judges-2010.pdf.
[58] TIMOTHY THOMAS ET AL., THE STATE OF EVICTIONS: RESULTS FROM THE UNIVERSITY OF WASHINGTON EVICTIONS PROJECT (2017), https://evictions.study/washington/index.html.
[59] TARA COOKSON ET AL., LOSING HOME: THE HUMAN COST OF EVICTION IN SEATTLE 88 (2018), https://www.kcba.org/Portals/0/pbs/pdf/Losing%20Home%202018.pdf.
[60] MARY KERNIC, FINAL REPORT OF THE "IMPACT OF LEGAL REPRESENTATION ON CHILD CUSTODY DECISIONS AMONG FAMILIES WITH A HISTORY OF INTIMATE PARTNER VIOLENCE STUDY" 60 (2010), https://www.ncjrs.gov/pdffiles1/nij/grants/248886.pdf.

Finally, a much smaller observational study revealed similar results (and very low rates of representation) for Sexual Assault Protection Order (SAPO) petitioners. In King County in 2010, only eight petitioners and ten respondents of 68 SAPO cases were represented by a lawyer. In cases where representation was imbalanced (one party was represented and the other was not), the party who had representation was more likely to achieve a positive outcome: "a party who is represented when the other side is not has an extremely high likelihood of the case being decided in their favor . . . (and) when both parties are represented, it seems to significantly level the playing field."[61]

A major limitation in the evidence is that cases are often combined without analyzing the differences between legal aid and full representation. As LSC notes, an individual may get limited legal advice or help filling out forms without actually having an attorney appear in court with them;[62] but there is limited evidence regarding the difference in outcomes along the spectrum of legal support. Having someone with organized paperwork can make a huge difference with how the case is presented compared to someone without any legal help. Additionally, civil legal aid through LSC is provided to individuals whose household has an annual income at or below 125% of the federal poverty level. Sandefur notes that it is likely that many people earn incomes above that limit but still struggle to afford legal representation.[63] There is a lack of data regarding individuals above the qualifying level for civil legal aid and whether and how much cost is a barrier to legal representation.

A. Innovations to expand access to legal representation

1. Non-lawyer legal support

Many state courts have begun to pilot programs that provide support to pro se litigants through non-lawyer navigators.[64] A national survey of such programs identified 23 different programs, mostly new: more than half of the programs surveyed began after 2014. While there is a wide range in the structure of the program and background and roles of the individuals serving as

[61] LAURA JONES, ANALYZING THE IMPACT AND APPLICATION OF THE SEXUAL ASSAULT PROTECTION ORDER (2011).
[62] LEGAL SERVS. CORP., *supra* note 44.
[63] Sandefur, *supra* note 52.
[64] MARY E. MCCLYMONT, NONLAWYER NAVIGATORS IN STATE COURTS: AN EMERGING CONSENSUS 43 (2019).

navigators, this national survey found that these programs had three common objectives: to enhance effectiveness of the court; to facilitate access to justice for pro se litigants; and to provide a rich experience for the navigators themselves.[65] The most common tasks taken on by navigators included assistance with legal forms and documents, providing legal and procedural information, and making referrals to formal legal help when necessary—all activities that help to lessen communication and language barriers. Indeed, the survey findings indicated that navigators who speak languages other than English are in particularly high demand.[66] Anecdotal evidence suggests that navigators facilitate pro se litigant court appearances, streamline court processes, save time for court clerks by increasing accuracy and completion of court documents and forms, and reduce court backlog; while providing pro se litigants with increased confidence in navigating the system.[67] See "Chapter 2: Communication and Language as a Gendered Barrier to Accessing the Courts" for more information on communication barriers to the courts.

In 2012, the Washington Supreme Court and the Washington State Bar Association created the Limited Licensed Legal Technician (LLLT) program, enabling traditional paralegals to operate without supervision of attorneys to support pro se litigants in limited activities relating to family law.[68] The program was meant to increase access to justice for low- and moderate-income litigants, and an initial evaluation in 2017 found that clients reported receiving competent assistance, improved legal outcomes, and reductions in stress, fear and confusion.[69] However, the program faced low student enrollment in the training program and low litigant demand, likely due to limited awareness.[70] In June 2020, the Washington Supreme Court voted 7-2 to 'sunset' the LLLT program, allowing current LLLTs to continue practicing and those currently in training to finish the training, but closing the program to new applicants. Chief Justice Stephens cited unsustainable costs and low interest as reasons to end the pilot.[71]

[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] THOMAS CLARKE & REBECCA L. SANDEFUR, PRELIMINARY EVALUATION OF THE WASHINGTON STATE LIMITED LICENSE LEGAL TECHNICIAN PROGRAM (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2949042.
[69] *Id.*
[70] *Id.*
[71] JUSTICE DEBRA L. STEPHENS, RE: WASHINGTON SUPREME COURT VOTES TO SUNSET THE LIMITED LICENSE LEGAL TECHNICIANS PROGRAM (2020), https://www.abajournal.com/files/Stephens_LLLT_letter.pdf.

2. Providing access to representation

Court Watch notes that in SAPO petitions in Pierce County, the court assigns an attorney to represent the petitioner when the respondent appears with a lawyer and the petitioner does not, in order to "level the playing field."[72] Washington State's Office of Public Defense Parents Representation program provides a free, state-funded lawyer to low-income parents in cases where termination of parental rights or dependency are possible outcomes. Program evaluations have demonstrated better outcomes for children, with increased family reunification, fewer failures and case re-filings, and reduced time to permanent outcomes.[73] As of 2018, the program operates in all 39 Washington counties.[74]

3. Pilots in California

The California State Legislature passed legislation to fund pilot projects aimed at increasing access to civil legal representation for individuals who are low-income beginning in 2012, serving over 40,000 litigants who are low-income to date with full representation, limited scope legal assistance (unbundled services), or court-based services. The majority of clients were served in eviction cases, but support was also provided in family law cases including child custody and guardianship. Evaluations of the pilot projects found that clients with representation in these cases achieved greater access to the justice system, increased positive outcomes in court cases, and more efficient court proceedings.[75]

IV. Additional Financial Barriers

Going to court can be expensive for reasons beyond the fees, fines, and legal representation. To even arrive at a courthouse requires necessary arrangements for "travel, scheduling, and

[72] JONES, *supra* note 61.
[73] Elizabeth Thornton & Betsy Gwin, *High-Quality Legal Representation for Parents in Child Welfare Cases Results in Improved Outcomes for Families and Potential Cost Savings*, 46 FAM. L.Q. 139 (2012).
[74] *Parents Representation Program*, WASH. STATE OFF. OF PUB. DEF. (2020), https://www.opd.wa.gov/program/parents-representation.
[75] KELLY JARVIS ET AL., REPORT TO THE CALIFORNIA STATE LEGISLATURE FOR THE SARGENT SHRIVER CIVIL COUNSEL ACT EVALUATION (2020), https://www.courts.ca.gov/documents/Shriver-20200326-Materials.pdf.

precisely timed information,"[76] all of which may be difficult depending on a person's access to housing stability, the internet, transportation, and even time off from work. Income disparity is the foundation that turns basic arrangements into financial barriers to accessing the courts. For example, income disparity is at the root of housing instability, lack of access to the internet to gather information, lack of access to adequate transportation, and lack of ability to take time off from work and still remain housed. Notably, transgender, gender non-binary, and gender-non-conforming individuals experience additional barriers to economic security compared with cis-gender individuals that impede equitable access to court. For instance, a 2015 study on transgender health and economic insecurity in New York found that compared with non-transgender respondents, transgender individuals were twice as likely to be in poverty, currently be homeless, and be unemployed due to systemic discrimination and obstacles in relevant sectors. As such, these barriers to financial stability would then disproportionately obstruct transgender individuals' ability to equitably access court services.[77] The goal of this subsection of the report is to display the following:

1. How income disparities in Washington State disproportionately affect women, transgender, gender non-binary, and gender-nonconforming individuals, and especially Black, Indigenous and people of color who are women, transgender, gender non-binary, or gender non-conforming.
2. How that disparity turns the small details of the necessary arrangements for going to court into a financial barrier to accessing justice.

There is currently no direct research looking into the financial barriers of accessing civil court. In the absence of direct research, common aspects of physically going to court were analyzed for their financial requirements and then compared to the income disparities present across race and gender.

[76] Maximilian A. Bulinski & J. J. Prescott, *Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency*, 21 MICH. J. RACE & L. 205, 208–09 (2016).
[77] SOMJEN FRAZER & ERIN HOWE, TRANSGENDER HEALTH AND ECONOMIC INSECURITY: A REPORT FROM THE 2015 LGBT HEALTH AND HUMAN SERVICES NEEDS ASSESSMENT SURVEY (2015), http://strengthinnumbersconsulting.com/wp-content/uploads/2017/06/TG-health-and-economic-insecurity-report-FINAL.pdf.

A. Income disparities

Washington State and national data show stark income inequities based on gender identity, race, sexual orientation, and disability status. This is found using measures such as wage gaps, median income, and proportion of the population below the poverty level. A 2015 study found that in Washington State, employers pay women $0.78 for every dollar paid to men.[78] National data show that this wage inequity is even more extreme when race and ethnicity are considered. Nationally, in 2020 employers paid Asian American, Native Hawaiian, and Other Pacific Islander women $0.85, white women $0.79, Black women $0.63, Indigenous women $0.60, and Latinas $0.55 for every dollar paid to white men.[79] It is important to note that when data combines diverse populations of people into one category (such as combining all Asian, Native Hawaiian, and Other Pacific Islander populations) disparities within these groups are masked. For example, nationally, employers paid Burmese women only $0.52 for every dollar paid to white, non-Hispanic men.[80] Another example of this masking of disparities is clear when looking at median income. While aggregated data often suggest that Asian, Native Hawaiian, and Other Pacific Islander populations fair well financially, there is huge income variability across populations in this group. For example, national data show the median annual income for Taiwanese and Indian women in full-time, year-round positions is $70,000 while this same indicator is $30,000 for Burmese women and $35,000 for Hmong women.[81] In Washington, 39.4% of single women with children lived below the poverty line and were the family type most likely to live below the poverty line.[82]

There are significant disparities in poverty rates for women based on race as well: 19.2% of white women in Washington State live below 150% of the poverty line compared to 41.3% of Hispanic women, 38.4% of Native American women, 35.8% of Black women, 28.1% of women of two or

[78] CYNTHIA HESS & JESSICA MILLI, INST. FOR WOMEN'S POL'Y RSCH., THE STATUS OF WOMEN IN WASHINGTON: FORGING PATHWAYS TO LEADERSHIP & ECONOMIC OPPORTUNITY 2 (2015).
[79] NAT'L P'SHIP FOR WOMEN & FAMS., QUANTIFYING AMERICA'S GENDER WAGE GAP BY RACE/ETHNICITY (2021), https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/quantifying-americas-gender-wage-gap.pdf.
[80] NAT'L P'SHIP FOR WOMEN & FAMS., *supra* note 79.
[81] Robin Bleiweis, *The Economic Status of Asian American and Pacific Islander Women*, CTR. FOR AM. PROGRESS (Mar. 4, 2021), https://www.americanprogress.org/issues/women/reports/2021/03/04/496703/economic-status-asian-american-pacific-islander-women.
[82] HESS & MILLI, *supra* note 78, at 14.

more races, and 21.2% of Asian, Native Hawaiian, and Other Pacific Islander women.[83] Relatedly, social categories such as gender, race, and disability status are interrelated and "do not exist independently of one another."[84] For instance, the same study noted that "Asian American and Pacific Islander women with disabilities were more likely to report being discriminated against in the workplace than those without disabilities."[85] Workplace discrimination is a contributing factor to income instability and inequality. As such, observing intersections of gender, race, and disability status impacted by financial barriers illustrates critical differences in who is impacted by financial instability and to what extent. As noted above, combining diverse populations, such as all Asian, Native Hawaiian, and Other Pacific Islander populations, in a dataset may mask significant disparities.

According to the 2013 report "The Status of Women in Washington," the median income for Washington women in 2013 was higher than the national median income for women, while still lower than the median income for men in Washington. However, this does not hold up across all races. In 2013, the median income for women across all racial groups in Washington was $41,300 but nationwide was $38,000. The median income for men in Washington was $53,000 compared to $48,000 nationally. However, Asian, Native Hawaiian, and Other Pacific Islander and Hispanic women in Washington had median incomes less than the national average for these populations.[86] This suggests that while Washington may be making better progress toward pay equity than the national average for some women, that is not true for all women.

For women across Washington State, employers paid Asian, Native Hawaiian, and Other Pacific Islander women 77.6%, Black women 60.3%, Hispanic women 46.6%, Native American women 60.3%, and white women 74.7% of the income they paid white men for full-time, year-round work.[87] This state trend is reflected in the racial wage gap in King County as well. In 2013, the median income of white households in King County was $75,437 while for Black households it

[83] *Id.* at 13.
[84] Michelle Maroto, David Pettinicchio & Andrew C. Patterson, *Hierarchies of Categorical Disadvantage: Economic Insecurity at the Intersection of Disability, Gender, and Race*, 33 GENDER & SOC'Y 64, 69 (2019).
[85] *Id.* at 70.
[86] HESS & MILLI, *supra* note 78, at 7.
[87] *Id.* at 8.

was $36,150.[88] As noted above, disparities for specific populations within the larger racial groups are often masked.

Part of the reasons for this income disparity is the level of educational attainment of women and types of occupations women hold.[89] Education is seen as a major component of social mobility and increased income needed to leave poverty behind; and Black, Indigenous, and women of color typically have lower levels of educational attainment when compared to white women in Washington State[90] due to systemic racism and related barriers which impede equitable access to and enjoyment of educational success. For instance, in educational settings Black girls disproportionately experience "overly punitive disciplinary practices," under resourced teachers, courses, and extracurricular activities, and higher rates of assault, violence, and trauma than "their white counterparts."[91] As such, Black girls are faced with significantly higher systemic barriers to educational attainment and success than their white peers.

In 2013, Black, Hispanic, and American Indian/Alaska Native (AIAN) women were far less likely to have a Bachelor's degree than white women in Washington State.[92] While this 2013 study does not sufficiently disaggregate data for Asian, Native Hawaiian, and Other Pacific Islander populations, data from this same time period in King County found that Native Hawaiian and Other Pacific Islander individuals of all gender were also less likely than white individuals to have a Bachelor's degree.[93] This is likely part of the reason that Black, Indigenous, and people of color were vastly over-represented in King County's poverty statistics as of 2015 with 15% of Black, 2% of AIAN, 2% of Hawaiian or Other Pacific Islander, and 15% of Asian individuals living in poverty despite representing 6.2%, 0.8%, 0.7%, and 14.8% of the population respectively.[94] That same

[88] FRANCESCA MURN & ALICE PARK, UNDERSTANDING KING COUNTY RACIAL INEQUITIES: KING COUNTY RACIAL DISPARITY DATA (2015), https://www.uwkc.org/wp-content/uploads/ftp/RacialDisparityDataReport_Nov2015.pdf.
[89] HESS & MILLI, *supra* note 78.
[90] *Id.*
[91] LETICIA SMITH-EVANS ET AL., UNLOCKING OPPORTUNITY FOR AFRICAN AMERICAN GIRLS: A CALL TO EDUCATIONAL EQUITY (2014), https://www.nwlc.org/sites/default/files/pdfs/unlocking_opportunity_for_african_american_girls_final.pdf; see "Chapter 9: Juvenile Justice and Gender and Race Disparities" for more information on this topic.
[92] *Id.*
[93] MURN & PARK, *supra* note 88, at 11.
[94] *Id.*

year, the median income for Black residents in King County was less than half of the median income of white residents.[95]

Another reason for this vast income difference between men and women in Washington is women spend more time caring for children. According to the 2016 Residential Time Summary Report, 64.0% of children with custody plans in Washington spent more time with their mothers than their fathers and 11.1% of custody plans gave full custody to mothers compared to 2.7% that gave full custody to fathers.[96] The 2019 American Time Use Survey found that women spend twice as much time caring for children as men.[97] This has a clear impact on earnings in Washington State: of all those who said they could not work full time due to childcare responsibilities, approximately 95% were women.[98] The inequal division of unpaid domestic labor such as childcare is discussed further in "Chapter 4: The Impact of Gender on Courtroom Participation and Legal Community Acceptance."

The wage gap and the impact of caring for children result in a double-hit towards women in Washington achieving self-sufficiency and stability, which are important for accessing civil court. In 2017, the University of Washington published a report on a new measure of poverty, the Self-Sufficiency Standard.[99] This new standard measures how much money a family needs in different areas of Washington to meet basic needs without any type of outside aid, including government or community aid. The Standard also measures tax credits and tax rates as a part of the income needed to support a family's "basic needs." Basic needs include food and housing, but no "extras" such as meals-to-go or vacations. The Self-Sufficiency Standard found that an adult with a preschooler will need to earn at almost double that of a single adult to remain self-sufficient.[100]

[95] *Id.*
[96] PETERSON, *supra* note 50, at 3. The Washington State Center for Court Research notes in its report that the limitations of Residential Time Summary Report data are significant and that these data should be interpreted with caution.
[97] U.S. DEP'T OF LAB., BUREAU OF LAB. STAT., AMERICAN TIME USE SURVEY—2019 RESULTS 9 (2020), https://www.bls.gov/news.release/pdf/atus.pdf#:~:text=AMERICAN%20TIME%20USE%20SURVEY%20%E2%80%94%202019%20RESULTS%20In,the%20U.S.%20Bureau%20of%20Labor%20Statistics%20reported%20today (data from Table 1: Time spent in detailed primary activities and percent of the civilian population engaging in each activity, averages per day by sex, 2019 annual averages).
[98] HESS & MILLI, *supra* note 78.
[99] DIANA M. PEARCE, THE SELF-SUFFICIENCY STANDARD FOR WASHINGTON STATE 2017 (2017), http://selfsufficiencystandard.org/sites/default/files/selfsuff/docs/WA2017_SSS.pdf.
[100] *Id.*

Considering how women are responsible for the majority of childcare, this places an extraordinary burden on single women to remain self-sufficient. This financial burden plays out in many ways to act as a barrier between those who need to access court business and the courts themselves.

Caring for children only partially explains pay disparities between women and men. When all other factors are controlled for (race, educational attainment, hours worked, region, industry and occupation), there is still a 38% difference in the pay between women and men.[101] This 38% difference can be at least partially explained by different societal expectations for men and women.[102] For example, when women try to negotiate in a similar manner to men, results on income are often negative.[103] And, while tenure is attached to publishing and research, male professors at higher education institutions will sometimes use their parental leave to focus on research and being published while women generally focus on childcare and recovering from birth.[104] And though Black women have higher workforce participation rates than Hispanic, Asian, and white women,[105] their labor was historically tied to a lower social status when compared to white women.[106] This form of historical discrimination can still be seen today in the types of jobs Black, Indigenous, and women of color are most likely to be found working: low-wage, little upper-mobility in terms of promotions, and little stability.[107]

When analyzing data based on gender identity, sexual orientation, and race—national statistics show that the intersection of multiple marginalized identities amplifies income inequities. The 2015 U.S. Transgender Survey found that poverty rates for transgender respondents were twice the rate of the general population and unemployment rates were three times higher than the U.S. unemployment rate. Unemployment rates were even higher among transgender

[101] KEVIN MILLER & DEBORAH J. VAGINS, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP (2018), https://files.eric.ed.gov/fulltext/ED596219.pdf.
[102] SARAH JANE GLYNN, GENDER WAGE INEQUALITY: WHAT WE KNOW AND HOW WE CAN FIX IT 64 (2018), https://equitablegrowth.org/wp-content/uploads/2018/04/040918-pay-inequality2.pdf.
[103] MILLER & VAGINS, *supra* note 101.
[104] *Id.*
[105] *Labor Force Characteristics by Race and Ethnicity, 2017*, BLS REPORTS: U.S. BUREAU OF LAB. STAT. (Aug. 2018), https://www.bls.gov/opub/reports/race-and-ethnicity/2017/home.htm.
[106] JOCELYN FRYE, THE MISSING CONVERSATION ABOUT WORK AND FAMILY 31 (2016), https://cdn.americanprogress.org/wp-content/uploads/2016/09/30124619/WorkAndFamily-WomenOfColor-Oct.pdf.
[107] *Id.*

respondents who were Black, Indigenous, and people of color and those with disabilities. Transgender respondents who were Black, Indigenous, and people of color as well as those with disabilities, who had undocumented status, who were working in the underground economy, or who were living with HIV also had even higher rates of poverty.[108]

Nationally, poverty rates among transgender individuals (data not further disaggregated by sexual orientation or gender) were about 29%, among cisgender bisexual women about 29%, among cisgender bisexual men about 20%, among cisgender lesbian women about 18%, among cisgender straight women about 18%, among cisgender straight men about 13%, and among cisgender gay men about 12%. The odds of transgender people living in poverty are 70% higher than the odds of a cis-straight man and 38% higher than cis-straight women after controlling for other factors such as race, age, education, etc. However Black LGBTQ+[109] individuals had a poverty rate of over 30% compared to a poverty rate of about 25% among Black cisgender straight individuals, about 15% for white LGBTQ+ individuals, and 9% among white cisgender straight individuals.[110] In Washington specifically, 11.5% of cisgender straight people live below the poverty line compared to 18.1% of the LGBTQ+ community.[111]

Many Washingtonians with disabilities also have lower incomes, more food insecurity, higher poverty rates, and lower levels of employment than people without disabilities who were demographically similar. In 2017 the poverty rate for people with disabilities in Washington was 19.5% vs. 10% for people without disabilities. The same report found that individuals with disabilities are paid "62% of the median earnings of Washingtonians without disabilities. Women with disabilities [are paid] 63% of their male counterparts" salary.[112] As previously discussed,

[108] SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf
[109] The report does not run a race/ethnicity analysis for specific populations within the larger LGBT population.
[110] M. V. LEE BADGETT, SOON KYU CHOI & BIANCA D. M. WILSON, LGBT POVERTY IN THE UNITED STATES: A STUDY OF DIFFERENCES BETWEEN SEXUAL ORIENTATION AND GENDER IDENTITY GROUPS 25 (2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf.
[111] *Id.*
[112] WASH. STATE DIV. OF VOCATIONAL REHAB., DISABILITY & DVR STATISTICS REPORT (2017), https://www.dshs.wa.gov/sites/default/files/dvr/pdf/2017%20Disability%20%26%20DVR%20Statistics%20Report.pdf

notable differences emerge when observing income disparities while paying particular attention to other factors such as gender, race, and disability status simultaneously.

B. The high cost of childcare

Childcare is expensive. In 2018, American parents paid an average of $1,230 per month for infant childcare. Families making the median income for their state could expect to spend almost 18% of their monthly income on childcare.[113] Black families can expect to spend up to 42% of their monthly income on infant childcare. Some parents who can afford to leave the workforce may choose to do so. This can negatively impact life-long earnings. Families that choose to have one parent stay home may face losing up to almost half a million dollars in earnings, retirement savings, and career advancement opportunities.[114] And in 2012, of the 15% of single, Black mothers who reported staying at home, 71% reported living in poverty.[115] Childcare expenses create financial hardships which can impede a litigant's ability to attend court for their court hearing, response to a subpoena or jury summons due to the inability to pay for childcare. In fact, in Philadelphia the impact that the burden of childcare has on jury diversity was the principal argument in a hearing about starting free-onsite childcare in courts in Philadelphia.[116]

In Washington State, childcare is no less expensive. In King County for example, the average cost per month for childcare is almost double the cost in Spokane across all ages and settings. Generally, childcare costs are higher for younger children and care is more expensive at a center than in the home. In 2017, the median monthly childcare cost for an infant in King County was $1,499 at a childcare center and $1,083 for home-based care,[117] while in Spokane, families could expect to pay $849 per month for an infant at a childcare center and $650 per month for home

[113] Simon Workman & Steven Jessen-Howard, *Understanding the True Cost of Child Care for Infants and Toddlers*, CTR. FOR AM. PROGRESS (Nov. 15, 2018), https://www.americanprogress.org/issues/early-childhood/reports/2018/11/15/460970/understanding-true-cost-child-care-infants-toddlers.
[114] Rasheed Malik & Jamal Hagler, *Black Families Work More, Earn Less, and Face Difficult Child Care Choices*, CTR. FOR AM. PROGRESS (Aug. 05, 2016), https://www.americanprogress.org/issues/early-childhood/news/2016/08/05/142296/black-families-work-more-earn-less-and-face-difficult-child-care-choices.
[115] Stay-at-Home Mothers on the Rise, PEW RSCH. CTR.'S SOC. & DEMOGRAPHIC TRENDS PROJECT (Apr. 8, 2014), https://www.pewsocialtrends.org/2014/04/08/after-decades-of-decline-a-rise-in-stay-at-home-mothers.
[116] Blondell Reynolds Brown, *Councilwoman Blondell Reynolds Brown Hosts Hearing on Childcare in Courts*, PHILA. CITY COUNCIL (Mar. 6, 2019), http://phlcouncil.com/councilwoman-blondell-reynolds-brown-hosts-hearing-on-childcare-in-courts.
[117] *Ethnic and Racial Minorities & Socioeconomic Status*, AM. PSYCH. ASS'N (July 2017), https://www.apa.org/pi/ses/resources/publications/minorities.

based care.[118] Yet, in terms of affordability, Child Care Aware of Washington concludes that Spokane County is a less affordable county to obtain childcare because the county's median income is significantly lower than both King County and the state average.[119]

Between January and March of 2020, a team of graduate student researchers at the University of Washington School of Public Health conducted an independent evaluation of the two free, onsite childcare centers located in courts in Washington State. The goal of the evaluation was to answer the question: "Are the on-site childcare programs, at the Children's Waiting Room in Spokane, Washington and the Jon and Bobbe Bridge Drop-In Childcare Center at the Maleng Regional Justice Center in Kent, Washington, enabling access to court business?" Of note, the center at the Maleng Regional Justice Center was closed down in 2020 as a result of impacts from the COVID-19 pandemic. Using a survey distributed to parents using both childcare centers, the evaluation found that over 90% of parents and guardians who took the survey strongly agreed that the on-site childcare programs increased their access to court services. Women were statistically more likely to report the childcare centers in the courts increased their access to court business.[120] The full report can be found in Appendix C of this report. The graduate students included several recommendations related to courthouse childcare centers which are discussed further below.

C. Housing instability

Another primary barrier to court access is housing instability. Housing instability makes it difficult for individuals who have experienced domestic violence to seek safety, and is often the reason behind child welfare interventions. Civil courts provide protection orders to people, usually women, whose partners are abusive or violent. Civil protection orders are an important part of seeking safety; and nationally, about 20% of all women who experience domestic violence receive some type of protection order.[121] In Washington State, orders of protection have no filing fee associated to make them as accessible as possible to survivors. During the COVID-19

[118] *Data & Reports*, SPOKANE REG'L HEALTH DIST. (2021), https://srhd.org/data-and-reports; *Advocacy*, CHILD CARE AWARE OF WASH. (2021), https://childcareawarewa.org/advocacy.

[119] *Id.*

[120] UNIV. OF WASH. SCH. OF PUB. HEALTH CMTY.-ORIENTED PUB. HEALTH PRAC. PROGRAM, EVALUATION REPORT: ON-SITE CHILDCARE PROGRAMS IN COUNTY COURTHOUSES & THEIR EFFECT ON ACCESS TO THE JUSTICE SYSTEM (2020).

[121] PROTECTION ORDERS AND SURVIVORS, INST. FOR WOMEN'S POL'Y RSCH. (2017).

pandemic, Governor Inslee issued a proclamation urging courts to do everything possible to allow virtual participation in protection order proceedings.[122]

However, financial barriers, including the threat of housing instability, often keep individuals from seeking protection. People experiencing domestic violence are far more likely to also experience housing instability and have civil court needs related to housing and child welfare.[123] An in-depth review of 84 women whose partners killed them showed significant financial barriers to safety, including a lack of affordable housing. The study also cited that abusers can further economic instability for women by showing up at their workplace or refusing to pay court mandated child support.[124] Washington is one of the 15 states that does not offer economic support as a part of a protection plan for people experiencing domestic violence.[125] And the consequences of leaving an abuser without having stable housing established can be severe: in Washington State a lack of stable housing is often the reason behind child welfare interventions and harms chances for family reunification.[126] See "Chapter 8: Consequences of Gender-Based Violence: Domestic Violence and Sexual Assault" for more information on gender-based violence.

D. Access to information and the internet

Another factor to consider when looking at the effects of housing instability on ability to access civil courts is how housing instability and poverty affect access to the internet. It is becoming increasingly important for individuals to be able to access information about the legal system and courts on the internet. In the 2019 National 'State of the State Courts' survey, 68% of respondents reported that they would search for information about state courts directly from the state court website, and among respondents under 50 years old, the percentage increased to 72%. Over half of the under-50 respondents also noted they would be likely to search for and trust information

[122] *Domestic Violence Protection Order Process*, WASH. CTS. (2020), https://www.courts.wa.gov/dv/?fa=dv_order.ordtypes#A1.
[123] CIV. LEGAL NEEDS STUDY UPDATE COMM., 2015 WASHINGTON STATE CIVIL LEGAL NEEDS STUDY UPDATE (2015), https://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf.
[124] WASH. STATE COAL. AGAINST DOMESTIC VIOLENCE, ECONOMIC BARRIERS TO SAFETY IN DOMESTIC VIOLENCE SITUATIONS (2012), https://wscadv.org/wp-content/uploads/2016/12/housing-and-economic-dvfr-issue-brief-11-2012.pdf.
[125] INST. FOR WOMEN'S POL'Y RSCH., *supra* note 121.
[126] PARTNERS FOR OUR CHILDREN, POVERTY AND HOUSING INSTABILITY: THE IMPLICATIONS FOR FAMILIES INVOLVED IN THE CHILD WELFARE SYSTEM (2011), https://partnersforourchildren.org/sites/default/files/august_practice_brief.pdf.

about their state courts on the court's official social media account.[127] However, simply having a website does not automatically ensure access. For example, some websites can be difficult to navigate and make it hard for individuals to access the information they need: in the 2017 'State of the State Courts' survey, 80% of respondents noted that easier navigation of court websites would have a positive impact on their experience.[128]

According to the analysis of the 2017 survey of registered voters for the National Center for State Courts, customer service by state courts is an area requiring improvement, and a need for fixing online access was identified in all of the highly rated solutions.[129] The survey found that older women struggled with forms and procedures while younger and non-white voters were dissatisfied with their interactions with court staff. Several of the proposed policy solutions relied on convenient access to the internet including improving court websites, connecting users with court staff online to answer questions, or even paying fines and fees online. Importantly, however, solutions relying on improving convenient access to the internet must simultaneously seek to remedy individuals' lack of internet access to have a meaningful impact. The aforementioned proposed policy solutions reflected findings from the 2015 survey of registered voters showing that technology-based alternatives to conducting business inside an actual courthouse was favored 3 to 1.[130] This would be in addition to the numerous court forms and user guides already available online, as seen through the King County Superior Court website. It should be noted that only registered voters were included in these surveys and therefore they cannot be considered representative of all people who need to access the courts to conduct court business.

[127] *The State of State Courts: A 2019 NCSC Public Opinion Survey*, NAT'L CTR. FOR STATE CTS. (2020), https://www.ncsc.org/topics/court-community/public-trust-and-confidence/resource-guide/2019-state-of-state-courts-survey.
[128] *The State of State Courts: A 2017 NCSC Public Opinion Survey*, NAT'L CTR. FOR STATE CTS. (2018), https://www.ncsc.org/topics/court-community/public-trust-and-confidence/resource-guide/2017-state-of-state-courts-survey.
[129] GBA STRATEGIES, 2017 STATE OF THE STATE COURTS – SURVEY ANALYSIS (2017), https://www.ncsc.org/__data/assets/pdf_file/0012/16131/sosc-2017-survey-analysis.pdf.
[130] GBA STRATEGIES, ANALYSIS OF NATIONAL SURVEY OF REGISTERED VOTERS (2015), https://www.ncsc.org/__data/assets/pdf_file/0018/16164/sosc_2015_survey-analysis.pdf .

Despite the importance of the internet as an information tool when accessing the courts, there are disparities in households with internet access nationally and in Washington State. The Census Bureau's 2012 survey showed that nationally 23% of white households did not have any internet access in the home while 38% of Black households and almost 36% of Hispanic households lacked all access to the internet.[131] For instance, an expert in the community noted that Black transgender women reported a lack of internet access as part of the reason why they had not responded timely to a Health Care Authority's notice of rulemaking regarding a gender dysphoria treatment rule. They explained the compounding barriers of lack of access to medical care, employment discrimination and inability to find work, housing instability and discrimination were barriers to access to the internet. In King County, there are significant disparities in internet access based on income. In 2014, households that made less than $50,000 a year were 5.5 times less likely to have internet access in the home than those who made above $50,000 a year. In 2013 the median income for Hispanic, Black, and AIAN households was all under $50,000 in King County while the median income for white households was well over $50,000.[132] This means that Hispanic, Black, and AIAN households were far more likely to not have access to the internet at home.

Even when information is on a court website, and the user has access to the internet, information is not necessarily accessible to all users. State court websites should be made accessible to people with disabilities, formatted to be accessed with assistive technology such as screen readers or voice recognition software.[133] Additionally, making websites mobile-enabled improves access for individuals who primarily access the internet from a phone; the evidence shows that young adults, people of color, individuals without a college degree, and those with lower household income who own smartphones are more likely to say that their phone is their primary source of internet access.[134] Courts should include user testing in determining how effective people are at

[131] *Computer and Internet Access in the United States: 2012*, U.S. CENSUS BUREAU (2012), https://www.census.gov/data/tables/2012/demo/computer-internet/computer-use-2012.html. This data table does not provide data for Native Hawaiian or Other Pacific Islanders or Native Americans.
[132] MURN & PARK, *supra* note 88.
[133] U.S. DEP'T OF JUST., C.R. DIV., DISABILITY RTS. SECTION, ACCESSIBILITY OF STATE AND LOCAL GOVERNMENT WEBSITES TO PEOPLE WITH DISABILITIES (2008), https://www.ada.gov/websites2.htm.
[134] KATHRYN ZICKUHR & AARON SMITH, DIGITAL DIFFERENCES (2012), https://www.pewresearch.org/internet/2012/04/13/digital-differences/.

being able to access and understand information on the internet. Hawaii, Maryland, Michigan, and Florida are examples of states using 'responsive design' to make their courts websites mobile-friendly.[135] When accessed in August of 2020, the Washington State Courts website did not appear to be mobile enabled. Facilitating access to information about the courts and legal system can increase access for all, especially low-income individuals and Black, Indigenous, and people of color.

Some state court systems have gone further by moving proceedings for minor legal disputes like lesser misdemeanors and traffic violations entirely online. The state of Michigan began piloting online proceedings using the platform technology, Matterhorn, in 2014, primarily for traffic violations. Later analysis showed that many user requests on the platform were made during evenings and weekends, potentially indicating greater ease of access for people who are not able to come to court during traditional working hours. Indeed, in a user survey, "more than a third of survey respondents reported that they would not have been able to come to the courthouse in person at all if not for the availability of the online platform."[136] Users also reported positive experiences, feeling the platform was easy to use and that it enhanced their understanding of the facts of their case during the process.[137] Likewise, the Franklin County, Ohio municipal court developed an online dispute resolution platform in 2016 for income tax disputes, which previously had very high rates of defaults when individuals failed to appear in court. Evaluations found that cases were resolved much more quickly when online dispute resolution was used, and that defendant participation and voluntary dismissal increased, especially for defendants from low- to middle-income neighborhoods. Participants noted that the process reduced the time and financial cost as well as stress associated with physical court appearances. The majority of users in 2019 accessed the system by mobile phone.[138] Remote court access may also be meaningful for individuals who fear coming to the court in person due to their immigration status, though (as noted below) there may be different equity implications of video proceedings.

[135] ROBERT GREACEN, EIGHTEEN WAYS COURTS SHOULD USE TECHNOLOGY TO BETTER SERVE THEIR CUSTOMERS (2018).
[136] J. J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993 (2017).
[137] *Id.*
[138] ALEX SANCHEZ & PAUL EMBLEY, ACCESS EMPOWERS: HOW ODR INCREASED PARTICIPATION AND POSITIVE OUTCOMES IN OHIO (IN TRENDS IN STATE COURTS, 2020) (2020), https://www.ncsc.org/__data/assets/pdf_file/0018/42156/Trends_2020_final.pdf.

Of note, the COVID-19 pandemic has increased the use of remote video technology and other remote options for accessing court. The pandemic created opportunities for courts to offer virtual participation in new ways. People access court hearings from work without having to take the day off work or without having to arrange transportation or childcare to get to court. Virtual participation increases access to the courts and decreases many of the barriers litigants can face. However, there may be risks with remote proceedings as well. In 2020, prior to the pandemic, the Brennan Center for Justice conducted a literature review of the research on the effects of video court proceedings in civil, criminal, and immigration proceedings. The report highlights findings that suggest that video conferencing may impact court outcomes. For example, they summarize studies finding that video hearings were associated with higher bond amounts, increased likelihood of deportation in immigration courts, and decreased perceptions of credibility. The authors conclude that while video technology may be a valuable tool, that more research is needed and that long-term adoption of remote court proceedings should be approached with caution.[139] The Gender and Justice Commission's evaluation of Domestic Violence—Moral Reconation Therapy (DV-MRT) also found that participants noted both pros and cons of attending these court-provided sessions remotely during the pandemic. But overall participants did feel that being able to join remotely: 1) allowed them to better navigate their work schedules and to attend even when they lacked transportation, and 2) made the program more accessible.[140] See Appendix C of the full report for the full DV-MRT evaluation.

E. Transportation

As previously discussed, traveling to the courthouse is an essential part of conducting court business. However, without a car or access to a functional and punctual public transportation system, arriving at a courthouse during the very specific time window can be difficult. For instance, an attorney working in Washington shared that their clients in rural areas often noted they did not have money to put sufficient gas in their cars to travel to the courthouse or where

[139] ALICIA BANNON & JANNA ADELSTEIN, BRENNAN CTR. FOR JUST., THE IMPACT OF VIDEO PROCEEDINGS ON FAIRNESS AND ACCESS TO JUSTICE IN COURT (2020), https://www.brennancenter.org/sites/default/files/2020-09/The%20Impact%20of%20Video%20Proceedings%20on%20Fairness%20and%20Access%20to%20Justice%20in%20Court.pdf.

[140] AMELIE PEDNEAULT, SAMANTHA TJADEN, AND ERICA MAGANA. EVALUATION OF WASHINGTON STATE DOMESTIC VIOLENCE – MORAL RECONATION THERAPY (DV-MRT) PROGRAMS PROCESS AND OUTCOMES (2021).

services were. An evaluation of Washington State's Transportation Initiative for TANF Adults found five "transportation deserts" in Washington State, all in rural areas.[141] These are areas that lack public transportation and also had lower than average rates of car ownership. The evaluation also found that only 38% of adults using TANF owned personal vehicles. Also, while two-thirds of adults using TANF had preschool aged children, those with children were less likely to own cars. But, while only 8.7% of these adults lived in what the evaluation defined as an area without public transportation and also did not own a car, living in an area "with" public transportation did not mean it was convenient. The evaluation defined living "near public transportation" as simply "Living in a zip code area served by public transit system or within Public Transportation Benefit Area."[142]

There are disparities in car ownership. Nationally, in 2016 it was found that people with no high school diploma were the least likely to own cars by level of educational attainment, and Black, non-Hispanic families were the racial demographic least likely to own a private vehicle.[143] There is no data on car ownership by demographic in Washington State. However, based on the previously discussed data on level of educational attainment and income levels, it can be reasoned that there are disparities in car ownership in Washington as well. Additionally, in the 2021 legislative session, the Office of the Insurance Commissioner in Washington requested that legislation be enacted to "ban the industry's use of credit scoring" due to findings that "low-income people in Washington state are more likely to struggle with their credit…for reasons that have nothing to do with their insurance risk. [C]ommunities of color are disproportionately represented in low-income demographics."[144] As such, penalizing individuals with lower credit scores negatively and disproportionately impacts Black, Indigenous, and other communities of color in spite of lack of association between credit score and risk involved.

[141] BRENT L. BAXTER, WASH. STATE DEP'T OF SOC. AND HEALTH SERVS., EVALUATING THE IMPACT OF WASHINGTON STATE'S TRANSPORTATION INITIATIVE FOR TANF ADULTS (2017), https://nawrs.org/wp-content/uploads/2017/08/2-3-Baxter-Impact-of-WA-State-Transportation-Initiative.pdf.
[142] *Id.* at 6
[143] 2016 SCF CHARTBOOK (2016), https://www.federalreserve.gov/econres/files/BulletinCharts.pdf.
[144] *2021 Legislative Priorities: Prohibiting the Use of Credit Scoring in Insurance*, OFF. OF THE INS. COMM'R WASH. STATE (2021), https://www.insurance.wa.gov/legislative-priorities.

F. The ability to miss work

Of course, having accessible transportation does not guarantee that arriving at the courthouse will be convenient or even possible. Due to the precise nature of scheduling for court and because courthouse operation hours are primarily business hours during the week, going to court may often mean needing to take time off from work. But, for many, time off from work is not as simple as just letting your boss know you cannot come in that day. As seen during the COVID-19 pandemic, taking time off work requires scheduling flexibility and enough of a financial cushion to miss time from work.[145] Washington State passed a law requiring employers to provide paid sick leave, but has no such provisions for other essential appointments, such as court dates.[146]

And without paid leave, many cannot take time from work. Women are twice as likely as men to work part time.[147] A study released in March of 2020 found that about half of all households in the United States do not have an emergency savings fund and that one-fifth of the households in the lowest income brackets have on average only $900 of available liquid financial assets, usually in a checking account that pays for bills.[148] It also found that after taking into account monthly bills, about a quarter of American households have only $400 available. In Washington State, the Prosperity Scorecard shows that 26.7% of Washington households live in liquid asset poverty, 15.8% have zero or negative net worth, and that 47.8% of renters in Washington paid more than one third of their monthly income on rent.[149] Additionally, only 66.3% of Washington households had savings for an emergency last year. Due to the previously discussed income disparities these populations are going to be disproportionately women and Black, Indigenous, and people of color. This leaves people with a difficult choice: do they go to court or do they make rent that month?

[145] David Kroman, *As Coronavirus Spreads, Some Can't Afford A Sick Day*, CROSSCUT (Mar. 3, 2020), https://crosscut.com/2020/03/coronavirus-spreads-some-cant-afford-sick-day; Usha Ranji, Michelle Long & Alina Salganicoff, *Coronavirus Puts a Spotlight on Paid Leave Policies*, KFF (Dec. 14, 2020), https://www.kff.org/coronavirus-covid-19/issue-brief/coronavirus-puts-a-spotlight-on-paid-leave-policies.
[146] Usha Ranji, Michelle Long & Alina Salganicoff, supra note 145.
[147] HESS & MILLI, *supra* note 78.
[148] STEPHEN BROBECK, DO BIG BANKS PROVIDE AFFORDABLE ACCESS TO LOWER INCOME SAVERS? 21 (2020), https://consumerfed.org/wp-content/uploads/2020/03/Affordable-Banking-Access-for-Low-Income-Consumers-Report.pdf.
[149] *Prosperity Now Scorecard*, PROSPERITY NOW, https://scorecard.prosperitynow.org/data-by-location.

V. Recommendations

- Low-income care givers often lack access to safe, affordable, quality, childcare, and this limits their ability to access courts. To remove such barriers and improve all court users' ability to conduct court business using remote means:
    - Courts should retain and expand the best of the remote access opportunities that the courts adopted during the COVID-19 pandemic (e.g., digital platforms accessible via computer or smart phone) – the ones that maximize communication and language access without penalizing litigants for using remote means. Publish (electronically) accessible directions on how to access court business and documents remotely, and limit fees for accessing court business and documents remotely.
    - Courts should consider more flexible hours of operation or, with increased funding, expanded hours of operation.
    - Stakeholders should explore additional way to improve access opportunities such as funding and distributing devices (laptops, tablets, phones, etc.) that can support remote access in community and childcare centers, women's shelters, schools (as appropriate in individual jurisdiction); expanding on-site childcare centers at courthouses; or supporting other means (such as vouchers) to access childcare to attend court.
- The Washington State Legislature should consider funding "navigators" in courts in all counties to assist those seeking help with family law issues, and should also consider funding them for other areas of law.
- Stakeholders should propose an amendment to GR 34 to allow fee waivers based solely on the litigant's attestation of financial status, without additional proof. Allowing presentation of such waivers to the Clerk or other designated non-judicial officer should also be considered to help streamline the procedure. Information about fee waivers should be prominently displayed (in multiple languages) at the courthouse and online.

- Stakeholders should convene a workgroup to analyze the application of GR 34 fee waivers to name change recording fees. The workgroup should consider ways to reduce barriers to name change recording for indigent individuals.
- GR 34 is not always interpreted to extend fee waivers to fees associated with parenting classes, family law facilitators, and other family law costs and fees. GR 34 should be amended to explicitly extend waivers to all such fees.
- Courts should be required to accept electronic (as well as hard copy) filings and submissions of all documents.

Appendix I. Washington Superior Court User Fee by County

The following table contains Family Law Superior Court fee information collected in March through May of 2021 from a sampling of representative counties in Washington State drawing from diverse geographical areas. This information was collected from court websites and email and phone correspondence with Superior Court Clerks. This table is intended to illustrate financial barriers specific to Family Law that litigants may face, based on county. Additionally, particular attention is paid to whether or not sliding-scale or fee waivers are available for each type of service.

General Notes:

- Facilitator Fees: Facilitator fees were not applicable in Lewis and Okanogan counties. King, Skagit, Spokane, and Stevens County indicated availability of fee waivers or sliding scale for facilitator fees. All other sampled counties did not clearly indicate whether or not facilitator fees were available on sliding scale or waivable entirely based on demonstrated financial need.
- Title 26 Guardian Ad Litem services: A majority of counties sampled indicated that Title 26 Guardian Ad Litem (GAL) county pay and/or low-income services were available. Available information indicated availability of GAL fee waiver, but did not necessarily provide the actual cost of the reduced services or data verifying that persons in need of sliding scale or waived GAL fees are able to access these services. Collecting data on accessibility to low- or no-cost GAL services is an area which could be explored in future research.
- Parenting Plan Seminar**:** A majority of counties sampled required the completion of a parenting plan seminar in Family Law cases. Approximately half of counties sampled included approved seminars with services available on a sliding scale rate.
- Mediation**:** A majority of approved mediation service providers offered classes on a sliding scale rate based on income. Most counties required mediation prior to a hearing.

Table 2. Washington Superior Court User Fee by County

County	Title 26 Guardian Ad Litem	Parenting Plan Seminar	Mediation	Facilitator
Benton/Franklin	(*).[i] $70-$275 hourly rate. $1,600-$3,750 retainer.[ii]	Required. $25-$115.[iii] (↔,◊)	Required. $62.50-$250/hr or $400-$500 for ½ day.[iv] (↔)	$15-$25.[v]
Chelan	(*).[vi] Varied. County: $700 + rate $50/hr. Private: GAL registry, pay rate. (◊).[vii]	Required. $40 per party.[viii] (↔,◊)	Not required. $25 intake, $26-$170/session.[ix] (↔)	$15-$30.[x]
Clark	(*, ◊).[xi] Fee ordered and set by court.[xii]	N/A.[xiii]	Required.[xiv] $0[xv]-$250[xvi]/session. (↔)	$20.[xvii]
Grant	(*,↔,◊). Cost set by judge.[xviii]	Required. $35[xix]-$54.99.[xx]	Judge ordered.[xxi] $50-$200/session.[xxii] (↔,◊)	$20.[xxiii]
Grays Harbor	(*,↔,◊), set by judge.[xxiv] $100-$250. $2,500 retainer.[xxv]	N/A.[xxvi]	Required. $150-$300/hr, parties split cost.[xxvii,xxviii] (↔,◊)	$20.[xxix]
Jefferson	(*,◊). County pay: $60/hr, $500 max. Private: GAL max is $200/hr.[xxx]	Required. $50.[xxxi]	Not required. $40 intake + $40-$550/session.[xxxii] (↔,◊)	$20.[xxxiii]
King	Information unavailable.[xxxiv]	Required. $40-$75.[xxxv] (↔,◊)	$25-$1,000.[xxxvi] (↔)	$30.[xxxvii] (↔,◊)
Lewis	(*). $0.[xxxviii]	Required. $50.[xxxix] (↔)	Required.[xl] Cost varies.[xli] (↔)	N/A.[xlii]
Okanogan	(*,↔,◊).[xliii] Varied. Court appointed GAL fee is $75/hour.[xliv]	Required. $50.[xlv]	1st session $0, follow-up session fee $50-$200.[xlvi] (↔)	Free.[xlvii]

County	Title 26 Guardian Ad Litem	Parenting Plan Seminar	Mediation	Facilitator
Pierce	(*).[xlviii] $75-$200, retainer $1,875.[xlix]	Required. $0-$60.[l] (↔)	$50-$300.[li] (↔)	$20.[lii]
Skagit	(*).[liii] $75 to $245/hr. Retainer fee $1,500 to $3,000.[liv]	Required. 5 options from $45.95-$99.[lv] (↔)	Required.[lvi] $75-$325.[lvii] (↔)	$20.[lviii] (◊)[lix]
Snohomish	(*).[lx] $100-$250/hr. Retainer fee $2,000-$6,000.[lxi]	Required.[lxii] $39.95-$50.[lxiii] (↔,◊)	Required. $600.[lxiv] (↔)	$25.[lxv]
Spokane	(*). $50-any cost, GAL discretion, (↔).[lxvi]	Required. $25-$31 per person.[lxvii]	Required. $5-$275/hr.[lxviii] (↔)	$0-$25. (◊).[lxix]
Stevens	(*).Varied.[lxx]	Required. $54.99.[lxxi] (↔)	Not required.[lxxii] $10-$110/hour.[lxxiii] (↔)	$20; (◊).[lxxiv]
Walla Walla	(*).[lxxv] $115/hour.[lxxvi]	Required. No cost or approved plan list.[lxxvii]	Not required. Cost varies.[lxxviii]	$20.[lxxix]
Whatcom	(*,◊).[lxxx] $70-$250/hr, $500-$5,000 retainer.[lxxxi]	Required. $50-$72.95.[lxxxii] (↔,◊)	Required. Varied cost.[lxxxiii] (↔,◊)	$20.[lxxxiv]
Whitman	(*). Fees set by court.[lxxxv]	Court dependent, all classes accepted.[lxxxvi]	Required. $180-$350/hr.[lxxxvii] (↔)	$20-$30.[lxxxviii]
Yakima	Information unavailable.[lxxxix]	Required.[xc] (↔)	$25-$170.[xci] (↔,◊)	$75.[xcii]

Table 2 Key

- ◊ = fee is waivable (i.e., available option for court to bear cost, typically determined by demonstrated need)
- ↔ = fee available on sliding scale
    - sliding scale symbol indicates that at least some of the service provided in that section offers sliding scale. For instance, some counties have multiple provider options for mediation, in that context "↔" means that at least one of those providers offers sliding scale services.
- * = Public (county) pay/low-income GAL service available.
- If neither ◊ nor ↔ symbol is present in a given cell, it means that sliding scale and/or waived fee services were unavailable in this county OR that no information pertaining to the availability was identified in the course of this research.

Footnotes for Table 2.

[i] Pursuant to 26.12.175 (https://apps.leg.wa.gov/rcw/default.aspx?cite=26.12.175): "(d) The court shall enter an order for costs, fees, and disbursements to cover the costs of the guardian ad litem. If both parents are indigent, the county shall bear the cost of the guardian."

[ii] Nine available guardians ad litem, one registered GAL offered bilingual (English and Spanish) services (http://www.benton-franklinsuperiorcourt.com/information-and-forms-by-case-type/domestic-paternity-case-information-and-forms/title-26-guardian-ad-litem/).

[iii] Fee based on monthly income and is waivable if indigent. All county approved seminars charge the same rates. (http://www.benton-franklinsuperiorcourt.com/information-and-forms-by-case-type/domestic-paternity-case-information-and-forms/parenting-seminars/).

[iv] Benton/Franklin approved mediator list: 30 mediators, four pay by sliding scale, two charge by half day (http://www.benton-franklinsuperiorcourt.com/information-and-forms-by-case-type/domestic-paternity-case-information-and-forms/).

[v] Benton/Franklin county facilitator (https://www.co.benton.wa.us/pview.aspx?id=791&catid=45): $25 for 30-minute initial session, $15 for subsequent sessions. Fees are non-refundable.

[vi] Personal communication with Kim Morrison, Chelan County Superior Court Clerk on March 26, 2021.

[vii] GAL fee information not available online, Title 26 registry does not include GAL fees (http://www.co.chelan.wa.us/files/superior-court/documents/Title%2026%20GAL%20List.pdf). GAL fees are decided on case-to-case basis in court. Private pay: GALs set rate; County pay: $50/hour, typically authorize up to $700 initially; clients who are indigent are not required to cover this cost, (personal communication with Kim Morrison, Chelan County Superior Court Clerk on March 26, 2021).

[viii] Fee reduction and waiving fee are dependent on court order. Fee paid in advance and is non-refundable (https://www.co.chelan.wa.us/clerk/pages/parenting-class).

[ix] Wenatchee Valley Resolution Center: Intake: $25 non-refundable fee, Session fee: $26-$170 per three-hour mediation session based on sliding scale, voluntary process, both parties must agree (www.wvdrc.org).

[x] Appointment: $30 fee for one-hour, pre-paid appointments (no refunds). Walk-ins: $15 for 30 minutes, discontinued during COVID-19. Forms: available for fee ranging $5-$20 per packet. $20 for divorce with (or without) children. Free Wednesday Workshop: closed during COVID-19 (https://www.co.chelan.wa.us/clerk/pages/court-facilitator).

[xi] GAL fee is ordered and set by court. Fee waiver is available if approved by judge (Personal communication with Scott G. Weber, Clark County Superior Court Clerk on April 2, 2021).

[xii] 11 GALs listed on registry; fee not available online (https://clark.wa.gov/sites/default/files/media/document/2021-03/GALRegistry%2026_0.pdf).
[xiii] Typically, parenting plan is not required unless some sort of 199 restriction is present, not aware of any classes offered in county (Personal communication with Scott G. Weber, Clark County Superior Court Clerk on April 2, 2021).
[xiv] Mediation is mandatory unless regarding custody (Personal communication with Scott G. Weber, Clark County Superior Court Clerk on April 2, 2021).
[xv] Community mediation services, first consult is free. For Clark County Clerk, no fee (Personal communication with office of Scott G. Weber, Clark County Superior Court Clerk on April 2, 2021).
[xvi] https://www.mediationclarkcounty.org. First consultation is free, sliding scale payment for future sessions. "Fees are provided on a sliding fee scale depending on income and range from a $25 co-pay to $250 per party per session. There is an initiating party fee of $25." Cost split between participants.
[xvii] $20 fee for a 20-minute appointment, non-refundable, paid in advance (https://clark.wa.gov/clerk/family-court-facilitator). Children are not allowed at facilitator meeting. Childcare cost may constitute an additional financial consideration and potential barrier.
[xviii] Personal communication with Crystal (509-754-2011 ext. 4144), Grant County in April 2021.
[xix] Parenting NW, completed via email (Personal communication with Parenting Northwest 509-770-9240 in April 2021).
[xx] https://www.onlineparentingprograms.com.
[xxi] If parties don't agree, commissioner will request mediation. No county approved list of mediators. Can locate and utilize service and submit proof of attendance (personal communication with Kimberly A. Allen, Grant County Superior Court Clerk in April 2021).
[xxii] Columbia Basin DRC: sliding scale available. Clients pay $50-$200 per session. If client is unable to pay any amount, service still available. (https://www.cbdrc.org/).
[xxiii] (http://www.grantcountywa.gov/Clerk/Fee-Schedule/PDF/2018-Fee-Schedule-Eff-2018-10-01.pdf).
[xxiv] Fee waiving and sliding scale cost determined either through judge ruling or negotiation with GALs (personal communication with Kym Foster, Grays Harbor County Superior Court Clerk on March 29th, 2021).
[xxv] Six GALs on registry, three indicate retainer cost (https://cms5.revize.com/revize/graysharborcounty/2021%20GAL%20REGISTRY%20LIST.pdf).
[xxvi] Clerk had not heard of parenting seminar, unlikely to be required in this county (personal communication with Kym Foster, Grays Harbor County Superior Court Clerk on March 29th, 2021).
[xxvii] Five mediator options (https://cms5.revize.com/revize/graysharborcounty/GH%20Family%20Mediator%20Roster%202021.pdf).

[xxviii] Mediation is a new service, compiling list of mediators is required this year but not yet available (personal communication with Kym Foster, Grays Harbor County Superior Court Clerk on March 29th, 2021).
[xxix] (https://cms5.revize.com/revize/graysharborcounty/Clerk/FEE%20SCHEDULE%20GH%20COUNTY%202020.pdf).
[xxx] "If indigent client or estate under $3,000 fees, county pays the cost" (Personal communication Jefferson County Court Administrator on May 7, 2021).
[xxxi] "[M]andatory parenting class known as Children in the Middle. It is currently offered once a month and costs $50. Parties need to register in advance for the class and may not attend together" (https://www.co.jefferson.wa.us/170/Family-Law-Information).
[xxxii] Peninsula Dispute Resolution Center: sliding scale, based on what clients can pay (https://pdrc.org/). Parenting plan mediation: $40 fee per client intake fee, mediation session fee is sliding scale ranging from $40-$550, center charges whatever party can afford to pay (Personal communication with (360)-452-0458 on April 20, 2021).
[xxxiii] $20 fee per visit (https://www.co.jefferson.wa.us/DocumentCenter/View/71/Courthouse-Facilitator-Information-PDF?bidId=).
[xxxiv] 44 registered GALs, prices not listed on registry which is available only via email, not online (Personal communication with Nadia Camille Simpson, Court Operations Supervisor on April 29th, 2021).
[xxxv] $40 per person plus additional processing fees. Potential for $35 additional fee if registration is submitted late. Sliding scale and waiving fee are contingent on demonstrated need (https://kingcounty.gov/courts/superior-court/family/parent-seminar.aspx).
[xxxvi] Sliding scale, total cost cannot exceed $1,000 and no less than $25, parties pay portion based on personal income, fee reduction request form available (https://kingcounty.gov/courts/superior-court/family/services/mediation.aspx).
[xxxvii] $30 fee per visit, waiving or reducing fee is contingent on income (https://kingcounty.gov/courts/superior-court/family/facilitator.aspx).
[xxxviii] Lewis County GALs are volunteers, no identified cost (https://lewiscountygal.org).
[xxxix] Consider the Children is a Lewis County superior court approved parenting class (https://familyess.org/consider-the-children/). Cost is $50 per participant for a four-hour class, paid in advance. "Class Fee may be discounted for those whose incomes can be verified to fall below poverty guidelines" (https://secureservercdn.net/198.71.233.65/97u.7fe.myftpupload.com/wp-content/uploads/2020/09/CTC-Webinar.pdf).
[xl] Mediation is required unless court waives based on good cause shown (https://lewiscountywa.gov/media/documents/LOCAL_COURT_RULES_LEWIS_COUNTY_SUP_CT_Effective_September_1_2019.pdf).
[xli] Center for Constructive Resolution and Conversation (https://lewiscountyccrc.org) sliding scale available. "The fee depends on the case type and if the parties need DS AND PP or just one or the other as far as the family law cases. Also, generally each party is

responsible for 50% of the fee unless otherwise ordered by the court. Other cases, fee depends on the case type" (Personal communication with Jackie Viall, Program Director at Center for Constructive Resolution and Conversation on April 22nd 2021).

[xlii] No family law court facilitators in Lewis County (Personal communication with office of Scott Tinney, Lewis County Superior Court Clerk on April 16, 2021).
[xliii] Sliding scale and/or waiving GAL fees is only available when court approved and appointed (Personal communication with Dennis T. Rabidou, Okanogan Superior Court Administrator on May 5th, 2021).
[xliv] "Each GAL has their own fee but when they are appointed by the court the fee is $75 [per] hour," GAL registry is unavailable online (Personal communication with Dennis T. Rabidou, Okanogan Superior Court Administrator on May 5th, 2021).
[xlv] Course available in English and Spanish. No indication of sliding scale or fee waiving availability (http://okanogandrc.org/class.html).
[xlvi] Okanogan County Dispute Resolution Center: Sliding scale based on gross annual income. Minimum is $50 per session per client, maximum is $200 per session per client. "If the case has already been filed with the court, no additional charge [] for the first mediation session. Should the mediation require an additional session or sessions, the regular fee schedule will apply (see above)" (https://okanogancounty.org/superiorcourt/docs/DRChandout_e.pdf).
[xlvii] Appointments with facilitator are free. No children allowed at appointments (Personal communication with (509) 422-7132, office of Okanogan Superior Court Facilitator).
[xlviii] Personal communication with Pierce County Superior Court Administration on May 10, 2021.
[xlix] 16 GALs on registry, five no longer available, three did not clearly state fee for services (https://www.piercecountywa.gov/1057/2609-Registry-List).
[l] Eight seminar options. Parenting Seminar *Crossroads of Parenting and Divorce* is free, all other options cost up to $60, sliding scale payment options available (https://www.piercecountywa.gov/DocumentCenter/View/3221/Approved-Parenting-Seminar-Providers-?bidId=).
[li] Cost options: $200 for representing self (per party), $250 attorney is representing self, $300 if wanting shuttle mediation, client speaks to mediator and mediator speaks to other party. There is a $50 deposit, based on financial aid request fees beyond this deposit can be waived. Pierce County: "Center for Dialog & Resolution CDR) Pierce County" (https://centerforresolution.org/fees-policies/).
[lii] (https://www.piercecountywa.gov/DocumentCenter/View/74989/feeschd61018pdf?bidId=).
[liii] Skagit County pay GALs are available $50/hour up to $750 for county pay cases so parties can proceed without having to pay for a GAL (Personal communication with Michelle Cooke, Skagit County Superior Court Manager on May 3, 2021).

[liv] (https://skagitcountywa.gov/utilities/GetPDF/default.aspx?Folder=SupCrtFiles&DocName=GAL26).
[lv] The following approved parenting seminar courses are available in English and Spanish: "Separate Homes Connected Families" Co-Parenting Class, online or in-person, three hours, $99 (https://www.voaww.org/drctrainings); "Successful Co-Parenting" Class, $50/person, sliding scale: income <$30k is $20 or provide proof of no income, four-hour in person class (https://docs.google.com/forms/d/e/1FAIpQLSeL7ytEW5IvYqz6yWXBdyfqd3E75Yc_XxDdTg5lT2pPreMAPA/viewform); "Two Families Now" cost is $49.99 for 30-day access online, four-hour course (www.TwoFamiliesNow.com); "Children in Between" Class, can present court approved fee waiver, $45.95 for 30-day access ($48.95 with fees), four-hour class (online.divorce-education.com); "Co-Parenting" Class, $54.99 with tax, four-hour online course (www.OnlineParentingPrograms.com).
[lvi] If going to trial, mediation is always required (Personal communication with Michelle Cooke, Skagit County Superior Court Manager on May 3, 2021).
[lvii] 26 approved mediators, one mediator offers Spanish/English bilingual services (https://www.skagitcounty.net/utilities/GetPDF/default.aspx?Folder=SupCrtFiles&DocName=MEDIATOR_LIST).
[lviii] $20 fee per ½ hour appointment paid in advance. Spanish speaking facilitator available on select days. Fees can be waive based on motion in advance. (https://skagitcountywa.gov/Departments/SuperiorCourt/familylaw.htm).
[lix] Personal communication with Michelle Cooke, Skagit County Superior Court Manager on May 3, 2021.
[lx] Under limited circumstances for those parties who qualify, the Court may appoint and pay for the GAL under Titles 26; the maximum time allowed on these cases is 12 hours (https://snohomishcountywa.gov/1441/Guardian-ad-Litem-GAL). County pay GAL registry can be found here: (https://snohomishcountywa.gov/DocumentCenter/View/80130/Title-26-GAL-Registry--County-Pay).
[lxi] (https://snohomishcountywa.gov/DocumentCenter/View/80131/Title-26-GAL-Registry--Private-Pay).
[lxii] Personal communication with Snohomish Superior Court Facilitator on May 7th, 2021.
[lxiii] Approved parenting seminars are Successful Co-Parenting ($50, low-income rate option of $20 with verification) and Children in Between ($39.95 for 30-day access, can submit court approved fee waiver and/or verification of indigency). https://snohomishcountywa.gov/4132/Parenting-Seminars.
[lxiv] DRC of Snohomish, Island & Skagit Counties: Family mediation is $600 per session, paid by both parties, non-refundable, $75 non-refundable service fee paid by each party. Fees available on sliding scale and individuals can file a fee discount application (https://www.voaww.org/mediation).
[lxv] (https://snohomishcountywa.gov/Faq.aspx?QID=1336).
[lxvi] Private pay GALs can charge anything. County pay charge base rate of $50, county pay rate is $60/hour up to a maximum of $1,800. Sliding scale is not available. Parties must pay $50, regardless of income – county can absorb rest of cost if necessary, based on demonstrated need (Personal communication with Spokane County Commissioners Office on April 21, 2021).

[lxvii] All parties required. "Sharing the Children" seminar offered through 1) Fulcrum Institute, cost is $25-30, not waivable or 2) NW Mediation Center, cost is $31 per person (https://www.spokanecounty.org/DocumentCenter/View/2088/Sharing-the-Children-Seminar-PDF?bidId=).

[lxviii] Mediation required except in cases of domestic violence. Spokane county Family Law Mediators: Fees range from $5-$275 per hour, majority of mediators offer sliding scale and split cost of mediation between parties (https://www.spokanecounty.org/DocumentCenter/View/4338/Family-Law-Mediator-List-PDF?bidId=). Fulcrum Institute Dispute Resolution Clinic: sliding scale $10-$105/hour, not waivable (www.fulcrumdispute.com). Northwest Mediation Center: Sliding scale mediation cost up through $75,000 gross yearly income at which point mediation becomes $110/hour (www.nwmediationcenter.com).

[lxix] Prior to COVID-19, first facilitator visit was free and subsequent visits were each $25. Petition to waive fee was available. During COVID-19, no charge for facilitator services and assistance occurs via zoom and email (https://www.spokanecounty.org/1403/Family-Court-Facilitator).

[lxx] GAL registry available via email. Contact each GAL independently to obtain cost of services. GAL service available via a family court investigator who is qualified as a GAL at county expense given eligibility (Personal communication with Evelyn Bell (Assistant Pam Ray), Stevens County Superior Court Administration on May 3, 2021).

[lxxi] Parenting plan seminar required prior to judge granting a divorce, four-hour class minimum. Online Co-Parenting/Divorce Class four-hour class, $54.99 with tax, discounted price available if need is demonstrated (https://www.onlineparentingprograms.com/online-classes/co-parenting-divorce-class.html).

[lxxii] Court ordered based on if parties are in agreement or not (Personal communication with Office of Stevens County Superior Court Clerk on April 22, 2021).

[lxxiii] Mediation Services: Fulcrum Institute Dispute Resolution: sliding fee scale $10/hour to $105/hour depending on how much clients can pay, not waivable, would just be at $10 (https://www.fulcrumdispute.com/parentingplans.jsp). Northwest Mediation Center: sliding scale based on pre-tax household income used to determine sliding scale eligibility, $75,001 and above = $110 per hour (https://www.nwmediationcenter.com/costs).

[lxxiv] (https://stevenscountywa.gov/pview.aspx?id=21121&catid=0).

[lxxv] "WWLGALR 5: APPOINTMENT OF GUARDIAN AD LITEM FROM REGISTRY" (B) Indigent Parties: "If either of the parties is found to be indigent, then the court may appoint a GAL from the list at the expense of the County" (https://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&ruleId=SUPERIORSUPWAL5.00&pdf=1).

[lxxvi] Calculation is based on $115/hour rate. GAL registry is combined for Title 11 & Title 26. No fees listed on registry (Personal communication with Kayla C. Zimmer, Walla Walla County Administrative Supervisor on April 19, 2021).

[lxxvii] Typically completed online, two-hour minimum for class to count., (Personal communication with Kathy Martin, Walla Walla County Superior Court Clerk on March 26, 2021).
[lxxviii] No typical mediation provider, determined on case-to-case basis (Personal communication with Kathy Martin, Walla Walla County Superior Court Clerk on March 26, 2021).
[lxxix] (https://www.co.walla-walla.wa.us/document_center/clerk/Fees%20Schedule.pdf).
[lxxx] "Affidavit of Indigency" available to file (https://whatcomcounty.us/455/Guardian-Ad-Litem-GAL).
[lxxxi] (https://whatcomcounty.us/DocumentCenter/View/698/All-Pre-Approved-Guardians-Ad-Litem-PDF?bidId=).
[lxxxii] Whatcom county approved Parenting Seminars: If a person has a fee waiver from the court is declared indigent by the court they can indicate that status on the registration form. Additionally, active-duty military personnel can receive a discount (https://whatcomcounty.us/2898/Parenting-Class-Information).
[lxxxiii] "WDRC operates on a sliding fee scale and will never turn anyone away for lack of funds" (https://www.whatcomdrc.org/family-mediation).
[lxxxiv] (https://whatcomcounty.us/DocumentCenter/View/678/Filing-Fee-Schedule-PDF?bidId=).
[lxxxv] "Fees are set by the court, in consideration of the GALs hourly fee and the Payor's ability to pay. The county pays/subsidizes GAL Fees in some cases" (Personal communication with Jill Whelchel, Whitman County Superior Court Clerk on March 26, 2021). Unclear what range of charges for GAL is, GAL registry not readily accessible.
[lxxxvi] "'Parenting Class' is not required in every case. A court may order it, and it could be a specific provider, but I have not seen that. Unless specified, any class (including low cost online classes) have been accepted" (Personal communication with Jill Whelchel, Whitman County Superior Court Clerk on March 26, 2021).
[lxxxvii] One mediator, Northwest Mediation Center, offers sliding scale (http://whitmancounty.org/DocumentCenter/View/2731/Mediator-List-2021-v2xlsx).
[lxxxviii] Facilitator user: $30 for 1st hour + $20 for each additional hour. (https://www.whitmancounty.org/DocumentCenter/View/1144/Clerk-COVID-19-Updates).
[lxxxix] Information for Yakima County GALs was not available online. Website indicated GAL information could be obtained via conversation with county facilitator; in spite of several attempts, was not able to establish contact with facilitator.
[xc] Personal communication with Tracey M. Slagle, Yakima County Clerk on March 26th, 2021.
[xci] Sliding scale, waivable in extreme situations (https://www.yakimacounty.us/Faq.aspx?QID=216).
[xcii] Appointment must be made in advance. Spanish interpretive service available. (https://www.yakimacounty.us/497/Court-Facilitator).

Chapter 2

Communication and Language as a Gendered Barrier to Accessing the Courts

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Chief Justice Steven C. González; Claire Mocha, MPH; Constance van Winkle, JD

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I. Summary

Equal access to justice demands that the justice system: 1) transmit information to everyone in a way they can understand, and 2) receive information from everyone equally. Federal and state law require courts to provide spoken and sign language interpreters to ensure language access for individuals with Limited English Proficiency (LEP) and d/Deaf, Hard of Hearing or DeafBlind (D/HH/DB) individuals. Despite efforts by Washington courts, barriers remain for individuals whose primary language is not English and for those who are D/HH/DB. The consequences of not having an interpreter are serious, particularly in cases which involve domestic violence because the safety and wellbeing of the person and their children are at risk. Women (particularly Black, Indigenous, and women of color)[1] and LGBTQ+[2] individuals are disproportionally impacted by sexual violence and Intimate Partner Violence (IPV), indicating that communication barriers may be particularly dangerous for these populations.

Legal language is complex, which creates a barrier for individuals to fully understand and exercise their rights in police interrogations and in the courts. This is true for all people who have difficulty communicating in spoken English, but these barriers are amplified for people who experience access issues or discrimination on multiple fronts. For example, individuals who are D/HH/DB and foreign-born may encounter even greater barriers. Research shows that many immigrant women are more likely than U.S.-born women to have lower educational attainment, to work in low-wage service industry jobs with inflexible schedules, to live in poverty, or to experience domestic violence and sexual assault. All indications, based on available data, are that woman immigrants are impacted more by language barriers as they navigate multiple barriers to accessing the courts. Finally, prejudice and biases against certain forms of spoken English, including accents and vernacular, can jeopardize the right to a fair trial.

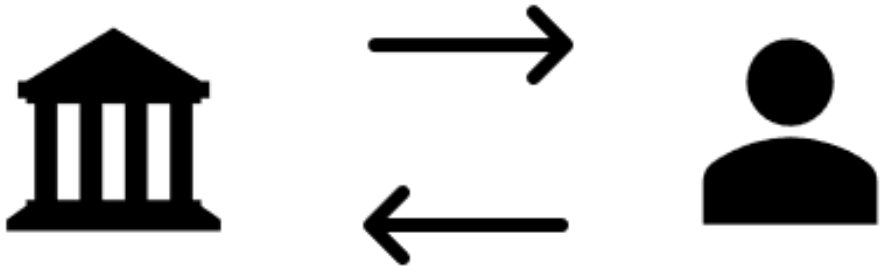
[1] The 2021 Gender Justice Study uses the race and ethnicity terms used in the underlying sources when citing data in order to ensure we are presenting the data accurately and in alignment with the how the individuals self-identified. When talking more broadly about the body of literature we strive to use the most respectful terms. See Section V of the full report ("2021 Gender Justice Study Terminology, Methods, and Limitations") for a more detailed explanation of terminology used throughout the report.
[2] Lesbian, gay, bisexual, transgender, queer, or questioning

Language access services, through professional interpretation of spoken communication and translation of documents; as well as the use of bilingual and multilingual court personnel, lawyers, and others, is integral to court operations and services, and necessary to a functional and fair justice system.

II. Introduction

Communication and understanding require participation by at least two parties: the one transmitting the message, and the one receiving the message. Equal access to justice demands that the justice system both transmit information to everyone in a way they can understand and receive information from everyone equally.

Figure 1: Communication Moves in Two Directions



Under the first arrow in Figure 1, members of the judicial system may encounter barriers to communicating effectively with individuals with LEP or D/HH/DB individuals. These communications are difficult partly because legal language is hard for most people to understand.[3] Any person without specialized training or education in the law could have difficulty understanding the language used commonly by law enforcement, lawyers, courtroom staff, judges, and others. Specific examples of instances where language or communication barriers may arise include, but are not limited to:

[3] Joseph Wszalek, *Ethical and Legal Concerns Associated With the Comprehension of Legal Language and Concepts*, 8 AJOB NEUROSCIENCE 26 (2017).

- Courts communicating information to self-represented (pro se) litigants regarding complex court procedures.
- Courts sharing court policies, procedures, and services on their website in English, but not always in languages other than English and in alternate formats.
- Court services such as clerk's offices, communicating with persons with disabilities.
- Law enforcement communicating with LEP persons where they do not share a language.

Under the second arrow, as individuals try to communicate within the judicial system, they may encounter barriers, biases, or discrimination based on the way they communicate. Examples include, but are not limited to:

- Pro-se individuals navigating the civil legal system, including finding and filling out forms and documents and communicating with court staff.
- Giving testimony as a witness or as another participant, including through an interpreter, in court proceedings.

The following populations could be more vulnerable to barriers in communication and language access within the legal system:

- People with LEP
- People who are D/HH/DB
- People with a disability that limits functional speech, such as people with specific verbal or written language limitations, such as cognitive disabilities, low English literacy, or traumatic brain injury
- People who speak with non-English native accents, regional accents, or regional or cultural vernacular forms of English
- Youth

In each of these categories, a person might face additional barriers if they belong to groups that are marginalized because of gender, sexual orientation, race/ethnicity, class, education,

disability, and more. The burden of reducing barriers to communication should lie with the justice system, not with individuals. This chapter outlines communication barriers that can impact people of all genders, but highlights times when those barriers disproportionally impact or are amplified for some genders. In many cases there is a lack of research or data on the intersection with gender, and those gaps are highlighted throughout the chapter a well. There is a notable lack of literature on communication barriers to the courts for transgender, gender nonbinary, and gender-nonconforming individuals. However transgender, gender nonbinary, and gender non-conforming LEP and D/HH/DB individuals likely experience an amplification of the barriers outlined in this chapter when these barriers intersect with bias and discrimination in the courtroom as outlined in "Chapter 4: The Impact of Gender and Race in the Courtroom and in the Legal Community."

III. Individuals with Limited English Proficiency (LEP)

A person with limited English proficiency is one who speaks a language other than English as their primary language and who has a limited ability to read, write, speak, or understand English.[4] The Washington State Office of Financial Management (OFM) estimated in 2016 that Washington State had a population with LEP of over 650,000 individuals, or about nine percent of the state population (though this only takes into account the 45 most commonly spoken languages; the real number is probably higher).[5] In Washington State the number of people who have LEP has been increasing, and so has the number of languages spoken.[6] The Washington State Office of Superintendent of Public Instruction (OSPI) reported that 234 languages were spoken by English

[4] COMMONLY ASKED QUESTIONS AND ANSWERS REGARDING LIMITED ENGLISH PROFICIENT (LEP) INDIVIDUALS (2011), https://www.lep.gov/sites/lep/files/media/document/2020-03/042511_QA_LEP_General_0.pdf.
[5] *Estimate of Population with Limited English Proficiency (LEP) for the State and Counties*, OFF. OF FIN. MGMT. (2019), https://ofm.wa.gov/washington-data-research/population-demographics/population-estimates/special-subject-estimates. The OFM uses data from OSPI, the US Census, and TANF/Medicaid/SNAP. For methodology, see OFF. OF FIN. MGMT, LIMITED ENGLISH PROFICIENCY POPULATION ESTIMATE METHODOLOGY https://ofm.wa.gov/sites/default/files/public/legacy/pop/subject/ofm_pop_limited_english_proficiency_methodology.pdf. Denominator for population percentage is from the 2016 U.S. Census American Community Survey.
[6] CHHANDASI PANDYA, MARGIE MCHUGH & JEANNE BATALOVA, LIMITED ENGLISH PROFICIENT INDIVIDUALS IN THE UNITED STATES: NUMBER, SHARE, GROWTH, AND LINGUISTIC DIVERSITY 12 (2011).

language learner students during the 2017-2018 school year.[7] In 2019 in Washington, 109 languages were reported to the Washington State Administrative Office of the Courts (AOC)-managed Court Interpreter Reimbursement Program indicating Washington courts have encountered individuals in at least that many languages.[8]

The most common languages spoken in Washington State after English, in order of frequency of encounters by courts in the reimbursement program, are: Spanish, Russian, Vietnamese, Arabic, Mandarin, Korean, Somali, Punjabi, Chuukese, Amharic, Samoan, Tagalog, Filipino, Mam, Cantonese, Swahili, Khmer, Farsi, Tigrinya, Romanian, French, Laotian, Hindi, Mixteco, Thai, Mongolian, Ukrainian, Burmese, Armenian, Marshellese, Oromo, Japanese, Portuguese, Kosraean, Nepali, Quiche, Soninke, Bosnian, Wolof, Polish, Mandinka, Ilokano, and Nuer. There are many more languages spoken by residents in Washington, but this list is illustrative of the point: Washington courts must prepare for encountering individuals speaking languages from around the world, including Indigenous languages.

It is not enough to identify languages by only counting those who have received interpreter services, since many times when language services are not available to aid in communicating their need, people will be left out of this method of identifying who is in that community and what languages they speak. In addition to tracking the languages spoken by those accessing services, it is important also to analyze data from multiple sources, including the U.S Census, American Communities Survey, and state and local governmental programs to get an accurate picture. This is because some language data sources, such as the U.S. Census, group languages into large language groups, therefore losing the richness of the diversity of languages. An example of this is within the Asian American, Native Hawaiian, and Pacific Islander (AANHPI) communities in Washington State, where people from 42 different nations speaking over 100

[7] PATTY FINNEGAN, MEA MOORE & KATIE WEAVER RANDALL, UPDATE: TRANSITIONAL BILINGUAL INSTRUCTION PROGRAM (TBIP) REPORT TO THE LEGISLATURE 15 (2019), https://www.k12.wa.us/sites/default/files/public/migrantbilingual/pubdocs/ADA-2019-02-UPDATE-TBIP.pdf.

[8] Data from Administrative Office of the Courts, Languages Reported to the Court Interpreter Reimbursement Program (2019). While this dataset only captures data from about 44 courts, those courts are well-distributed across the Washington, suggesting that the number of languages represented captures nearly all the languages we see in courts in Washington.

different languages and 1,000 different dialects are present.[9] This language diversity data is lost when we rely on a single source of data, such as the U.S. Census, and doing so leaves our courts unprepared to meet the language needs of all Washingtonians.

A. Federal law

People with LEP have an implied right to an interpreter in criminal proceedings through the Fifth, Sixth, and Fourteenth Amendments' guaranteed right to a fair trial, right to be present at trial, right to confront witnesses, right to effective assistance of counsel, and the right to due process.[10] For example, courts have found fundamental fairness provided by the Sixth Amendment required the litigant to be present at trial and denial of interpreter services equated to denial of the defendant's "presence."[11]

Non-discrimination protections in Title VI of the Civil Rights Act of 1964, (Title VI) and the Omnibus Crime Control and Safe Streets Act of 1968, provide that no person shall "on the ground of race, color or national origin, be excluded from participation in, denied benefits of, or subject to discrimination under any program…receiving Federal" financial assistance.[12] The non-discrimination protections apply to courts and court related services receiving federal funding.[13] Additionally, the services are prohibited from being administered in such a fashion as to effect subjecting recipients to discrimination based on national origin.[14] The Supreme Court, in *Lau v. Nichols*, 414 U.S. 563 (1974) interpreted regulations to hold that Title VI prohibits conduct that has a disproportionate effect on persons with LEP because such conduct constitutes national origin discrimination. In *Lau*, a school district was required to take reasonable steps to provide

[9] WASH. STATE COMM'N ON ASIAN PAC. AM. AFFS. (2019), https://capaa.wa.gov/?s=42+different.
[10] AM. BAR ASS'N, STANDARDS FOR LANGUAGE ACCESS IN COURTS 22 (2012), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf.
[11] *See State v. Gonzalez-Morales,* 138 Wn.2d 374, 377, 979 P2d 826 (1999). *See United States ex rel. Negron v. State,* 434 F.2d 386, 389 (2d Cir. 1970).
[12] 34 U.S.C. § 10228 (c)(1).
[13] AM. BAR ASS'N, *supra* note 10, at 24.
[14] *See* 28 C.R.F. §§ 42.104(b)(2), 42.203(e).

students of Chinese origin, who had LEP, with a meaningful opportunity to participate in educational programs.

Additionally, in 2000, Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency," was issued to require federal agencies to publish guidance on how recipients of federal assistance from the agency will provide meaningful access to persons with LEP. Pursuant to Executive Order 13166, the U.S. Department of Justice (DOJ) issued, "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons,"[15] acknowledging the use of qualified interpreter services in legal proceedings. In 2010, DOJ issued what is known as the "Courts Letter," indicating DOJ's position that Title VI requires the delivery of free, timely, qualified interpreter services in all legal proceedings, criminal or civil, and in interactions inside and outside of the courtroom.[16]

While much of the legal focus regarding LEP language access focuses on access to interpretation **in** the courtroom, the DOJ notes that individuals with LEP need access to language services in additional contexts, including when interacting with clerks' offices; at self-help centers; reading signage; accessing court websites; and in interactions with court-appointed counsel, psychologists, mediators, Guardian ad litem (GALs) and Court Appointed Special Advocates (CASAs),[17] and other court personnel.[18]

[15] 67 Fed. Reg. at 41455 (2002).
[16] Thomas E. Perez, *Language Access Guidance Letter to State Courts from Assistant Attorney General Thomas E. Perez*, LIMITED ENGLISH PROFICIENCY (Aug. 16, 2010), https://www.lep.gov/final_courts_ltr_081610.pdf.
[17] "Court Appointed Special Advocates (CASAs) and Guardians Ad Litem (GALs) are appointed by judges to represent children's best interests in child abuse and neglect cases. CASAs are trained volunteers; GALs may be attorneys or trained volunteers." *CASAs and GALs*, Child Welfare Info. Gateway, U.S. Dep't of Health & Hum. Servs., https://www.childwelfare.gov/topics/systemwide/courts/specialissues/casa-gal/. A GAL can be paid or serve as a volunteer GAL, and most volunteer GALs serve as CASAs in dependency actions. *Guardian ad Litem (GAL)*, WASH. CTS., https://www.courts.wa.gov/committee/?fa=committee.display&item_id=314&committee_id=105.
[18] U.S. DEP'T OF JUST., LANGUAGE ACCESS IN STATE COURTS (2016).

B. Washington State law

The Washington State Law Against Discrimination (WLAD) provides a right to be free from discrimination because of national origin. WLAD includes the right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement.[19] Government offices are places of public accommodation.[20]

In addition to the WLAD, Washington State Law provides specific legal authority for the delivery of interpreter services in the court context to individuals with LEP under chapter 2.43 RCW. Washington State secures the rights of non-English speaking persons to full protection in legal proceedings through the assistance of a qualified interpreter.[21] Every non-English-speaking person in a legal proceeding is entitled to the services of a court-appointed, qualified interpreter.[22] A non-English speaking person is defined as a person "who cannot readily speak or understand the English language."[23] During a legal proceeding, a judge is to appoint a qualified interpreter in the following situations:

> [W]hen a non-English-Speaking person is a party to a legal proceeding, or is subpoenaed or summoned by an appointing authority or is otherwise compelled by an appointing authority to appear at a legal proceeding, the appointing authority shall use the services of only those language interpreters who have been certified by the administrative office of the courts, unless good cause is found and noted on the record by the appointing authority.[24]

The right to a qualified interpreter may not be waived unless the person with LEP requests a waiver and the appointing authority determines on the record that the waiver was made knowingly, voluntarily, and intelligently.[25] While not binding on Washington courts, it is

[19] R CW 49.60.030.
[20] *See* WASH. STATE OFF. OF THE ATT'Y GEN., CIVIL RIGHTS RESOURCE GUIDE 22 (2015), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/CRR-Guide.pdf.
[21] RCW 2.43.10.
[22] RCW 2.43.030.
[23] RCW2.43.020.
[24] RCW 2.43.030(b).
[25] RCW 2.43.060.

instructive to know that the 10th Circuit Court of Appeals found that waiver of interpreter services is not a decision for the LEP defendant's attorney or the court: it is the defendant's decision alone.[26]

Washington State has invested in interpreter services for courts through the following efforts: 1) the work of the AOC court interpreter program, which oversees the certification of court interpreters for spoken languages;[27] 2) the Washington State Interpreter Commission with a mission to "ensure equal access to justice and to support the courts in providing access to court services and programs for all individuals regardless of their ability to communicate in the spoken English language";[28] and 3) through local court efforts including language access plans and specialized interpreter services departments providing litigants with interpreters throughout the process. However, these systems vary by court.

For individuals with LEP, RCW 2.43.030 requires courts to appoint a certified or qualified spoken language interpreter to assist the person throughout the proceeding. Washington State's AOC has been a leader in ensuring interpreters working in the courts are qualified to do so. Washington AOC's Interpreter Program oversees testing and certification of spoken language interpreters qualified to work in Washington courts, provides some training to interpreters seeking court credentials, and provides training to judicial officers.[29]

Additionally, the State Legislature enacted RCW 2.43.090 in 2008, which required all trial courts in the State of Washington to, "develop a written language assistance plan to provide a framework for the provision of interpreter services for non-English-speaking persons accessing the court system in both civil and criminal legal matters."[30] In regard to the provision of

[26] *United States v. Osuna*, 189 F.3d 1289 (10th Cir. 1999).
[27] *Washington State Court Interpreter Program*, WASH. CTS., https://www.courts.wa.gov/programs_orgs/pos_interpret.
[28] *Interpreter* Commission, WASH. CTS., https://www.courts.wa.gov/programs_orgs/pos_interpret/index.cfm?fa=pos_interpret.display&fileName=interpreterCommission.
[29] *Washington State Court Interpreter Program*, WASH. CTS., https://www.courts.wa.gov/programs_orgs/pos_interpret.
[30] RCW 2.43.090(1).

interpreter services for court services, hearings, or court-managed programs, the language assistance plans must contain, at a minimum, procedures addressing the following:

- Identification and assessment of the language needs of non-English-speaking persons;
- Process for the appointment of interpreters on behalf of those parties;
- Notification to court users of the right to and availability of interpreter services prominently displayed in the courthouse in the five foreign languages that U.S. Census data indicates are predominate in the jurisdiction;
- The court's process for providing timely communication with non-English speakers by all court employees who have regular contact with the public, and meaningful access to court services, including access to services provided by the clerk's office;
- Procedures for evaluating the need for translation of written materials, prioritizing those translation needs, and translating the highest priority materials (taking into account the frequency of use of forms by the language group, and the cost of orally interpreting the forms);
- The provision of training to judges, court clerks, and other court staff on the requirements of the language assistance plan and how to effectively access and work with interpreters; and
- A process for ongoing evaluation of the language assistance plan and monitoring of the implementation of the language assistance plan.

Section 2 of the above cited statute requires that each court, when developing its language assistance plan, consult with judges, court administrators and court clerks, interpreters, and members of the community, such as domestic violence organizations, pro bono programs, courthouse facilitators, legal services programs, and/or other community groups whose members speak a language other than English.

Not all courts have created language access plans, despite the requirement in RCW 2.43.090; and some courts that have adopted language access plans have not updated them since 2009.[31] In an effort to assist courts in adopting or updating their language access plans, in 2017, the AOC and the Supreme Court Interpreter Commission released an updated guidance document about language access plan policies, requirements, and procedures. Entitled "Deskbook on Language Access in Washington Courts,"[32] it provides guidance for courts to create and implement their policies and procedures according to the listed requirements in statute (See RCW 2.43.090(1)(a)-(g)). The Deskbook also contains a model language access plan template for courts to use to notify the public of the court's procedures for providing language access services. The specific nature of how services are provided varies from county to county, especially during the COVID-19 pandemic in which there are more proceedings in which interpreters are situated remotely. Both in the short-term, and for those courts planning to retain remote hearings and remote interpreter services in some fashion, courts will need to update their plans to reflect those service changes.

In addition to these state laws, Washington State has undertaken various efforts aimed at improving access to services for LEP individuals. Among those efforts is the 2017 Executive Order, "Reaffirming Washington's Commitment to Tolerance, Diversity, and Inclusiveness," wherein Governor Inslee reaffirms the right to be free from discrimination based on race, color, and national origin and acknowledges the positive impact that immigrants have on our state. The Executive order notes, "one in every seven people in this state are immigrants," and immigrants "…are an integral part of our communities and workforce."[33] In 2020, Governor Inslee adopted

[31] National data suggest that there may be geographic disparities in development of language access plans. A 2006 national survey of 158 courts conducted by The National Center for State Courts found almost 60% of courts in population centers had a language assistance plan, while only 26% of courts in rural areas had such a plan. BRENDA K. UEKERT ET AL., THE NAT'L CTR. FOR STATE CTS., SERVING LIMITED ENGLISH PROFICIENT (LEP) BATTERED WOMEN: A NATIONAL SURVEY OF THE COURTS' CAPACITY TO PROVIDE PROTECTION ORDERS 4 (2006), https://www.ojp.gov/pdffiles1/nij/grants/216072.pdf.

[32] ADMIN. OFF. OF THE CTS., WASH. CTS., DESKBOOK ON LANGUAGE ACCESS IN WASHINGTON COURTS (2017), http://www.courts.wa.gov/programs_orgs/pos_interpret/content/pdf/StateLAP.pdf.

[33] Exec. Order No. 17-01, Governor Jay Inslee (2017). According to the Migration Policy Institute, in 2019, Washington's immigrant population was approximately 1,133,000, or 14.9% of the total population, with slightly over half (51.9%) listed as female. *Immigrant Population by State, 1990-Present*, MIGRATION POL'Y INST. (2019), https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-state-1990-present. The U.S. Census Bureau reported similar demographic data for 2019, estimating 14.9% of Washington State residents, or 1,132,834 residents, are foreign born. *Selected Social Characteristics in the United States*, U.S CENSUS BUREAU (2021), https://data.census.gov/cedsci/table?q=washington%20foreign%20born%20&g=0400000US53&tid=ACSDP1Y2019.

the "Washington State Novel Coronavirus (COVID-19) Response Language Access Plan," acknowledging our "obligation to communicate in ways that are accessible and culturally-and linguistically relevant."[34] Within the COVID-19 Response Language Access Plan, Governor Inslee reiterates the requirement that state agencies are expected to provide "language assistance services, including translated materials."[35]

C. The interaction of communication barriers, immigration, and gender

The interaction of court access, including language access, with matters impacting gender and immigration is complex. The Migration Policy Institute (MPI) reports that while immigrants to the U.S. from Mexico and Central America are more likely to be male, immigrants from the Caribbean, South America, Asia, and Europe are more likely to be female. They report that female immigrant flows from the Philippines, Dominican Republic, China, and Nigeria to the U.S. have been increasing, which might raise the demand for less common languages spoken by populations in these countries, particularly those from rural and Indigenous communities.[36]

In addition to language barriers, female immigrants face additional factors that may lead to disparities in access to the courts. The MPI reports that immigrant women are more likely than native-born women to have lower education attainment, which could make it harder to access written translations of court documents and forms. Also, immigrant women are more likely than U.S.-born women to work in low-wage service industry jobs and to be living in poverty.[37] The National Women's Law Center notes that jobs in the service sector often use last-minute, inflexible scheduling and give workers little or no control over their work schedules.[38] These

DP02&hidePreview=true. Between 2000 and 2017, the U.S. experienced a 72.5% population increase in foreign-born individuals, as compared to only a 20.2% increase for U.S.-born individuals. Evidently, immigrant populations have increased significantly over the last 20 years. *Washington: Demographics & Social*, MIGRATION POL'Y INST. (2019), https://www.migrationpolicy.org/data/state-profiles/state/demographics/WA.

[34] WASHINGTON STATE NOVEL CORONAVIRUS (COVID-19) RESPONSE LANGUAGE ACCESS PLAN (2020). https://www.coronavirus.wa.gov/sites/default/files/2020-06/LanguageAccessPlan_0.pdf.

[35] *Id.*

[36] JEANNE BATALOVA, IMMIGRANT WOMEN AND GIRLS IN THE UNITED STATES IN 2018 11 (2020), https://www.migrationpolicy.org/article/immigrant-women-and-girls-united-states-2018.

[37] *Id.*

[38] LIZ WATSON, LAUREN FROHLICH & ELIZABETH JOHNSTON, COLLATERAL DAMAGE: SCHEDULING CHALLENGES FOR WORKERS IN LOW-WAGE JOBS AND THEIR CONSEQUENCES (2014), https://www.nwlc.org/sites/default/files/pdfs/collateral_damage_scheduling_fact_sheet.pdf.

factors may create financial and time barriers to accessing the courts, as will be discussed below. See also "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for more on the financial barriers to accessing the courts.

Research also shows that immigrant women experience higher rates of domestic and sexual violence compared to U.S.-born women.[39] The elevated rate of domestic and sexual violence among immigrant women, communication barriers that some immigrant women face as described throughout this chapter, and unique barriers to reporting experienced my immigrant women (e.g., fear of deportation[40]) likely amplify disparities in court access for immigrant women. See "Chapter 8: Consequences of Gender-Based Violence: Domestic Violence and Sexual Violence" for further analysis on the intersection of immigration status and gender-based violence. The findings in Chapter 8 also show that women, particularly Black, Indigenous and women of color, and LGBTQ+ individuals are disproportionally impacted by sexual violence and IPV. This continues to paint a picture of cumulation of inequities for people with multiple marginalized identities.

D. Financial barriers

Under Washington law, courts must appoint an interpreter for litigants who are LEP in both civil and criminal matters; however, payment for the interpreter services is a separate issue. Under RCW 2.43.040, when a litigant initiates a legal matter, as is the case in many civil cases, the court may make the litigant pay for the cost of the interpreter services unless the litigant is indigent. This is known as a fee waiver or "in forma pauperis" process under RCW 2.43.040. However, this has been found to be unconstitutional by Washington case law. In *State v. Marintorres*, the defendant successfully challenged an assessment of the costs of his Spanish-speaking interpreter under RCW 2.43.040(4) and 10.01.160(2) on equal protection grounds.[41] He noted that chapter 2.42 RCW, which deals with providing interpreters for hearing impaired parties, requires the

[39] *SART Toolkit Section 6.12*, NAT'L SEXUAL VIOLENCE RES. CTR., https://www.nsvrc.org/sarts/toolkit/6-12.
Bushra Sabri et al., *Intimate Partner Homicides in the United States, 2003-2013: A Comparison of Immigrants and Nonimmigrant Victims*, 36 J. INTERPERSONAL VIOLENCE 4735, 4735 (2018).
[40] TAHIRIH, IMMIGRANT SURVIVORS FEAR REPORTING VIOLENCE (2019), https://www.tahirih.org/wp-content/uploads/2019/06/2019-Advocate-Survey-Final.pdf.
[41] 93 Wn. App. 442, 451–52, 969 P.2d 501 (1999).

county to appoint and pay for a qualified interpreter without any provision that the expense of the interpreter is a taxable cost. The *Marintorres* court agreed that there was a violation of equal protection, reasoning that this distinction in the treatment of hearing-impaired and non-English speaking criminal defendants could not satisfy even "rational basis" review.[42]

This practice of charging non-indigent LEP litigants the cost of interpreter services also conflicts with federal DOJ guidance that such practices violate Title VI requirements to provide free interpreter services. Long standing DOJ policy directives advise state courts which are recipients of federal financial assistance that imposing fees on LEP parties for interpreter services to allow them to access court hearings and services violates their Title VI obligation to provide meaningful access.[43] Because of this guidance, many courts have stopped using the fee waiver process for interpreter services. King County Superior Court was investigated by DOJ for this practice and has since stopped using the fee waiver process for court interpreter costs.[44] Not all courts have abandoned the fee waiver process, however, and the differing practices around the state lead to confusion and create barriers for LEP individuals. At least one county Superior Court takes the position that RCW 2.43.040 (3) directs the court to charge for civil case interpretation costs and it does not have the authority to waive the charge, even in the face of a federal policy prohibiting the recipient from doing so if the recipient receives Title VI or Safe Streets Act funding. This puts courts in a quandary: either 1) comply with their interpretation of RCW 2.43.040 (3) and charge for civil case interpretation, which risks a chilling effect on LEP persons who need protection orders and a risk to federal funds impacting other court programs as well as county programs funded from the same federal grant, or 2) provide free interpreter services for civil cases and risk being out of compliance with the statute. See "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for more information on the populations who are most impacted by poverty, and the barriers to court created by court user fees including: women (particularly Black,

[42] *Id.* at 451; *State v. Diaz-Farias,* 191 Wn. App. 512, 526–27, 362 P.3d 322 (2015).
[43] U.S. DEP'T OF JUST., CIV. RTS. DIV., COMMUNICATION WITH COURTS REGARDING LANGUAGE ACCESS, https://www.justice.gov/file/1250731/download.
[44] J. MICHAEL DIAZ, RE: LETTER OF RESOLUTION - REVIEW OF INTERPRETIVE SERVICES IN KING COUNTY SUPERIOR COURT; DOJ # 171-82-22 (2015), https://www.lep.gov/sites/lep/files/resources/20151201_KCSC_Letter_of_Resolution.pdf.

Indigenous and women of color), and transgender, non-binary, and gender non-conforming individuals.

E. Limited access to spoken language interpreters

The limited availability of court certified or registered spoken language interpreters in some languages and areas of the state may be a barrier to providing timely access to legal proceedings for individuals with LEP. If a court does not have an interpreter qualified in a given language in their county or in a nearby county, they will need to bring an interpreter in from another area of the state.[45] This can lead to a delay in accessing courts.

Scheduling interpreters can be a challenge because of the way court calendars are organized. Members of the Washington State Supreme Court Interpreter Commission provided the following overview of this challenge, based on anecdotal experience: Courts generally schedule interpreters in two ways, either by calendaring the case on the usual docket and requesting the interpreter for the block of time likely needed, or by having a separate interpreter calendar where cases needing interpreter services are scheduled. Where the case is scheduled on the docket, and not on an interpreter calendar, courts tend to schedule interpreters for blocks of time. This requires some guess work around the likely length of time that a hearing will last. In the past, courts would call the cases that utilized interpreters at the start of the docket to ensure that the case could be heard before the interpreter had to leave. However, some courts no longer prioritize hearing cases with interpreters at the start of the docket. Thus, an interpreter scheduled for a two-hour time block at the beginning of the docket may leave before the litigant's case is called, requiring the case to be rescheduled. Cases scheduled on the "interpreter calendar," may experience a longer wait time to get to a hearing than their counterparts who do not need interpreter services.

Individuals with LEP seeking relief through "ex-parte" proceedings[46] may find the court unprepared to provide them with communication access services. By the nature of the hearing,

[45] *State v. Aljaffar*, 198 Wn. App. 75, 392 P.3d 1070 (2017).
[46] *Ex parte* proceedings are legal proceedings conducted without notice and the presence of other parties impacted by the proceeding. Generally, *ex parte* proceedings are allowed only when a party requires urgent relief that cannot wait until the opposing party is informed of such a request. *See Superior Court Statistical Reporting*

"ex-parte" proceedings are unscheduled. The difficulty for courts in these situations is providing timely interpreter services to allow access to litigants seeking relief, such as a Domestic Violence Protection Order. For spoken language services, courts can use telephonic interpreter services for these interactions, although it is recognized best practice to provide in-person interpreter services for evidentiary hearings.[47] Some courts also have on-site staff interpreters that may be available for unscheduled hearings, but many do not. Civil legal aid attorneys in Washington report advising pro se clients about seeking Domestic Violence Protection Orders, only to have the pro se party appear at *"ex-parte"* and the court not be able to communicate with them. An example of this is where, even when an advocate attempted to provide advance notice by calling the clerk's office to alert them for the need for an interpreter, the response was that they could not request an interpreter without first having a case number for the matter. Meaning, the pro se individual needed to appear and file the case without an interpreter in order for the clerk to request an interpreter. Historically, if the individual has a Domestic Violence advocate with them, some courts rely on the advocate to interpret, even though they are not qualified to do so. This places advocates in a difficult position since the person they are advocating for needs the protection order and if they do not interpret, the hearing might be postponed. However, as a result of the passage of E2SHB 1320 during the 2021 Washington legislative session, courts will be making extensive changes to how LEP individuals seeking Domestic Violence Protection Orders will be able to access the courts, including: 1) translation of court forms in more languages, 2) the ready assignment of interpreters to victims in all aspects of the investigation and legal proceedings associated with their protection requests, and 3) the provision of private meeting spaces in court houses for victims and interpreters to meet with advocates and prosecutors.[48] The statute explicitly will not allow courts to have an advocate interpret for the client in a hearing, nor allow the same interpreter to interpret for both parties when not on the record.[49]

Manual, WASH. CTS., https://www.courts.wa.gov/jislink/index.cfm?fa=jislink.codeview&dir=stats_manual&file=ct1expar.

[47] See GR 11.3 Remote Interpretation

[48] ENGROSSED SECOND SUBSTITUTE H.B. 1320, 64th Leg., Reg. Sess. (Wash. 2015).

[49] *Id.*

Timely access to interpreting services is particularly challenging in the case of languages of lesser diffusion—those languages for which there are not many speakers in a given area or jurisdiction. Washington courts certify spoken-language court interpreters in 13 languages and registers interpreters in approximately 90 additional languages.[50] These credentials provide some information to judicial officers about the interpreter's language and interpretation ability. Additionally, Washington courts have a searchable database of credentialed interpreters for these languages. However, as noted above, OSPI reports that 234 different home languages are represented in Washington's public schools.[51] As the number of languages spoken at home by families and their children exceed the number of languages credentialed by the AOC, there exists the real world possibility that some court users who need interpretation into a language with no court-certified or registered interpreters available will experience delays in getting language access services while the courts seek individuals who can perform the language access assistance needed.

When a person with LEP comes in contact with the court and does not communicate in one of the registered or certified languages, courts struggle with finding an interpreter. A 2017 survey of Washington State courts' experiences providing court interpreters found that, while Spanish was reported to be the most interpreted language in courts, over a third of courts surveyed reported providing interpreter services for more than ten different languages, "with one court reporting 162 languages."[52] In the same survey, 59% of courts reported that they were often unable to get timely interpretation services, especially for languages of lesser diffusion. This was especially difficult in the case of jury trials or next day hearings. One-fifth (21%) of courts reported having used non-certified interpreters to fill the gap, a practice that jeopardizes LEP participants'

[50] *Registered Interpreters*, WASH. CTS. (2020), https://www.courts.wa.gov/programs_orgs/pos_interpret/index.cfm?fa=pos_interpret.display&fileName=registeredInterpreters; *Certified Interpreters*, WASH. CTS. (2020), https://www.courts.wa.gov/programs_orgs/pos_interpret/index.cfm?fa=pos_interpret.display&fileName=certifiedInterpreters.

[51] FINNEGAN, MOORE & WEAVER RANDALL, *supra* note 7.

[52] JEANNE ENGLERT, FUNDING COURT INTERPRETERS: A SURVEY REPORT ON COURT INTERPRETER SERVICES AND FUNDING NEEDS IN WASHINGTON STATE (2018), https://www.courts.wa.gov/programs_orgs/pos_bja/isftf/Funding%20Court%20Interpreters%202018.pdf.

understanding of proceedings, as an interpreter without certification may not have the specific legal vocabulary needed to convey the substance of the proceedings.[53]

As immigration patterns change, courts may receive more requests for specific languages that were not previously in as much demand in their jurisdiction. For example, in its language access plan, the Kitsap County Court identified the current highest need languages to be Spanish, Mam, American Sign Language (ASL), Kanjobal and Vietnamese; but noted that due to demographic shifts, future languages needed include Gujarati, Chuukese, and Swahili.[54] This can create a barrier for individuals with LEP as local courts work to identify appropriately qualified interpreters and establish contracts with them to bring them to court work. For languages in which there is no certification or registration process and directory, courts are left to identify individual interpreters on their own or through their networks. Therefore, immigrants and refugees who speak languages of lesser diffusion may face disparities in access to the legal system. LEP prevalence varies by language. While Spanish is the most common language spoken in Washington State after English, it is only spoken by 30% of Washington's LEP population, followed by Chinese (Mandarin and Cantonese), Vietnamese, Korean, and Russian.[55] The Migration Policy Institute reports that 41.5% of Washington State's foreign-born population has LEP.[56] As shown in Table 1, Vietnamese speakers have the highest proportion of LEP—in other words, nearly 60% of Washington residents who speak Vietnamese at home speak English less than 'very well.' Individuals from these language communities are more likely to face language barriers when accessing the courts:

Table 1. Percent of LEP by Language Community, Washington State, 2018

Language spoken at home	% of speakers LEP
Vietnamese	59.8%
Thai/Lao/Tai-Kadai languages	50.4%
Korean	49.4%

[53] *Id.*
[54] Kitsap County District Court, *Language Access Plan* (2018), https://www.kitsapgov.com/dc/Documents/Kitsap%20District%20Court%20LAP%20DeskBook%202018.pdf.
[55] PANDYA, MCHUG & BATALOVA, *supra* note 6.
[56] MIGRATION POLICY INSTITUTE, *Washington State Immigration Data Profile* (2020), https://www.migrationpolicy.org/data/state-profiles/state/language/WA.

Hmong	48.3%
Chinese (Mandarin and Cantonese)	47.6%
Amharic/Somali/Afro-Asiatic	45.3%
Khmer	44.4%
Russian	41.6%
Persian	40.2%
Arabic	38.6%

Footnotes for Table 1:

Source: Data from 2018 American Community Survey, U.S. Census Bureau

The challenge in providing qualified interpreters is not restricted to languages of lesser diffusion, however. A nation-wide needs assessment by the National Center for State Courts (NCSC) noted that access to interpreters for criminal court cases was generally consistent, but much less consistent for civil court cases. The National Center for State Courts notes that the consequences of not having an interpreter could be particularly serious in civil cases which involve incidents of domestic violence, as "a full understanding of the scope of violence is critical to decisions in these cases, in which the safety and well-being of victims and children are potentially at risk."[57] A 2018 survey of Washington domestic violence/sexual assault advocates revealed high unmet need for interpreters, with nearly a third of all advocates noting that it is "not easy" to obtain interpreter services in their court. Nearly half of respondents from majority-rural Region 2 counties responding that obtaining interpreter services was "not easy."[58] They reported that when interpreters were not available, clients had to rely on non-certified interpreters, or wait for an interpreter to be found. In the instance of waiting for an interpreter, this can lead to a delay in accessing courts. In the instance of using non-certified interpreters, advocates note that inconsistencies or inaccuracies in interpreting in these contexts can have serious negative

[57] CTR. FOR CT. INNOVATION, EFFECTIVE COURT COMMUNICATION: ASSESSING THE NEED FOR LANGUAGE ACCESS SERVICES FOR LIMITED ENGLISH PROFICIENT LITIGANTS IN DOMESTIC VIOLENCE, SEXUAL ASSAULT, DATING VIOLENCE, AND STALKING CASES (2015), https://www.courtinnovation.org/sites/default/files/documents/LEP%20Needs%20Assessment%20Report_FINAL.pdf.

[58] JEANNE ENGLERT, FUNDING COURT INTERPRETER SERVICES IN WASHINGTON COURTS: A SUMMARY OF FEEDBACK ON COURT INTERPRETER SERVICES AND FUNDING NEEDS (2019), https://www.courts.wa.gov/programs_orgs/pos_bja/isftf/Interpreter%20compiled%20feedback%20report%20final.pdf.

consequences for their clients.[59] However, even qualified and certified interpreters may struggle with sensitive material in some cases such as those concerning domestic violence or sexual assault, which might require challenging or sensitive vocabulary, have a higher need for confidentiality, and could result in experiences of vicarious trauma for the interpreter. Not all interpreters feel prepared to handle domestic violence or sexual assault cases, and training resources are provided to them to handle such types of proceedings.[60] Specialized training in these topics could help interpreters be more prepared for these challenging situations.[61] See "Chapter 8: Consequences of Gender-Based Violence: Domestic Violence and Sexual Violence" for more information on the gendered impacts of domestic violence and sexual assault. These are impacts that can be exacerbated for individuals with LEP.

Attorneys report that during the COVID-19 pandemic, access to interpreters in Washington State for communication with in-custody clients has become even more difficult, as there are few spaces large enough to accommodate three people socially distancing in jails and prisons, and most jail phone systems do not allow three-way calling for telephonic interpretation.[62] Access to interpreters has suffered in general during the pandemic, as only a quarter of surveyed defense attorneys agree that interpreters are as available during COVID-19 as they were before the pandemic.[63] In King County, "attorneys have often resorted to calling an interpreter and holding their phone or laptop up to the glass where they meet their clients in jail," when interpreters are unavailable or unwilling, due to unsafe conditions, to physically enter the jail.[64]

There is reason to believe that limited access to interpreters may have a disproportionate impact on female court users. As noted previously, female immigrants are more likely than their native-

[59] *Id.*
[60] *See* Cristina Helmerichs, *Vicarious Trauma and Interpreters*, AM. TRANSLATORS ASS'N (Feb. 13, 2020), http://www.ata-divisions.org/ID/vicarious-trauma-and-interpreters; *see also* CLAC RESOURCE LIST FOR COURT INTERPRETER EDUCATION ON VICARIOUS TRAUMA (2017) https://umtia.org/resources/Documents/2%20%20201705%20CLAC%20Vicarious%20Trauma%20Resources.pdf.
[61] CTR. FOR CT. INNOVATION, *supra* note 57.
[62] KATRIN JOHNSON & JASON SCHWARTZ, DEFENDING CLIENTS IN THE COVID-19 ENVIRONMENT: SURVEY RESULTS FROM PRIVATE AND PUBLIC DEFENSE COUNSEL (2021) (a total of 296 defense attorneys from 34 counties in Washington State responded to a survey in December 2020 about the impact of COVID-19 on their work).
[63] *Id.* at 12.
[64] David Kroman, *COVID-19 Delays Justice for King County Inmates who Need Interpreters*, CROSSCUT (Nov. 18, 2020), https://crosscut.com/news/2020/11/covid-19-delays-justice-king-county-inmates-who-need-interpreters.

born peers to work low-wage, service sector jobs. The National Women's Law Center notes that jobs in this industry often employ last-minute scheduling and give employees little flexibility or control over their work schedules.[65] For female court users needing an interpreter, delays or rescheduling of court hearings may be particularly problematic given the challenges they may face in making time to come to court.

F. Assessment of need for language services

How do judges know if a person with LEP needs an interpreter? The American Bar Association (ABA) points out that the level of English proficiency needed for daily tasks is likely very different from the level of English proficiency needed for "meaningful participation in court proceedings."[66] An individual may be able to respond to basic biographical questions, but struggle to understand legal terms and complex courtroom procedures, especially under what may be stressful conditions. Assessing language proficiency requires specialized training that most judges and courtroom staff do not possess. Because assessing language proficiency is a task that requires training in language acquisition and language proficiency assessment, training that is not typically within the purview of judges, attorneys, and court personnel, the American Bar Association recommends that people with LEP be allowed to self-identify as needing language access services and courts should presume a request for interpreter services is bona fide.[67] Washington State law does provide that LEP litigants may waive their right to an interpreter, only after the appointing authority determines, on the record, that the waiver has been made knowingly, voluntarily, and intelligently.[68]

G. Interactions with court clerks and other personnel

Many of the interactions between litigants and parties and court personnel occur outside the courtroom, and in a variety of programs. People go to the court clerk to file pleadings, to initiate a court matter, to seek legal remedy or protections, and to respond to ongoing matters. One of the potential barriers for individuals with LEP in interacting with a court clerk is the unscheduled

[65] WATSON, FROHLICH & JOHNSTON, *supra* note 38.
[66] AM. BAR ASS'N, *supra* note 10.
[67] *Id.*
[68] RCW 2.43.060.

nature of those interactions. Even in courts with language access plans, those plans do not generally govern the operations of the clerk's office as they are independent from the operations of the court. The requirement to provide meaningful access to the services of a court clerk's office is clear. According to the DOJ:

> …the meaningful access requirement extends to court functions that are conducted outside the courtroom. Examples of such court-managed offices, operations, and programs can include information counters; intake or filing offices; cashiers, and other similar offices, operations, and programs. Access to these points of public contact is essential to the fair administration of justice, especially for unrepresented LEP persons. DOJ expects courts to provide meaningful access for LEP persons to such court-operated or managed points of public contact in the judicial process, whether the contact at issue occurs inside or outside the courtroom.[69]

For example, the Pierce County Language Access Plan notes that when interpreters are not busy in courtroom proceedings, they may be available to assist in the clerk's office, but it's unclear what happens when someone needs to access the clerk's office otherwise.[70] It might be true that some courts work with the court clerk to establish procedures for how persons with LEP will access the functions of the clerk's office, but it is unclear how extensive those coordinated practices are in courts around Washington. Little is known about the interpreter services provided at clerks' offices, outside of anecdotal evidence that some offices use staff bilingual in English and Spanish, and that some court clerks' offices may have access to telephonic interpreter services to allow them to communicate with any person with LEP coming into their offices. Advocates report incidents around the state where LEP and d/Deaf pro se individuals, sometimes seeking Domestic Violence Protection Orders, are unable to communicate with the clerk's office when they attempt to file pleadings and schedule hearings.

[69] DEP'T OF JUST., COMMUNICATION WITH COURTS REGARDING LANGUAGE ACCESS, https://www.justice.gov/file/1250731/download.
[70] JOVI LEE, LANGUAGE ACCESS PLAN OF PIERCE COUNTY COURTS (2018), https://www.co.pierce.wa.us/DocumentCenter/View/68593/2018-Language-Access-Plan---3-26-2018?bidId=.

GALs or CASAs are commonly appointed in family law matters involving child custody determinations. They have the obligation to represent the best interests of the person for whom they are appointed. GALs are required to become informed about the facts of the case,[71] and to do so are often required to conduct interviews with relevant family members.[72] Communication barriers could impact the extent to which GALs are able to fully interview family members, negatively impacting the thoroughness of the final report or recommendation to the court, and the court may not be aware of the underlying barriers that may be influencing the accuracy of the report. Additionally, if only one party has LEP, such communication barriers could represent an important inequity in access to justice. To avoid this, the GAL must assess the level of English of the clients to determine whether an interpreter is needed and follow the steps to schedule an interpreter for needed interviews. Given the challenges in obtaining certified interpreters for courtroom procedures noted above, this could lead to delays in the process or even potentially fewer meetings with parties with LEP in order to meet court deadlines. State law allows for compensation to be provided to cover administrative costs associated with conducting a GAL investigation, which includes interpreter services for GALs.[73] Therefore, in order for a GAL to conduct a thorough investigation in cases where one or more parties have LEP, the GAL must be familiar with the process to work with an interpreter. However, the state GAL Guidebook does not once make mention of the use of interpreters or how GALs are to identify and communicate with families with LEP.[74] There is a lack of evidence regarding actual practice of GALs regarding clients with LEP statewide.

Additionally, the National Center for State Courts reports that many states note a need for language services in the office of the prosecutor, public defense, civil attorneys, and for court-ordered service providers. Court-ordered service providers responding to the survey from a 2013 nation-wide needs assessment reported receiving high numbers of LEP referrals and being unable

[71] GAL Rule 2(g).
[72] TITLE 26 FAMILY LAW GUARDIAN AD LITEM GUIDEBOOK 26 (2008), https://www.courts.wa.gov/content/manuals/domViol/appendixE.pdf.
[73] "Additional compensation may be allowed for other administrative costs, including . . . other services not provided by the guardian or limited guardian." RCW 11.92.180. "Compensation will be fixed by the court." *Id.*
[74] TITLE 26 FAMILY LAW GUARDIAN AD LITEM GUIDEBOOK, *supra* note 72.

to serve them.[75] Illustrative of the barriers in these settings is a 2021 settlement agreement between the DOJ and Whatcom County Public Defense and Whatcom County Sheriff's Office,[76] finding that both programs failed to provide appropriate interpreter services for a d/Deaf individual. While not directly applicable to LEP interpreter services, it is likely that the barriers identified in this settlement agreement are similar for LEP individuals.

H. Court observers and family participation

In the context of language access services for LEP individuals, one category of individuals often overlooked is the court observer, including family and friends of a criminal defendant, who themselves are LEP. In criminal cases, it is not uncommon for a defendant or victim's family and friends to be present during trial or sentencing to observe the proceedings and support the defendant. Article 1, Section 10 of the State Constitution provides that:

> [j]ustice in all cases shall be administered openly, and without unnecessary delay." In *Allied Daily Newspapers of Wash. v. Eikenberry*, the Washington State Supreme Court further defined the open court mandate, saying, "We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice. Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.[77]

This raises concerns regarding the policy of Washington Courts to be open courts when LEP individuals do not have access to be a court observer because courts do not generally provide interpreter services for LEP individuals in this capacity. Courts could take guidance for the provision of interpreter services to d/Deaf court observers, jurors, and companions of a litigant, even when that litigant is not d/Deaf or in need of interpreter services.

[75] CTR. FOR CT. INNOVATION, *supra* note 57.
[76] *DOJ and Whatcom County Resolve Multiple Complaints Regarding Violations of the Americans with Disabilities Act*, DEP'T OF JUST., U.S. ATT'YS OFF. (June 14, 2021), https://www.justice.gov/usao-wdwa/pr/doj-and-whatcom-county-resolve-multiple-complaints-regarding-violations-americans.
[77] *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

Washington State also requires courts to appoint credentialed interpreter services for LEP parents, guardians, and children involved in juvenile court proceedings and programs using the framework of chapter 2.43 RCW. RCW 13.04.043 directs that juvenile court administrators "shall obtain interpreters as needed consistent with the intent and practice of chapter 2.43 RCW, to enable non-English speaking youth and their families to participate in detention, probation, or court proceedings and programs." In addition, RCW 12.40.080(8) provides that "The diversion unit shall, subject to available funds, be responsible for providing interpreters to effectively communicate during diversion unit hearings or negotiations. RCW 2.56.130 also requires the administrator for the courts to develop informational materials for non-English speaking youth and their families. These requirements, enacted in 1993, demonstrate Washington's early recognition that communication in informational materials and outside the hearing itself, during diversion and negotiation, must be available for those who are LEP.

One area which remains unexamined is the inability of LEP individuals to serve as jurors in the State of Washington. In part, this is due to the eligibility requirements to be a juror, which include being able to communicate in English.[78] Because of this, currently interpreters are not provided for LEP individuals to allow them to participate as jurors. This has an impact then on the likelihood that an LEP defendant will have a jury of their peers.

I. Monitoring and complaint system

Finally, the National Center for State Courts notes the need for procedures to monitor the quality of language services provided. Few jurisdictions have processes to collect feedback from consumers and stakeholders, and report that the system for filing complaints is often confusing and lacks follow-up.[79]

The Deskbook on Language Access in Washington Courts specifies that courts must provide information in the court's plan about their complaint resolution procedures regarding the delivery of language access services to individuals needing interpreter or translation services. There are two types of complaints regarding language access services that the Interpreter

[78] RCW 2.36.070.
[79] CTR. FOR CT. INNOVATION, *supra* note 57.

Commission reviews. One is a complaint against an individual interpreter and another is a complaint against a court for failure to provide language access services. AOC staff assigned to the Interpreter Commission gather information from the complainant and will provide language access services to do so, such as translating the complaint form, complaint information, and conducting information gathering interviews using credentialed court interpreters whenever necessary or possible. The Interpreter Commission will refer complaints about the lack of language access services to the Commission's Issues Committee to review those complaints and, either resolve the matter by providing an advisory letter to the court in question, or refer it to the full Interpreter Commission for further review and action. This is an informal process whereby the Interpreter Commission may be involved in providing consultation and guidance to LEP parties and local courts in resolving and removing barriers to language access services and resources.[80]

Complaints filed with the Interpreter Commission or a local court against an individual interpreter can be filed by an individual or by a person who witnesses the actions of an interpreter that forms the basis of the complaint against the interpreter. Those types of complaints generally allege a violation of a provision of GR 11.2, the Code of Professional Conduct for Judiciary Interpreters,[81] and are referred to the Interpreter Commission's Disciplinary Committee for further action.[82]

Individuals with a complaint regarding an interpreter are encouraged to first consider talking to the interpreter to resolve the matter. In the event this does not resolve the matter, complainants are advised to next communicate their grievance to the court interpreter coordinator or court administrator, and the courts must make interpreter arrangements using a different interpreter to address the grievance. When a grievance against an interpreter is not resolved at the local

[80] Personal Communication with Interpreter Commission Staff and Members.
[81] GR 11.2, https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&ruleid=gagr11.2.
[82] Information about how to file a complaint against a spoken language interpreter can be found at: https://www.courts.wa.gov/programs_orgs/pos_interpret/index.cfm?fa=pos_interpret.display&fileName=sliComplaint.

level, complainants are informed that they may file a complaint with the DOJ or the Interpreter Commission.[83]

A number of courts have submitted detailed procedural steps for filing a complaint with the court itself by identifying who the complaint is to be filed with, how to submit it, the court's timelines for reviewing and resolving the complaint, and the appeal process, if any. A small number of courts have provided complaint information and forms in Spanish and Russian languages. There is a variance among local courts in terms of the specific information that must be contained in the complaint; one municipal court encourages complainants to identify "the sections in the court's plan, statutes, or regulations alleged to have been violated and the time frame in which the lack of compliance is alleged to have occurred."[84] Where courts require or encourage complainants to cite a court policy, plan section, or written procedure that is alleged as having been violated, complainants who do not read English cannot access that information because it is not translated for their use.

All of the plans submitted to AOC do refer to the complaint resolution process offered by the Interpreter Commission and the Commission will hire interpreters to assist complainants in filing a grievance.

J. Efforts to address disparities and recommendations

Courts across Washington State are taking steps to be more accessible to individuals with LEP, but progress is uneven. For example, 70% of courts surveyed in Washington provide forms translated into at least one language other than English; 52% provide multilingual signage; 36% provide interpreters for pro se litigants; and 26% provide interpreters for courtroom facilitators and court-mandated programs.[85] In a 2015 nation-wide needs assessment, the National Center for State Courts noted several innovations at the local level to increase language access to state courts: Washington, D.C. is prioritizing the hiring of bilingual court staff in high-need languages;

[83] *Spoken Language Interpreter Complaint Report*, WASH. CTS. (2020), http://www.courts.wa.gov/programs_orgs/pos_interpret/index.cfm?fa=pos_interpret.display&fileName=sliComplaint.
[84] Language Access Plan of Lynnwood Municipal Court, submitted to the AOC on May 28, 2018.
[85] ENGLERT, *supra* note 52.

the King County Superior Court is making family law forms available online in several languages; and the Washington State courts are working with community-based organizations to ensure that interpreters have specialized training on topics such as gender-based violence.[86] The AOC Pattern Form Committee created bilingual Spanish/ English family law pleadings in the past; however, those forms are not current and the committee is assessing the need for and plan to update the forms and potentially expand the number of translated forms. While it appears that few superior courts still utilize the fee waiver process, elimination of the fee waiver in all courts would do much to ensure equal access for LEP individuals to the courts.

IV. Individuals who are d/Deaf, Hard of Hearing, or DeafBlind (D/HH/DB)[87]

According to the 2011 American Community Survey, about 3.6% of the U.S. population, or about 11 million individuals, consider themselves d/Deaf or have serious difficulty hearing. In Washington State 3.8% of individuals, or about 290,000 individuals, are classified as having a "hearing difficulty." This number reflects a broad range of hearing loss, not only individuals who communicate in ASL. This is in part due to the way in which these data are gathered. The U.S. Census and American Community Survey contain questions about a person's ability to hear. Individuals are asked to indicate if they are d/Deaf or have serious difficulty hearing. One in eight people in the United States aged 12 years or older has hearing loss in both ears, based on standard hearing examinations.[88] Over one-half of the responses indicating difficulty to hear are from individuals age 65 and over. While exact numbers are unknown, Washington State is home

[86] CTR. FOR CT. INNOVATION, *supra* note 57.
[87] This label refers to a diverse community of people who self-identify differently. The term "deaf" generally refers to the condition of not hearing, while "Deaf" is used by a group of people who share a common language (ASL) and culture. Hard of Hearing can refer to a person with hearing loss. The National Association of the Deaf notes that these are the most commonly accepted terms. Each of these labels may imply different language proficiencies and preferences, and each group may face specific barriers to communication. *Community and Culture – Frequently Asked Questions*, NAT'L ASS'N OF THE DEAF (2021), https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions.
[88] Frank R. Lin, John K. Niparko & Luigi Ferrucci, *Hearing Loss Prevalence in the United States*, 171 ARCHIVES INTERNAL MED. 1851 (2011).

to a thriving and diverse d/Deaf population and is home to the Washington State School for the Deaf in Vancouver, Washington.

A. Federal law

Individuals who are d/Deaf, Hard of hearing, or DeafBlind (D/HH/DB) have the same constitutional protections outlined above as well as federal protections to access to interpreters under Title II and Title III of the Americans with Disabilities Act (ADA), which requires state and local government agencies (public entities) and private entities open to the public (public accommodations) respectively to provide effective communication so that individuals may access their programs.[89]

Title II of the ADA, which governs state and local governments, provides that, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, activities of a public entity, or be subjected to discrimination by any such entity."[90] Regulations implementing the ADA require public entities to, "take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communication with others."[91] In this context, "companion" means a family member, friend, or associate of an individual seeking access to a service, program, or activity of a public entity, who, along with such individual, is an appropriate person with whom the public entity should communicate.

Public entities must provide auxiliary aids and services necessary to provide an equal opportunity to participate in the program or services provided by the public entity.[92] Such aids and services include qualified sign language interpreters.[93] In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities.[94] Additionally, a public entity may not require an individual with a

[89] 42 U.S.C. §§ 12132, 12182.
[90] 42 U.S.C. § 12132.
[91] 28 C.F.R. § 35.160 (a)(1).
[92] 28 C.F.R. § 35.160 (b)(1).
[93] 28 C.F.R. § 35.104.
[94] 28 C.F.R. § 35.160 (b)(2).

disability to bring another individual to interpret for them or rely on a minor child to interpret, absent an imminent threat to safety.[95]

Title III of the Americans with Disabilities Act requires public accommodations to provide effective communication to individuals with disabilities. This becomes relevant when discussing services outside the courthouse, such as interactions with family court services, GALs, and CASAs. 42 U.S.C. §§ 12182 (a) states that, "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns or operates a place of public accommodation." Regulations implementing the ADA require places of public accommodation to furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities, including to companions who are individuals with disabilities.[96] Similar to the Title II context, places of public accommodation may not require an individual with a disability to bring their own interpreter or rely on a minor child to interpret, except in the instance of an emergency involving an imminent threat to safety.[97]

Federal law also governs the way in which public entities communicate with people with disabilities using telecommunication services. Title IV of the ADA provides that where a public entity communicates by telephone with applicants or beneficiaries, text telephones (TTYs) or equally effective telecommunications systems shall be used to communicate with individuals who are d/Deaf or hard of hearing or have speech impairments.[98] Furthermore, Title IV provides that where a public entity uses an automated-attendant system, such as voicemail, that system must provide effective real-time communication with individuals using auxiliary aids and services, including TTYs and telecommunications relay systems.[99]

The primary means by which individuals who are D/HH/DB access the telecommunication system is through TTY relay and video relay services. In Washington State, the Department of Social and Health Services' Office of Deaf and Hard of Hearing (ODHH) oversees Washington Relay.

[95] 28 C.R.F. §§ 35.160 (c)(1), (3).
[96] 28 C.F.R. § 36.303 (c)(1).
[97] 28 C.F.R. §§ 36.303 (c)(2)–(4).
[98] 28 C.F.R. § 35.161.
[99] *Id.*

Washington Relay is designed to connect D/HH/DB and speech disabled individuals with people and businesses that use standard (voice) telephones. Although the relay service has been in existence for more than 18 years, many people don't understand how it works. As a result, people who receive relay calls often hang up, believing the caller is a telemarketer. ODHH has instituted a "Don't Hang Up" campaign to raise awareness about relay calls and accessibility to telecommunication services for individuals with communication-related disabilities.[100] It's critical for courts to understand these services and accessibility issues when interacting over the phone with persons with disabilities and to train staff accordingly.

Finally, federal law governs the use of video remote interpreting (VRI) and establishes guidelines for those who use VRI services. DOJ requires entities using VRI to meet all of the following performance standards: real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication; a sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the face, arms, hands, and fingers of the person using sign language, regardless of their body position; a clear, audible transmission of voices; and adequate staff training to ensure quick set-up and proper operation.[101] Having these details spelled out in federal statute reminds us that remote interpreting for D/HH/DB individuals has unique considerations and courts should be aware of these requirements as they implement procedures for ASL interpreter services to be delivered remotely.

B. Washington State law

As mentioned above, the WLAD[102] provides a right to be free from discrimination because of national origin or the presence of any sensory disability in state government and in places of public accommodation. Additionally, people who are D/HH/DB have the right to interpreter services under chapter 2.42 RCW, which is specific to interpreter services in court. Washington

[100] *See Telecommunication Relay Services*, WASH. STATE DEP'T OF SOC. & HEALTH SERVS., https://www.dshs.wa.gov/altsa/odhh/telecommunication-relay-services
[101] 28 C.F.R. § 36.303(d).
[102] RCW 49.60.030.

State secures the constitutional rights of d/Deaf persons and of other persons who, because of impairment of hearing or speech, are unable to readily understand or communicate the spoken English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.[103] Under RCW 2.42.120, the court must appoint and pay for a qualified interpreter to interpret legal proceedings involving D/HH/DB persons or affecting a juvenile under their guardianship. In addition, a D/HH/DB person is provided a qualified interpreter when required to participate in a program or activity ordered by the court as part of sentencing, required as part of a diversion agreement, or required as part of probation or parole. [104]

RCW 2.42.130 requires courts to request a qualified interpreter and/or an intermediary interpreter through a list maintained by ODHH,[105] or through one of Washington's Deaf Service centers. In addition, the:

> …appointing authority shall make a preliminary determination, on the basis of testimony or stated needs of the hearing-impaired person, that the interpreter is able in that particular proceeding, program, or activity to interpret accurately all communication to and from the hearing-impaired person. If at any time during the proceeding, program, or activity, in the opinion of the hearing-impaired person or a qualified observer, the interpreter does not provide accurate, impartial, and effective communication with the hearing-impaired person the appointing authority shall appoint another qualified interpreter.[106]

C. Findings about gender disparities

The communication and language barriers to accessing the courts described throughout this chapter can have impacts across all genders. There are instances in which these impacts are

[103] RCW 2.42.010.
[104] RCW 2.42.120.
[105] *Regional Service Centers*, WASH. STATE DEP'T OF SOC. & HEALTH SERVS., https://www.dshs.wa.gov/altsa/odhh/regional-service-centers-0.
[106] RCW 2.42.130(2). Note: use of the term, "hearing-impaired" is used only when referring to specific terminology used in state statute. Throughout the document, where not citing statute, authors use the term Deaf, Hard of Hearing, and DeafBlind.

amplified for people with multiple marginalized identities. This chapter highlights those instances throughout the chapter (or in many cases highlights a gap in the data and research needed to understand those intersections), but some of those gendered impacts are described in more detail here. People who are d/Deaf,[107] especially those with other marginalized identities, face employment challenges in the U.S.: d/Deaf people are less likely to participate in the labor market than are hearing people, with women, Black, American Indian and Alaska Native, and d/Deaf persons with additional disabilities[108] facing even lower participation.[109] For those who do participate in the workforce, d/Deaf Black, Indigenous and women of color experience severe wage gaps, with Latina d/Deaf women being paid 60 cents for each dollar paid to white d/Deaf women. For comparison, white hearing men are paid nearly twice the average salary of Latina d/Deaf women.[110] The resulting economic disparities likely also impact d/Deaf individuals' experiences with law enforcement and courts systems. It is important to acknowledge that datasets which group diverse populations together, such as combining all Asian, Native Hawaiian, and Pacific Islander populations into one category, often masks disparities experienced by populations within that group. So, data such as that just cited is likely an incomplete picture of the individuals most impacted by employment barriers and wage gaps.

Gender disparities may also arise when survivors of IPV and sexual assault who are D/HH/DB access the justice system. Some national research suggests that rates of IPV and sexual assault in people who are D/HH/DB may be higher than in their hearing counterparts. However, the research is not conclusive, and the way that many of these studies are conducted makes it difficult to generalize their findings to the wider D/HH/DB community.[111] The best available,

[107] The source document refers specifically to people who are d/Deaf.
[108] The source document uses the term "deafdisabled."
[109] CARRIE LOU GARBEROGLIO, STEPHANIE CAWTHON & MARK BOND, DEAF PEOPLE AND EMPLOYMENT IN THE UNITED STATES: 2016 (2016).
[110] *Id.*
[111] For example, some studies group together people who are D/HH/DB with people with all other disabilities. This is the case of the National Intimate Partner and Sexual Violence Survey, which asks if participants have a disability, but does not identify hearing or d/Deaf status. *See* Matthew J. Breiding & Brian S. Armour, *The Association Between Disability and Intimate Partner Violence in the United States*, 25 ANNALS EPIDEMIOLOGY 455 (2015). The National Crime Victimization Survey does report individuals with a hearing disability as a separate group and notes a higher rate of violent crime victimization (15.7 per 1,000) than for individuals without disabilities (12.7 per 1,000). However, these data do not separate out sexual assault and IPV from other violent crimes. *See* Erika Harrell, *Crime Against Persons with Disabilities, 2009-2015 - Statistical Tables*, STAT. TABLES 17 (2017). Much of the

nationally representative evidence does suggest that rates of IPV are higher in the d/Deaf community than the hearing community.[112] There is a lack of evidence regarding rates of sexual assault in the d/Deaf community compared to the hearing community.

Multiple qualitative studies and anecdotal evidence collect~~ed f~~rom d/Deaf survivors and service providers across the U.S. find that d/Deaf survivors face barriers to reporting victimization and communicating with law enforcement that are specific to the d/Deaf community. Barriers to reporting include the following:

- Accessing emergency responders: If 911 dispatchers and operators of non-emergency contact lines are not well-versed in using TTY systems, those channels of communication may be inaccessible.[113]
- Challenges communicating with law enforcement: d/Deaf respondents have reported negative interactions with law enforcement in the community due to communication barriers. A needs assessment of the Minneapolis Police Department noted that while the department had written policies and procedures in place for officers to acquire

literature specific to IPV/sexual assault survivors who are d/Deaf has been conducted in post-secondary education settings, and generally finds higher rates of lifetime IPV and sexual assault prevalence in d/Deaf respondents than those reported in the hearing population. *See* Melissa L Anderson & Irene W Leigh, *Intimate Partner Violence Against Deaf Female College Students*, 17 VIOLENCE AGAINST WOMEN 13 (2011); Teresa Crowe Mason, *Does Knowledge of Dating Violence Keep Deaf College Students at Gallaudet University Out of Abusive Relationships?*, 43 JADARA 19 (2019); Rebecca A. Elliott Smith & Lawrence H. Pick, *Sexual Assault Experienced by Deaf Female Undergraduates: Prevalence and Characteristics*, 30 VIOLENCE & VICTIMS 948 (2015). In addition, data from Washington State suggests that individuals who are D/HH/DB begin and complete Bachelor's degrees at lower rates than hearing individuals, and studies of hearing sexual assault survivors found that non-students reported higher rates of sexual assault than students enrolled in post-secondary education. *See* CARRIE LOU GARBEROGLIO, STEPHANIE CAWTHON & ADAM SALES, POSTSECONDARY ACHIEVEMENT OF DEAF PEOPLE IN WASHINGTON: 2017 10 (2017); LYNN LANGTON, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013 20 (2014). Therefore, prevalence estimates in post-secondary students may be lower than the actual rates in the d/Deaf population. Additionally, studies with d/Deaf students use a variety of methodologies, including using written English or signed ASL, and differences in the ways the questions are asked may lead to variation in results.

[112] A 2014 study with a national sample of Deaf respondents found rates of partner rape other forms of IPV significantly higher than those reported in hearing respondents of the National Violence Against Women Survey. Robert Q Pollard, Erika Sutter & Catherine Cerulli, *Intimate Partner Violence Reported by Two Samples of Deaf Adults Via a Computerized American Sign Language Survey*, 29 J. INTERPERSONAL VIOLENCE 948 (2014). Day et al. found similar rates of IPV in Deaf and hearing respondents, but the authors note that selection bias may have influenced this result. STEFANIE J. DAY, KELSEY A. CAPPETTA & MELISSA L. ANDERSON, A BRIEF REPORT: INTERPERSONAL VIOLENCE EXPOSURE AND VIOLENCE MYTH ACCEPTANCE IN THE OHIO DEAF COMMUNITY 13 (2019).

[113] JENNIFER OBINNA ET AL., UNDERSTANDING THE NEEDS OF THE VICTIMS OF SEXUAL ASSAULT IN THE DEAF COMMUNITY (2005), https://www.ojp.gov/pdffiles1/nij/grants/212867.pdf.

interpreters to communicate with d/Deaf individuals, practical barriers remain. For example, d/Deaf respondents who have tried to verbally communicate with law enforcement have reported being mislabeled as drunk or as having a mental illness due to speech patterns.[114] After hours or when an interpreter is not readily available, law enforcement may attempt to communicate with people who are d/Deaf through written English, which may not be an effective mode of communication for the d/Deaf person.[115] (for more on this topic, see section V, Interactions with Law Enforcement).

- Concerns with using interpreters: Deaf communities tend to be small and insular, and if an interpreter is known to the survivor, the survivor may have concerns about confidentiality. If the same interpreter cannot be scheduled for each conversation with investigators, the survivor may find themself disclosing the assault to multiple members of the d/Deaf and ASL-signing community.[116]
- Identifying IPV tactics: Research into IPV in the d/Deaf community shows that some tactics of intimidation and control are specific to d/Deaf survivors, for example control of electronic communication channels to isolate the victim.[117] Law enforcement, prosecutors, jurors, and judges may not recognize d/Deaf-specific abuse and control tactics as IPV.

Because police rarely show up with an interpreter, data regarding prevalence of victimization of people who are D/HH/DB is likely inaccurate. This means it is unknown whether D/HH/DB survivors experience victimization less often than hearing survivors or simply report victimization less often. Additionally, there is a lack of evidence regarding whether law enforcement gather data on the D/HH/DB status in victim reports. Anecdotal information from advocates serving the D/HH/DB communities indicate that many D/HH/DB survivors fear reporting to law enforcement during a domestic violence or sexual assault incident out of fear it will result in them being

[114] *Id.*
[115] *Id.*
[116] Michelle S. Ballan et al., *Intimate Partner Violence Among Help-Seeking Deaf Women: An Empirical Study*, 23 VIOLENCE AGAINST WOMEN 1585 (2017); Sheli Barber, Dov Wills & Marilyn J Smith, *Deaf Survivors of Sexual Assault*, *in* PSYCHOTHERAPY WITH DEAF CLIENTS FROM DIVERSE GROUPS 320 (2010).
[117] NANCY SMITH & CHARITY HOPE, CULTURE, LANGUAGE AND ACCESS: KEY CONSIDERATIONS FOR SERVING DEAF SURVIVORS OF DOMESTIC AND SEXUAL VIOLENCE 36 (2015).

arrested. This occurs when the police are only able to communicate with the alleged abuser and the D/HH/DB individual is the one arrested, mistakenly. Anecdotal information also suggests that when law enforcement was not prepared to provide an interpreter, reports of domestic violence went unfiled and uninvestigated. Without accurate data on the prevalence and reporting of sexual assault and IPV crimes against people who are D/HH/DB, it is unknown whether sexual assault or IPV crimes against people who are D/HH/DB are investigated or prosecuted at rates comparable to crimes against hearing survivors.

Survivors report additional barriers to justice within the system. In a study of d/Deaf survivors of IPV, one respondent noted, "The court rooms were difficult and intimidating and were not HOH [hard of hearing] accommodating [SIC]. When I told a judge that I was HOH, his response was 'I'll talk louder'. I often left confused and unsure about what was even said. The legal system is not designed to protect victims.[118] Another respondent reported, "Court and police dropped case because of interpreters."[119]

As noted above, there is a higher prevalence of IPV and sexual violence among women, (particularly Black, Indigenous and women of color and immigrant women), and LGBTQ+ individuals. D/HH/DB individuals from these populations may experience an amplification of the barriers described here.

D. Financial limitations

Chapter 2.42 RCW does not permit the imposition of fees for sign language interpreters on litigants or individuals requesting ASL interpreter services in any legal or quasi-judicial proceeding. The ADA prohibits government entities from charging individuals with hearing loss for the cost of interpreter or other language access, such as Communication Access Real-Time Translation (CART), services. This also applies to interpreting services and written texts provided for D/HH/DB persons participating in court ordered programs and services. Washington State

[118] From an unpublished dissertation on d/Deaf experiences of trauma and PTSD due to domestic violence. Quotes were collected through surveys of female d/Deaf survivors recruited through snowball sampling. Due to safety concerns, it's unknown if any respondents were located in Washington State. Personal Communication with Kabreanna Tamura (Jan. 18, 2021).
[119] *Id.*

courts utilize the General Rule (GR) 33 request for accommodation forms; however, courts vary in the use of this form, with most courts utilizing an interpreter services request process unique to the court. The use of different systems in courts can lead to confusion, particularly where the court is not equipped or prepared to communicate with D/HH/DB individuals as they navigate the court process.

E. Limited access to sign language interpreters

Access to qualified interpreters in the context of interpreter services for D/HH/DB individuals brings up different issues than it does for LEP litigants. This is in part because AOC does not certify sign language interpreters and instead relies on the credentialing system created by the national sign language interpreter organization, the Registry of Interpreters for the Deaf (RID). RCW 2.42.110 defines a "qualified interpreter," as one certified by the state, or is an interpreter certified by RID with the Comprehensive Skills Certificate or the CI/CT certification. However, these RID-issued credentials are no longer available for testing, although an interpreter holding one of these credentials is still considered certified so long as they meet the requirements to maintain their certification.[120] In 1998, the RID created the Specialist Certificate: Legal (SC:L) in recognition by the RID that the majority of sign language interpreters with the Comprehensive Skills Certificate or the CI/IC certification are not qualified, without further training, to interpret in court settings.[121] As a result of that change in view by ASL interpreting professionals, ODHH and the Interpreter Commission developed criteria to create a list of interpreters "certified" by the state in order to create a more appropriately qualified list of interpreters for court hearings. The current administrative rule, WAC 388-818-500, et.seq., provides that court sign language interpreters should hold SC:L national certification from RID, or have passed the written portion of the SC:L exam. However, of 429 certified interpreters listed in the RID in Washington State, only 20 are listed as having the SC:L. ODHH maintains a listing of those qualified court interpreters

[120] *Update on Credentials and Testing: SC:L and OTC*, REGISTRY OF INTERPRETERS FOR THE DEAF, INC. (2021), https://rid.org/update-on-credentials-and-testing-scl-and-otc.
[121] *Interpreter Certifications*, NORTHWEST AMERICAN SIGN LANGUAGE ASSOCIATES, INC. (2021), https://nwasla.com/interpreter-certifications.

for the courts.[122] Because so few interpreters meet the requirements outlined in the WAC, courts therefore may find it necessary to utilize interpreters who hold national certification as outlined in RCW 2.42.110.

The availability of SC:L credentialed interpreters is becoming limited because RID suspended testing for that certification (SC:L) in June 2016.[123] This means that as of 2016, Washington State has very limited ability to add any interpreters to the list of those qualified to interpret in courts under the procedures identified by AOC and ODHH. As attrition reduces the number of previously certified interpreters, there is a growing shortage of ASL interpreters available to the courts. No action has been taken to address this issue within Washington courts, however, the Interpreter Commission has begun to raise the issue as one of concern for Washington courts.[124]

Litigants who are both d/Deaf/HH and blind may have additional barriers to accessing courts. In part, this is due to the limited number and location of sign language interpreters who are trained to interpret for DeafBlind persons. Many DeafBlind individuals communicate through tactile or protactile sign language.[125] There is no formal certification process for interpreters working in these modalities. ODHH follows the practice recommended by the DeafBlind Service Center, as a subject matter expert, and honors their recommendations on who is qualified. The DeafBlind Service Center has identified approximately fifty interpreters in the State of Washington who are qualified to interpret tactile and/or protactile sign language. Geographical location is an important factor in access as, out of 51 listed interpreters, 30 are located in King County, and all are west of the Cascades.[126] Only three of those listed are also listed by RID as having the SC:L certification. The RID registry also does not currently have an option to search for interpreters

[122] WAC 388-818-510. The ODHH list can be found at: https://fortress.wa.gov/dshs/odhhapps/Interpreters/CourtInterpreter.aspx.
[123] *Certifications Under Moratorium*, REGISTRY OF INTERPRETERS FOR THE DEAF, INC. (2021), https://rid.org/rid-certification-overview/certifications-under-moratorium.
[124] INTERPRETER COMM'N MEETING, WASH. CTS., MEETING MINUTES FROM FEBRUARY 14, 2020 (2020), https://www.courts.wa.gov/content/publicUpload/Interpreters_Meeting%20Materials/20200214_m.pdf.
[125] Tactile sign language is when the DeafBlind person puts a hand on top or below the signer's movements so that a deafblind person can feel the movement of the signs and communicate. Protactile sign language is a developing language that provides environmental visual cues as coded information relayed to the DeafBlind person by touching their leg, back, shoulder or arm in specific ways.
[126] *Tactile and Close Vision Interpreters and Rates*, WASH. STATE DEP'T OF SOC. & HEALTH SERVS., https://www.dshs.wa.gov/altsa/odhh/tactile-and-close-vision-interpreters-and-rates.

with tactile and/or protactile sign language ability.[127] To identify a tactile and/or protactile interpreter with SC:L certification, one would have to cross-reference both lists. The low number of qualified interpreters in many areas of the state, and barriers to identifying them, may lead to delays in acquiring interpreters for these individuals. Additionally, the low-incidence of DeafBlind individuals interacting with courts and courts encountering DeafBlind litigants, may cause additional barriers.

Litigants who are foreign-born and D/HH/DB with limited English language skills, may also face additional barriers to accessing interpreter services in courts. If they are required to complete a form requesting interpreter services, those forms are not translated nor provided in an accessible format, such as Large Print or Braille or with form completion instructions provided in ASL via video. Courts are challenged in providing resources to file an interpreter request in an accessible format, including making online requests, and this causes delays in getting a hearing scheduled.[128]

Courts are required to provide an "intermediary interpreter, otherwise known as a "Certified Deaf Interpreter (CDI)" if the D/HH/DB client is not readily interpretable by an interpreter who uses the dialect of ASL standardly taught in interpreter training programs.[129] A CDI is trained to identify and communicate with non-standard forms of ASL.[130] The CDI is, by definition, a Deaf individual and likely a native user of ASL. The CDI works as a team with a hearing sign language interpreter to provide communication access to individuals who have non-standard sign language, including individuals who are foreign born, communicate in "home signs," or those with mental health or cognitive disabilities. Either the deaf party or the ASL interpreter can inform the court of the need for the CDI.[131] Increasingly, use of a CDI is becoming standard procedure in other parts of the country to ensure effective communication for complex legal proceedings and

[127] *Search Page*, REGISTRY OF INTERPRETERS FOR THE DEAF, https://myaccount.rid.org/Public/Search/Member.aspx.
[128] Information provided by court administrators to AOC staff.
[129] RCW 2.42.140, RCW 2.42.140. The term "intermediary" is codified at RCW 2.42.140, but it is an outdated term. The role is now referred to as a qualified or Certified Deaf Interpreter (DI or CDI).
[130] CARLA MATHERS, NAT'L CONSORTIUM OF INTERPRETER EDUC. CTRS., BEST PRACTICES AMERICAN SIGN LANGUAGE AND ENGLISH INTERPRETATION WITHIN COURT AND LEGAL SETTINGS 23, 38 (2009), http://www.diinstitute.org/wp-content/uploads/2012/06/Best-Practices-Legal-Interpreting.pdf.
[131] RCW 2.42.140.

matters. A quick internet search found guidelines on CDI use from courts in California, Maryland, and New Jersey, among others.[132] However, this is a fairly new practice for most courts, and courts may not understand the role of the ASL interpreter in relation to the CDI, how to access CDI interpreters, and how to conduct a hearing with both an ASL interpreter and a CDI.

As noted above in the section on LEP, D/HH/DB individuals may find courts unprepared to provide them communication access for "ex parte" hearings. Or, in areas with low availability of interpreters, people who are D/HH/DB may face delays and rescheduled hearings if a certified or registered interpreter is not available when needed. VRI services are one alternative, which allows the interpreter to be located remotely; however, there are special considerations when using VRI services for D/HH/DB court participants. Contrary to LEP users, where the end user may join only by phone because they lack the necessary equipment to join by video, sign language is a visual language, and all parties utilizing the interpreter service must have adequate video and audio to participate in a remote interpreted event. This requires the use of broadband internet, extensive court staff training on the use of VRI, and additional considerations such as additional disabilities that render video interpreting inaccessible. Video remote interpreting is happening not only in situations where the interpreter is located remotely, but also where the hearing itself is being held remotely and all or most parties are appearing from a remote location. This is an increasingly common practice during the COVID-19 pandemic, addressed below in section VIII, subsection B: Remote access to information through court websites.

F. Incarceration

The Americans with Disabilities Act and Rehabilitation Act of 1973 applies to jails and prisons.[133] D/HH/DB individuals in prison are entitled to reasonable accommodations or modifications to program policies to allow them to have equal access to programs, services and activities. Despite the legal requirements to provide access, D/HH/DB individuals incarcerated in jails or prisons have multiple communication needs. Many d/Deaf individuals in prison experience prolonged communication deprivation, referred to as being a, "prison within a prison," that leads to mental

[132] Use of CDI in Courts Search, GOOGLE, https://www.google.com/ (search "use of CDI in courts").
[133] 29 U.S.C. § 701 et seq.

health conditions.[134] They need to be able to contact individuals on the outside, including legal representatives and friends and family. They need to communicate effectively with correctional officers and staff, in order to express needs, follow instructions, and stay safe in case of an emergency. They need to communicate in order to access services in the facility such as education, rehabilitation, and work opportunities. They need to communicate with fellow incarcerated individuals in order to enjoy social stimulation and avoid isolation.[135]

Bureau of Justice Statistics data show that D/HH/DB individuals are over-represented in the incarcerated population nationally: 6.2% of people incarcerated in state and federal prisons and 6.5% of people incarcerated in jails reported having a "hearing disability," compared to 2.6% of the non-incarcerated population.[136] These data are not disaggregated by gender. The Washington State Department of Corrections does not publish data on disabilities, so it is unclear how many people incarcerated in prisons who are D/HH/DB may be facing communication barriers while incarcerated in Washington.

Disability Rights Washington's Amplifying Voices of Inmates with Disabilities (AVID) project conducted a series of visits to county jails across the state in 2016 to assess compliance with DOJ requirements for communication accessibility. They conclude that "no county jail in Washington comes close to meeting" those requirements.[137] Based on their observations at the time, they report that most jails had limited communication access technology, primarily old TTY (text telephone) machines packed away in boxes or not in working order. AVID notes that TTY is no longer the preferred communication method for individuals who primarily communicate with ASL, as TTY requires communication in written English.[138] The use of TTY for communications among D/HH/DB persons has greatly decreased since the inception of the Video Relay Service (VRS)platform, which allows individuals to use ASL with an ASL interpreter through a video connection to place phone calls. The lack of phone access and reliance on TTYs is highly

[134] TALILA A. LEWIS, HELPING EDUCATE TO ADVANCE THE RIGHTS OF THE DEAF (HEARD), DEAF IN PRISON FACT SHEET (2014), https://behearddc.org/wp-content/uploads/2018/11/DeafInPrison-Fact-Sheet-.pdf.
[135] N.R. Schneider & Bruce D. Sales, *Deaf or Hard of Hearing Inmates in Prison*, 19 DISABILITY & SOC'Y 77 (2004).
[136] JENNIFER BRONSON & MARCUS BERZOFSKY, DISABILITIES AMONG PRISON AND JAIL INMATES, 2011–12 13 (2015).
[137] DAVID CARLSON, ACCESS DENIED: CONDITIONS FOR PEOPLE WITH PHYSICAL AND SENSORY DISABILITIES IN WASHINGTON'S COUNTY JAILS (2017).
[138] *Id.*

problematic and seriously impacts a D/HH.DB person's ability to make a phone call. This is especially impactful if their personal cell phone is taken from them at the time of arrest and the law enforcement entity cannot locate a working TTY or provide access to VRS with a laptop computer that has pre-installed software to call a VRS provider. This has serious consequences for a single parent who is D/HH/DB: there is no way they can call a relative to take care of their children or family member while they are in jail.[139] Washington Department of Corrections' current policy on telephone use simply states that, "Individuals with hearing and/or speech disabilities, and those who wish to communicate with parties who have such disabilities, will have access to a TTY/TDD or VRS."[140] It's unclear which, or how many, state facilities currently allow access to VRS. Disability Rights Washington's observations are now several years out of date, and there is a lack of current data regarding availability of VRS in county and local jails.

In a series of interviews with d/Deaf individuals who had experienced incarceration (some in Washington State), and with service providers, respondents noted that access to interpreters inside correctional institutions was limited, meaning they might be left without an interpreter on the weekends.[141] Respondents reported a lack of important accommodations like vibrating alarm clocks, closed-captioning on T.V., and interpreters or other services to allow them to participate in education or employment.[142] This last issue is supported by quantitative data: a national survey of incarcerated individuals showed that those with a hearing disability were 24% less likely to use work assignments while incarcerated. The authors note that this is especially concerning given the literature showing that access to programs, education and work opportunities can reduce offender recidivism.[143] There is a lack of evidence regarding access to prison programs and opportunities by gender.

[139] Personal communication with Washington State Department of Social and Health Services, Office of Deaf and Hard of Hearing staff on June 23, 2021.
[140] STEPHEN SINCLAIR, TELEPHONE USE BY INCARCERATED INDIVIDUALS 10 (2019), https://www.doc.wa.gov/information/policies/files/450200.pdf.
[141] Kabrianna Tamura & Elaine Gunnison, *Hearing on the Deaf Penalty: the Intersections of Deafness and Criminal Justice*, 7 J. QUALITATIVE CRIM. JUST. & CRIMINOLOGY 123 (2019).
[142] *Id.*
[143] Jennifer M. Reingle Gonzalez et al., *Disproportionate Prevalence Rate of Prisoners with Disabilities: Evidence from a Nationally Representative Sample*, 27 J. DISABILITY POL'Y STUD. 106 (2016).

G. Interactions with court clerks and other personnel

As noted above, the unscheduled nature of interactions with court clerks means that there may not be interpreting services available when D/HH/DB individuals arrive to file pleadings, to address a court matter, to seek legal remedy or protections, and to respond to ongoing matters. While courts have GR 33 processes and ADA coordinators, it is unknown the extent to which those programs apply to the operations within the clerk's offices themselves. It's also unknown which court clerk's offices in Washington State have bilingual staff, telephonic or video interpreting systems, or contracts with interpreters or translators. For D/HH/DB individuals, this would likely mean either video remote interpreter services or in-person interpreter services to allow d/Deaf individuals access to effective communication in their interactions with the court clerk. It's also unknown which court clerk's offices have these services in place or how they meet the communication needs of D/HH/DB individuals.

D/HH/DB individuals are entitled to a court-funded interpreter to access court ordered programs or activities.[144] This includes family court services and court-ordered diversion programs. D/HH/DB individuals may face barriers in accessing these services and when working with court-appointed GALs or CASAs, who may lack the procedures for requesting an interpreter or be unaware of how to work with interpreters. Anecdotal reports indicate a common practice that happens in some courts is for a court to waive the requirement for a party where the court would otherwise have to provide an interpreter for the litigant to participate. This occurs in family law cases for the parenting seminar, for example. One advocate observed a judge waive the required parenting class for a DeafBlind parent instead of arranging for interpreter services. In interactions with GALs, the lack of interpreter services can result in fewer interactions with D/HH/DB parties and an over-reliance on individuals involved for whom there are no communication barriers.

In criminal cases, where diversion programs are an option, it is not clear how available those programs are to individuals in languages other than English, which may be a barrier for D/HH/DB individuals' participation due to interpretation needs. This process of the court foregoing participation in court ordered programs undermines the intention behind referring people to

[144] RCW 2.42.110.

these services. There is a lack of evidence to document how frequently this practice might occur and what impacts there might be by gender.

H. Court observers and family participation

In addition to the Washington State Constitution, Article 1, Section 10, regarding open courts addressed in the LEP context, persons with disabilities have the right to interpreter services when they are companions to a person involved with the justice system, as jurors, and as court observers. The ADA requires courts to provide accommodations to persons with disabilities when needed to participate as a juror. In addition, covered entities, at times, communicate with someone other than the person who is receiving their goods or services. As discussed above, the ADA refers to such people as "companions."[145] The obligation to furnish auxiliary aids and services extends to companions who are individuals with disabilities, whether or not the individual accompanied is also a person with a disability.[146]

Advocates report that some courts are providing interpreter services for d/Deaf and Hard of Hearing jurors and court observers, such as family members of a litigant. The full extent to which courts around Washington provide these services is unclear, but the legal requirement to do so is clear.

I. Impact of language impairments on systems knowledge

Language impairments include a wide spectrum of challenges and abilities in verbal and written communication. They may stem from learning and developmental disabilities, fetal alcohol spectrum disorder, traumatic brain injury, or low or reduced language acquisition from reduced language exposure during critical developmental periods.[147] Language impairments can manifest as difficulties with a variety of tasks such as verbal processing and comprehension, verbal expression, reading and writing, and understanding cultural, social, and contextual

[145] 28 CFR § 35.160(a)(2). A "companion" is "a family member, friend, or associate of an individual seeking access to a service, program, or activity of a public entity, who, along with such individual, is an appropriate person with whom the public entity should communicate." *Id.*
[146] 28 CFR § 35.160 (b)(1).
[147] Michael LaVigne & Gregory Rybroek, *Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders*, 15 U.C. DAVIS J. JUV. L. & POL'Y 37 (2011).

communication rules (referred to in the literature as "pragmatic skills").[148] More than 90% of D/HH/DB children are born to hearing families, which often means that the child and parent do not share language in common at the time of the child's birth.[149] Research shows that this can lead to language acquisition delays because even though the child may be educated in the U.S., comprehension and understanding are complicated by language acquisition delays unique to D/HH/DB children and hearing children of parents whose primary language is ASL. This has resulted in a noticeable gap in understanding of legal concepts and processes among D/HH/DB community members, and misunderstandings by courts in the capability of those persons to be prudent decision-makers, especially in situations where custody determinations are before the court.

Individuals with diagnosed language disabilities have a legal right under WLAD to accommodations to allow them full enjoyment of their legal rights and services. However, individuals with language impairments, but no recognized disability, may not be offered accommodations. The consequences of language impairment can be serious, as language impairment negatively affects a person's ability to understand the criminal or juvenile justice process, to communicate with counsel, to understand and comply with terms of bond or community custody, to complete programming successfully, and ultimately, to lead productive lives.[150] Decades of social science research from across the U.S. suggests that the population of youth and adults involved in the criminal justice system has a higher rate of language impairments than the general population.[151] In Washington State, youth involved in the juvenile

[148] *Id.*
[149] Ross E. Mitchell, Michaela Karchmer, *Chasing The Mythical Ten Percent: Parental Hearing Status of Deaf and Hard of Hearing Students in the United States*, 4 SIGN LANGUAGE STUD. 138 (2004).
[150] LaVigne & Rybroek, *supra* note 147, at 44.
[151] *See, e.g.*, Stavroola A.S. Anderson, David J. Hawes & Pamela C. Snow, *Language Impairments Among Youth Offenders: A Systematic Review*, 65 CHILDREN & YOUTH SERVS. REV. 195, 200 (2016) (a systematic review of 17 articles published 1982-2016 in USA, UK and Australia found a "strong association between youth offending and language impairments" in verbal comprehension, verbal expression and "pragmatic skills"); Jonathan A. Berken, Elizabeth Miller & Deborah Moncrieff, *Auditory Processing Disorders in Incarcerated Youth: A Call for Early Detection and Treatment*, 128 INT'L J. PEDIATRIC OTORHINOLARYNGOLOGY 109683 (2020) (a test of auditory processing in 52 incarcerated adolescents found that 17.3% met the threshold for auditory processing disorder, compared to an estimated prevalence of 2-7% in the general adolescent population); ELIZABETH GREENBERG, LITERACY BEHIND BARS: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY PRISON SURVEY 170 (2003) (the last nationwide adult literacy prison survey found lower average literacy in the incarcerated adult population compared to the nonincarcerated adult population); Amy E. Lansing et al., *Cognitive and Academic Functioning of Juvenile*

justice system have higher rates of special education eligibility, and worse performance on standardized reading tests, than their peers.[152] Very little of the research on language impairments includes data analyzed by gender. However, the aggregated data suggest that female youth and adults with language impairments, in the absence of identified disabilities, may face steep barrier to communication and full exercise of their rights in the justice system, relative to females without these impairments.

Language impairments can affect youth and adults at multiple stages of criminal justice involvement, potentially limiting their understanding of their rights as presented in Miranda warnings;[153] the requirements of conditional release or probation;[154] the terms and collateral consequences of a guilty plea;[155] or simply engaging in effective communication with their defense lawyer or the judge.[156] Additionally, treatment and services accessed through the justice

Detainees: Implications for Correctional Populations and Public Health, 20 J. CORR. HEALTH CARE 18 (2014) (among a sample of 1,829 court-involved youth in Cook County who took vocabulary and oral reading tests, all performed below the area average and nearly one quarter of the group qualified as having a "major impairment" in receptive verbal skills).

[152] CARL MCCURLEY, ANDREW PETERSON & ALEX KIGERL, STUDENTS BEFORE AND AFTER JUVENILE COURT DISPOSITIONS (2017), https://www.courts.wa.gov/subsite/wsccr/docs/Education%20and%20Juv%20Ct%20Dispositions_finalrev.pdf. In 2017, WSCCR found special education eligibility rates of 24% in youth with juvenile court dispositions, and 32% in youth sentenced to probation or juvenile rehabilitation; meanwhile, 39% of youth with juvenile court dispositions had met the reading standard for their grade level, compared to 66% of their peers.

[153] Anne Marie Lieser, Denise Van der Voort & Tammie J. Spaulding, *You Have the Right to Remain Silent: The Ability of Adolescents with Developmental Language Disorder to Understand Their Legal Rights*, 82 J. COMMC'N DISORDERS 105920 (2019). A group of 40 non-court-involved youth, half with developmental language disorder, were tested on Miranda Rights comprehension; 75% of those with developmental language disorder scored below "sufficient" understanding, compared to 30% of youth without developmental language disorder, even when controlling for IQ. *Id.*

[154] ROSA PERALTA ET AL., WASHINGTON JUDICIAL COLLOQUIES PROJECT: A GUIDE FOR IMPROVING COMMUNICATION AND UNDERSTANDING IN JUVENILE COURT (2012). The Judicial Colloquies Project demonstrated that Washington Courts standard forms on adjudication and disposition are written in language that is very hard to understand—even the forms for use in juvenile justice. *Id.* More detail on the Judicial Colloquies Project can be found in section V, subsection D: Youth.

[155] "Chapter 13: Prosecutorial Discretion and Gendered Impacts" discusses evidence from studies finding that youth understand very little about the terms of plea bargains and the rights they give up when they take plea bargains.

[156] Pamela C. Snow, *Speech-Language Pathology and the Youth Offender: Epidemiological Overview and Roadmap for Future Speech-Language Pathology Research and Scope of Practice*, 50 LANGUAGE, SPEECH, & HEARING SERVS. SCHS. 324 (2019). A 2019 review of the literature on Development Language Disorder in youth offenders noted that adults unfamiliar with developmental language disorder can easily misinterpret signals of low comprehension as instead representing behavioral problems, lack of motivation and noncompliance. *Id.*

system (or mandated by the justice system) may involve some level of verbal therapy or participation to be effective.[157]

J. Efforts to address disparities and recommendations

A small, qualitative study was conducted in the San Francisco Bay Area to assess the outcomes of a two-hour cultural competency training for law enforcement officers responding to d/Deaf victims of domestic violence.[158] Results were mixed: participants reported high overall satisfaction with the training, noting the prior misconceptions they had held regarding communication with d/Deaf individuals. However, they also expressed a desire for further education. Participants also reported lower confidence in their ability to respond to d/Deaf victims; perhaps, as the authors note, because participants hadn't been as aware of potential language challenges before the training.[159]

One Washington county has a model program for individuals who use ASL. King County's Emergency Sign Language Interpreter Program (ESLIP) provides an on-call interpreter for "emergency and time sensitive situations on a 24 hour a day basis, 365-days-a-year." The county retains the services of a sign language interpreter on call who is dispatched to an encounter with the police or for other legal matters. Other legal situations include seeking protection orders and initial meetings with an attorney prior to arraignment.[160] It is unknown if there are similar services in any other county in Washington. In their review of Washington's county jails, AVID highlighted Pierce County for providing video relay technology to incarcerated d/Deaf individuals who use ASL, noting that this was an exception among jails.[161]

Respondents to a qualitative study on D/HH/DB incarcerated individuals conducted in several states (including Washington) recommended public awareness training on d/Deaf communication for justice system staff as a whole. Respondents to the study also recommended

[157] Lansing et al., *supra* note 151; Snow, *supra* note 156.
[158] Alina Engelman & Julianna Deardorff, *Cultural Competence Training for Law Enforcement Responding to Domestic Violence Emergencies With the Deaf and Hard of Hearing: A Mixed-Methods Evaluation*, 17 HEALTH PROMOTION PRAC. 177 (2016).
[159] *Id.*
[160] *Emergency Sign Language Interpreter Program (ESLIP)*, KING CNTY. OFF. OF CIV. RTS. & OPEN GOV'T (2014), https://www.kingcounty.gov/~/media/exec/civilrights/documents/ESLIPpublic.ashx?la=en.
[161] CARLSON, *supra* note 137.

hiring an individual who is d/Deaf-aware and who can function as an on-site ADA representative in prisons, jails, courts, and other spaces and can advocate on behalf of D/HH/DB individuals' rights. Respondents noted that D/HH/DB individuals were often unaware of procedures to report mistreatment or lack of access when institutionalized, suggesting a lack of systems in place to ensure ADA compliance in correctional facilities.[162]

V. Interactions with Law Enforcement

Police observations, interactions, and reports can end up being a critical part of a criminal case. When those observations and reports are with LEP or D/HH/DB individuals, many of the same factors already mentioned can create a disparate impact on the outcome. *Miranda v. Arizona* states that a suspect must knowingly and voluntary waive their rights to silence and to an attorney, but it does not specify a standard to ensure that suspects fully understand their rights as read to them. Numerous assessments over the years and across the country have demonstrated that often, Miranda rights as read by law enforcement are worded in a way that is difficult to understand, using uncommon vocabulary and complex sentence structure,[163] and that suspects commonly do not fully understand verbal warnings.[164] As noted above, this puts anyone whose native language is not English at a disadvantage Even native English speakers may struggle to understand Miranda warnings, and certain individuals may be particularly disadvantaged, including individuals with other language impairments, mental illness, cognitive disabilities, low literacy levels, and youth.[165]

[162] Tamura & Gunnison, *supra* note 141.
[163] Richard Rogers et al., *An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage*, 31 LAW & HUM. BEHAV. 177 (2007).
[164] Michael Rendall & Ken MacMahon, *Influences on Understanding of a Verbally Presented Police Caution Amongst Adults Involved in the Criminal Justice System: A Systematic Review*, PSYCHIATRY, PSYCH. & L. 1 (2020).
[165] Morgan Cloud et al., *Words without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495 (2002); Virginia G. Cooper & Patricia A. Zapf, *Psychiatric Patients' Comprehension of Miranda Rights*, 32 LAW & HUM. BEHAV. 390 (2008); Gwyneth C. Rost & Karla K. McGregor, *Miranda Rights Comprehension in Young Adults with Specific Language Impairment*, 21 AM. J. SPEECH LANGUAGE PATHOLOGY 101 (2012); Wszalek, *supra* note 1.

A. Individuals with LEP

Title VI of the Civil Rights Act of 1964 applies to law enforcement in the same way it applies to courts. Law enforcement agencies which receive any money from the federal government must provide meaningful access to all services and programs provided by the agency. The kind of language services needed depend on the importance of the interaction. In situations where law enforcement is conducting a facility tour for the public or engaging in a community event, volunteer interpreters may be allowed; however, in law enforcement activities where accuracy is very important, such as an interrogation or arrest, law enforcement should ensure competent interpreter services.[166]

Despite the longstanding legal obligation, immigrants with LEP may face barriers when interacting with law enforcement in emergency situations. Lee et al. conducted a national survey of service providers regarding the police response to immigrant crime victims, including some in Washington State.[167] Service providers reported that when police responded to incidents of domestic violence against female immigrants, language barriers created substantial barriers to safety for those victims. In some cases police failed to take a report because of an inability to communicate with the victim, or spoke to only to the suspected perpetrator in English, or used children of the victim or perpetrator to interpret.[168]

People who have LEP may face language barriers when being interrogated by the police. For example, officers may over-estimate a suspect's ability to understand English, and foreign-born suspects may not know they have the right to an interpreter. Researchers report that some individuals may show high proficiency in conversational English but struggle with the complex legal language commonly used in Miranda warnings. Pavlenko et al. demonstrated this challenge in a 2019 study with undergraduate students studying in U.S. universities.[169] Only 10% of native

[166] Federal Guidance at 67 Fed. Reg. 117 at 41469.
[167] NATALIA LEE ET AL., NATIONAL SURVEY OF SERVICE PROVIDERS ON POLICE RESPONSE TO IMMIGRANT CRIME VICTIMS, U VISA CERTIFICATION AND LANGUAGE ACCESS 42 (2013).
[168] *Id.*
[169] Aneta Pavlenko, Elizabeth Hepford & Scott Jarvis, *An Illusion of Understanding: How Native and Non-Native Speakers of English Understand (and Misunderstand) Their Miranda Rights*, 26 INT'L J. OF SPEECH, LANGUAGE & L. (2019).

English speakers fully understood spoken Miranda warnings. Among foreign-born students studying in English alongside native English speakers (a group who can be assumed to use English proficiently), none understood fully. Thirteen percent did not understand the Miranda warnings at all. Even more worrying, non-native English speakers consistently overestimated their own understanding, often substituting words that sounded similar to words that they misunderstood to create an "illusion of understanding."[170] This finding raises the question as to whether even proficient non-native English speakers are able to fully understand their rights during a police interrogation.

Finally, law enforcement officers sometimes ask bilingual officers or other bilingual individuals to act as interpreters if they speak the same language as an individual with LEP who is being questioned or interrogated. This practice comes with some risks, including when the interpreter is not sufficiently fluent in the language or where they are not sufficiently neutral. It is generally recognized courts should not make use of a biased interpreter during trial proceedings. Whenever possible, an interpreter should be entirely disinterested.[171] However, whether a person is too interested in a proceeding to be qualified as an interpreter is ordinarily within the discretion of the trial court.[172] In law enforcement interactions, using a bilingual police officer as an interpreter comes with risks. For example, in *People v. Aguilar-Ramos*, the court found that a Spanish-speaking defendant was not adequately advised of his Miranda rights by the police during a custodial interrogation due to the detective's lack of proficiency in Spanish.[173] The defendant was unable to understand his rights and therefore he did not knowingly and intelligently waive his Miranda rights. Additionally, there is risk in using other individuals as interpreters, where the individual is not deemed to be sufficiently neutral. For example, in *State v. Cervantes*, the court held that "[i]f it is fundamentally unfair for a trial court to appoint a biased interpreter in a courtroom setting, it cannot be less unfair for police to use a potential co-defendant as an interpreter."[174]

[170] *Id.*
[171] 21 C.J.S. Courts § 141, at 216 (1940).
[172] *State v. Bell*, 57 Wn. App. 447, 455, 788 P.2d 1109 (1990).
[173] *People v. Aguilar-Ramos*, 86 P.3d 397 (Colo. 2004)
[174] *State v. Cervantes*, 62 Wn. App. 695, 814 P.2d 1232 (1991)

Merely speaking the language may not be a sufficient qualification for a police officer to provide accurate interpretation. A study conducted in Australia compared the accuracy of interpretation of police interrogation between untrained bilingual English/Spanish speakers and trained interpreters. The bilingual speakers performed much worse than trained interpreters in every area, and the authors concluded that "bilingualism alone does not guarantee competent interpreting."[175] The authors note that true interpreting is not word-to-word translation, but involves conveying the tone, meaning and subtext of a message, and in the case of legal interpreting, the correct use of legal terminology. The study found that trained interpreters outperformed untrained bilingual individuals not only in accuracy of the interpreted speech, but also in use of correct interpreting protocols and accuracy of speech manner.[176] Use of qualified, trained interpreters matters, as errors in interpretation can have devastating legal implications for the person being interviewed or interrogated.[177] Of note, the Seattle Police Department manual instructs officers to "request an employee who speaks the person's native language" before using telephone interpreting services.[178]

B. Individuals who are D/HH/DB

Under the ADA, local and state government agencies, including law enforcement, are required to give equal access to and communicate equally with persons who are D/HH/DB.[179] The DOJ has pursued multiple complaints against police departments across the country for failure to comply with this obligation, including a recent settlement with the Whatcom County Sheriff's Office.[180] Despite the legal obligation to do so, many law enforcement agencies are unprepared to

[175] Sandra Hale, Jane Goodman-Delahunty & Natalie Martschuk, *Interpreter Performance in Police Interviews. Differences Between Trained Interpreters and Untrained Bilinguals*, 13 INTERPRETER & TRANSLATOR TRAINER 107, 121 (2019).
[176] *Id.* Similar results have been found in other non-U.S. settings. There is a lack of evidence on this topic in the U.S.
[177] SUSAN BERK-SELIGMAN, COERCED CONFESSINS: THE DISCOURSE OF BILINGUAL POLICE INTERROGATIONS (2009). Berk-Seligman conducted a review of 112 appellate cases from California, New York and Florida and found that police offers were routinely used as Spanish-English interpreters during investigation and interrogation, and have even been called to testify about their interpretation. *Id.*
[178] "Use the Voiance for interpreting if a Department employee is not available to translate." *Seattle Police Department Manual, 15.250 – Interpreters and Translators*, SEATTLE.GOV (May 7, 2019), https://www.seattle.gov/police-manual/title-15---primary-investigation/15250---interpreters/translators.
[179] 28 CFR § 35.130.
[180] DEP'T OF JUST., *supra* note 76. *See also Police Interactions with Deaf Persons*, 3 AELE MONTHLY L. J. 101 (2009), https://www.aele.org/law/2009all03/2009-03MLJ101.pdf (compilation of settlement agreements).

effectively communicate with D/HH/DB individuals. According to the National Association of the Deaf, "the vast majority of law enforcement receive either no training at all or only perfunctory training." [181]

The lack of communication access in law enforcement interactions can lead to miscommunications and, at times, is associated with use of deadly force. For example, in 2017, Magdiel Sanchez, a deaf man, was shot and killed by police after he failed to comply with oral commands by the officer to drop a short metal pipe he had in his hands. This happened after a neighbor informed the police that Mr. Sanchez was d/Deaf.[182] In another publicized instance in Tacoma, Washington, a d/Deaf woman who called the police to report an assault was tased and arrested by the responding officers without an interpreter present, despite having reportedly identified herself as d/Deaf during her 911 call.[183] When she sought damages in a lawsuit, a federal jury agreed that her civil rights had been violated by the officers.[184] While there is a lack of systematic data on this topic, a recent qualitative study with female d/Deaf survivors of domestic violence provides anecdotal accounts of these interactions presenting a barrier to reporting or access to justice. Two respondents out of a group of 22 noted not being able to receive needed police protection. One respondent noted, "Police came many times but he would act normal and I would be frozen. They didn't have patience to speak with me."[185]

Elements of law enforcement interactions which may seem routine for some, present serious language access challenges for D/HH/DB individuals. For example, the simple practice of handcuffing a d/Deaf person who signs has the result of silencing them.[186] In the Whatcom County Sheriff's Office settlement agreement, the county agreed to handcuff all persons who are

[181] Amiel Fields-Meyer, *When Police Officers Don't Know About the ADA*, ATLANTIC (Sept 26, 2017), https://www.theatlantic.com/politics/archive/2017/09/the-steadily-problematic-interactions-between-deaf-americans-and-police/541083.
[182] *Id.*
[183] BENRO OGUNYIPE, NAT'L BLACK DEAF ADVOCATES, INC., PUBLIC STATEMENT ON INVESTIGATION INTO THE BATTERY AND ARREST OF LASHONN WHITE (2012), https://www.nbda.org/EE/files/NBDA_Statement_on_Investigation_into_Battery_and_Arrest_of_Lashonn_White.pdf.
[184] John Knicely, *Jury Agrees Deaf Woman's Rights Violated, but Refuses Huge Payout*, KIRO 7 NEWS (Mar. 19, 2014), https://www.kiro7.com/news/jury-agrees-deaf-womans-rights-violated-refuses-hu/81795935/.
[185] Tamura, Kabrianna and Elaine Gunnison. *Deafness and Trauma: A preliminary investigation of trauma in Deaf domestic violence survivors.* Unpublished dissertation, Seattle University (2020).
[186] Tamura & Gunnison, *supra* note 141.

d/Deaf or hard of hearing in front of their body, unless there is a reasonable safety risk.[187] D/HH/DB individuals may also need an interpreter in order to fully understand their Miranda rights. Simply presenting them in written English isn't sufficient for D/HH/DB individuals who have limited English proficiency.[188] This again ties into the concepts addressed in this chapter regarding the lack of systems awareness for some D/HH/DB individuals.

C. Individuals with cognitive disabilities

Data from the Bureau of Justice Statistics national inmate survey shows that individuals with cognitive disabilities are over-represented in the incarcerated population: 19.5% of people in state and federal prisons have cognitive disabilities, compared to 4.8% of the general population.[189] These data indicate marked gender disparities: 30.3% of women in state and federal prisons have a cognitive disability, compared to 18.7% of men; and 41.2% of women in local jails report a cognitive disability, compared to 29.4% of men in local jails.[190] These data only present binary gender data, which prohibits analysis for gender non-binary and other gender-nonconforming individuals. Incarceration data is also generally presented based on the facility where someone is housed (e.g., female and male facilities) rather than based on their actual gender identity. See "Chapter 11: Incarcerated Women in Washington" and Section V of the full report ("2021 Gender Justice Study Terminology, Methods, and Limitations") for more information on the limitations of incarceration data as well as information on transgender individuals being housed in facilities that do not align with their gender identity.

Some cognitive disabilities relating to language impairments may not be noticeable in conversation, but do impact individuals' understanding of complex sentences with uncommon vocabulary words—such as Miranda warnings. In a small study with 34 high-functioning adults with specific language impairments, researchers found that those individuals had a poorer comprehension of Miranda rights than had been found in peers with a similar level of education,

[187] DEP'T OF JUST., *supra* note 76.
[188] *Id.*
[189] BRONSON & BERZOFSKY, *supra* note 136.
[190] *Id.*

and that the majority could not be said to have fully understood their rights as read to them in a verbal warning.[191]

D. Youth

The U.S. literature on youth interrogations shows that 85 to 90% of juveniles waive their Miranda rights. An assessment of 122 juvenile Miranda warnings collected from jurisdictions across the country showed that the majority of the warnings required at least a 6th grade reading level, with some sections requiring up to a grade 13 reading level.[192]

The Washington Judicial Colloquies Project was developed to address low comprehension among youth involved in the juvenile justice system.[193] The project worked with experts and youth in different regions of the state to 1) identify areas where comprehension was lacking, and 2) to develop communication tools for judges to use during hearings to ensure that youth fully understand conditions of release, dispositions, and conditions of probation. These tools include scripts for verbal communication and written forms that use plain language and simple formatting, including checklists. For example, rather than the phrase "appearing in court as required," which many youth took to refer to their physical appearance (how they were dressed), youth suggested the phrase "you have to come to court when you're told to." The Colloquies were piloted in Benton-Franklin and Clark County district courts, as well as in other states, including Delaware, Florida, Massachusetts, and more.[194] It is not clear whether the Colloquies are currently in use in any Superior Courts in Washington State.

E. Efforts to address disparities and recommendations

In 2017, The King County Sheriff's Office made substantial changes to the Miranda warnings to be used with juveniles to facilitate their understanding and ability to make an informed choice

[191] Rost & McGregor, *supra* note 165.
[192] Rogers et al., *supra* note 163.
[193] ROSA PERALTA ET AL., WASHINGTON JUDICIAL COLLOQUIES PROJECT: A GUIDE FOR IMPROVING COMMUNICATION AND UNDERSTANDING IN JUVENILE COURT (2012).
[194] Personal Communication with George Yeannakis and Rosa Peralta (April 30, 2021).

about their rights.[195] The Seattle City Council went further in August 2020, passing a law prohibiting law enforcement from questioning youth without providing legal counsel.[196]

VI. Bias Against Individuals Speaking English with Non-Native Accents, Regional Accents, or Vernacular in The Courts, or Those Speaking Through an Interpreter

A. Use of vernacular and accented English

Rachel Jeantel was a childhood friend of Trayvon Martin and a leading witness for the prosecution in the trial of George Zimmerman for Martin's death. Jeantel testified for nearly six hours during the trial but her testimony was reportedly never mentioned during jury deliberations nor taken into account in the jury's decision to acquit Zimmerman.[197] After the trial, one juror reported that Jeantel was both "hard to understand" and "not credible." Jeantel had spoken in African American Vernacular English, a vernacular form of English recognized by linguists as having consistent grammatical rules and pronunciations, but that is stigmatized in non-Black society.[198]

There is a substantial body of research on the impact of the use of vernacular Aboriginal English in Australian courts, and in some cases, courts there and in the UK have allowed the use of vernacular interpreters for witnesses who communicate primarily in a vernacular or creole version of English.[199] Additional studies found that accented speech was "rated less truthful than native speech," and that people wrongly attribute, "the difficulty of understanding the speech to the truthfulness of the statement." [200] Therefore, accented speech was negatively associated

[195] *Sheriff's Office Simplifies Miranda Warnings for Juveniles*, KING CNTY. SHERIFF'S OFF. (2017), https://www.kingcounty.gov/depts/sheriff/news-media/news/2017/September/Miranda-warnings-simplified-for-juveniles.aspx.
[196] Council Bill 119840, Ordinance No. 126132, https://seattle.legistar.com/LegislationDetail.aspx?ID=4606197&GUID=11CA0994-A2A6-4283-A63A-01003E95BB22&Options=ID%7CText%7C&Search=119840.
[197] John R. Rickford & Sharese King, *Language and Linguistics on Trial: Hearing Rachel Jeantel (and Other Vernacular Speakers) in the Courtroom and Beyond*, 92 LANGUAGE 948 (2016).
[198] Taylor Jones et al., *Testifying While black: An Experimental Study of Court Reporter Accuracy in Transcription of African American English*, 95 LANGUAGE e216 (2019).
[199] Rickford & King, *supra* note 197.
[200] Shiri Lev-Ari & Boaz Keysar, *Why Don't We Believe Non-Native Speakers? The Influence of Accent on Credibility*, 46 J. EXPERIMENTAL SOC. PSYCH. 1093 (2010).

with truthfulness. These biases can impact the litigant or witness' credibility without some intervention to address the hidden bias or to bolster creditably.

One example of accent bias comes from the experiences of Indigenous individuals. The study of Native American English, or what is referred to in research as a "reservation accent," "occurs in indigenous communities regardless of whether a heritage language is spoken; and that through English, indigenous people are creating and maintaining their own ethnic identities."[201] During the 19th and 20th centuries, the federal government often forcibly removed Indigenous children from their families and placed them in boarding schools. Federal boarding schools only allowed the children to speak English in an attempt to eradicate Indigenous languages.[202] Dennis Banks shared his recollections of being in a boarding school during the 1930s and 1940s: "…forced haircuts during which we'd be shaven bald, the slaps on the wrists by wooden rulers when we spoke Indian languages…"[203]

Researchers believe this may be where the reservation accent stems from as children during this timeframe were speaking English with similar intonations went home to their communities. Later, as some Indigenous people moved from their reservations to cities, intertribal communities were created which may have further reinforced the reservation accent.[204] Anecdotal information shared by community members indicates that when Indigenous individuals who have a "reservation accent" are in encounters with law enforcement, store owners, and others in authority positions, their accent can draw a negative reaction from those persons, including speculation that they are in this country illegally or are more likely to commit a crime, or they become the object of derision due to the way they speak. While some people can codeswitch (change their language, inflection, tone, and vocabulary to match the dominant

[201] Tristan Ahtone, *Talk on the Rez: English Prosody and the Native American Accent*, IN THESE TIMES (Mar. 8, 2017), https://inthesetimes.com/article/talk-on-the-rez-english-prosody-and-the-native-american-accent.
[202] *Id.*; Jon Reyhner, *American Indian Boarding Schools: What Went Wrong? What Is Going Right?*, 57 J. AM. INDIAN EDUC. 58 (Spring 2018).
[203] Reyhner, *supra* note 202, at 59. It is outside of the scope of this chapter to fully present the problematic history of boarding schools and the impacts on Indigenous communities, but there is substantive scholarship on this topic.
[204] Ahtone, *supra* note 201.

society's expectations), it isn't easy for everyone and the pressure to do this may lead to feeling a rift with one's authentic self, depression, and anxiety.[205]

B. Interpreter credibility and undermining the credibility of a witness/litigant

The lack of understanding by the court of the interpreting process can lead to communication barriers for clients and harm their credibility. The misunderstanding is that there are direct translations for words in English and other languages. Courts often implore interpreters to provide a "verbatim, word-for-word translation or interpretation." Courts and attorneys are looking for consistency in responses; however, interpreters using different word choices when translating from the client's language into English can impact this. While the LEP person may be using the same phrasing or signs, the interpreter may "voice" a different word or phrase to convey the meaning of that phrase or sign. This is because in many languages, there is no verbatim "translation," but instead, interpreters work on providing a message that has an equivalent meaning. If the interpreter, or if different interpreters over the course of time, use a different phrase or word choice, the LEP individual is at risk of being accused of inconsistent testimony and their credibility as a witness can be called into question. In addition, many court-certified interpreters speak English with an accent and one must be concerned that accent bias (discussed above) by attorneys, the court, or jurors can undermine the credibility of the interpretation by the interpreter, or worse, the credibility of the speaker whose utterances are interpreted. If an interpreter utters a sentence in grammatically incorrect English, though the utterance may make sense in context, there is always the risk that because it was not stated in "standard English," it will be taken as less credible information. Scholars have argued that the concept of "standard English" is in fact a myth, and that even the use of this term normalizes the misperception that there is one form of correct English rather than recognizing and normalizing linguistic diversity.[206]

[205] Angelique Georges, *Exploring Communicative Adaptations of Minority Status Individuals: An Overview of Code Switching Literature*, 12 PERSPECTIVES 1 (2020).
[206] ABIGAIL LANE, NORMALIZING INCLUSION: THE STANDARD ENGLISH MYTH (2012), https://www.colorado.edu/pwr/sites/default/files/attached-files/abigail_lane_standard_english_myth_normalizing_inclusion_divconf_2012.pdf; ROSINA LIPPI-GREEN, *The Standard Language Myth*, *in* ENGLISH WITH AN ACCENT 55, 55–65 (1997).

Additionally, implicit bias and a lack of cultural competency may create additional barriers for LEP and d/Deaf clients as they interact with courts and court systems. Many LEP and d/Deaf individuals have different cultural backgrounds that may not include familiarity with the U.S. legal system. Implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions. Implicit bias happens on the unconscious level and can come up in cases where LEP and d/Deaf individuals are involved. Research into cultural competency issues in courts is an important component of this work, as is learning about the ways in which implicit bias may impact legal proceedings involving the use of interpreter services.[207]

VII. Barriers and Facilitators to Communication for Individuals with Disabilities that Impede Functional Speech

Some individuals with disabilities such as cerebral palsy or severe autism may have little or no functional speech and may use alternate methods or assistive technologies to communicate (known as Augmentative and Alternative Communication, or AAC). The same protections under the ADA would require courts to find an appropriate accommodation to facilitate this communication; however, this often depends on awareness of different auxiliary aids and services and an openness of the legal system to providing these services. Such auxiliary aids and services, including assistive speech technology, are important for people with disabilities to exercise their legal rights. The literature shows that people with disabilities are disproportionately likely to be victims of crime: for example, women with a disability are more likely to report experiencing IPV including sexual violence and physical violence,[208] and individuals who use AAC are more likely than the general population to be the victims of abuse.[209] Moreover, individuals with limited or no functional speech also face barriers in accessing justice. Barriers may include: 1) challenges reporting the crime to police and participating in the

[207] LANE, *supra* note 206.*;* LIPPI-GREEN, *supra* note 206.
[208] Breiding & Armour, *supra* note 111.
[209] Leanne Togher et al., *Development of a Communication Training Program to Improve Access to Legal Services for People with Complex Communication Needs*, 26 TOPICS LANGUAGE DISORDERS 199 (2006).

investigation;[210] 2) if the case goes to trial, challenges to the individual's credibility as a witness or their capacity to testify because of their use of AAC technology;[211] or 3) concerns about facilitated communication (when a person with speech ability aids the individual communicating using AAC).[212]

There is a lack of research and data regarding the experiences of people with limited functional speech and their interactions with various actors in the legal system, and whether there are disproportionate impacts by gender.

VIII. Promising Practices for Improving Communication and Language Access

A. Plain language

Self-representation in civil cases has become increasingly common: the National Center for State Courts reports that in 76% of civil cases, at least one litigant was self-represented.[213] According to data from 2001, 65% of family law litigants in Washington State represent themselves in court (pro se).[214] There are many reasons why litigants may represent themselves in court, but evidence from other states indicates that the high cost of legal representation may be one.[215] This barrier is likely to disproportionately affect women, especially Black, Indigenous and women of color, sexual and gender minorities, immigrant women, and women with disabilities, who face greater economic hardship due to lower wages, less labor force participation, concentration in

[210] Mary Oschwald et al., *Law Enforcement's Response to Crime Reporting by People with Disabilities*, 12 POLICE PRAC. & RSCH. 527 (2011).
[211] Diane Nelson Bryen & Christopher Wickman, *Ending the Silence of People with Little or No Functional Speech: Testifying in Court*, 31 DISABILITIES STUD. Q. (2011).
[212] Togher et al., *supra* note 209.
[213] PAULA HANNAFORD-AGOR, SCOTT GRAVES & SHELLEY SPACEK MILLER, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS (2015).
[214] Charles R. Dyer et al., *Improving Access to Justice: Plain Language Family Law Court Forms in Washington State*, 11 SEATTLE J. SOC. JUST. 49 (2013).
[215] NATALIE ANNE KNOWLTON ET AL., CASES WITHOUT COUNSEL: RESEARCH ON EXPERIENCES OF SELF-REPRESENTATION IN U.S. FAMILY COURT (2016), https://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf.

low-wage sectors, and high costs of child care and other family expenses.[216] See "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for more information on populations most impacted by wage gaps and poverty and for research on programs to address financial barriers to legal representation.

Legal language is complex and difficult for many people to understand.[217] Pro se litigants may struggle to fill out documents and forms needed for their case. The U.S. Supreme Court's decision in *Turner v. Rogers* recognized the challenge that pro se litigants face.[218] However, the right to counsel appointed by the court for low-income persons primarily exists in the context of criminal cases.[219] No such right exists in most civil cases. Recognizing that many individuals will be unrepresented in civil matters, the Washington State Access to Justice Board, the Washington State AOC, and the Washington State Office of Administrative Hearings launched the Pro Se Project to create an online self-help center with guides, plain-language documents, checklists, and more tools to help pro se litigants navigate the legal process.[220] This project could benefit all pro se litigants, with particular benefits for pro se litigants unable to afford legal representation. While the first step of the Pro Se Project was to translate family court forms into plain language, it is unclear what the current status of this project is, or if any effort was made to evaluate outcomes for pro se litigants.

The use of plain language is also relevant in jury instructions. Multiple states have begun a process to create jury instruction forms that use simplified, non-legal language in an attempt to help jurors make informed decisions with an accurate understanding of the relevant law.[221]

[216] M V LEE BADGETT, SOON KYU CHOI & BIANCA D M WILSON, LGBT POVERTY IN THE UNITED STATES: A STUDY OF DIFFERENCES BETWEEN SEXUAL ORIENTATION AND GENDER IDENTITY GROUPS 47 (2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf; CYNTHIA HESS & JESSICA MILLI, THE STATUS OF WOMEN IN WASHINGTON: FORGING PATHWAYS TO LEADERSHIP AND ECONOMIC OPPORTUNITY 33 (2015), https://wawomensfdn.org/wp-content/uploads/2020/07/ReportStatusofWomeninWA.pdf.
[217] Wszalek, *supra* note 1.
[218] Dyer et al., *supra* note 214.
[219] *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).
[220] *Id.*
[221] *Jury Instructions*, PLAIN LANGUAGE, https://plainlanguage.gov/examples/brochures/jury-instructions.

Washington's civil and criminal pattern jury instructions have been "translated" into plain language whenever possible, and trial judges and attorneys are encouraged to use them.[222]

B. Remote access to information through court websites

It is becoming increasingly important for individuals to be able to access information about the legal system and courts on the internet. In the 2019 'State of the State Courts' survey, 68% of respondents reported that they would search for information about state courts directly from the state court website. Among respondents under 50 years old, the percentage increased to 72%. Over half of the under-50 respondents also noted they would be likely to search for and trust information on their state courts on the court's official social media account.[223] However, simply having a website does not automatically ensure access. For example, some websites can be difficult to navigate and make it hard for individuals to access the information they need. In the 2017 'State of the State Courts' survey, 80% of respondents noted that easier navigation of court websites would have a positive impact on their experience.[224] State court websites should be made accessible to people with disabilities, formatted to be accessed with assistive technology such as screen readers or voice recognition software.[225] Additionally, making websites mobile-enabled improves access for individuals who primarily access the internet from a phone. The evidence shows that young adults; Black, Indigenous and people of color; individuals without a college degree and those with lower household income who own smartphones are more likely to say that their phone is their primary source of internet access.[226] Hawaii, Maryland, Michigan and Florida are examples of states using 'responsive design' to make their courts websites mobile-friendly.[227] When accessed in August of 2020, the Washington State

[222] *See Washington Pattern Jury Instructions*, WESTLAW, https://govt.westlaw.com/wccji/Index.
[223] GBAO STRATEGIES, STATE OF THE STATE COURTS SURVEY ANALYSIS, 2019 (2020), https://www.ncsc.org/topics/court-community/public-trust-and-confidence/resource-guide/2019-state-of-state-courts-survey.
[224] GBAO STRATEGIES, 2017 STATE OF THE STATE COURTS - SURVEY ANALYSIS (2018), https://www.ncsc.org/topics/court-community/public-trust-and-confidence/resource-guide/2017-state-of-state-courts-survey.
[225] U.S. DEP'T OF JUST.; CIV. RTS. DIV.; DISABILITY RTS. SECTION, ACCESSIBILITY OF STATE AND LOCAL GOVERNMENT WEBSITES TO PEOPLE WITH DISABILITIES (2003), https://www.ada.gov/websites2_scrn.pdf.
[226] Kathryn Zickuhr & Aaron Smith, *Digital Differences*, PEW RSCH. CTR. (Apr. 13, 2012), https://www.pewresearch.org/internet/2012/04/13/digital-differences; Eric Tsetsi & Stephen A. Rains, *Smartphone Internet Access and Use: Extending the Digital Divide and Usage Gap*, 5 MOBILE MEDIA & COMMC'N 239 (2017).
[227] ROBERT GREACEN, EIGHTEEN WAYS COURTS SHOULD USE TECHNOLOGY TO BETTER SERVE THEIR CUSTOMERS (2018).

Courts website did not appear to be mobile enabled. Facilitating access to information about the courts and legal system can increase access for all, especially low-income individuals and Black, Indigenous, and people of color.

Translating court websites, or information contained within a website, into commonly used languages is another important element of accessibility. Many courts in Washington have very little translated information on their court website. Many others rely on machine translation tools to automatically translate the website content, but studies show that machine translation tools fail to provide accurate translations comparable to human translators, even with recent developments in the technology.[228] For example, in Yakima County, where 97% of the population with LEP speak Spanish,[229] the Yakima County District Court has a machine translate option available. Information about the availability of interpreter services was not readily accessible in translation, nor was information about how to file an interpreter complaint.[230] The King County Superior Court website has a link on the main index to 'Interpreter Services,' and noted that interpreter services are available at no cost for all court events; but the information there is only provided in English.[231] For mandatory forms and pattern forms, The Washington State Courts website has some important forms available in commonly used languages like Spanish, Russian, Chinese, Korean, and Vietnamese; however, when visited in August 2020, translation of forms was ongoing, and the titles of the forms on the Spanish page were listed only in English, with download instructions and important information about low-cost legal representation also only in English.[232]

COVID-19 has complicated communication between incarcerated defendants or represented clients and their defense attorneys. There are fewer in-person visitation opportunities, and the

[228] YONGHUI WU ET AL., GOOGLE'S NEURAL MACHINE TRANSLATION SYSTEM: BRIDGING THE GAP BETWEEN HUMAN AND MACHINE TRANSLATION, https://arxiv.org/pdf/1609.08144.pdf%20(7.pdf.
[229] This figure is according to the 2015 American Community Survey. STATE OF WASHINGTON (ACS 2015), https://www.lep.gov/sites/lep/files/resources/WA_cnty_LEP.ACS_5yr.2015.pdf
[230] These are factors measured by the Justice Access index from the National Center for Access to Justice. *See Language Access – 2016*, NAT'L CTR. FOR ACCESS TO JUST. (2021), https://ncaj.org/state-rankings/2016/language-access.
[231] OFF. OF INTERPRETER SERVS. (OIS), https://www.kingcounty.gov/courts/superior-court/interpreter-services.aspx.
[232] *Español Formularios*, WASH. CTS., https://www.courts.wa.gov/forms/?fa=forms.static&staticID=19&language=Spanish.

transition to video visit makes it difficult to have confidential communication.[233] In December 2020, 17% of surveyed attorneys said they had been unable to communicate with at least some of their in-custody clients. Moreover, the transition to remote hearings has been rocky, with defense attorneys reporting some positive and some challenging experiences. Remote hearings can make it more challenging for defense attorneys to communicate confidentially with their clients during hearings, unless breakout rooms are enabled.[234]

The COVID-19 pandemic has made remote access to information all the more important, as in-person visits to courts have been suspended in many areas. The Washington State Board for Judicial Administration Court Recovery Task Force conducted a survey in September 2020 to understand how courts are adapting their practice to the COVID-19 pandemic. They found that 78% of the courts surveyed reported using remote platforms for hearings, and many of those also continued to conduct in-person hearings or provided other technological support for people without internet access. Language access accommodations vary: while 71% of courts provided interpreters during remote hearings, only 34% provided interpreters for break-out discussions (such as between a litigant and their lawyer), and 34% translated written materials.[235] It is unclear what impact the COVID-19 pandemic has had on language barriers for users accessing the courts.

IX. Recommendations

- To improve access to interpreter services for people with limited English Proficiency (LEP) and d/Deaf, Hard of Hearing, and DeafBlind individuals in legal proceedings and court services and programs, stakeholders should convene to do the following:

[233] JOHNSON & SCHWARTZ, *supra* note 62. A total of 296 defense attorneys from 34 counties in Washington State responded to a survey in December 2020 about the impact of COVID-19 on their work. *Id.*
[234] *Id.*
[235] BJA COURT RECOVERY TASK FORCE LESSONS LEARNED COMMITTEE, CHANGING COURT PRACTICES AMIDST COVID AND BEYOND (2020), https://www.courts.wa.gov/programs_orgs/pos_bja/Final%20Changing%20Court%20Practices%20Admist%20COVID%20Survey%20summary.pdf.

- Review accessibility – at all levels of court – by limited English language users statewide, including people with hearing loss, to court interpreting services, and develop an action plan to address identified barriers.
- Suggest procedures to monitor and enforce the requirement that each court develop and annually maintain a language access plan pursuant to RCW 2.43.090; address whether the Washington Administrative Office of the Courts (AOC) needs to increase staffing within the Interpreter Services Program to assist courts in creating and implementing their language access plans and in making their language access plans accessible electronically.
- Address the establishment of interpreter training programs in Washington, partnering with other state agencies and community colleges, to create dedicated language interpretation programs and to provide resources to develop new interpreters in the wide variety of languages we need to meet the language interpretation needs of government programs.
- AOC should partner in the development of a certification program for American Sign Language (ASL) court interpreter certification.

- To improve access to the courts for those with limited English proficiency, the Washington Pattern Forms Committee should help translate key court information and forms into our state's top 37 languages (per the Office of Financial Management). To that end, the Committee should: (1) create a list of vital documents (including civil protection order requests and other court forms, information about language services, directions on how to access court in-person and remotely, etc.), and (2) determine how to make them most accessible to the people who need them. With regard to translating forms that trigger court action after filing (such as requests for protection orders), we suggest a pilot project in selected counties to test the feasibility of different approaches to gaining court action based on such translated documents.
- AOC should create guidance for and offer assistance to Washington courts in creating and maintaining accessible websites, including translations and disability accommodations.

- AOC should determine how best to acquire language data on LEP parties, witnesses, etc. from Superior, District, and Municipal courts, to enable AOC to identify and address gaps in language services delivery.

Chapter 3

Gender and Barriers to Jury Service

Judge Rebecca Glasgow

Shelby Peasley, JD; Ophelia S. Vidal, MPH

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I. Summary

Diversity of a jury, or even the larger jury pool from which the jury is selected, impact jury decisions. Diverse juries have longer deliberations, discuss more case facts, make fewer inaccurate statements, and members are more likely to correct inaccurate statements. In short, jury and jury pool diversity impact the equity and justice of jury verdicts.

Black, Indigenous, and women of color[1] as well as Lesbian, Gay, Bisexual, Transgender, and Queer or Questioning (LGBTQ+) people, are underrepresented in Washington jury pools, the group of people from which juries are selected. Insufficient data exist to show whether these populations are underrepresented on Washington juries statewide. We also do not know whether these populations are disproportionately excused from jury service for hardship, for cause, or because of peremptory challenges,[2] though experts in the field strongly believe that racial and gender disproportionality exists at various stages of the jury selection process.

Experienced civil and criminal trial attorneys report that women are more often excused from jury service for hardship because they shoulder a disproportionate burden of child and family care responsibilities. There are also economic barriers to jury service, and evidence suggests those barriers disproportionately affect low-income women, including Black, Indigenous, and women of color; and LGBTQ+ people.

Recommendations include further study to fill identified gaps in data and strategies to reduce known barriers to jury service with emphasis on eliminating or mitigating economic barriers. Recommendations include increasing access to childcare for potential jurors and establishing pilot community and nontraditional courts to accommodate people with childcare and other family care responsibilities. Finally, recommendations include exploring ways to expand financial

[1] The 2021 Gender Justice Study uses the race and ethnicity terms used in the underlying sources when citing data in order to ensure we are presenting the data accurately and in alignment with the how the individuals self-identified. When talking more broadly about the body of literature we strive to use the most respectful terms. See Section V of the full report ("2021 Gender Justice Study Terminology, Methods, and Limitations") for a more detailed explanation of terminology used throughout the report.

[2] A peremptory challenge in jury selection is a right for the attorney(s) on each side to reject a certain number of potential jurors without stating a reason.

compensation for jurors. Because of the inequalities of local court funding, the Washington State Legislature should consider statewide financial support for jury improvements.

II. Background on Jury Service

A. History of women's jury service in Washington

Both the United States Constitution and the Washington Constitution provide a right to a jury trial. Jury service is therefore one of the cornerstones of civic responsibility. Historically, white married women first served on juries in the Washington territorial courts in 1883, when these women also obtained the right to vote.[3] But a woman's right to serve on a jury was eliminated in 1887 when the territorial Supreme Court declared women had neither the right to vote nor the right to sit on a jury.[4] The court majority said, "The 'labor and responsibility which [jury duty] imposes [was] so onerous and burdensome, and so utterly unsuited to the physical [condition] of females that the legislature could not have intended to impose such an obligation.'"[5] The Washington Constitution, adopted in 1889, included neither women's suffrage nor a right for women to serve on juries.

About twenty years later, in 1911, Washington made white women automatically eligible for jury service when the Legislature amended its jury service statute placing all electors, including white women, on the list of eligible jurors.[6] This made Washington the first state to permanently allow certain women to serve on juries.[7] Washington courts minimized application of the statute by either permitting this subset of women to be excused from jury service upon request and without

[3] Aaron H. Caplan, *The History of Women's Jury Service in Washington*, 59 WASH. STATE BAR NEWS 3 (2005) at 1.
[4] *Id.* at 4 (describing *Harland v. Territory*, 3 Wash. Terr. 131, 13 P. 453 (1887), *abrogated by Marston v. Humes*, 3 Wash. Terr. 267, 28 P. 520 (1891)).
[5] *Id.* at 5 (quoting *Harland*, 3 Wash. Terr. at 140).
[6] Caplan, *supra* note 3, at 7.
[7] The Wyoming Territory allowed women to serve on juries in the early 1870s, but it later revoked this right. Kim Viner, *Women on the Jury: Wyoming Makes History Again*, WYOHISTORY.ORG (Jan. 23, 2020), https://www.wyohistory.org/encyclopedia/women-jury-wyoming-makes-history-again.

judicial inquiry, or requiring the prospective juror to opt-in to eligibility for jury service.[8] It was not until 1967 that Washington eliminated an exception for jury service based solely on gender.[9]

Because eligibility for jury service is connected to the right to vote, and nonwhite women were denied the right to vote for far longer than white women, most Indigenous women and women of color were unable to serve on juries for longer than white women. For example, naturalized citizens of Asian descent could not vote until 1952.[10] Nationwide, only in 1962 did all Indigenous people have the right to vote. Our state constitutional prohibition against votes for "Indians not taxed" remained until 1974.[11] Black people did not uniformly have a right to vote until 1965.[12] Because the right to serve on a jury is so intimately tied to the right to vote, these barriers to voting have also often been barriers to jury service.

B. Why equity in jury representation matters

Equity in jury representation creates higher public trust and confidence in the legal system.[13] Inequity in jury representation raises serious questions about the legal system's dedication to achieving and maintaining equity and justice in its verdicts.[14]

In mock juries, jury diversity has increased the rigor of case assessment and analyses. Diverse mock juries had longer deliberations, discussed more case facts, made fewer inaccurate statements, and were more likely to correct inaccurate statements.[15] "Jurors tend to rely on their

[8] Caplan, *supra* note 3, at 7.
[9] *Id.* at 9.
[10] Terry Ao Minnis & Mee Moua, *50 Years of the Voting Rights Act: An Asian American Perspective*, AAJC (Aug. 4, 2015), https://www.advancingjustice-aajc.org/report/50-years-voting-rights-act-asian-american-perspective; Immigration and Nationality Act, Pub. L. No. 82-414, § 101, 66 Stat. 163, 167 (1952).
[11] WASH. CONST. art. 6, § 1 (1889). Barriers such as postal address requirements still hamper voting for people living on reservations in other states today. Patty Ferguson-Bohnee, *How the Native American Vote Continues to Be Suppressed*, 45 ABA HUM. RTS. MAG. (2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/how-the-native-american-vote-continues-to-be-suppressed/.
[12] Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.
[13] *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 145-46, 143, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994).
[14] Ashish S. Joshi & Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, A.B.A. LITIG. SECTION, DIVERSITY & INCLUSION COMM. (Sept. 1, 2015), https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences/.
[15] *Id.*

lived experiences when participating in jury deliberations;" therefore, having more diverse perspectives "can yield a discussion that is more well-balanced."[16]

Studies vary in their conclusions as to whether the gender of jurors makes a difference. One study indicates that gender can influence communication styles, how evidence is evaluated, and how controversies are resolved.[17] If women are underrepresented on juries, studies suggest this will impact the accuracy and efficiency of deliberations.[18] The gender of jurors may make a difference in cases involving sexual violence.[19] But other studies concluded that gender alone is not enough to impact jury decisions.[20]

However, research shows that juries with jurors of color were less punitive against Black and Latinx defendants than all-white juries.[21] We were unable to find any research that looks at the intersection of gender and race, which would allow us to understand whether jury decisions varied among subpopulations (i.e., white women compared to white men; Black women compared to Black men; etc.).

The positive impact of racial and ethnic diversity occurred even when the jury *pools,* from which jurors are selected, were diverse, regardless of the diversity of the seated jury. Juries formed from all-white jury pools convicted Black defendants at a rate of 81% compared to 66% for white defendants, but the conviction gap was nearly eliminated when the jury *pool* had just one Black member.[22]

[16] Peter A. Collins & Brooke Miller Gialopsos, *Answering the Call: An Analysis of Jury Pool Representation in Washington State*, 22 CRIMINOLOGY, CRIM. JUST. L. & SOC'Y 6 (2021).
[17] Isabella M. García Toro, *Gender Matters in Jury Duty: Male and Female Participation During the Deliberation Process*, REVISTA JURÍDICA UPR 61, 62, (2015).
[18] Lucy Fowler, *Gender and Jury Deliberations: The Contributions of Social Science*, 12 WM. & MARY J. WOMEN & L. 1, 26-28, 47-48 (2005); García Toro, *supra* note 17, at 68-77; Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 96 YALE L. J. 593, 599-604 (1987).
[19] Collins & Gialopsos, *supra* note 16, at 6; *see also,* Helen Eigenberg, Karen McGuffee, Gale D. Iles & Tammy S. Garland, *Doing Justice: Perceptions of Gender Neutrality in the Jury Selection Process*, 37 AM. J. CRIM. JUST. 258, 269-70, 272 (2012).
[20] Eigenberg, McGuffee, Iles & Garland, *supra* note 19, at 261, 269-70, 272.
[21] Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Finding, Implications, and Directions for Future Research*, 2 SOC. ISSUES & POL'Y REV. 65, 83-84 (2008).
[22] Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q. J. ECON. 1017, 1032 (2012). "However, as the number of blacks in the pool increases, this differential goes away; in fact, with at least one black member of the jury pool, conviction rates are almost identical (71% for blacks and 73% for whites)." *Id.*

In sum, these conclusions suggest that diverse representation of various communities in jury pools and juries has measurable impact on the criminal justice system and reduces inequitable incarceration.

III. Washington Laws Governing Jury Qualifications and Selection

The United States Constitution and the Washington Constitution provide a right to a jury trial.[23] Washington laws concerning qualifications for jury service are facially gender-neutral, race-neutral, and neutral to participation by LGBTQ+ people. To serve as a juror a person must (1) be at least eighteen years old; (2) be a United States citizen; (3) reside in the county where they were summoned; (4) be able to communicate in English; and (5) have no felony convictions without a corresponding restoration of civil rights.[24]

All qualified citizens have a right to be considered for jury service and an obligation to appear for jury service once they are summoned.[25] If a potential juror meets the statutory requirements, they cannot be excluded from a jury because of their race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, gender identity, or any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability.[26] Accommodations must be made for people with disabilities.

Potential jurors are selected from a master jury list made up of all registered voters, licensed drivers, and identicard holders who live in that county.[27] Jurors must be randomly selected from a fair cross section of the population in the area served by the court.[28] The court must ensure

[23] WASH. CONST. art. 1, § 21.
[24] RCW 2.36.070.
[25] RCW 2.36.080(1); *see also Powers v. Ohio*, 499 U.S. 400, 409, 111 S. Ct. 1364, 113 L. Ed. 2d. 411 (1991) (venireperson's equal protection right to serve as juror); *State v. Burch*, 65 Wn. App 828, 834, 830 P.2d 357 (1992).
[26] RCW 2.36.080(3); RCW 49.60.030; *Batson v. Kentucky*, 476 U.S. 79, 84, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128-29, 143, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994); *City of Seattle v. Erickson*, 188 Wn.2d 721, 732, 398 P.3d 1124 (2017).
[27] GR 18(b); RCW 2.36.054.
[28] RCW 2.36.080(1); WASH. CONST. art. 1, § 22.

random selection of jurors from the master list, though no uniform method of selection is required throughout the state.[29]

Jurors receive a written juror summons by mail.[30] Once summoned, the potential jurors receive a written or electronic declaration where they state whether they meet the statutory juror qualifications.[31] Failure to appear for jury service is a misdemeanor.[32]

A qualified potential juror may not be excused from jury service unless they establish an undue hardship, extreme inconvenience, public necessity, or another reason accepted by the court.[33] If a juror is unfit due to bias, prejudice, indifference, inattention, or another reason listed in statute, the judge must excuse them from service.[34] General Rule 37, discussed in more detail below, also provides protections against racially motivated peremptory challenges.

IV. Women of Color, Indigenous Women, and LGBTQ+ People are Underrepresented in Jury Pools, but There are Significant Gaps in Data About Representation at Other Stages

In 2016 and 2017, the Washington State Supreme Court Minority and Justice Commission conducted a yearlong, statewide juror demographic survey through 33 participating courts.[35] The survey showed that Black, Indigenous, and people of color were underrepresented in the pool of jurors responding to jury summonses in *all* of the participating courts in Washington.[36] A recent analysis of this data showed that Black, Indigenous, and women of color were also underrepresented in all of the participating courts.[37] And LGBTQ+ people were underrepresented in King County, the only county with population data sufficient to analyze this question.[38]

[29] RCW 2.36.065.
[30] RCW 2.36.095(1).
[31] RCW 2.36.072(1).
[32] RCW 2.36.170.
[33] RCW 2.36.100(1).
[34] RCW 2.36.110.
[35] Collins & Gialopsos, *Answering the Call: An Analysis of Jury Pool Representation in Washington State*, *supra* note 16, at 2.
[36] *Id.*
[37] *Id.*
[38] *Id.*

A 2021 Minority and Justice Commission survey of people responding to jury summons in King, Pierce, and Snohomish Counties during the COVID-19 pandemic showed that just over 51% of people initially responding in those counties were women.[39] Respondents in these counties during this time period tended to be college educated and almost half reported a combined household income of over $100,000.[40] The average age of respondents was about 50 years old, and more than half of respondents were married.[41] The 2021 study replicated the findings from the data collected in 2016 and 2017, again showing non-white respondents overall were underrepresented and white respondents were overrepresented in King County jury pools.[42] This report analyzed the data using a white/non-white binary, and did not present data on the intersection of gender and race. So, if the data allows, there are opportunities to conduct future analysis of this data to understand representation among specific subpopulations (e.g., Black or Indigenous populations), and to better understand how race and gender interact.

The 2016-2017 data showed that Black, Indigenous, and women of color are underrepresented in jury pools,[43] suggesting they likely face more barriers to jury service than white women, and people who experience multiple oppressions often face multiple hurdles. In response to the 2021 survey in King, Pierce, and Snohomish Counties during the pandemic, more than 35% of respondents reported caregiving responsibilities, including a need for childcare, as a barrier to jury service.[44] More than half of respondents reported work-related issues as a barrier to service while more than 20% reported financial barriers, including an inability to afford being away from work.[45] This report presented the data on barriers for all genders and races combined, so if the data allows, there are opportunities to conduct future analysis of this data to better understand how barriers impact specific subpopulations such as Black, Indigenous, and women of color.

Otherwise, there are significant gaps in demographic data about potential jurors and jurors at each stage of the jury selection process. Of Washington trail courts who responded to a 2021

[39] PETER A. COLLINS & BROOKE MILLER GIALOPSOS, AN EXPLORATION OF BARRIERS TO RESPONDING TO JURY SUMMONS 3 (2021) (draft technical report on file with the authors and with the Gender and Justice Commission).
[40] *Id.* at 3.
[41] *Id.* at 3, 19.
[42] *Id.* at 19.
[43] Collins & Gialopsos, *Answering the Call: An Analysis of Jury Pool Representation in Washington State*, *supra* note 16, at 4.
[44] COLLINS & GIALOPSOS, AN EXPLORATION OF BARRIERS TO RESPONDING TO JURY SUMMONS, *supra* note 39, at 27.
[45] *Id.* at 27, 37.

survey of Washington courts, only 26% collect any demographic data at all about jurors or potential jurors.[46] And only five court respondents statewide reported their court collects demographic data at every stage of the jury selection process.[47] Courts reported that they lacked resources to collect robust data about jurors and potential jurors.[48] Some reported that they do not collect juror demographic data because they are not required to do so.[49]

In 2021, the Washington State Legislature provided a budget proviso to the Administrative Office of the Courts to implement an electronic demographic survey for all jurors who begin a jury term in Washington State. All courts will be invited and encouraged to provide the survey to jurors who show up for jury duty. The survey will collect data on each juror's race, ethnicity, age, gender, sexual orientation, employment status, educational attainment, income, and other relevant factors. The Administrative Office of the Courts will be responsible for providing a report on the demographic data to the Governor and Legislature by June 20, 2023.[50]

V. Barriers to Jury Service and Laws or Programs Attempting to Mitigate Barriers

A. Economic barriers

Research suggests that the primary barrier to jury service is socioeconomic: people with low incomes are less likely to receive and respond to a jury summons.[51] People with low incomes face the greatest barriers to receiving a jury summons in large part due to the master lists and jury summons processes. Low-income people are less likely to be registered to vote, have higher rates of renting, and are more likely to be mobile, rendering state-compiled address lists quickly out-

[46] RHAELYNN GIVENS & EMILIE MADDISON, JURY DIVERSITY: A SURVEY OF WASHINGTON STATE TRIAL COURTS ANALYSIS OF COURT DEMOGRAPHIC DATA COLLECTION AND JUROR ACCOMMODATIONS 5 (2021).
[47] *Id.* at 6.
[48] *Id.* at 8.
[49] *Id.*
[50] ENGROSSED SUBSTITUTE S.B. 5092, 67th Leg., Reg. Sess. (Wash. 2021).
[51] GIVENS & MADDISON, *supra* note 46, at 8; Paula Hannaford-Agor, *Systemic Negligence in Jury Operations: Why the Definition of Systemic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 773-74 (2011).

of-date.[52] Some people, many who live on reservations for example, do not have physical mailing addresses, which presents a barrier to receiving and responding to a juror summons.[53]

Exclusions are likely exacerbated for people who are experiencing homelessness or frequent moves that may be associated with poverty. Because jurors are summoned by mail, a person who does not have a mailing address or whose address changes frequently, may not reliably receive a jury summons. Similarly, to the extent people experiencing homelessness are less likely to have a driver's license or identicard or be registered to vote, they are likely to be underrepresented on the jury master lists, which would likely make them also underrepresented on juries. Homelessness disproportionately affects transgender people, as well as people who are members of some racial and ethnic groups, for example.[54] We are not aware of any studies in Washington of jury service among people experiencing homelessness.

Research across the United States indicates that people who work hourly positions are most likely to fail to respond to a jury summons.[55] For adults earning less than $35,000 a year (94.8% above the Washington State poverty line for a single adult), the possibility of lost wages and work-related barriers are significant causes of jury summons noncompliance.[56] And in the 2008 Jury Research Project conducted by the Washington State Center for Court Research, Hispanic or Latino prospective jurors were more likely to respond to jury summons if their employer fully compensated for lost wages versus if they did not: 65%, compared to 14%, respectively.[57]

Significantly for purposes of this analysis, socioeconomic factors are correlated with other societal disparities: In Washington, 21% of Native American people, 16.3% of the Black population, and 16% of Latinos live below the poverty line, compared to 8.2% of white and 7.9% of Asian American populations.[58] Additionally, 10.9% of working-age women (defined as women

[52] *Id.*; Robert C. Walters, Michael D. Marin & Mark Curriden, *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 329, 350 (2005).
[53] *See* Ferguson-Bohnee, *supra* note 11.
[54] COLLINS & GIALOPSOS, AN EXPLORATION OF BARRIERS TO RESPONDING TO JURY SUMMONS, *supra* note 39, at 4.
[55] *Id.* at 331.
[56] *Id.*
[57] JENNI CHRISTOPHER, CARL MCCURLEY, EDWARD VALACHOVICH, TOM GEORGE & JULIA APPEL, WASH. STATE CTR. FOR CT. RSCH., ADMIN. OFF. OF THE CTS., JUROR RESEARCH PROJECT REPORT TO THE WASHINGTON STATE LEGISLATURE (2008), https://www.courts.wa.gov/subsite/wsccr/docs/Juror%20Research%20Report%20Final.pdf.
[58] *Washington 2020*, TALK POVERTY (2021), https://talkpoverty.org/state-year-report/washington-2020-report/.

between the ages of 18 and 64) live in poverty, compared to 8.9% of working-age men.[59] And the race and gender wage gap severely disadvantages women of color. Nationally, for every dollar employers pay white men, they pay Asian women $0.90, white women $0.79, Black women $0.62, Indigenous women $0.57, and Latinas $0.54.[60] It is important to note that when data combines diverse populations of people into one category (such as combining all Asian and Native Hawaiian and Pacific Islander populations) disparities within these groups are masked.

Poverty is further exacerbated by transgender identity and gay or lesbian sexual orientation. Fourteen percent of transgender people in Washington report being unemployed, and 28% live in poverty.[61] Women in same sex marriages are more likely to live in poverty than opposite-sex married couples despite higher rates of employment and educational attainment.[62]

Finally, in a recent survey of jury and court administrators and Superior Court Clerks, one of the top two barriers to jury service that these experts reported was financial burdens such as lost income.[63] Similarly, 20% of people responding to the 2021 survey in King, Pierce, and Snohomish Counties reported financial barriers to their jury service, like an inability to afford missing work.[64] In sum, socioeconomic barriers to jury service primarily impact those who are most likely to be low-income: women of color, people who are transgender, women in same-sex marriages, and people of all genders who are Indigenous, Black, and/or Latinx. See "Chapter 1: Gender and Financial Barriers to Accessing the Courts," for a detailed analysis of income and pay disparities.

1. Juror compensation

Washington law provides for some minimal compensation to mitigate the cost of jury service. For each day's attendance, jurors are compensated for mileage and they receive between $10

[59] *Id.*
[60] Robin Bleiweis, *Quick Facts About the Gender Wage Gap*, CTR. FOR AM. PROGRESS (Mar. 24, 2020), https://cdn.americanprogress.org/content/uploads/2020/03/23133916/Gender-Wage-Gap-pdf. Data from the United States Census Bureau 2018. Note that not disaggregating Asian American race may hide further disparities.
[61] NAT'L CTR. FOR TRANSGENDER EQUALITY, 2015 U.S. TRANSGENDER SURVEY, WASHINGTON STATE REPORT (2017), http://www.transequality.org/sites/default/files/docs/usts/USTS-WA-State-Report.pdf.
[62] Alyssa Schneebaum & MV Lee Badgett, *Poverty in US Lesbian and Gay Couple Households*, 25 FEMINIST ECON. 1, 3 (2019).
[63] GIVENS & MADDISON, *supra* note 46, at 12. Survey respondents were asked about barriers specific to "women, women of color, parents, or other underrepresented groups."
[64] *See* COLLINS & GIALOPSOS, AN EXPLORATION OF BARRIERS TO RESPONDING TO JURY SUMMONS, *supra* note 39, at 27.

and $25.[65] Each jurisdiction is responsible for determining the daily amount within that range they wish to pay jurors for service.[66] The majority of Washington courts whose administrators or clerks responded to a recent survey reported paying the $10 minimum amount.[67] Some courts also reported providing money for jurors to buy lunch.[68]

The 2008 Washington Juror Research Project conducted by the Washington State Center for Court Research studied whether increasing compensation from $10 per day to $60 per day would impact jury participation. The project found that providing increased compensation to a select group had no impact.[69] However, a follow-up analysis (also by researchers at Washington State Center for Court Research) found that the study was limited in scope, with 88% of the study sample being white and 51% having a household income of more than $50,000 per year.[70] No analysis was conducted to determine whether the increased jury compensation was sufficient to compensate for lost wages and associated costs (i.e., travel, parking, childcare). The increased compensation component of the study was also inadequately advertised for the participants. The telephone survey showed that out of the group of individuals who received a jury summons but who did not appear for jury service, only one out of every twelve was even aware they would have received an increased amount of pay as part of the study.[71] More recently, in the 2021 survey of people responding to jury summons in King, Pierce, and Snohomish Counties, 21% of respondents recommended increasing juror compensation by paying an amount equivalent to a living wage, the equivalent of a juror's current wage, or some other significant increase in juror compensation.[72]

Other states have increased juror compensation to improve jury summons compliance. For example, in the mid-1990s, New York Court of Appeals Chief Judge Judith Kaye and the New York

[65] RCW 2.36.150.
[66] *Id.*
[67] GIVENS & MADDISON, *supra* note 46, at 12.
[68] *Id.*
[69] CHRISTOPHER, MCCURLEY, VALACHOVICH, GEORGE & APPEL, *supra* note 57, at 7-8.
[70] Andrew J. Bloeser, Carl McCurley & Jeffery J. Mondak, *Jury Service as Civic Engagement: Determinants of Jury Summons Compliance*, 40 AM. POL. RES. 179, 190, 193-94, 199-200 (2011).
[71] CHRISTOPHER, MCCURLEY, VALACHOVICH, GEORGE & APPEL, *supra* note 57, at 4.
[72] COLLINS & GIALOPSOS, AN EXPLORATION OF BARRIERS TO RESPONDING TO JURY SUMMONS, *supra* note 39, at 29.

Legislature reformed the jury process, in part by increasing jury pay. Officials reported increased participation of hourly wage earners as a result.[73]

The Washington State Supreme Court recently addressed sufficiency of juror compensation.[74] The Court held that under the governing statute, jurors are not employees for purposes of Washington's minimum wage laws, so they are not entitled to minimum wage for jury service.[75] In RCW 2.36.080(3), the Legislature provided that jurors should not be excluded because of their economic status, but it did not create a cause of action that would allow low-income jurors to demand increased juror compensation.[76]

In sum, we know that jurisdictions pay jurors between $10 and $25 per day plus mileage, but the majority of jurisdictions responding to a recent survey reported paying at the low end of the juror pay range. One survey of people responding to jury summons in Washington has suggested increasing juror pay would increase participation, and New York appears to have had some success increasing participation from hourly wage earners. The Legislature should consider funding a study to determine at what level increased juror pay would likely yield greater participation. Any future funding increase of juror pay should be funded by the Legislature, rather than on a county-by county basis.

2. Employment protections

Employers must provide employees with sufficient leave of absence,[77] but they are not required to pay employees for their time during jury service. Employers cannot threaten, coerce, or harass an employee for serving as a juror nor can they deny promotional opportunities.[78] Intentional violations of the statute constitute a misdemeanor.[79]

[73] Walters, Marin & Curriden, *supra* note 52, at 351-52.
[74] *Rocha v. King County*, 195 Wn.2d 412, 460 P.3d 624 (2020).
[75] *Id.* at 424.
[76] *Id.* at 430-31 ("We find no legislative intent to support an implied cause of action allowing jurors to seek a remedy for damages or requiring increased pay.").
[77] RCW 2.36.165(1).
[78] RCW 2.36.165(2).
[79] RCW 2.36.165(4).

Importantly, the 2021 survey of people responding to a juror summons in King, Pierce, and Snohomish Counties showed that a significant number of respondents said that lost wages were a barrier to jury service.[80] The 2008 Juror Research Project referenced above found that employer compensation for lost wages was the greatest contributor to participants' willingness to respond to a jury summons.[81] Thus, workplace compensation protections may be more significant in achieving equitable jury summons compliance than direct juror compensation.

Some union contracts in Washington contain clauses that require employers to pay workers when they are on jury duty. [82] The state of New York has responded more broadly by adopting regulations requiring companies with over 20 employees to pay workers for hours missed due to jury service, and establishing an independent ombuds officer to represent juror interests in related disputes.[83]

Washington should consider adopting a requirement that employers pay workers for hours missed due to jury service. If laws are changed to provide for employer pay for jury service, care should be taken to be sure that the definition of included employer is designed to be inclusive of low-wage workers.

B. Childcare and family responsibilities

An additional significant barrier to jury service is the need to provide care for children or other family members. Washington juror and court administrators and Superior Court Clerks responding to the recent survey most frequently reported childcare as the most common barrier to jury service.[84] And more than 35% of people responding to the 2021 survey in King, Pierce,

[80] COLLINS & GIALOPSOS, AN EXPLORATION OF BARRIERS TO RESPONDING TO JURY SUMMONS, *supra* note 39.
[81] CHRISTOPHER, MCCURLEY, VALACHOVICH, GEORGE & APPEL, *supra* note 57, at 12.
[82] For example, union contracts often include jury duty clauses for employees to receive full pay for jury duty service. *See* Dena G. Weiss & Ernestine M. Moore, *Paid Jury Leave in Major Union Contracts, 1961*, 85 MONTHLY LAB. REV. 405, 405 (1962) (noting that by 1961, over half of major union contracts provided full or partial pay for jury duty service); *see also* SECTION 17.4: JURY DUTY, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE STATE OF WASHINGTON & WASHINGTON FEDERATION OF STATE EMPLOYEES 2021-2023 63 (2021), https://www.wfse.org/system/files/wfse_gg_contract_0.pdf (indicating that employees of the Washington Federation of State Employees union will receive paid leave for jury duty service).
[83] Walters, Marin & Curriden, *supra* note 52, at 352, 354.
[84] GIVENS & MADDISON, *supra* note 46, at 12.

and Snohomish Counties reported caregiving responsibilities as a barrier to jury service.[85] Only four courts responding to the survey of trial courts reported providing childcare or making accommodations for jurors with childcare needs.[86]

Caregiving responsibilities disproportionately fall on women.[87] Experienced attorneys with significant jury trial experience in Washington have observed that women have been disproportionately excused from jury service because of childcare obligations. One attorney reported that in her four years serving in one urban Washington court, she cannot recall a single Latina serving on a jury.

Another experienced attorney reported that school closures disproportionately affect the representation of women on juries. Another attorney reported that in her trials, pregnant women have been excused based on stereotypical assumptions regarding their limitations. A lack of breastfeeding accommodations may also be a barrier. Courts responding to a survey reported various accommodations for pregnant or breastfeeding jurors like frequent breaks, lactation rooms, and refrigeration space. However only 56% of respondents report making accommodations for pregnant jurors and only 49% report making accommodations for breastfeeding jurors.[88] Several responses also emphasized excusing jury service or postponing it based on caregiving needs, pregnancy, or breastfeeding status.[89]

Where schools have transitioned to at-home, remote learning as a result of the COVID-19 pandemic, family care and parental responsibilities have increased, and they continued to fall disproportionately on women.[90] For example, one experienced attorney reported participating in a trial during the COVID-19 pandemic where the court was willing to automatically excuse individuals with COVID-related concerns, including caring for someone in a high-risk population and needing to provide childcare related to remote learners. Given the data regarding the

[85] COLLINS & GIALOPSOS, AN EXPLORATION OF BARRIERS TO RESPONDING TO JURY SUMMONS, *supra* note 39, at 26–27.
[86] GIVENS & MADDISON, *supra* note 46, at 9.
[87] Kim Parker, *Women More Than Men Adjust Their Careers for Family Life*, PEW RSCH. CTR. (Oct. 1, 2015), https://www.pewresearch.org/fact-tank/2015/10/01/women-more-than-men-adjust-their-careers-for-family-life/.
[88] GIVENS & MADDISON, *supra* note 46, at 9.
[89] *Id.*
[90] *See generally* Kate Power, *The COVID-19 Pandemic Has Increased the Care Burden of Women and Families*, 16 SUSTAINABILITY: SCI., PRAC. & POL'Y 67 (2020).

disproportionate burden of family care described above, women probably have been disproportionately excused from jury service during this time. See "Chapter 4: The Impact of Gender and Race in the Courtroom and in the Legal Community" for more information on how caregiving responsibility fall disproportionally on women and how that has been exacerbated as are result of COVID-19.

Data collected from parent surveys about Washington's two free courthouse childcare centers indicates that jurors are not using these services.[91] Our recommendations include seeking funding opportunities to increase access to the justice system for parents. To the extent that this includes prospective jurors with childcare responsibilities, any free childcare available at courthouses should be made available to prospective jurors, and information about the availability of free childcare should be included in the juror summons. Almost 17% of respondents in the 2021 survey of people responding to jury summons in King, Pierce, and Snohomish Counties recommended reimbursement for childcare as a solution.[92] Courts should consider whether they can accommodate parenting schedules for jurors who need to pick up children after school or from their childcare. Courts should support additional services like reimbursing parents for the cost of childcare during jury service and increasing respite care options for childcare and elder care to facilitate jury service. Notice of such services should appear in the jury summons.

C. Bias in jury selection

During the jury selection process, parties may exercise general or particular challenges "for cause."[93] General for-cause challenges apply when a juror is disqualified from serving on any jury.[94] Particular for-cause challenges are objections to a juror serving as a juror in the particular case on trial.[95] Particular challenges can be based on a juror's implied bias, actual bias, or an

[91] KALIA HOBBS ET AL., UNIV. OF WASH. SCH. OF PUB. HEALTH, EVALUATION REPORT: ON-SITE CHILDCARE PROGRAMS IN COUNTY COURTHOUSES & THEIR EFFECT ON ACCESS TO THE JUSTICE SYSTEM 7–8 (2020).
[92] COLLINS & GIALOPSOS, AN EXPLORATION OF BARRIERS TO RESPONDING TO JURY SUMMONS, *supra* note 39, at 30.
[93] RCW 4.44.150.
[94] RCW 4.44.150(1).
[95] RCW 4.44.150(2).

inability to perform the juror's duties.[96] Implied bias means the juror has certain conditions or relationships that may create a bias for or against a party in the case.[97] Actual bias exists when the juror has a state of mind that prevents them from acting fairly and impartially in the case.[98]

Each party may also exercise peremptory challenges during the selection process, which allow a party to excuse a juror without stating a reason.[99] Peremptory challenges based solely on a potential juror's gender are barred by Washington's Equal Rights Amendment.[100]

In *Batson v. Kentucky*, the United States Supreme Court held that the Equal Protection Clause of the United States Constitution bars the State from excusing a potential juror with a peremptory challenge based on race in a criminal case.[101] The Court further held that to contest such a challenge, the defendant must first establish a prima facie showing that "raises an inference of purposeful discrimination," then the burden shifts to the State to provide a race-neutral explanation, and the trial court must analyze the State's reason to determine if there was purposeful discrimination.[102] The United States Supreme Court later applied *Batson* to hold that, in a civil case, the State could not excuse a juror with a peremptory challenge based on their gender.[103] And the Ninth Circuit has similarly applied the *Batson* analysis to evaluate the removal of a potential juror based on the person's sexual orientation.[104]

Then, in *City of Seattle v. Erickson*, the Washington Supreme Court held that a trial court must recognize a prima facie case of purposeful discrimination when the peremptory challenge is exercised against the only member of a racially cognizable group.[105]

Around this same time, a coalition of stakeholders sought to increase protections against racially motivated peremptory challenges.[106] The Washington State Supreme Court adopted General

[96] RCW 4.44.170.
[97] RCW 4.44.180.
[98] RCW 4.44.190.
[99] RCW 4.44.130, .140.
[100] *Burch*, 65 Wn. App at 837.
[101] 476 U.S. at 97.
[102] *Id.* at 94.
[103] *J.E.B.*, 511 U.S. at 143.
[104] *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 476-84 (9th Cir. 2014).
[105] 188 Wn.2d at 736.
[106] *See Proposed New Rule GR 37 – Jury Selection*, WASH. CTS. (2017), http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=537.

Rule 37 in 2018.[107] Under the rule, a party or the court may object to a peremptory challenge if they think the challenge is based on improper racial bias.[108] If an objective observer could view race or ethnicity as a factor in the peremptory challenge, the court must deny the peremptory challenge, allowing the potential juror to remain.[109] An objective observer is someone who recognizes that implicit, institutional, and unconscious biases, along with purposeful discrimination, have led to the unfair exclusion of prospective jurors.[110]

When reviewing a peremptory challenge for bias, the court must consider a number of factors, such as the number and type of questions posed to the potential juror, whether that juror's answers were similar to other jurors' answers, and whether those other jurors were also challenged.[111] Certain reasons are presumed to be invalid due to a history of association with "improper discrimination in jury selection," such as prior contact with law enforcement, residing in a high crime area, and a close relationship with someone who has been stopped, arrested, or convicted of a crime.[112] Additionally, if a party wishes to justify their peremptory challenge based on the potential juror's behavior, the judge or opposing counsel must also have observed the behavior in question.[113]

Some stakeholders, including the Washington Association of Prosecuting Attorneys, advocated for GR 37 to incorporate gender as well as race and ethnicity. Legal Voice also advocated that discrimination based on gender identity and sexual orientation should be included in the rule.[114] The Washington State Supreme Court did not adopt these proposals. Proponents of incorporating gender argued that there were anecdotal "reports that women have been excluded from juries in trials involving domestic violence," and that gender-motivated exclusions should

[107] Order in the Matter of the Proposed New Rule General Rule 37—Jury Selection, No. 25700-A-1221 (Order re GR 37) (Wash. Apr. 5, 2018).
[108] GR 37(c), (d).
[109] GR 37(e).
[110] GR 37(f).
[111] GR 37(g).
[112] GR 37(h).
[113] *Id.* In *State v. Jefferson*, 192 Wn.2d 225, 429 P.3d 467 (2018), the Washington State Supreme Court recognized that the *Batson* procedures had not proven strong enough to prevent racial discrimination in jury selection. 192 Wn.2d at 229. Specifically, the court explained that the *Batson* test makes it difficult for defendants to prove purposeful discrimination and fails to address peremptory strikes due to implicit or unconscious bias. *Id*. at 242. Prior to *Jefferson*, GR 37 was adopted to address those issues. *Id*. at 234.
[114] Sara L. Ainsworth, Legal Voice, Comments to proposed GR 37 (Mar. 7, 2017).

be prevented by court rule.[115] The Washington ACLU and the Washington Association of Prosecuting Attorneys provided alternative drafts of the rule that incorporated gender.[116]

Opponents of applying GR 37 more broadly argued that bias against people based on race and ethnicity is a uniquely difficult problem that warranted the approach taken in GR 37, while discrimination based on gender was not of the same character, and they did not want to dilute the focus of the rule. In addition, they recognized that peremptory challenges are also used as a tool to eliminate bias on a jury, and they did not want to expand the application of GR 37 so far that it did more harm than good.

Anecdotally, Washington litigators have reported disproportionate exclusion of women through peremptory challenges in cases involving domestic violence and in civil, gender and pregnancy discrimination cases. A former prosecutor recalled trials in which the defense attorney asked all women in the jury pools about their prior experience with sexual harassment and domestic violence. In one trial where the jury pool was expanded to allow for an alternate, all woman were excused by the defense through preemptory strikes and strikes for cause, or because of childcare issues. Ultimately, the jury panel was comprised entirely of men. Despite this anecdotal evidence, very few jurisdictions collect demographic data, including about gender, of people who are ultimately selected to sit on juries.[117]

Further, LGBTQ+ people may also suffer discrimination in jury selection, though current data is unavailable to determine if such discrimination exists. LGBTQ+ people may also avoid participation in jury service if they fear discrimination or public mistreatment. For example, transgender, gender nonbinary, and gender queer people in Washington have reported unequal treatment, harassment, and even physical assault in public facilities, including government offices.[118] Only 14% of respondents to the U.S. Transgender Survey in Washington State reported

[115] *Id.*; *see also*, *e.g.*, Geoffrey Revelle, Access to Justice Board, Comments to proposed GR 37 (Mar. 13, 2017) and Rebecca Glasgow, Washington Women Lawyers, Comments to proposed GR 37 (Apr. 23, 2017).
[116] Salvador Mungia and La Rond Baker, American Civil Liberties Union, Comments to proposed GR 37 (Feb. 24, 2017) (providing an alternative draft but taking no position on whether it should be adopted); Letter from Rich Weyrich to Supreme Court Clerk Carlson about Proposed Rule GR 37 (Jan. 4, 2017) (providing alternative rule language incorporating gender and arguing for that version's adoption).
[117] GIVENS & MADDISON, *supra* note 46, at 5.
[118] NAT'L CTR. FOR TRANSGENDER EQUALITY, *supra* note 61.

that they had their chosen name on all legal documents; and being misidentified in a public setting is a source of anxiety.[119] And 61% avoided public restrooms in order to avoid confrontation.[120] One member of the community who works with queer youth said "Queer and Trans folks are worn out by the justice system."[121]

Yet in the survey of Washington jury and court administrators and Superior Court Clerks, only one court reported asking potential jurors about their preferred pronoun when they appeared and only eight described using gender neutral language on juror forms.[122] Only 22 courts statewide reported offering single stall or gender neutral bathrooms.[123] As a result, courts with policies that are aware of these issues may be able to encourage a higher level of jury participation from people in these communities. Education of judges and court personnel on these issues should be a priority.

D. Felony convictions

The Washington Constitution prohibits people who have been convicted of "infamous crimes" from voting unless their civil rights have been restored.[124] "Infamous crimes" is defined in state law to mean a crime punishable by death or imprisonment in a state or federal correctional facility.[125] Infamous crimes do not include an adjudication in juvenile court or a conviction for a misdemeanor or gross misdemeanor.[126]

After a felony conviction, a person's civil rights are automatically restored in Washington, making them eligible to serve on a jury, when they are no longer serving a term of total confinement.[127] A person does not need to take steps to restore their right to sit on a jury, but they do need to have a driver's license, identicard, or be registered to vote in order to be on the master list from

[119] *Id.*; Judge Lisa Mansfield's interview with Matthew Wilson, Executive Director of the Oasis Center for Queer Youth.
[120] NAT'L CTR. FOR TRANSGENDER EQUALITY, *supra* note 61.
[121] Judge Lisa Mansfield's interview with Matthew Wilson, Executive Director of the Oasis Center for Queer Youth.
[122] GIVENS & MADDISON, *supra* note 46, at 10.
[123] *Id.*
[124] WASH. CONST. art. 6, § 3.
[125] RCW 29A.04.079.
[126] *Id.*
[127] RCW 2.36.010(13); RCW 29A.08.520.

which people are selected to appear for jury duty. And a person must re-register to vote after their right to vote is restored.[128]

Prior to a person's release from confinement, the Department of Corrections must provide them with a voter registration form and instructions on the various ways they can register to vote.[129] The Department of Corrections provides assistance with obtaining a Washington identicard in preparation for release from confinement and the fee is often waived.[130]

Felony convictions have nevertheless been a barrier to jury service. While no study has specifically assessed the impact of felon exclusions in Washington, research in other states shows clear systemic disparities in jury service due to racial trends in mass incarceration. For example, in one study in Georgia, where the Black to white ratio of incarceration is 3.2 to 1, felon jury exclusion was found to reduce the pool of eligible Black people statewide by nearly one-third.[131]

In Washington, the rate of incarceration per 100,000 people is more than five times higher for Black people than for white people; and 3.56% of the Black population are disenfranchised, compared to 0.87%of the general population.[132] These disparities exist across genders, with Black boys and men being more likely to face incarceration than white boys and men,[133] and Black girls and women being more likely to face incarceration than white girls and women.[134] Similarly, American Indian/Alaska Native people in Washington are overrepresented in the prison system, constituting 5% of the incarcerated population despite comprising only 2% of the state population.[135] American Indian/Alaska Native populations are imprisoned at rates nearly five times that of the white population.[136] See "Chapter 11, Incarcerated Women in Washington," for

[128] RCW 10.64.140(d); RCW 29A.08.520.
[129] RCW 72.09.275.
[130] Department of Corrections Policy 380.550; RCW 46.20.117.
[131] Darren Wheelock, *A Jury of One's "Peers": The Racial Impact of Felon Jury Exclusion in Georgia*, 32 JUST. SYS. J. 335, 347 (2011).
[132] *State-by-State Data*, THE SENT'G PROJECT (2020), https://www.sentencingproject.org/the-facts/#map?dataset-option=SIR. See also "Chapter 11: Incarcerated Women in Washington."
[133] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (New Press 2012).
[134] THE SENT'G PROJECT, INCARCERATED WOMEN AND GIRLS 2, 5 (2020), https://www.sentencingproject.org/publications/incarcerated-women-and-girls/.
[135] *Washington State Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/WA.html (last visited July 7, 2021).
[136] Thomas Bonczar & Joseph Mulako-Wangota, *Corrections Statistical Analysis Tool (CSAT) – Parole*, BUREAU OF JUST. STAT., https://www.bjs.gov/parole/ (count of year-end probation population by sex, race/Hispanic origin,

a more detailed analysis of gender, racial, and ethnic disparities in incarceration. As noted in that chapter, there is a notable lack of research focusing on Indigenous, Asian, and Native Hawaiian or Other Pacific Islander populations; significant data issues for Latinx populations; and substantial missing race and ethnicity data for some datasets.

Peremptory exclusions may also result in disproportionate exclusions of people with felony convictions from juries. According to GR 37, some lived experiences such as interactions with and distrust of the police, living in high crime neighborhoods, or having a close relationship with people who have interacted with the jail or prison system are presumptively invalid reasons for a peremptory challenge.[137] This portion of the rule does not include having previously been convicted of a crime. Thus, there is still reason to question whether, in communities that are disproportionately policed and incarcerated, exclusions for potential jurors are also disproportional.

VI. Jury Service Summary of Findings

LGBTQ+ people and Black, Indigenous, and women of color have been found to be underrepresented in Washington *jury pools*. Only five courts statewide report collecting demographic data about jurors and potential jurors at every stage or nearly every stage of the process. Insufficient data exist to show whether women (in particular Black, Indigenous, and women of color), or LGBTQ+ people are underrepresented on Washington juries. However, attorneys report that they believe women are more often excused for hardship because of the disproportionate burden they bear with regard to child and family care responsibilities. And to the extent there are economic barriers to jury service, evidence suggests that those barriers would disproportionately affect low-income women; Black, Indigenous, and women of color; and LGBTQ+ people. We do not know whether there is gender bias in jury selection through the use

generated using the Corrections Statistical Analysis Tool); E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2016 (2018), https://www.bjs.gov/content/pub/pdf/p16_old.pdf; DANIELLE KAEBLE, PROBATION AND PAROLE IN THE UNITED STATES, 2016 (2018); U.S. Census Bureau American Communities Survey (2016) (for the U.S. and Washington population counts for rates calculations).

[137] GR 37(h)(i)-(iv). *See also State v. Saintcalle*, 178 Wn.2d 34, 75-114, 309 P.3d 326 (2013) (González, C.J., concurring), *abrogated by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017).

of peremptory challenges, but attorneys also report that women are disproportionately challenged in certain types of cases.

VII. Recommendations

- In order to determine whether women (including Black, Indigenous, women of color, and women in poverty) and LGBTQ+ people are disproportionately underrepresented in the jury selection process and why, by the end of 2021, stakeholders, such as the Washington State Supreme Court Minority and Justice Commission and the Washington Pattern Jury Instructions Committee, should convene a jury diversity workgroup to build on prior data collected by the Minority and Justice Commission by studying the following:
    - By the end of 2022, the workgroup, with assistance from AOC, should determine how best to mandate and fund collection of demographic data at every stage of the jury selection process in every Washington jurisdiction.
    - By the end of 2023, the workgroup, with assistance from WSCCR, should collect and study court data to determine whether Black, Indigenous, and women of color or LGBTQ+ people are disproportionately excused from jury service for hardship, for cause, or based on peremptory challenges, and whether different subpopulations are affected differently.
- Recent data shows that significant numbers of potential jurors in Washington lack the resources to participate in jury service. The Washington State Legislature should consider funding research to identify the level of juror compensation that would most effectively increase participation by low-income people.
- In order to enhance jury participation by Black, Indigenous, women of color, women in poverty, and LGBTQ+ people, by the end of 2023, the jury diversity workgroup should encourage courts to consider creative alternatives that accommodate jurors with caregiving responsibilities. Courts should consider whether they can accommodate parenting schedules for jurors who need to pick up children after school or childcare. The workgroup and Supreme Court Commissions should seek funding with court partners to develop creative pilot projects

and measure their success. The workgroup should develop best practices for judges to account for the effects on jury diversity when evaluating juror hardship, and train judges on these best practices.

  - Apply the remote practices recommendation described in "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for voir dire (jury selection).
  - Apply the childcare access recommendation described in "Chapter 1: Gender and Financial Barriers to Accessing the Courts" to jurors.
  - Apply the flexible hours recommendation described in "Chapter 1: Gender and Financial Barriers to Accessing the Courts" to jurors.
  - By the end of 2022, the jury diversity workgroup should develop best practices for courts to account for the barriers to service for LGBTQ+ jurors, including adding nonbinary gender choices to all forms and referring to jurors by their correct pronouns and chosen names. Train judges and court staff on these best practices.

- Recent data shows that significant numbers of potential jurors in Washington cannot afford to participate in jury service.
  - In order to reduce or eliminate financial barriers to jury service, the workgroup should, by the end of 2023, explore how best to require or incentivize employers to provide paid time off for jury service, following models in other states.
  - The legislature should consider adopting a statewide juror compensation increase sufficient to meaningfully increase juror attendance.

Chapter 4

The Impact of Gender and Race in the Courtroom and in the Legal Community

Robert Mead, JD, MLS; Jennifer Ritchie, JD; Andrea Vitalich, JD

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I. Summary

The 1989 Gender and Justice in the Courts Study (1989 Study) found that gender affects both process and outcomes. It found that women face credibility issues in the courtroom and that women, as litigants, lawyers, and judges, were not always treated with respect, though the impact was often subtle and individual. In 2021, evidence suggests that biases based on gender, race, ethnicity, and other demographics continue to impact and shape various dynamics in the courtroom between litigants, jurors, witnesses, attorneys, judges, and court personnel. Similar biases negatively impact the acceptance of women, people who identify as LGBTQ+, and Black, Indigenous, and people of color[1] within the legal community more broadly.

Sometimes such bias in the courtroom is explicit, taking the form of unfair treatment in court, harassment, and disrespect. Often it is implicit, tainting decisions made by lawyers, judges, and jurors and possibly impacting case outcomes. For example, female and transgender litigants and witnesses face bias in the courtroom, especially if they are perceived to be sex workers. See "Chapter 10: Commercial Sex and Exploitation." Stereotypes about women's gender roles and demeanor may affect the way female attorneys and their clients are perceived and, ultimately, judged. Female litigators, especially women of color, continue to face uneven treatment from judges and demeaning treatment from opposing counsel, and may fear that resisting this treatment will harm their clients. The systemic consequences of these biases are addressed in depth in other chapters throughout this report.

While the bench and the bar are much more diverse in 2021, women, particularly Black, Indigenous, and other women of color, face barriers within the legal profession including pay disparity, career complications, and workplace harassment. As of 2020, over 40% of Washington's judiciary is female and the Washington Supreme Court is now the most diverse state supreme court in the history of the nation, with seven female justices (out of nine), two

[1] The 2021 Gender Justice Study uses the race and ethnicity terms used in the underlying sources when citing data in order to ensure we are presenting the data accurately and in alignment with the how the individuals self-identified. When talking more broadly about the body of literature we strive to use the most respectful terms. See Section V of the full report ("2021 Gender Justice Study Terminology, Methods, and Limitations") for a more detailed explanation of terminology used throughout the report.

justices who are members of the LGBTQ+ community, and four justices who are persons of color. This includes Chief Justice González, who is the first person of color and the first Jewish person to hold that position. However, both men and women of color continue to be significantly underrepresented in judicial and law firm leadership positions nationally and in Washington. As of 2019, most equity partners in U.S. law firms were white males, whereas male attorneys of color constituted 6% of equity partners and women of color constituted only 3% of overall equity partners. About 2% of equity partners identified as LGBTQ+ and less than 1% of equity partners had a disability. There is a national pay gap between male and female attorneys, and it worsened from 85.3% in 2019 to 71.6% in 2021, dropping almost to the 2002 level of disparate pay (69.4%). Family and care responsibilities disproportionately borne by many women, and the impact of the COVID-19 pandemic, play a key role in contributing to these disparities.

Despite existing laws, policies and rules of professional conduct, sexual and workplace harassment continue to pervade the legal community, both nationally and in Washington. A pilot project conducted as part of the 2021 Gender Justice Study shows this. Our workplace survey of employees in Washington courts, Superior Court Clerks' Offices, and judicial branch agencies found that 57% of respondents experienced at least one type of workplace harassment on at least one occasion in the past 18 months. Though harassment experiences were not limited to any one group, employees who identified as American Indian, Alaska Native, First Nations, or other Indigenous Group Member (86%), bisexual (84%), gay or lesbian (73%), and women (62%) reported the highest rates of harassment.

In 2018, the Board for Judicial Administration (BJA) charged the Gender and Justice Commission with developing a model anti-harassment policy for Washington Courts. This policy was adopted by the Board for Judicial Administration on March 20, 2020. We strongly encourage all courts in the State of Washington to adopt a written anti-harassment policy and to implement it in a meaningful way. Much more needs to be done. For example, the judicial branch should take explicit steps to promote equity, diversity, and inclusion and should foster a culture that values individual differences in age, sexual orientation, gender identity or expression, disability, race, and ethnicity. It should also monitor the effectiveness of these efforts.

II. The 1989 Gender and Justice in the Courts Study Found That Gender Affects Both Process and Outcomes, But Concluded that the Impact Was Often Subtle and Individual

The 1989 Washington State Task Force on Gender and Justice in the Courts was concerned with "the professional acceptance and credibility of women in the courts, the effect of gender biased treatment on case outcome, and gender bias in employment practices and procedures."[2] It tasked the Committee on the Treatment of Lawyers, Litigants, Judges, and Court Personnel to explore issues of gender bias and harassment against female lawyers, litigants, judges, and court employees. The Committee studied the courtroom environment, focusing on the treatment of litigants and legal professionals in the court and the credibility of women in the courtroom. It also studied the acceptance of women more broadly in the legal and judicial communities, and court personnel practices and procedures. The report found that "women faced continuing problems of credibility in the courtroom and women, as litigants, lawyers, and judges, were not always treated with respect."[3]

The Committee reported information from five sources: (1) reports from other state gender bias task forces and the American Bar Association's (ABA) Commission on Women in the Profession; (2) public hearings; (3) a survey of 1,509 responding lawyers; (4) a survey of 222 responding judicial officers (185 men and 33 women); and (5) personnel policies from the various Washington State courts. The two surveys were "the main source of data for this report," but the Committee quoted extensively from the hearings as well. The Committee found that "some aspects of gender bias, as a result of cultural and societal influences, exist in the Washington State Court system," but that "the bias tends to be more subtle than overt and is more a problem of individuals than the system as whole."[4] The Committee gave numerous examples of this bias derived from the surveys and hearings, including: use of first name rather than surname for female (but not male) judges, attorneys, litigants, and witnesses; use of diminutive terms like

[2] WASH. STATE TASK FORCE ON GENDER & JUST. IN THE COURTS, GENDER & JUSTICE IN THE COURTS 23 (1989), https://www.courts.wa.gov/committee/pdf/Gender%20and%20Justice%20in%20the%20Courts--Final%20Report,%201989.pdf (hereinafter "1989 Study").
[3] *Id.* at 4.
[4] *Id.* at 135.

"young lady" or "dear" for female attorneys, litigants, and witnesses both in and out of open court; comments on personal appearance; the question "Are you a lawyer?" in court and in front of clients; sexist remarks and jokes; and how female litigants were regarded as less credible because of their gender by male judges of the and lawyers.[5]

The Committee specifically asked attorneys and judges "whether they thought that conduct such as use of first names and familiar terms, sexual or demeaning remarks and jokes, or biases as to credibility had an effect on case outcome." About 50% of female lawyers and judges reported that it occasionally happens. By contrast, 80% of male lawyers, and nearly 100% of male judges reported that it never does.[6]

There has not been a subsequent survey in Washington that addresses the impact of explicit and implicit gender bias in the Washington State courts and legal community, although it was tangentially addressed in a 2012 survey of the Washington State Bar Association, which is discussed later. Several additional issues addressed by the Committee in 1989 have been evaluated by the judicial branch, legal scholars, and social scientists since then, including gender-based pay inequity, sexual harassment within the profession, and the effects of gender bias in the courtroom.

III. In 2021 Women Still Face Disrespect and Problems of Credibility Inside the Courtroom Because of Gender and Race

Biases based on gender, race, and other demographics continue to impact and shape various dynamics in the courtroom between litigants, jurors, witnesses, attorneys, judges, and court personnel. Sometimes such bias is explicit, taking the form of unfair treatment in court, harassment, and disrespect. More often it is implicit, tainting some of the day-to-day decisions made by lawyers, judges, and jurors and possibly impacting case outcomes. The systemic consequences of these biases are addressed in depth in the chapters throughout this report. Below we briefly highlight two illustrative issues: 1) Bias towards female and transgender litigants

[5] 1989 Study, *supra* note 2
[6] *Id.*

and witnesses, especially if they are perceived to be sex workers, and 2) Bias in the courtroom towards female litigators, especially Black, Indigenous, and women of color.

A. Gender still affects process and outcomes for women litigants and witnesses

Part of the problem is Washington judges' assumptions about how women should behave – and judges' expression of those assumptions in their rulings certainly supports the perception that the justice system is not fair to women. For example, in *State v. McKee*,[7] the sentencing judge in a rape case reduced the defendant's sentence because the victim was exchanging sex for money. Specifically, the trial court imposed an exceptional sentence below the standard range because the victims "were initiators and/or willing participants in the illicit circumstances, or precursor offenses, leading to their rapes."[8] The Court of Appeals reversed and ruled that such reasoning constituted "a reflection of the trial court's personal opinion and subjective belief that raping a prostitute is not as brutal as raping a woman who 'did not willingly start off ready to perform a sex act.'"[9]

Women in the sex industry often face explicit and implicit bias in the courtroom in both criminal settings, such as when testifying as victims of gender-based violence or against their exploiters, and in civil settings, such as in family law and domestic violence cases. We heard from some women and advocates that the women's credibility was questioned by judges, jurors, and opposing counsel because they were engaged in prostitution. A trafficking survivor who testified in favor of Senate Bill 5180 (2021-2022) (allowing the vacating of prostitution sentences committed as a result of being a victim of trafficking) described her experience having to go, as part of the vacatur process, "back to the court where a judge years earlier had called me a "hooker." She added: "I remember looking back at the audience in the court room and feeling like they thought I was garbage. I felt so low, and like I was a bad person."[10]

[7] 141 Wn. App. 22, 167 P.3d 575 (2007).
[8] *Id*. at 34.
[9] *Id*.
[10] Recorded testimony to the Washington State Legislature's House Public Safety Committee. TVW. Available at https://www.tvw.org/watch/?eventID=2021031184 at the 23 minute mark.

The data shows that court personnel have sometimes shown similar disrespect towards members of the LGBTQ+ community. One example of such bias is the explicit misgendering of transgender litigants and witnesses. The 2015 U.S. Transgender Survey found that while 75% of individuals seeking a name change felt that they were treated respectfully by judges and court staff, 23% felt that they were only sometimes treated respectfully and two percent felt that they were never treated respectfully.[11] The Survey explains:

> Reports of only sometimes or never being treated with respect were higher for certain groups of people, including people who were currently working in the underground economy, such as sex work, drug sales, or other work that is currently criminalized (41%), and people who had not had any hormonal or surgical treatment (35%). Respondents who interacted with judges or court staff who thought or knew they were transgender were asked about specific experiences during their interactions. Twenty-three percent (23%) were referred to by the wrong gender pronouns (such as he, she, or they) or title (such as Mr. or Ms.) during their interactions. Almost one in five (19%) people who interacted with judges or court staff were asked questions about their gender transition, such as whether they take hormones or have had any surgery. Nearly one in ten (9%) reported that they received unequal treatment or service, and 3% were verbally harassed. Overall, more than one-third (36%) of those who interacted with judges or court staff during the name change process reported having at least one of these experiences.[12]

The survey also found that 13% of respondents who used court services reported being denied equal treatment or service, were verbally harassed, or were physically attacked because of being transgender.[13]

[11] SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 83–84 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.
[12] *Id*. at 84.
[13] *Id.* at 219.

Though gender bias against litigants in certain types of cases has decreased, assumptions about how women should behave, and about whether women and others who fail to behave in the manner expected of their gender can really be considered victimized, credible, or even worthy of respect, remain. Similarly, some literature since 1989 suggests that gender and racial bias, especially implicit bias against attorneys, witnesses, and clients may affect the outcomes of cases.[14] The chapters of this report that deal with access to process – for example, access to jury service, ability to pay court fees, feasibility of filing protection orders or even coming to the courthouse, participation by speakers with limited English proficiency, etc. – show that perceptions from 1989 about biased process are, unfortunately, a reality today. Likewise, the chapters of this report that address substantive areas of law – for example, juvenile justice proceedings, criminal charging, bargaining and sentencing, employment discrimination, family law – show that those perceptions from 1989 are also a reality today.

B. Bias in the courtroom against female litigators, especially Black, Indigenous, and women of color

Female litigators, especially Black, Indigenous, and women of color, continue to struggle against implicit and explicit gender and race bias in trial from judges, juries, opposing counsel, and even clients. They face uneven treatment from judges and demeaning treatment from opposing counsel, and they fear that resisting this treatment will harm their clients.

In a 2014 survey, 70.4% of women attorneys surveyed indicate that they experienced gender bias in the courtroom.[15] Women attorneys continue to report experiencing gender bias from judges, jurors, and opposing counsel, including: being mistaken for a secretary or paralegal; being called a term of endearment (honey, sweetheart); being critiqued for their voice sounding shrill or too high (this perception was echoed by judges who have commented that a woman raising her voice in court was a problem because she sounds shrill, whereas a man sounds aggressive); being treated differently (ignored, bullied, treated in a condescending manner); and having clients

[14] *See, e.g.*, Jennifer Bennett Shinall, *Settling in the Shadow of Sex: Gender Bias in Marital Asset Division*, 40 CARDOZO L. REV. 1857 (2019); Michele N. Struffolino, *The Devil You Don't Know: Implicit Bias Keeps Women in Their Place*, 38 PACE L. REV. 260 (2018).
[15] TAMMY J. MAYER & GARY L. MILLER, AGEISM AND SEXISM IN COURT 3 (2017), https://www.iadclaw.org/assets/1/7/16.1-_Meyer-_Ageism_and_Sexism_in_Court.pdf.

express a preference for male lead trial counsel (although judges reported that they often found women litigators better prepared and more likely to follow courtroom rules).[16]

Hostility against female trial lawyers can force a "double-blind dilemma" during trial, meaning the "attorney is conflicted between the need to confront the situation and nullify its demeaning effect, and a fear that any response will hurt her client's case."[17]

Implicit bias against female attorneys appears to extend all the way to the United State Supreme Court.[18] Researchers analyzed the 601 briefs submitted between the 2010 and 2013 terms using quantitative textual analysis, searching for emotional content, and then comparing the gender of the authors of the briefs with the gender of the author of the opinion. They determined:

> Our findings suggest that male justices reward attorneys, both male and female, for conforming to traditional gender norms in briefs. In other words, male attorneys are rewarded for utilizing more masculine language in their briefs, whereas female attorneys are rewarded for employing more feminine language. However, we find no effect on female justices' evaluations of legal arguments for either male or female attorneys.[19]

They suggest that female justices are more cognizant of the tension faced by female attorneys when struggling against gender bias and are "perhaps less likely to sanction female counsel for violating gender norms."[20] They conclude that, "this has important consequences for calls for diversity on the bench as well as normative concerns over the blindness of the justice system."[21]

[16] Connie Lee, *Gender Bias in the Courtroom: Combatting Implicit Bias Against Women Trial Attorneys and Litigators*, 22 CARDOZO J.L. & GENDER 229, 234 (2016).
[17] *Id*. at 242. *See also* Sky Mihaylo & Joan C. Williams, *Interrupting Bias: Inside and Outside the Courtroom*, 32 J. AM. ACAD. MATRIMONIAL L. 365, 370 (2020) (calling this issue "tightrope bias").
[18] Shane A. Gleason, Jennifer J. Jones & Jessica Rae McBean, *The Role of Gender Norms in Judicial Decision-Making at the U.S. Supreme Court: The Case of Male and Female Justices*, 47 AM. POL. RSCH. 494 (2018). *See also* Shane A. Gleason, *Beyond Mere Presence: Gender Norms in Oral Arguments at the U.S. Supreme Court*, 73 POL. RSCH. Q. 596 (2020) (finding that attorneys are more successful in oral argument when their style is consistent with gender norms, raising normative concerns about implicit bias from the Court).
[19] *Id*. at 496.
[20] *Id*.
[21] *Id*.

Forensic psychologist and jury consultant Alexis Robinson observes that juror bias against female attorneys, especially Black, Indigenous, and women of color, may work to the detriment of their clients, who "may be at a distinct disadvantage with white and/or male jurors before any evidence is actually presented."[22] She explains:

> Stereotypes about women's gender roles and demeanor can affect the way that jurors perceive, and ultimately, judge female attorneys and their clients. Mock jurors indicated their disdain for the aggressive female attorneys by convicting their client more frequently than the assertive or passive female attorneys. Additionally, jurors were more receptive to the aggressive behavior when the attorney was male than when the attorney was female. Researchers believe that jurors' punishment of women attorneys and their clients is the result of the jurors' belief that aggressive behavior is counterstereotypical for women. It is also possible that jurors believe that females (regardless of presentation style) do not represent the juror's prototype of an attorney.[23]

Research suggests that "female attorneys of color are at a distinct disadvantage inside and outside the courtroom" because of biased judicial conduct.[24] Robinson contends that the "same biases that disadvantage women and Blacks, may have a unique effect on women of color" because Black women experience discrimination that corresponds to both their race and their gender.[25] Dr. Ann T. Greely, another psychologist and trial consultant, echoed these concerns at the 2012 ABA Section of Litigation Annual Conference, noting that gender and racial implicit bias "exhibited in its many forms within the courtroom, affect decision-making and could ultimately compromise the integrity of the court system."[26]

[22] Alexis A. Robinson, *The Effects of Race and Gender of Attorney on Trial Outcomes*, 23 THE JURY EXPERT 1, 2 (2011).
[23] *Id*. at 4.
[24] Connie Lee, *Gender Bias in the Courtroom: Combatting Implicit Bias Against Women Trial Attorneys and Litigators*, 22 CARDOZO J.L. & GENDER 229, 243 (2016).
[25] *Id*. at 3. *See also* Carla D. Pratt, *Sisters in Law: Black Women Lawyers' Struggle for Advancement*, 2012 MICH. ST. L. REV. 1777, 1779 (2012) ("For women of color, race is not merely an added layer that makes them subject to additional challenges, but rather a component of their identity that intersects with gender to expose them to unique challenges.").
[26] Ann T. Greeley, *Gender and Racial Bias in the Courtroom*, AM. BAR ASS'N SECTION OF LITIG. 2012, SECTION ANN. CONF.: TRIAL TACTICS IN A DIVERSE WORLD (Apr. 18-20, 2012), at 34.

Evidence suggests that similar biases based on gender, race, and other demographics negatively impact the acceptance of women, people who identify as LGBTQ+, and Black, Indigenous and people of color within the legal community more broadly. Explicit and implicit biases underlie disparities in representation, inequities in pay and professional opportunities, and experiences with sexual and workplace harassment. Here too, Black, Indigenous, and other women of color bear the brunt disproportionally.

IV. Gender and Race Disparities in the Legal Community

A. The legal profession in Washington has become more diverse, but gender and race disparities remain a challenge

The number of women lawyers in the United States has been slowly increasing for decades. It constituted 29.3% in 2001 and increased to 37% by 2020.[27] In 2016, women comprised the majority (50.3%) of JD candidates for the first time. As older attorneys, who are predominately white males, retire, the composition of the bar will continue the move towards gender parity.[28] In March 2020, there were 40,620 lawyers (active and inactive), judges, limited practice officers, and limited license legal technicians in the Washington State Bar Association. Of this total, 29,236 indicate their gender, with 12,366 (30.44%) identifying as female and 55 (0.14%) identifying as non-binary, not-listed, multi-gender, transgender, or two spirit. This leaves 16,815 (41.4%) identifying as male and another 11,384 (28%) for whom gender identity is not provided. Given that over a quarter of the membership do not indicate their gender, it is difficult to ascertain the precise gender makeup of the Washington bar.

The percentage of women among Washington State judges has also increased since the 1989 Study. As of January 28, 2019, 42% of the judiciary was female, including six of the nine Supreme Court justices (67%) and 11 of the 27 Court of Appeals judges (41%). As of 2020, seven of the nine

[27] AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION 2020 32 (2020), https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf.
[28] AM. BAR ASS'N, 2016-2017 ANNUAL REPORT OF THE SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR OF THE ABA 17 (2017), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/16_17_legal_ed_annual_report_final.pdf.

Supreme Court justices are now female, and two are members of the LGBTQ+ community.[29] Chief Justice González is the first person of color, and the first Jewish person, to hold that position. Gender diversity, along with the four justices who are persons of color, makes the Washington Supreme Court the most diverse state supreme court in the history of the nation.[30]

Clearly, we have made progress towards diversity. In 1988, women made up only 11.02% of the Washington judiciary, with only one female member each on the Supreme Court and Court of Appeals. By 2013, the judiciary was 36.03% female, with five female justices, including a female Chief Justice, Barbara Madsen, who followed a female Chief and was then followed by two additional female Chief Justices, and ten female appellate judges. Based on a review of the list kept by the Administrative Office of the Courts, the overall percentage of women in the judiciary has been increasing about one percent each year since 2013.[31] Nonetheless, the American Constitution Society for Law and Policy's report "The Gavel Gap: Who Sits in Judgment on State Courts?" found that while at the end of 2014, women of color in Washington comprised 15% of the general population, they comprised only four percent of state court judges. Similarly, men of color constituted 16% of the general population, but comprised only six percent of state court judges.[32]

Similar trends exist within the Bar. In 2015, the Washington State Bar Association (WSBA) reported that in 2013, "racial diversity within the WSBA closely mirrors national trends" with 89%

[29] A 2012 survey of the Washington bar found that nine percent of attorneys identified as LGBTQ+. TRUE BERRING, LLC, WASHINGTON STATE BAR ASSOCIATION MEMBERSHIP STUDY 41 (2012), https://www.wsba.org/docs/default-source/about-wsba/diversity/wsba-membership-study-report-2012.pdf?sfvrsn=f15638f1_0.

[30] Mark Joseph Stern, *Washington State Now Has the Most Diverse Supreme Court in History*, SLATE (Apr. 17, 2020), https://slate.com/news-and-politics/2020/04/grace-helen-whitener-washington-supreme-court.html ("Washington and California's Supreme Courts are, unfortunately, outliers on this front. A 2019 Brennan Center for Justice study found that most states' high courts are "overwhelmingly white and male." It noted that 24 states have all-white Supreme Courts, while just 15% of state Supreme Courts seats nationwide are held by people of color-even though nearly 40% of the country is non-white. Eighteen states never seated a Black Supreme Court justice and 13 "never seated a person of color as a justice." Women held just 36% of state Supreme Court seats.").

[31] Gender diversity, or the lack of it, on appellate courts impacts decisions. *See* Mary Pat Gunderson, *Gender and the Language of Judicial Opinion Writing*, 21 GEO. J. GENDER & L. 1 (2019) (examining an all-male state Supreme Court's use of language to downplay domestic violence and predatory sexual behavior by lawyers).

[32] WASH. STATE MINORITY & JUSTICE COMM'N, WORKFORCE DIVERSITY COMM., BRIDGING THE GAVEL GAP: A DIRECTORY OF JUDGES AND COMMISSIONERS OF COLOR IN THE STATE OF WASHINGTON 2017 3 (2017), https://www.courts.wa.gov/committee/pdf/JudgesAndCommissionersOfColorDirectory.pdf (citing TRACEY E. GEORGE AND ALBERT H. YOON, THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS? AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY (2018), https://www.acslaw.org/wp-content/uploads/2018/02/gavel-gap-report.pdf).

of the membership white compared to 72% of Washington's population and 26% female compared to 51% of the population.[33] This report also notes the social barriers experienced in the profession by LGBTQ+ people (36% reported experiencing barriers), people with disabilities (34% reported experiencing barriers), Black, Indigenous, and people of color (32% reported experiencing barriers), and women (29% reported experiencing barriers).[34]

B. Inequity in pay and career opportunities in the legal profession

1. Women, particularly Black, Indigenous, and women of color, face pay disparity and career complications

Pay disparity amplifies the barriers described in the prior section. In the largest 200 American law firms in 2019, women earned 85% to 93% of what men in the same position earned, with more equitable pay levels for associates than for equity partners.[35] Despite the growth in the percentage of female attorneys in the profession, federal statistics from 2002 show that female attorneys were paid on average only 69.4% of what their male counterparts were paid: $1,073 for women, compared to $1,547 for men.[36] By 2019, the federal statistics show that the pay disparity had improved to 85.3% with female attorneys making $1,878 a week compared to men making $2,202,[37] but by January 2021, likely due to the disparate impact of the COVID-19 pandemic on women, the pay disparity had widened dramatically to 71.6% with the income of female attorneys dropping to $1,665 a week compared to men, whose income had increased to $2,324.[38] The rate of recovery for salaries for female lawyers post-pandemic remains to be seen. It is important to note that Black, Indigenous, and women of color often face even more drastic

[33] LUMA CONSULTING, WASHINGTON STATE BAR ASSOCIATION DIVERSITY RESEARCH PROJECT LITERATURE OVERVIEW 2 (2015), https://www.wsba.org/docs/default-source/about-wsba/diversity/wsba-diversity-research-project-2015.pdf?sfvrsn=525738f1_0.
[34] *Id*. at 3.
[35] DESTINY PEERY, NAT'L ASS'N WOMEN LAW, 2019 SURVEY REPORT ON THE PROMOTION AND RETENTION OF WOMEN IN LAW FIRMS 20–21 (2020), https://www.nawl.org/d/do/969.
[36] AM. BAR ASS'N, COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW (2006).
[37] U.S. BUREAU OF LAB. STAT., CHART 39: MEDIAN WEEKLY EARNINGS OF FULL-TIME WAGE AND SALARY WORKERS BY DETAILED OCCUPATION AND SEX (2019), https://www.bls.gov/cps/aa2019/cpsaat39.pdf (labor force statistics from the current population survey).
[38] U.S. BUREAU OF LAB. STAT., CHART 39: MEDIAN WEEKLY EARNINGS OF FULL-TIME WAGE AND SALARY WORKERS BY DETAILED OCCUPATION AND SEX (2021), https://www.bls.gov/cps/cpsaat39.htm (labor force statistics from the current population survey).

pay inequities then white women. See "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for more data on how race and gender intersect to impact pay and income inequities.

A 2012 survey of the Washington State Bar Association found that nine percent of the bar identified as LGBTQ, non-binary, or two-spirit.[39] The survey also found that "their income lags notably behind the median and is the lowest of all diversity groups."[40] Women also ranked "high among diversity groups in terms of the frequency of barriers reported as well as the intensity of those barriers."[41]

Black, Indigenous, and women of color face significant intersectional disparity and barriers within the legal profession. The 2020 National Association of Women Lawyers Survey "Report on the Promotion and Retention of Women in Law Firms" reporting survey data from 2019 prior to the pandemic, found that white women constituted 18% of overall equity partners but women of color constituted only three percent of overall equity partners.[42] Male attorneys of color constituted another six percent of equity partners.[43] The remaining 73% of equity partners were white males. About two percent of equity partners identified as LGBTQ+ and less than one percent of equity partners had a disability.[44] The report note that the numerical results from 2020 are "a near exact replication of those from 2017 to 2019" and that "the progress made by women in law firms over the last decade has been slow and incremental at best, and law firms continue to face challenges with respect to supporting and promoting women."[45] In comparison to equity partners, the survey found that women of color make up about 22% of all law firm associates.[46] LGBTQ+ individuals of all genders comprise about four percent of associates, but persons with disabilities still comprise less than one percent of all associates.[47]

Disparity in pay and opportunity is amplified by the fact that women continue to contribute disproportionately to domestic activities in most households. There is a significant body of

[39] TRUE BERRING, LLC, *supra* note 29, at 120.
[40] *Id*.
[41] *Id*. at 121.
[42] Peery, *supra* note 35, at 8–10.
[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] *Id*. at 3.

national literature finding that women spend significantly more time than men on child care and elder care duties, "invisible" household labor (e.g., scheduling doctor's appointments, meal planning, organizing family events, etc.), and other unpaid domestic tasks.[48] The 2019 American Time Use Survey found that more women reported doing household activities every day, and they spent more time doing them; and men spent more time in leisure activities than women. This trend is true across all races and ethnicities captured in the survey, with Asian, Black, Hispanic, and white women all reporting spending more time on household activities and caring for household members than men in every race or ethnicity category. Hispanic/Latinx women reported spending the greatest number of hours per day on household activities. In families with children under age six, women spend nearly twice as much time as men providing childcare and women also spent more time doing other unpaid domestic tasks.[49] The trend of women shouldering more childcare exists even among dual-income couples.[50]

This unbalanced division of work is associated with "psychological distress, depression, role overload, and even poor cardiovascular health" for women.[51] This unequal division of domestic labor also amplifies challenges for women who absorb this extra workload, and then are often

[48] Lucia Ciciolla & Suniya S. Luthar, *Invisible Household Labor and Ramifications for Adjustment: Mothers as Captains of Households*, 81 SEX ROLES 467 (2019); *American Time Use Survey—2019 Results at Table 1- Time Spent in Detailed Primary Activities and Percent of the Civilian Population Engaging in Each Activity, Averages Per Day by Sex, 2019 Annual Averages,* U.S. BUREAU OF LAB. STAT. (2019), https://www.bls.gov/news.release/pdf/atus.pdf#:~:text=AMERICAN%20TIME%20USE%20SURVEY%20%E2%80%94%202019%20RESULTS%20In,the%20U.S.%20Bureau%20of%20Labor%20Statistics%20reported%20today; *Progress of the World's Women 2019-2020: Families in a Changing World*, UN WOMEN (2019), https://www.unwomen.org/en/digital-library/progress-of-the-worlds-women; Marrianne Bertrand, Jessica Pan & Emir Kamenica, *Gender Identity and Relative Income with Households* (Nat'l Bureau of Econ. Rsch., Working Paper No. 19023, 2013), https://www.nber.org/papers/w19023; Jill E. Yavorsky, Claire M. Kamp Dush & Sarah J. Schoppe-Sullivan, *The Production of Inequality: The Gender Division of Labor Across the Transition to Parenthood*, 77 J. MARRIAGE & FAMILY 662 (2015).

[49] *American Time Use Survey—2019 results at Table 1, Table 3, and Table 8A*, U.S. BUREAU OF LAB. STAT. (2019) https://www.bls.gov/news.release/pdf/atus.pdf#:~:text=AMERICAN%20TIME%20USE%20SURVEY%20%E2%80%94%202019%20RESULTS%20In,the%20U.S.%20Bureau%20of%20Labor%20Statistics%20reported%20today. Analysis of 2003-2011 American Time Use Survey data among married individuals with at least one working partner found that wives spent an average of 33.52 hours per week on "non market work" (childcare plus chores) compared to husbands who spent an average of 20.74 hours per week. On childcare alone, mothers spent an average of 9.41 hours per week compared to 5.07 hour per week per men. Bertrand, Pan & Kamenica, *supra* note 48.

[50] Yavorsky, Dush & Schoppe-Sullivan, *supra* note 48, review the literature on this topic and find that while some surveys have found a more equal division of domestic labor between men and women, research indicates that time use surveys are less accurate than the more robust research which uses time journaling and that men tend to over-estimate their contributions in time-use surveys more than women.

[51] Ciciolla & Luthar, *supra* note 48, at 467.

also penalized during hiring, allocation of work assignments, promotion and other career advances due to assumptions and biases that they will miss more work to attend to childcare, elder care, and other domestic duties. Researchers have found evidence of a "motherhood penalty" during hiring and in wages. This penalty is unique to women and contrasts sharply with the "fatherhood bonus" which gives male parents an advantage in hiring and in wages.[52] See "Chapter 5: Gender and Employment Discrimination and Harassment" for more information on hiring discrimination faced by women who are married, pregnant, or parenting and how this discrimination may be amplified for Black, Indigenous, and women of color. As noted in that chapter, there is a gap in the state and national literature related to workplace treatment of LGBTQ+ workers who are pregnant or parenting.

While most of this literature is general to all professionals, there are some studies specific to the legal profession. A study of the motherhood wage penalty found that the wage gap for mothers could be narrowed by delaying the birth of one's first child—but only for some occupations. Legal professionals were among those who experienced the largest wage gains by delaying starting a family, and wage penalties for early childbearing were the "most pronounced among education administrators, financial managers, and lawyers."[53] A separate study of the motherhood penalty found that while the sample of mothers across occupations experience a 2.8% wage penalty for every child, lawyers who were mothers experienced a penalty over 4% per child.[54] These stereotypes and motherhood penalties persist despite evidence (both from inside and outside of

[52] Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547 (2020); Stephen Benard & Shelley J. Correll, *Normative Discrimination and the Motherhood Penalty*, 24 GENDER & SOC'Y 616 (2010); Alexander H. Jordan & Emily M. Zitek, *Marital Status Bias in Perceptions of Employees*, 34 BASIC & APPLIED SOC. PSYCH. 474 (2012); Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOCIO. 1297 (2007); Stephanie Bornstein, *Poor, Pregnant and Fired: Caregiver Discrimination Against Low-Wage Workers*, WORKLIFE LAW (2011), https://worklifelaw.org/publications/IssueBrief_PoorPregnantAndFired.pdf; Rebecca Glauber, *Trends in the Motherhood Wage Penalty and Fatherhood Wage Premium for Low, Middle, and High Earners*, 55 DEMOGRAPHY 1663 (2018).

[53] Liana Christin Landivar, *First-Birth Timing and the Motherhood Wage Gap in 140 Occupations*, 6 SOCIUS : SOCIO. RSCH. FOR A DYNAMIC WORLD 1 (2020).

[54] Wei-hsin Yu & Janet Chen-Lan Kuo, *The Motherhood Wage Penalty by Work Conditions: How Do Occupational Characteristics Hinder or Empower Mothers?*, 82 AM. SOCIO. REV. 744, 760-761 (2017).

the legal profession) that the pro-work behaviors of mothers are comparable to (and sometimes exceed) the pro-work behaviors of fathers and non-parents.[55]

2. The COVID-19 pandemic exacerbated these disparities

The COVID-19 pandemic has exacerbated this issue with women absorbing the bulk of childcare duties, including remote learning, and other unpaid domestic labor needed as a result of the pandemic.[56] This may be partially responsible for the dramatic increase in the pay gap between male and female attorneys discussed above. Analysis of Understanding America Study data from March through July of 2020 for respondents who reported being married or living with their partner found working mothers were 27% more likely than working fathers to be the only providers of care for their children. The authors conclude that:

> Women have carried a heavier load than men in the provision of childcare during the COVID-19 crisis, even while still working. Mothers' current working situations appear to have a limited influence on their provision of childcare. This division of childcare is, however, associated with a reduction in working hours and an increased probability of transitioning out of employment for working mothers.[57]

Some researchers have suggested that the increase in time spent on domestic work among both men and women will lead to a more equal division of household labor,[58] while other researchers indicate that the pandemic has exacerbated gender inequity in this area, contributed to increased psychological distress among working mothers, and harmed women's work prospects.[59]

[55] Julie A. Kmec, *Are Motherhood Penalties and Fatherhood Bonuses Warranted? Comparing Pro-Work Behaviors and Conditions of Mothers, Fathers, and Non-Parents*, 40 SOC. SCI. RSCH. 444, 447 (2011) (citing research from 2000 from Alberta, Canada which found that "practicing lawyer mothers were more committed to their law careers than fathers despite the fact that mothers reported having less work control, spouses with longer work hours, and less workplace support than fathers").
[56] Dalvin Brown, *Women Take on a Greater Share of Parenting Responsibilities Under Stay-at-Home Orders*, USA TODAY (May 8, 2020), https://www.usatoday.com/story/money/2020/05/08/women-take-on-more-their-kids-remote-learning-responsibilities/5178659002; Daniel Carlson, Richard Petts & Joanna Pepin, *Changes in Parents' Domestic Labor During the COVID-19 Pandemic*, SOCARXIV (May 6, 2020), https://doi.org/10.31235/osf.io/jy8fn; Titan Alon et al., *The Impact of COVID-19 on Gender Equality*, 4 COVID ECON. 62 (2020).
[57] Gema Zamarro & Maria J. Prados, *Gender Differences in Couples' Division of Childcare, Work, and Mental Health During COVID-19* 1 (Univ. of S. Cal. CESR-Schaeffer Working Paper Series, Paper No. 2020-003, 2020), https://cesr.usc.edu/documents/WP_2020_003.pdf.
[58] Carlson, Petts & Pepin, *supra* note 56.
[59] Zamarro & Prados, *supra* note 57, at 1.

There has been a mass exodus of women from the workforce nationally as a result of COVID-19. Between February 2020 and February 2021 over 2.5 million women left the workforce nationwide, compared with about 1.8 million men.[60] This trend was apparent starting early in the pandemic. Between February and April of 2020 women went from having slightly lower unemployment rates than men (3.4% and 3.6% respectively) to having a rate almost three percentage points higher (16.3% and 13.5% respectively). Hispanic women saw an increase in unemployment rates of more than 200% in that timeframe, leading to a 20.2% unemployment rate in that population (compared to a 12.4% rate among white men). Single mothers have also been hugely impacted, with the unemployment rate in this population tripling in this timeframe (from 4.1% to 15.9%). Of note, over half of Black families with children and over 36% of Native American families with children nationally are headed by a single mother.[61] Job losses have also been worse among women without a college degree than among those with a college degree.[62]

In addition, the Understanding America Study data cited above found that 42% of working mothers and 30% of working fathers had reduced their working hours at some point between March and July 2020. Working mothers were about 17% more likely than working women without children and working fathers to have reduced their working hours during the pandemic.[63]

While research on the unequal division of unpaid domestic work is not specific to women in legal professions or to Washington State, it is likely that these findings are generalizable to both populations. The National Association of Women Lawyers explains the risk:

> Now, the representation of women and diverse attorneys in law firms and the legal profession are newly threatened by a global pandemic that has put financial pressures on law firms – the type of financial stress that has resulted in cuts to diversity efforts and diverse representation in the past. Further, the shift to

[60] *Labor Force Statistics from the Current Population Survey, Household Data Seasonally Adjusted: A-3. Employment Status of the Civilian Noninstitutional Population by Sex and Age, Seasonally Adjusted*, U.S. BUREAU OF LAB. STAT. (July 2, 2021), https://www.bls.gov/web/empsit/cpseea03.htm.
[61] *Quick Figures: Dramatic Decline in Employment Hits Women Even More Severely Than Men*, INST. FOR WOMEN'S POL'Y RSCH. (2020), https://iwpr.org/wp-content/uploads/2020/05/QF-Breadwinner-Mothers-by-Race-FINAL.pdf.
[62] Zamarro & Prados, *supra* note 57, at 1.
[63] *Id.*

> remote work and increased demands to support children and families no longer able to utilize schools and other services that have typically allowed women and attorneys of color to manage the demands of the legal profession alongside the demands at home has created additional challenges, if not threats, to the success and persistence of women and attorneys of color in law firms and the legal profession at large. [64]

Also, it is important to note that these are population level trends, which do not suggest that they are generalizable to every woman in every household. In fact, assumptions that they are can result in hiring and other workplace decisions that perpetuate gender inequities and continue to normalize an unequal division of unpaid domestic work.

IV. Sexual and Workplace Harassment Within the Legal Community

As explored in depth in "Chapter 5: Gender and Employment Discrimination and Harassment," biased treatment of women, people who identify as LGBTQ+, and Black, Indigenous, and people of color in the workplace can be explicit and predatory, taking the form of harassment, and even sexual assault. The legal profession is no exception. After first reviewing previous data on sexual and workplace harassment within the legal profession, nationally and in Washington's legal community, this chapter highlights key findings from a pilot project commissioned as part of the 2021 Gender Justice Study to identify whether employees of Washington's judicial branch (all court employees, employees of judicial branch agencies and organizations, and administrators and clerks who work closely with judicial branch employees) suffered from harassment and discrimination of any kind in their workplace.

A. Previous data on sexual and workplace harassment within the legal community

In 1989, the Committee on the Treatment of Lawyers, Litigants, Judges, and Court Personnel briefly touched on the question of sexual harassment, termed "sexual advances (verbal or

[64] Peery, *supra* note 35, at 10.

physical)," in their surveys. The Committee noted that 16% of lawyers and four percent of judges reported verbal advances by male attorneys to female attorneys. In addition, five percent of lawyers and two percent of judges noted physical advances. Fewer than five percent noted any advances committed by judges or court personnel. Fewer than five percent noted advances by male attorneys to female litigants. This level of verbal harassment and physical assault, likely underreported, existed within the bench and bar despite the developing case law establishing civil liability for such actions.

In 1989, there were certainly laws on the books that barred sexual harassment and workplace discrimination in employment, including judicial recognition of hostile work environment. Today, there are even more federal and state laws on the books, and they bar even more forms of discrimination in employment – for example, federal law now explicitly bars discrimination on the basis of sexual orientation in employment (See "Chapter 5: Gender and Employment Discrimination and Harassment" and "Chapter 7: Gender Impact in Family Law Proceedings" for details).

Since the 1989 Study and the judicial recognition of hostile work environments, sexual harassment in the workplace, including in courts and law firms, has become much more widely acknowledged. In fact, as of 2014, "50 to 66 percent of female lawyers and 25 to 50 percent of female court personnel have experienced or observed sexual harassment. Almost 75 percent of female lawyers believe that harassment is a problem in their workplaces."[65] The ABA reported similar national numbers in 2016.[66]

[65] Bobbi Liebenberg, *Sexual Harassment – A Serious Problem Persists*, 22 ABA PERSPECTIVES 2 (2014), https://www.americanbar.org/groups/diversity/women/publications/perspectives/2014/spring/sexual_harassmenta_serious_problem_persists.

[66] Cynthia L. Cooper, *Lawyers on Notice: Harassment and Discrimination Can Endanger Your License*, 25 ABA PERSPECTIVES 1 (2017), https://www.americanbar.org/groups/diversity/women/publications/perspectives/2017/winter/lawyers_notice_harassment_and_discrimination_can_endanger_your_license. The survey of 2,827 lawyers by the ABA's Commission on Women in the Profession found: "In reply to a question about whether people at their workplaces made sexist comments or told sexual stories or jokes, 82 percent of women and 74 percent of men replied in the affirmative. In addition, 27 percent of women and 8 percent of men said that they were subjected to 'unwanted romantic or sexual attention' or 'unwanted attempts to touch,' and 13 percent of women and 4 percent of men believed that they had lost career opportunities because they rebuffed sexual advances. Nonwhite and white respondents had similar response." *Id.*

And an international survey reported similar results in a survey of nearly 7,000 lawyers in 135 countries, which found that 35% of female lawyers and seven percent of male lawyers reported having been sexually harassed at work.[67] Of those who had been harassed, 77% of the female lawyers and 88% of the male lawyers never reported the incident due to "the status of the perpetrator, fear of repercussions, and the incident being endemic to the workplace."[68] The survey also found that 51% of female lawyers and 29% of male lawyers reported having been bullied at work.[69] The 359 U.S. survey respondents reported "higher rates of both bullying and sexual harassment than the global average: 63% of female respondents and 38% of male respondents reported that they had been bullied" with women 16% more likely to have been bullied within the past year, and "54% of female respondents and 11% of male respondents had been sexually harassed (above global averages)."[70]

This problem is also endemic in the NLJ 500 law firms in the United States, as shown by a survey of 1,262 female and male partners with at least 15 years of practice experience: 50% of women versus six percent of men had received unwanted sexual conduct at work with 16% of women versus one percent of men having lost work opportunities as a result of rebuffing sexual advances and 28% of women avoiding reporting sexual harassment due to fear of retaliation.[71] It is telling that these findings are part of a larger survey trying to ascertain why mid-career partners who are women leave the practice of law at much higher rates than their male colleagues.

The 2012 Washington State Bar Association Membership Study further illuminates the on-going need for anti-harassment training, policies, and enforcement within Washington's legal profession. The study notes that participants "indicated that they had experienced discrimination or sexual harassment because of their gender" including "inappropriate behavior by supervisors, clients who preferred to work with male attorneys, and insinuations of weakness or

[67] KIERAN PENDER, INT'L BAR ASS'N, US TOO? BULLYING AND SEXUAL HARASSMENT IN THE LEGAL PROFESSION (2019) https://www.unodc.org/res/ji/resdb/data/2019/us_too_bullying_and_sexual_harassment_in_the_legal_profession_html/iba_us_too.pdf.
[68] *Id*. at 8.
[69] *Id*.
[70] *Id.* at 98.
[71] ROBERTA D. LIEBENBERG & STEPHANIE A. SCHRAF, WALKING OUT THE DOOR: THE FACTS, FIGURES, AND FUTURE OF EXPERIENCED WOMEN LAWYERS IN PRIVATE PRACTICE (2019).

incompetence."[72] These challenges are significant enough that "nearly 7% of female attorneys have considered taking legal action against their employer because of discrimination."[73] The study was partially focused on the reasons attorneys left the profession and it is telling that harassment was "particularly evident in experiences of younger female attorneys."[74] One attorney responded:

> At a … firm outside the Seattle metro area, I felt dissuaded from taking any action about the anti-gay remarks and jokes I consistently heard at the office, because my direct supervisors were pretty flippant about the whole concept of diversity and harassment training. They'd actually boast about ridiculing diversity and harassment trainers and about laughing their way through the firm-imposed training seminars. I think they equated diversity and anti-harassment with "political correctness" and they saw it as attempts to modify normal behavior, and in their view, normal behavior includes treating being gay as a joke or as something to avoid, and making comments to women that I think cross the line into harassment, but they think is just part of normal interaction. E.g., asking women employees who they're dating, or why they don't have children, or even making direct comments about female staffers' body parts and overall attractiveness.[75]

[72] TRUE BERRING, LLC, THE WASHINGTON STATE BAR ASSOCIATION: MEMBERSHIP STUDY 2012 93 (2012), https://www.wsba.org/docs/default-source/about-wsba/diversity/wsba-membership-study-report-2012be2465f2f6d9654cb471ff1f00003f4f.pdf?sfvrsn=b0fd00f1_0. *See also* WOMEN LAWYERS ON GUARD, STILL BROKEN: SEXUAL HARASSMENT AND MISCONDUCT IN THE LEGAL PROFESSION, A NATIONAL STUDY (2020), https://womenlawyersonguard.org/wp-content/uploads/2020/03/Still-Broken-Full-Report-FINAL-3-14-2020.pdf.
[73] LUMA CONSULTING, WASHINGTON STATE BAR ASSOCIATION DIVERSITY RESEARCH PROJECT LITERATURE OVERVIEW 4 (2015), https://www.wsba.org/docs/default-source/about-wsba/diversity/wsba-diversity-research-project-2015.pdf?sfvrsn=525738f1_0.
[74] *Id.*
[75] True Berring, LLC, *supra* note 72, at 91. *See also* David N. Laband & Bernard F. Lentz, *Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover among Female Lawyers*, 51 INDUS. & LAB. REL. REV. 594 (1998) (nearly two-thirds of female lawyers in private practice and nearly half of those in corporate or public agency settings reported either experiencing or observing sexual harassment by male superiors, colleagues, or clients during the two years prior to the survey. Women who had experienced or observed sexual harassment by male superiors or colleagues reported lower overall job satisfaction than did those who had not, as well as a greater intention to quit).

The data is clear: sexual harassment is pervasive in the legal community, both nationally and in Washington. What this data doesn't tell us is: What other forms of workplace harassment exist in Washington's legal community? Who else in the legal community besides women are most impacted due to gender, race, and other demographics? Are Black, Indigenous, and other women of color disproportionally harmed? And what measures, if any, are in place to address these issues?

To start answering some of these questions and to establish a current baseline of workplace harassment within the judicial branch in Washington, the 2021 Gender Justice Study commissioned a state-wide survey of workplace harassment in the courts.

B. The 2021 Washington Courts Workplace Harassment Survey

The survey report (for the full survey report see Appendix C) includes findings from the state-wide Washington Courts Workplace Harassment Survey, as well as recommendations for action, based on key survey findings.

> The study population included all court employees, employees of non-court judicial agencies (Administrative Office of the Courts [AOC], Office of Civil Legal Aid, Office of Public Defense, and Commission on Judicial Conduct), as well as Superior Court Clerk's Office employees. The inclusive nature of the survey made it possible to estimate the extent and types of workplace harassment experienced by employees as a whole, as well as by identifiable demographic subgroups who might be expected to experience higher exposure to harassment based on their status or identity. The purpose of the survey was to establish a current baseline of workplace harassment—the most pervasive, people-driven risk in the workplace[76]—within the judicial branch, from which to evaluate progress on this issue via future survey administrations.[77]

[76] STÅLE VALVATNE EINARSEN, HELGE HOEL, DIETER ZAPF & CARY L. COOPER, *The Concept of Bullying and Harassment at Work*, *in* BULLYING AND HARASSMENT IN THE WORKPLACE 51 (3d ed. 2020).
[77] ARINA GERTSEVA. WORKPLACE HARASSMENT SURVEY: WASHINGTON STATE COURTS, SUPERIOR COURT CLERKS' OFFICES, AND JUDICIAL BRANCH AGENCIES - SUMMARY FINDINGS REPORT 1. WASHINGTON STATE CENTER FOR COURT RESEARCH (2021).

Key findings include (quoting directly from the harassment survey report[78]):

- The study found that 57% of respondents who participated in the survey experienced at least one type of workplace harassment on at least one occasion in the past 18 months; yet many employees did not recognize certain behaviors as "harassment," even if they viewed them as problematic or offensive. Although some of these experiences do not correspond strictly to the legal definition of harassment, they are serious enough to create a work environment that a reasonable person would consider unwelcome, offensive or disrespectful.
- To give a sense of magnitude of these findings, assuming a court workforce of approximately 4,500 individuals, these figures translate into 2,565 court employees who experienced some type of workplace harassment at least once in the past 18 months.
- Overall, respondents who experienced harassment in the preceding 18 months reported an aggregate total of 6,086 separate harassment problems. That is, on average, 3.66 problems per person. The majority of these experiences (77%) included some form of non-sexual work-related harassment. Some examples of these behaviors include giving unreasonable deadlines or unmanageable workloads, excessive monitoring of work, assigning meaningless task, or being blocked from promotion or training opportunities.
- Sixteen percent (16%) of respondents reported experiencing harassment based on their sexual orientation, 8% experienced gender-based harassment, 6% experienced race-based harassment, and 4% experienced unwanted sexual attention. Although less than 1% of survey respondents (n = 41) experienced sexual coercion, the severity of those incidents suggests a need for prevention efforts and specific consideration.
- Approximately 44% of employees who experienced harassment in the past 18 months did not seek help. Of those who tried to get help, 65% were able to obtain some resolution of their problem(s), including 9% who obtained a complete resolution of their problem(s). The most commonly cited reasons for not searching help were fear of repercussions (60%),

[78] *Id.* at 1-3.

the status of the perpetrator (57%), lack of confidence in reporting practices (54%), and the belief that incident would be perceived as acceptable by the organization (50%).

- The study found that harassment experiences are not limited to any one group. However, certain populations are more likely to experience workplace harassment than others.
- The highest rates of any workplace harassment were reported by Indigenous employees[79], (82%), bisexual (84%), gay or lesbian (73%), multiracial employees (66%), court clerks[80] (65%), and women (62%), relative to all respondents (57%).
- Indigenous employees, as a group, experienced the highest average number of harassment problems (7.29 per person) compared with any other racial or ethnic group. This estimate (7.29 problems per person) does not indicate how often (or how systematically) they have been exposed to these behaviors; it only represents an estimated number of different kinds of harassment behaviors they have been exposed to.
- Sexual minorities[81], as a group, were significantly more likely than their heterosexual peers to experience at least one type of workplace harassment on at least one occasion in the past 18 months (76% for sexual minority group vs. 57% for heterosexual respondents). The between-group differences in prevalence were the most dramatic for the harassment based on sexual orientation (39% for non-heterosexual and 14% for heterosexual respondents), gender-based harassment (20% vs. 7%), and unwanted sexual attention (10% vs. 3%).
- Women (including transgender women) were significantly more likely than men (including transgender men) to experience incidents of gender-based harassment (9% vs. 4%) and

[79] This report uses "Indigenous" throughout to represent respondents who selected "American Indian, Alaska Native, First Nations, or other Indigenous Group Member" response option alone or in combination with any other race or ethnicity.

[80] "Court clerks" refers to employees who self-identified their role as "court clerks." This include court clerks who have administrative responsibilities, at all levels of courts: some work for elected Superior Court Clerks; some work for appointed Superior Court Clerks; some work in the Municipal or District courts, the Court of Appeals, and the Supreme Court. The report distinguishes between court clerks and Superior Court Clerks due to their different rates of experienced harassment.

[81] "Sexual minorities" or "non-heterosexual respondents" includes respondents who responded to the question on sexual orientation by marking "gay or lesbian," "bisexual," "asexual," "pansexual," or "questioning."

work-related harassment (59% vs. 44%). When looking more closely at work-related harassment, results revealed significant gender differences for nine out of 14 behavioral situations described in the survey. Women were significantly more likely to report having their opinions ignored (37% vs. 25%), being exposed to an unmanageable workload (28% vs. 16%), having someone withholding information that affects their performance (27% vs. 15%), being shouted at or being the target of spontaneous anger (23% vs. 13%) being ignored or excluded (23% vs. 12%), being subjected to excessive monitoring (23% vs. 16%), receiving repeated reminders of errors (22% vs. 13%), and having someone spreading rumors about their competence (19% vs. 13%).

- Intersectionality analysis revealed that the issues most frequently identified by Black, Indigenous and women of color and sexual-minority women are simultaneously similar yet different from the experiences of single-race white women and heterosexual women:
    - Black or African-American and white women employees did not differ significantly in the prevalence of any type of harassment, except for race-based harassment (21% vs. 5%)
    - Hispanic/Latinx and white women experienced the same levels of overall workplace harassment (61%), but their experiences were significantly different in the prevalence of workplace maltreatment based on sexual orientation (26% for Hispanic/Latinx women vs. 16% for white women) and race (11% vs. 3%).
    - Indigenous women experienced the highest prevalence of overall workplace harassment (85%) compared with their single-race white peers (61%) or any other racial and ethnic group (based on the percentage point differences).
    - Sexual minority women were significantly more likely than heterosexual women to experience sexual-orientation based harassment (41% vs. 15%), gender-based harassment (22% vs. 8%) and work-related harassment (79% vs. 58%).
    - Non-white sexual minority women (n=15) were significantly more likely than non-white heterosexual women (n=201) to experience harassment based on sexual orientation (40% vs. 18%).

- We found a significant association between an employee's position and workplace harassment. Court clerks, as a group, experienced workplace harassment at a higher rate (65%) than respondents with any other appointment type. Judicial assistants experienced the second highest rate of harassment (61%). Among all survey respondents, Superior Court Clerks (49%) and Judges or Commissioners (51%) experienced the lowest rates of harassment. These numbers, however, are still alarming. They mean that one out of every two Judges or Commissioners and one out of every two Superior Court Clerks experienced some type of workplace harassment at least once during the preceding 18 months.
- When asked about the perpetrator of the "worst" harassment incident, 19% of respondents indicated that the perpetrator was their supervisor or manager, 15% indicated that it was someone more senior (other than manager or supervisor), and 9% indicated that the perpetrator was the Judge or Commissioner. For 9% of employees, the perpetrator was someone of equal seniority and for 5% the perpetrator was someone junior to them.
- A sizable share of respondents experiencing workplace harassment in the past 18 months reported having a major problem with work withdrawal (20%); and 22% with searching for a new job. Seeking fresh employment as a result of the harassment was particularly problematic for Black or African American employees (44%) and employees with non-binary gender identity (43%).
- Respondents who experienced workplace harassment in the past 18 months and those who did not differed strongly in their awareness of their workplace policy and procedures, their views of the organization's stance on diversity and commitment to take steps to protect the safety of employees. The biggest difference between these two groups were found in their level of confidence that their organization would deal with concerns or complaints in a thorough, confidential and impartial manner (87% vs. 60%).
- When analyzing the association between organizational factors and harassment, we found that awareness of policy (i.e., employees' awareness and understanding of anti-harassment policy and procedures) and expectation of response (i.e., employees'

confidence that the organization would respond to harassment), all other conditions being equal, significantly decreased employees' likelihood of harassment.

Recommendations for action, based on key survey findings, are included in Part V. below.

V. Responding to Gender- and Race-Based Harassment and Bias

A. Addressing bias in Professional Conduct Rules

In the past, courts have generally addressed harassment and discrimination with rules, policies, or for physically assaultive conduct, through the criminal justice system. For example, in 1993, the Washington Supreme Court adopted RPC 8.4(g)[82] which states that it is professional misconduct for a lawyer to "commit a discriminatory act prohibited by state law on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, honorably discharged veteran or military status, or marital status, where the act of discrimination is committed in connection with the lawyer's professional activities. …" And in 2011, the Court revised the Code of Judicial Conduct to bar bias and prejudice, and to require lawyers to refrain from manifesting bias or prejudice, or engaging in harassment, against parties, witnesses, lawyers, or others …"

The American Bar Association has adopted similar rules, some would say with stronger anti-discrimination and anti-harassment provisions; the ABA's Rule 8.4(g)[83] now makes the ethical rules governing lawyers more like Rule 2.3 that governs judges. Several states have also adopted the new version of Rule 8.4, while six have declined to do so due to concerns about free speech.[84]

In 2020, in response to sexual harassment and assault claims within the judicial branch, the Washington State Supreme Court Gender and Justice Commission approved and distributed a

[82] RPC 8.4, http://www.courts.wa.gov/court_rules/pdf/RPC/GA_RPC_08_04_00.pdf.
[83] AM. BAR ASS'N, H.D. PROPOSED RESOLUTION 109 & REPORT 16 (2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.pdf.
[84] Kristine A. Kubes, Cara D. Davis & Mary E. Schwind, *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, ABA UNDER CONSTRUCTION (Mar. 12, 2019), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4.

Model Anti-Harassment Policy[85] for use in Washington courts. This policy was adopted by the Board for Judicial Administration on March 20, 2020.[86] The Commission strongly encouraged all courts to "adopt a written anti-harassment policy that informs all of its employees, including Judicial Officers, that harassment will not be tolerated." The policy explains that it "seeks to eliminate all harassment because any act of harassment undermines the integrity and quality of the workplace and is unfair to any employee or volunteer who experiences it." These policies should define and provide examples of harassment and other prohibited conduct and outline a procedure that "encourages all employees, not just targets of harassment, to report misconduct." Importantly, the Commission also asked courts to "assure that complaints will be handled as confidentially as possible" and to "guarantee that employees who report harassment will not suffer adverse job consequences as a result."[87]

The harassment policy is broader than just gender-based harassment. It also bars "unwelcome language or conduct" targeting a person or group because of their age (40 or older, matching the Washington Law Against Discrimination and federal law), sex (including pregnancy), marital status, sexual orientation, gender identity, gender expression, race, creed, color, national origin, veteran status, or disability.[88] The policy explains that harassment becomes "unlawful when the unwelcome language or conduct becomes a condition of continued employment or is severe or pervasive enough that a reasonable person would consider intimidating, hostile, or abusive."[89] Perhaps most helpfully, the policy includes examples of harassment:

> Offensive jokes, comments about a person's body, degrading language, or slurs; Demeaning or sexually suggestive photos or videos shared through social media, email, or text message; Unwanted touching, offensive gestures, or blocking a person's movement. Sexual harassment is a form of harassment that is sexual in nature. Sexual harassment includes, but is not limited to: Unwelcome comments,

[85] WASH. STATE SUP. CT. GENDER & JUST. COMM'N, RE: MODEL ANTI-HARASSMENT POLICY (2020), http://www.courts.wa.gov/subsite/gjc/documents/Model%20Anti-Harassment%20Policy%20and%20FAQs.pdf.
[86] WASH. BD. FOR JUD. ADMIN., MINUTES: MARCH 20, 2020 (2020), https://www.courts.wa.gov/content/publicUpload/bja_meetings/BJA%202020%2003%2020%20MTG%20MIN.pdf.
[87] *Id*.
[88] *Id.*
[89] *Id.*

> jokes, suggestions, or derogatory remarks of a sexual nature; Inappropriate or unwelcome physical contact such as pats, squeezes, deliberately brushing against someone's body, or impeding or blocking a person's normal movement; Posting sexually suggestive or derogatory pictures, cartoons, or drawings at one's workstation or in common areas, or sending them through email or text messages; Unwelcome sexual advances or pressure for sexual favors; Basing employment decisions (such as promotions, evaluations, or assignments) or access to court services on a person's acquiescence in the sexually harassing conduct.[90]

We have found no evidence that such policies, or their wording, affects judges' or lawyers' actions. We support the adoption of such policies; but we make no claim that they can really address the roots of the problem.

VI. Recommendations

- To develop a more inclusive and respectful work environment, the judicial branch and its leaders should take explicit steps to promote equity, diversity, and inclusion, and to foster a culture that values individual differences in age, gender, sexual orientation, gender identity or expression, disability, race, and ethnicity.
- The judicial branch should deliver regular workplace harassment prevention trainings that drive real changes.
- The judicial branch and its leaders should follow best practices to design and deliver prevention trainings for all types of workplace harassment, including harassment based on gender, race, ethnicity, or LGBTQ+ status.
- These trainings should focus on changing behavior, not on changing beliefs. Anti-harassment programs should encourage the support of certain populations that are more likely to experience workplace harassment than others (including, but not limited to sexual and gender minorities; women; Black, Indigenous, and employees of color). These training

[90] *Id*.

programs should be evaluated to determine whether they are effective and what aspects of the training(s) are most important to changing culture.

- To improve transparency and accountability, the judicial branch and its leaders should be as transparent as possible (while respecting the rights of the accused person) about how they are handling reports of workplace harassment. Decisions regarding disciplinary actions, if required, should be made in a fair and timely way. This accountability can ensure that the court workforce feels supported by their organizations, because perceived organizational support is significantly associated with lower rates of workplace harassment.
- To measure progress, the judicial branch and its leaders should work with researchers to evaluate their efforts to create a more diverse, inclusive, and respectful environment. Conducting regular surveys will help to track whether planned processes have been implemented and whether an anti-harassment policy is producing the desired effects. The survey methodology, when fully implemented, will enable the judicial leadership to monitor the sustainability and effectiveness of the anti-harassment efforts. The methodology should allow the branch to disaggregate the data by race, ethnicity, sexual orientation, and gender identity or expression to reveal different experiences across populations. The results of surveys should be shared publicly to demonstrate that the branch takes the issue seriously.
- The Gender and Justice Commission should continue to develop programs to increase the number of women, including women and other persons of color, in both the bench and bar.
- The Gender and Justice Commission should partner with the associations representing Washington courts and clerks' offices to educate and advocate for the adoption of the Model Anti-Harassment Policy by courts across Washington. AOC should track the progress on adopting the policy and should develop a method for evaluating outcomes of the policy.
- Every Washington court should publicize its procedure for filing complaints of sexual and other types of discrimination and harassment, and include this procedure on its website.
- By not later than 2022, the Court Education Committee of the Board for Judicial Administration should partner with the Gender and Justice Commission to develop a training for judges on how to model and, if necessary, control their courtrooms in

ways that immediately address inappropriate gender-biased conduct on the part of attorneys and court personnel.

- The Washington State Bar Association should identify (or convene stakeholders to identify) ways to minimize barriers within the profession related to: pay disparity, promotion opportunities, career complications, and workplace environment. The group should focus on barriers related to age, gender, sexual orientation, gender identity or expression, disability, race, ethnicity, family and care responsibilities, and the impact of the COVID-19 pandemic.

Part II

Gender, Civil Justice, and the Courts

Chapter 5

Gender and Employment Discrimination and Harassment

Diego Rondón Ichikawa, JD; Shannon Kilpatrick, JD; Claire Mocha, MPH

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I. Summary

In 1989, there were certainly laws on the books that barred discrimination in employment. Today, there are even more federal and state laws on the books, and they bar even more forms of discrimination in employment – for example, federal law now explicitly bars discrimination on the basis of sexual orientation in employment. But the problems of discrimination and harassment in employment remain. They can invade all kinds of workplaces and effect all groups. Our research, however, shows that certain populations are subject to disproportionately high rates of discrimination and harassment in the workplace: females who are Black, Indigenous, and people of color;[1] those with disabilities; LGBTQ+ workers; female workers in service and hospitality work; female farmworkers; and female domestic workers.

The evidence reviewed in this section suggests that despite widespread legal protections, patterns of racial discrimination in hiring have remained steady over the decades; that Black, Indigenous, and other women of color are underrepresented in management positions across industries; and that in general, women as a group, especially Black, Indigenous, and women of color, earn significantly less than white men. A national survey in 2020 reported that 45% of Black women said they had experienced racism while applying for a job and 44% said they had experienced racism during decisions about promotion and pay. But this discrimination affects more than employment opportunities, conditions, and wages. It can also cause deep emotional harm and produce long-term health impacts.

And although there are strong federal and state antidiscrimination laws to protect against discrimination and sexual harassment in the workplace, the evidence suggests that they are not fully effective. While there is no statewide data from Washington on the number of workplace discrimination cases filed each year, the available evidence suggests that very few workers pursue cases in court and even fewer prevail. Some possible explanations include the fact that

[1] The 2021 Gender Justice Study uses the race and ethnicity terms used in the underlying sources when citing data in order to ensure we are presenting the data accurately and in alignment with the how the individuals self-identified. When talking more broadly about the body of literature we strive to use the most respectful terms. See Section V of the full report ("2021 Gender Justice Study Terminology, Methods, and Limitations") for a more detailed explanation of terminology used throughout the report.

workers face barriers to reporting and to finding legal representation, and evidence suggests unequal outcomes by gender, race, and ethnicity.

While there is insufficient Washington State data to analyze outcomes by gender and race, in federal employment court cases, Black, Latinx, and Asian American plaintiffs are more likely to have their cases dismissed than white plaintiffs. There is some evidence that plaintiffs bringing claims based on multiple marginalized identities fare worse in court—meaning, for example, a Black woman alleging both race and sex discrimination may be less likely to win her case than a white woman alleging only sex discrimination, or a Black man alleging only race discrimination.

We therefore conclude by recommending improvements to data collection as a first step towards figuring out the best way to improve our workplaces, our laws, and our fellow Washington workers' access to legal remedies. We need accurate data on the landscape of discrimination claims in courts in Washington; on the effectiveness of measures to reduce discrimination and harassment; and on the ability of workers to take advantage of those measures in court.

II. Legal Summary

A. Federal law

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to fail to hire or to fire an individual, or to otherwise discriminate against any individual, with respect to the terms, conditions, or privileges of employment "because of" the individual's sex, race, color, religion, or national origin.[2] An employer may not "limit, segregate, or classify" employees or applicants for employment because of sex, race, color, religion, or national origin.[3] In June 2020, the U.S. Supreme Court held for the first time that Title VII's bar on making employment decisions "because of … sex" includes lesbian, gay, and transgender individuals.[4] In other words, discrimination on the basis of sexual orientation or gender identity violates Title VII. Title VII's

[2] 42 U.S.C. § 2000e-2(a)(1).
[3] 42 U.S.C. § 2000e-2(a)(2).
[4] *Bostock v. Clayton County*, 590 U.S. ___, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020).

protections also bar discrimination against one who is not a member of a protected class, but who is associated with a member of a protected class.[5]

Before filing a lawsuit for Title VII violations, however, employees must first file a charge with the U.S. Equal Employment Opportunity Commission (EEOC) within 300 days of the discriminatory act (or the last discriminatory act if there is a continuing violation).[6] If the employee fails to meet that deadline, then they may not bring a Title VII claim in court. In addition, workers whose claims are covered by both federal and state law can file with their state agency (in Washington, the Washington State Human Rights Commission or WSHRC), instead.

Under Title VII there are two ways to demonstrate discrimination: disparate treatment and disparate impact. Under the disparate treatment theory, a plaintiff must prove that their employer acted with a discriminatory motive.[7] Under the disparate impact theory, it's not necessary to prove discriminatory intent. Instead, using that theory, the plaintiff can prevail by

[5] *See, e.g.*, *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 n.5, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) (noting "[i]t is clear, and respondent seemingly concedes, that its refusal to serve petitioner was a violation of s 201 of the 1964 Act, 42 U.S.C. s 2000a," even though she was a white woman – because she entered the store to eat at the lunch counter with six black friends).

[6] 29 U.S.C. § 626(d).

[7] Employees may make a prima facie case of discrimination through direct or circumstantial evidence. Direct evidence is "evidence, which, if believed, proves the [discriminatory intent] without inference or presumption." *Dominguez-Curry v. Nev. Transp. Dep't*, 424 F.3d 1027, 1038 (9th Cir. 2005) (quoting *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998)). For those without direct evidence, plaintiffs may make a prima facie case under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Using that framework, a plaintiff must show (1) they belong to a protected class, (2) they applied for and was qualified for the position, (3) they were rejected despite their qualifications, and (4) the employer filled the position with someone not of plaintiff's protected class, or considered other applicants whose qualifications were comparable to plaintiff's after rejected plaintiff. *Dominguez-Curry*, 424 F.3d at 1037. Once established, the prima facie case creates a rebuttable presumption of unlawful discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). The burden then shifts to the defendant to produce evidence that if believed would show the adverse employment action was taken "for a legitimate, nondiscriminatory reason." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). The plaintiff must then show the employer's reasons were a pretextual cover for discrimination. *Dominguez-Curry*, 424 F.3d at 1037. Pretext can be demonstrated by either showing the unlawful discrimination more likely motivated the employer or by showing the employer's explanation is not trustworthy because it is inconsistent or not believable. *Id.* Under Title VII, the plaintiff must prove either that (1) the discriminatory animus is the sole cause for the challenged employment action, or that discrimination is one of two or more reasons for the challenged decision, at least one of which may be legitimate, and the discriminatory reason was "a motivating factor" in the challenged action. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 856-57 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003). A motivating factor is a factor that "played a part in the employment decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (plurality opinion).

proving that an objectively neutral employment practice had a discriminatory consequence.[8] The vast majority of employment discrimination cases filed in federal courts allege disparate treatment.[9] State courts also have jurisdiction over such Title VII claims.[10]

Title VII offers a variety of remedies to employees who experience discrimination. They include injunctive relief, such as reinstatement or hiring of the employee, along with front pay, backpay for up to two years from the date the charge is filed with the EEOC (less any amounts earned by the plaintiff through other employment), plus other equitable relief as appropriate.[11] Title VII also authorizes the recovery of compensatory and punitive damages.[12] Compensatory damages are designed to compensate employees who experience wrongful conduct and include loss of future earnings and compensation for a range of negative emotional effects.[13] Punitive damages are designed to deter the employer from engaging in further discriminatory conduct. An employee can recover punitive damages against certain employers if the plaintiff proves the employer engaged in discriminatory practice(s) "with malice or with reckless indifference" to the rights of the individual.[14] Federal law caps the combined value of compensatory and punitive damages recoverable under Title VII, depending on the size of the employer.[15] The damages caps

[8] Disparate impact refers to employment practices that are facially neutral but "discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct. 849, 853, 28 L. Ed. 2d 158 (1971). 42 U.S.C. § 2000e-2(k) governs disparate impact cases. A disparate impact claim can be supported only if (1) the plaintiff demonstrates an employment practice disparately impacts a protected class of people and the employer "fails to demonstrate the practice is job related for the position in question and consistent with business necessity"; or (2) the plaintiff shows there is an alternative employment practice that did not have a disparate impact and the employer refused to adopt it. 42 U.S.C. § 2000e-2(k)(1)(A). Disparate impact claims employ a similar burden-shifting scheme. To prevail, a plaintiff needs to show a facially-neutral employment practice disproportionately impacted a protected class. *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977). The burden then shifts to the employer to show the employment practice has a "manifest relationship" to the position in question. *Griggs*, 401 U.S. at 432. If the employer is successful, the burden shifts back to the plaintiff to show other less discriminatory alternatives that equally serve the legitimate business interests. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975).

[9] ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY (2017). From an examination of a random sample of 1,788 employment discrimination cases filed in federal court between 1988-2003, 98% of cases alleged disparate treatment.

[10] *Yellow Freight Sys., Inc. v. Donnelly,* 494 U.S. 820, 110 S.Ct. 1566, 108 L. Ed. 2d 834 (1990).

[11] 42 U.S.C § 2000e-5(g)(1).

[12] 42 U.S.C. § 2000e-5(e)(3)(B); 42 U.S.C. § 1981a.

[13] "Future pecuniary loss, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a(b)(2), (3).

[14] 42 U.S.C. § 1981a(b)(1).

[15] 42 U.S.C. § 1981a(b)(3).

were set in 1991 and have not been adjusted for inflation.[16] Plaintiffs can also recover reasonable attorney fees and costs if they win.[17]

In addition to Title VII, the Equal Pay Act of 1963 prohibits wage discrimination on the basis of sex. The law does not require that jobs be identical, but they must be substantially equal. The Equal Pay Act covers all forms of pay, including salary, bonuses, and stock options. An employee with an Equal Pact Act claim may also have a claim under Title VII, because, as discussed above, it prohibits discrimination on the basis of pay. However, damages under the Equal Pay Act are limited to wages the employee was underpaid (in addition to reasonable attorneys' fees and costs) and do not include emotional distress damages. However, unlike Title VII, employees are not required to file with the EEOC before filing claims in court.

B. Washington State law

The Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, predates Title VII and in many ways provides more protections. The WLAD prohibits discrimination "because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained guide dog or service animal by a person with a disability."[18] The Washington State Legislature explicitly barred discrimination on the basis of sexual orientation – that prohibition was not explicit in federal law until a recent Supreme Court decision.[19]

In enacting the WLAD, the Washington State Legislature found discrimination in Washington State "threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state."[20] The Legislature also declared that the

[16] Sarah David Heydemann & Sharyn Tejani, *Legal Changes Needed to Strengthen the #MeToo Movement*, 22 RICH. PUB. INTEREST L. REV. 237 (2019). Damages limits range from $50,000 for employers with 15-100 employees, to $300,000 for employers with more than 500 employees. *Remedies for Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/remedies-employment-discrimination.
[17] 42 U.S.C. § 2000e-5(k).
[18] RCW 49.60.010.
[19] *Bostock v. Clayton County*, 590 U.S. ___, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020).
[20] RCW 49.60.010.

right to be free from discrimination constitutes a civil right.[21] To that end, the Legislature directed courts to interpret any ambiguity in the language of the statute generously to accomplish the goal of eliminating and preventing discrimination in Washington.[22] There is no similar direction in Title VII.[23]

The civil right provided by WLAD is broad. It includes (but is not limited to) the right to be free from discrimination in the following situations:

- To obtain and hold employment;
- To full enjoyment of any accommodations, advantages, facilities, or privileges of any place of public accommodation, resort, assemblage, or amusement;
- To engage in real estate transactions;
- To engage in credit transactions;
- To engage in insurance transactions;
- To engage in commerce; and
- To breastfeed a child in public.[24]

Unlike Title VII, the WLAD does not require claimants to file a claim with the EEOC before going to court. Washington lawyers familiar with this area of law note that the 300-day time limit to file with EEOC can pose a barrier to claimants (more on filing with the EEOC below). The WLAD's more streamlined procedure and longer filing period likely promotes better access to judicial remedies.

The WLAD gives people who have experienced illegal discrimination the right to sue in court to stop that behavior, to recover monetary damages, or both.[25] The WLAD is a broad remedial statute, meaning the law was enacted to provide remedy to individuals wronged by discrimination. Accordingly, the law allows for a variety of remedies to allow employees to be

[21] RCW 49.60.030(1).
[22] RCW 49.60.020.
[23] *Martini v. Boeing Co.*, 137 Wn.2d 357, 373, 971 P.2d 45 (1999).
[24] RCW 49.60.030(1).
[25] RCW 49.60.030(2).

made whole, including injunctive relief (such as stopping further violations or reinstatement if wrongly terminated), recovery of economic damages (such as back pay, front pay, loss of benefits, decreased retirement benefits, and lost earning capacity if denied promotions), general damages (for pain and suffering, anxiety, emotional distress, embarrassment, loss of enjoyment of life), and costs and reasonable attorneys' fees.[26]

The WLAD applies to employers with eight or more employees, including any governmental entity, municipality, or agency.[27] It does not apply to employers with fewer than eight employees. The definition of employer also excludes "any religious or sectarian organization" that is not a for-profit company,[28] and the Washington Supreme Court has upheld that exclusion as applied to those employees who are "ministers."[29] The WLAD prohibits discrimination and retaliation by both employers and prospective employers.[30] It applies to employment agencies and protects any prospective, current, or former customer or recruit.[31] Additionally, the WLAD applies to "any labor union or labor organization."[32] The Washington Supreme Court has interpreted the WLAD to provide protection for independent contractors,[33] unlike Title VII. This is an important protection for Washington contract workers: they make up around 10-20% of the workforce and they often lack job stability, benefits or other legal protections.[34] Additionally, the Washington Court of Appeals in *LaRose v. King County* held that an employer may be liable for a non-employee's harassment of an employee if the employer knew or had reason to know about that harassment and failed to stop it;[35] the Washington State Supreme Court in *Floeting v. Group Health Cooperative* ruled that the Washington State Legislature made employers "directly liable" for their own employees' sexual harassment of customers.[36]

[26] *Id.*
[27] RCW 49.60.040(11), (19).
[28] RCW 49.60.040(11).
[29] *Woods v. Seattle's Union Gospel Mission*, 197 Wn.2d 231, 481 P.3d 1060 (2021).
[30] RCW 49.60.200, .210.
[31] RCW 49.60.190, .210; *see also* RCW 49.60.190(3).
[32] RCW 49.60.190.
[33] *Marquis v. City of Spokane*, 130 Wn.2d 97, 108, 922 P.2d 43 (1996).
[34] JENNY R. YANG ET AL., REIMAGINING WORKPLACE PROTECTIONS (2020), https://www.urban.org/sites/default/files/publication/103331/reimagining-workplace-protections_0_0.pdf.
[35] 8 Wn. App. 2d 90, 437 P.3d 701 (2019).
[36] 192 Wn.2d 848, 852, 434 P.3d 39 (2019).

If the WLAD applies only to employers with eight or more employees, then what happens to people who suffer discrimination from smaller employers? In *Roberts v. Dudley*,[37] the Washington Supreme Court held that, although the employer was exempt from WLAD requirements because it employed fewer than eight people, it still did not have free reign to discriminate. The Court explained that the WLAD expresses a strong public policy that all inhabitants of the state should be free from discrimination. Therefore, the employee plaintiff had a common law cause of action for wrongful firing in violation of the public policy prohibiting sex discrimination found in such statutes as RCW 49.12.200 and RCW 49.60.010.[38]

The WLAD also provides a broader range of remedies than Title VII – in fact, the Washington Supreme Court has called those state law remedies "radically different."[39] Any person who successfully sues under the WLAD may recover "actual damages," an injunction against further violations, and/or reasonable attorney fees, as well as any other appropriate remedy authorized by the Civil Rights Act of 1964.[40] Unlike with Title VII, a plaintiff suing under the WLAD can recover any damages caused by the actions of the defendant, without limitation.[41] This can also include back pay and front pay.[42] In addition, Washington does not cap damages; state court juries can therefore award damages much higher than those available under Title VII.[43]

Washington has a state equivalent to the federal Equal Pay Act: The Equal Pay and Opportunities Act (EPOA).[44] First enacted in 1943, the EPOA similarly prohibits wage discrimination on the basis of sex. An employee may file a claim for civil damages in court without exhausting administrative remedies. The Washington State Legislature made sweeping improvements to the EPOA in 2019

[37] 140 Wn.2d 58, 77, 993 P.2d 901 (2000).
[38] *Roberts*, 140 Wn.2d at 77.
[39] *Martini v. Boeing Co.*, 137 Wn.2d 357, 375, 971 P.2d 45 (1999).
[40] RCW 49.60.030(2).
[41] *Martini*, 137 Wn.2d at 368.
[42] *See* 6A WASHINGTON PRAC.: WASH. PATTERN JURY INSTRUCTIONS: CIVIL, WPI 330.81 (7th ed).
[43] Some recent examples include: $1.75 million for emotional distress in a disability discrimination case, *Jury Orders FedEx Freight to Pay $6.85 Million for Disability Discrimination*, Bloomlaw (Nov. 16, 2020), https://www.bloomlawpllc.com/jury-orders-fedex-freight-to-pay-6-85-million-for-disability-discrimination; $600,000 in emotional distress for sexual harassment retaliation, J. Jury Verdict Against State of Washington, Sept. 28, 2020, http://sheridanlawfirm.com/wp/wp-content/uploads/2020/09/Click-here-to-see-judgment-and-jury-verdict.pdf; and $750,000 in emotional distress for gender discrimination retaliation, *Johnson v. Albertsons LLC*, 2:18-01678-RAJ, 2020 WL 3604107 (W.D. Wash. July 2, 2020).
[44] ch. 49.58 RCW.

to address the continuing wage gap between women and men; those improvements included prohibiting employers from seeking wage history from applicants, requiring employers to provide a wage scale or salary range for promotions/transfers, and promoting greater transparency about wage and salary information.[45]

C. Sexual harassment

Both state and federal courts have recognized that sexual harassment is a form of sex discrimination. In 1985, in *Glasgow v. Georgia-Pacific Corp.*,[46] the Washington Supreme Court broke new ground and held that a hostile work environment caused by a co-worker's sexual harassment constituted illegal sex discrimination under Washington's Law Against Discrimination.[47] A year later, in 1986, a unanimous United States Supreme Court recognized sexual harassment as a viable claim under Title VII in *Meritor Sav. Bank v. Vinson*.[48] Sexual harassment includes "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[49] The U.S. Supreme Court has also held that if "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,'" that also violates Title VII.[50] To prevail, the plaintiff must show that their work environment was both subjectively hostile to them and objectively hostile to a reasonable person.[51]

Under Title VII, an employer "is subject to vicarious liability"—meaning legally responsible for the actions of others—for a hostile work environment created by a supervisor.[52] An employer is held vicariously liable, with no defense, for sexual harassment by a supervisor that results in a

[45] *Id.*
[46] 103 Wn.2d 401, 693 P.2d 708 (1985).
[47] RCW 49.60.
[48] 477 U.S. 57, 66, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986).
[49] *Id.* at 65.
[50] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993).
[51] *Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027, 1034 (9th Cir. 2005); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994).
[52] *Burling Industries, Inc. v. Ellerth*, 524 U.S. 742, 764-65, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998).

"tangible employment action, such as discharge, demotion, or undesirable reassignment" for the target of the harassment.[53]

Washington law recognizes two kinds of sexual harassment claims—"quid pro quo" and hostile work environment.[54] "Quid pro quo" harassment exists where a supervisor (1) requires an employee to submit to unwelcome sexual conduct as a condition of receiving job benefits, or (2) takes a negative employment action against the employee for refusing the advances.[55] Hostile work environment claims exist where the behavior of co-workers or a supervisor toward an employee because of the employee's sex creates an intimidating, hostile, or offensive working environment.[56] Under the WLAD, the employer is held responsible for harassment by a company owner, manager, partner, or corporate officer.[57] For the harassment of co-workers or supervisors, the plaintiff must show the authorized employer knew, or should have known, about the harassment and failed to take reasonably prompt and adequate corrective action.[58]

III. Background on workplace discrimination and sexual harassment

A. Prevalence

As discussed above, there are strong laws on the books to combat workplace discrimination and sexual harassment in Washington. But we lack comprehensive data on the prevalence of workplace discrimination and sexual harassment in Washington State and, consequently, on the impact of those laws.

The recent survey of sexual harassment in the Washington courts conducted by the Gender and Justice Commission in collaboration with the Washington State Center for Court Research is a notable exception. This survey provides statewide data on workplace harassment and bullying among court employees, Superior Court Clerks' Office employees, and judicial branch employees.

[53] *Id.*
[54] *Antonius v. King County*, 153 Wn.2d 256, 261, 103 P.3d 729 (2004).
[55] *Glasgow v. Georgia Pacific Corp.*, 103 Wn.2d 401, 405, 693 P.2d 708 (1985).
[56] *Id.*
[57] *Id.* at 407.
[58] *Id.*

The Washington survey found high rates of harassment in these workplaces: 57% of respondents experienced at least one form of workplace harassment in the 18 months prior to the survey.[59] You can find the full survey technical report in Appendix C of this report. To supplement this Washington-specific data, we also reviewed national data where there are no comparable sources in Washington:[60]

- A review of data from the General Social Survey from 2002-2018 found that of all respondents, 5.31% reported race discrimination; 6.34% reported gender discrimination, and 3.18% reported experiencing sexual harassment in the 12 months before the survey; these data were not disaggregated by race, gender, or other demographics, and the dataset was limited to full-time workers.[61]

While the size of the General Social Survey dataset and the sampling methodology used make it a valuable source of national data, the results differ significantly from those found in research using less rigorous sampling methods:

- A Gallup poll from 2020 found that 18% of surveyed workers reported experiencing discrimination at work in the past year.[62]

[59] ARINA GERTSEVA. WORKPLACE HARASSMENT SURVEY: WASHINGTON STATE COURTS, SUPERIOR COURT CLERKS' OFFICES, AND JUDICIAL BRANCH AGENCIES - SUMMARY FINDINGS REPORT 1. WASHINGTON STATE CENTER FOR COURT RESEARCH (2021).

[60] Note that it is often not possible to make direct comparisons between studies, as wording of questions varies, and can influence responses. For example, respondents may report experiencing behavior that they themselves do not recognize as harassment, and so surveys that ask about behaviors experienced in the workplace often get higher rates of reported discrimination and harassment compared to surveys that use the terms "harassment" and "discrimination."

[61] Vincent J. Roscigno, *Discrimination, Sexual Harassment, and the Impact of Workplace Power*, 5 SOCIUS 1 (2019). The General Social Survey is a nationally representative sample of English-speaking and Spanish-speaking adults, and for this analysis authors used data from over 6,000 respondents over a series of five yearly waves of data collection.

[62] Camille Lloyd, *One in Four Black Workers Report Discrimination at Work*, GALLUP (Jan. 12, 2021), https://news.gallup.com/poll/328394/one-four-black-workers-report-discrimination-work.aspx (describing results from a web-based survey of over 8,000 respondents, conducted in English).

- And in a 2016 review of the social science literature, the EEOC reported that anywhere from 25% to 85% of female workers report having experienced sexual harassment in the workplace.[63]

B. Disparities

Existing evidence from national studies suggests that there are disparities in who commonly experiences discrimination and harassment at work. For example, the 2020 Gallup poll found that 24% of Black and Hispanic employees reported experiencing discrimination at work in the past year, compared to 15% of white employees (these data were not disaggregated by gender, sexual orientation, disability, or other factors).[64] Moreover, Black, Indigenous, and women of color; LGBTQ+ individuals; and other people with multiple marginalized identities may experience higher rates of workplace discrimination and sexual harassment. The recent Washington judicial branch survey mentioned above found, "[t]he highest rates of any workplace harassment were reported by employees who identified as Indigenous, (82%), bisexual (84%), gay or lesbian (73%), multiracial (66%), court clerks (65%), and women (62%), relative to all respondents (57%).[65]

1. Gender/sex and sexual orientation discrimination

Gender discrimination against female workers is pervasive, as is discrimination based on sexual orientation or transgender identity:

- In a nationally representative Pew survey in 2017, 42% of female respondents reported having experienced gender discrimination at work, compared to 22% of men.[66]
- A nationally representative survey conducted by Harvard University in 2017 found similar results to the Pew study regarding gender discrimination, and further reported that one

[63] CHAI FELDBLUM & VICTORIA LIPNIC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE: REPORT OF CO-CHAIRS CHAI R. FELDBLUM & VICTORIA A. LIPNIC (2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace. Cisgender or transgender status was not reported, and estimates for males were not reported.

[64] Lloyd, *supra* note 62.

[65] ARINA GERTSEVA, *supra* note 59, at 2. See Appendix C for the full survey report.

[66] Kim Parker & Cary Funk, *Gender Discrimination Comes in Many Forms for Today foWorking Women* (Dec. 14, 2017), https://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/. Cisgender or transgender status was not reported.

fifth of LGBTQ respondents reported having experienced workplace discrimination based on their LGBTQ identity.[67]

- Workers who identify as bisexual report being less likely to disclose their sexual orientation at work compared to their gay and lesbian counterparts; and they report facing discrimination and harassment when they do disclose—even from their gay and lesbian coworkers.[68]
- Women who are perceived to be lesbian, bisexual, or queer may be less likely to be hired than women who are perceived to be heterosexual.[69]
- In the 2015 U.S. Transgender Survey, 30% of those who had been employed in the previous year reported they had been fired, denied a promotion, or experienced other forms of discrimination, harassment, and mistreatment in the workplace because of their transgender identity; and 15% had been verbally harassed, physically attacked, and/or sexually assaulted at work.[70]

Women who are Black, Indigenous, and people of color may experience higher rates of gender discrimination:

[67] HARV. OP. RSCH. PROGRAM, DISCRIMINATION IN AMERICA: FINAL SUMMARY (2018), https://www.hsph.harvard.edu/horp/discrimination-in-america/. 31% of women reported having been discriminated against when applying for jobs and 41% when being paid equally or considered for promotions; 20 % of LGBTQ+ people reported having been discriminated against when applying for jobs and 22% when being paid equally or considered for promotions; compared to 18% of men in both situations. Race/ethnic data, gender data, and LGBTQ+ data were not disaggregated by the other demographic categories. *Id.*

[68] David F. Arena & Kristen P. Jones, *To id F. ANot to "B": Assessing the Disclosure Dilemma of Bisexual Individuals at Work*, 103 J. VOCATIONAL BEHAV. 86 (2017) (using data from online surveys conducted with over 800 gay, lesbian, and bisexual identified workers).

[69] Emma Mishel, *Discrimination Against Queer Women in the U.S. Workforce: A R:"a2fvirstc30","p*, 2 SOCIUS 1 (2016). The author sent pairs of resumes with typically female names to over 800 administrative jobs in four U.S. states (not including Washington State); while the resumes had equivalent experience and skills, one of the resumes included a history of leadership in a LGBTQ+ student organization, and the other did not. *Id.* The resumes with the LGBTQ+ experience received 30% fewer callbacks. *Id.*

[70] NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY (2017), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf. Mistreatment included breaches of confidentiality, negative job reviews, being forced to resign, not being allowed to use the bathroom that aligned with their gender, being told to present as the wrong gender at work, and more. The survey did not disaggregate between male, female, or gender-nonconforming respondents.

- Among older adults in a longitudinal cohort study, 25% of Black women reported any kind of discrimination in the workplace (compared to 11% of white men); more Black women (11%) than white women (8%) reported sex discrimination.[71]
- In a 2010 survey, 42.8% of LGBTQ+ Black, Indigenous, and respondents of color reported employment discrimination, compared to 37.7% of white LGBTQ+ survey respondents.[72]
- According to the U.S. Transgender survey, transgender respondents of color, especially American Indian, Black, and multiracial respondents, reported higher rates of discrimination, harassment, and mistreatment on the basis of their transgender identity, compared to their white peers.[73]

2. Race discrimination

While some white workers do file race discrimination claims, the evidence shows that Black, Indigenous, and people of color experience rates of racial discrimination in the workplace much more frequently:

- In the 2020 Gallup poll noted above, 18% of Black workers surveyed and 15% of Hispanic workers surveyed reported having experienced race-based discrimination in the past year, compared to 6% of white workers.
- In the Harvard study mentioned above, more than half of Black respondents noted having experienced discrimination in the workplace on the basis of race.[74]

The evidence suggests that Black women may experience higher rates of workplace race discrimination than Black men:

[71] Desta Fekedulegn et al., *Prevalence of Workplace Discrimination and Mistreatment in a National Sample of Older U.S. Workers: The REGARDS Cohort Study*, 8 SSM - POPULATION HEALTH 1 (2019) (reporting from a sample of nearly 5,000 adults pulled from a nation-wide cohort of non-Hispanic Black and white adults).
[72] Darren L. Whitfield et al., *Queer Is the New Black? Not So Much: Racial Disparities in Anti-LGBTQ Discrimination*, 26 J. GAY & LESBIAN SOC. SERVS. 426 (2014) (relying on data from a 2010 survey of adult LGBTQ individuals in Colorado (n=3,854)).
[73] NAT'L CTR. FOR TRANSGENDER EQUALITY, *supra* note 70.
[74] *Id.*

- In the longitudinal study noted above, more Black women reported racial discrimination in the workplace (17%) than Black men (12%), compared to two percent each of white women and white men.[75]
- An Essence survey in 2020 reported that 45% of Black women said they had experienced racism while applying to a job, and 44% said they had experienced racism "while being considered for a promotion or for equal pay."[76]

3. Discrimination on the basis of disability

The experiences of workplace discrimination among people with disabilities vary widely, as some disabilities are more readily apparent than others, which may affect how people are treated.[77] However, the evidence suggests that in general, people with disabilities are discriminated against in hiring, compensation, and treatment in the workplace:

- A field experiment that sent job applications to over 6,000 accounting positions in the U.S. found that applications that disclosed a physical or developmental disability received 26% fewer callbacks compared to applications that did not—even though all had the same qualifications.[78]
- In a nationally representative telephone survey of U.S. adults with self-reported disabilities, 36% of those who were actively seeking work reported that employers "incorrectly assumed that they could not do the job because of their disability."[79] Over 16% of those currently working reported receiving lower pay than peers in similar positions.[80]

[75] Desta Fekedulegn et al., *supra* note 71.
[76] ESSENCE, *More Than Three-Quarters Of Black Mothers Worry Their Children Will Be Victims Of Police Brutality, ESSENCE Survey Finds* (June 15, 2020), https://www.essence.com/feature/essence-insights-black-mothers-police-brutality/. The Essence online survey includes responses from 749 U.S. adult Black women.
[77] SARAH PARKER HARRIS & ROB GOULD, EXPERIENCE OF DISCRIMINATION AND THE ADA 9 (2019), https://adata.org/sites/adata.org/files/files/ADA percent20Research percent20Brief_Discrimination percent20and percent20the percent20ADA_FINAL.pdf.
[78] Mason Ameri et al., *The Disability Employment Puzzle: A Field Experiment on Employer Hiring Behavior*, 71 INDUS. & LAB. RELS. REV. 329 (2018).
[79] KESSLER FOUND., THE KESSLER FOUNDATION 2015 NATIONAL EMPLOYMENT AND DISABILITY SURVEY: REPORT OF MAIN FINDINGS 20 (2015), https://kesslerfoundation.org/sites/default/files/filepicker/5/KFSurvey15_Results-secured.pdf. This nationally representative telephonic survey reached over 3,000 U.S. adults with disabilities by phone.
[80] *Id.*

Experiences of disability discrimination have also been shown to vary by social identity, as individuals belonging to other marginalized groups experience more pervasive and severe discrimination:

- Female workers with disabilities file Americans with Disabilities Act (ADA) charges with the EEOC at a rate 42% higher than their male counterparts.[81]

4. Sexual harassment

The federal government's Merit Systems Protection Board collects and publishes what is probably the most comprehensive and long-lasting survey of sexual harassment in the workplace, surveying federal employees regularly since 1981.[82] In 2016, roughly one in seven federal employees reported having experienced sexual harassment during the two years before the survey (20.9% of female employees and 8.7% of male employees). Note that these results should not be generalized to the wider population (in fact, they are significantly lower than those found in a recent national survey);[83] as discussed below, sexual harassment prevalence varies greatly by workplace. However, they are helpful to understand historical trends. Rates of sexual harassment had decreased slightly since the previous survey in 1994.[84] Employee understanding of sexual harassment had changed significantly, with more employees overall recognizing specific actions as harassment, and showing a higher rate of agreement between male and female employees on which actions qualify as harassment. The most common reaction reported by victims of workplace sexual harassment was avoidance of the harasser (61%), followed by asking the harasser to stop (59%). Note that respondents could select multiple options. Only 11% filed

[81] Jennifer Bennett Shinall, *The Substantially Impaired Sex: Uncovering the Gendered Nature of Disability Discrimination*, 101 MINN. L. REV. 61 (2017) (from an examination of EEOC charges from 2000-2009).

[82] U.S. MERIT SYS. PROTECTION BD., OFF. OF POL'Y & EVALUATION, UPDATE ON SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE 10 (2018), https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1500639&version=1506232&application=ACROBAT.

[83] HOLLY KEARL, THE FACTS BEHIND THE #METOO MOVEMENT: A NATIONAL STUDY ON SEXUAL HARASSMENT AND ASSAULT (2018), https://ncvc.dspacedirect.org/handle/20.500.11990/789. This nationally representative survey of over 2,000 adults found that 38% of women and 13% of men reported ever having experienced sexual harassment at work. Note, however, that this survey asked about lifetime experiences, while the Merit Systems Protection Board only asks about experiences in the previous two years.

[84] However, rates cannot be compared exactly because the methodology changed: the 2016 survey asked about 12 different harassment behaviors, while the 1994 survey asked about eight behaviors.

a formal complaint. Concerningly, 12% of respondents reported changing jobs or locations to avoid the harassment.[85] This data was not disaggregated by race, LGBTQ+ identity, pay grade, or other factors.

C. Variations in workplace sexual harassment and discrimination by industry

1. Service and hospitality

The sectors most represented in EEOC sexual harassment filings are accommodation and food services, retail trade and healthcare, and social assistance.[86] Workers in hotels and accommodations may be vulnerable because much of their work is done in isolation. More than half of hotel housekeepers in Seattle surveyed in 2016 reported sexual harassment or assault on the job.[87] Restaurant workers experience sexual harassment from supervisors, co-workers, and customers. In a nation-wide survey of female fast-food industry workers, 40% reported having experienced "unwanted sexual behaviors," with Black and Latina women reporting higher rates.[88] Prior to the COVID-19 pandemic, the restaurant industry was the fastest-growing sector of the U.S. economy, and it is marked by extreme gender and racial segregation in roles and wages: female, Black, and Hispanic workers in the industry are more likely to be living in poverty than their male and white counterparts, and are more highly concentrated in low-wage positions and tipped positions.[89] In many parts of the country, tipped positions are subject to a much lower federal minimum wage (referred to as the "tipped minimum wage"), on the assumption that tips from customers will make up the difference.[90]

[85] U.S. MERIT SYS. PROTECTION BD., *supra* note 82.
[86] AMANDA ROSSIE, JASMINE TUCKER & KAYLA PATRICK, NAT'L WOMEN'S L. CTR., OUT OF THE SHADOWS: AN ANALYSIS OF SEXUAL HARASSMENT CHARGES FILED BY WORKING WOMEN (2018), https://nwlc.org/wp-content/uploads/2018/08/SexualHarassmentReport.pdf (from an analysis of filings from women in the private sector, 2012-2016).
[87] PUGET SOUND SAGE, SURVEY OF DOWNTOWN SEATTLE HOTEL HOUSEKEEPERS REVEALS FREQUENT SEXUAL HARASSMENT AND PAIN (2016), https://pugetsoundsage.org/wp-content/uploads/2016/12/PSS_HotelWorkerSurvey_Sept2016.pdf
[88] HART RSCH. ASSOCS., KEY FINDINGS FROM A SURVEY OF WOMEN FAST FOOD WORKERS (2016), https://hartresearch.com/wp-content/uploads/2016/10/Fast-Food-Worker-Survey-Memo-10-5-16.pdf.
[89] HEIDI SHIERHOLZ, LOW WAGES AND FEW BENEFITS MEAN MANY RESTAURANT WORKERS CAN'T MAKE ENDS MEET (2014), https://files.epi.org/2014/restaurant-workers-final.pdf.
[90] *Id.*

There appears to be an inverse relationship between rates of sexual harassment and the tipped minimum wage—industry experts note that financial dependence on customer tips leads to "an environment in which a majority female workforce must please and curry favor with customers to earn a living."[91] This supports the theory that minimum wage policy can affect not just workplace wages, but also workplace safety: restaurant workers in tipped positions report higher rates of sexual harassment; and restaurant workers in states with a "tipped minimum wage" report higher rates of sexual harassment than those in states with a single minimum wage, like Washington State. In all scenarios, female restaurant workers report higher rates of sexual harassment than their male counterparts.[92]

2. Domestic workers

While there are less data on domestic workers, it is important to note that they are often excluded from civil rights and discrimination protections by design[93] and because their employers may not meet the minimum requirement of number of employees, but they report high rates of mistreatment: in a national survey of nannies, caregivers and housecleaners, 36% reported experiencing verbal harassment in the past year.[94] Domestic workers are almost exclusively female (91.5%), and most are Black, Indigenous, and women of color (52.4%).[95] A higher proportion of domestic workers are foreign-born compared to the general population, and they earn lower wages as a group than other workers and are more likely to be living in poverty. They are also much less likely than other workers to receive employer-provided retirement or health insurance.[96] Given their high rates of poverty and lack of benefits, domestic workers are likely to

[91] THE RESTAURANT OPPORTUNITIES CTRS. UNITED & FORWARD TOGETHER, THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY 1 (2014).
[92] *Id.*
[93] *See* RCW 49.60.040(10) (excluding from the definition of "employee" individuals employed "in the domestic service of any person"); 42 U.S.C. §§ 2000e(b) (exclusion for businesses with fewer than fifteen workers). *See also* Richard Carlson, *The Small Firm Exception and the Single Employer Doctrine in Employment Discrimination*, 80 ST. JOHN'S L. REV. 1197, 1199 (2006) ("The exemption may be one reason why small firms are much less likely than larger firms to hire a representative number of black employees"). The domestic worker exclusion in WLAD dates back to the original 1949 enactment of the law. *See* LAWS OF 1949, ch. 183, § 3(b).
[94] LINDA BURNHAM & NIK THEODORE, HOME ECONOMICS: THE INVISIBLE AND UNREGULATED WORLD OF DOMESTIC WORK (2012), https://idwfed.org/en/resources/home-economics-the-invisible-and-unregulated-world-of-domestic-work/@@display-file/attachment_1.
[95] JULIA WOLFE ET AL., DOMESTIC WORKERS CHARTBOOK (2020), https://files.epi.org/pdf/194214.pdf.
[96] *Id.*

be extremely vulnerable to any retaliatory actions taken by an employer in the event that an employee complains about or reports discrimination or harassment. Etelbina Hauser, a 56-year-old domestic worker born in Honduras and living in Washington State, recounted the experience of going from job to job, fleeing sexual harassment: "Hunger will make you put up with a lot of things… You realize that you have to find a way to survive, even with your dignity crushed."[97]

3. Farmworkers

Human Rights Watch reports that farmworkers may be particularly vulnerable to sexual harassment in the workplace.[98] Working alone in remote or low-visibility areas; a high proportion of male supervisors to female employees; and financial vulnerability are some of the factors that may influence high rates of sexual harassment for female farmworkers.[99] Experts in Washington note that in the agricultural industry, male supervisors can have a huge amount of control over their employees, including the power to reassign, hire, and fire with very little oversight, making female employees extremely vulnerable. While no comprehensive national data exists, available data suggests that rates of sexual harassment are extremely high among female farmworkers.[100] Sexual harassment in these workplaces can include unwanted touching, verbal abuse and exhibitionism, but sometimes also sexual assault or sexual coercion.[101]

Given that farmworkers are majority Hispanic/Latinx, and females are more likely to experience sexual harassment than males, Latina farmworkers likely face a disproportionate impact of workplace sexual harassment.[102] Farmworkers may depend on their employers not only for

[97] Alexia Fernandez Campbell, *Housekeepers and Nannies Have No Protection from Sexual Harassment Under Federal Law*, VOX (Apr. 26, 2018), https://www.vox.com/2018/4/26/17275708/housekeepers-nannies-sexual-harassment-laws.

[98] GRACE MENG, CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT (2012). The authors interviewed 160 individuals, including farmworkers, attorneys, industry members, and experts in 11 states (including Washington).

[99] Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16 VIOLENCE AGAINST WOMEN 237 (2010).

[100] MENG, *supra* note 98. Human Rights Watch reports that in a series of interview conducted in 2012, nearly all workers interviewed had experienced sexual violence or harassment on the job or had witnessed or heard about it happening to someone else. *See also* Morales Waugh, *supra* note 99 (from interviews with 150 Mexican and Mexican-American farmworker women in California, 80% reported having experienced some form of sexual harassment, and 24% of those reported experiencing sexual coercion on the job).

[101] *Id.*

[102] TRISH HERNANDEZ & SUSAN GABBARD, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2015-2016: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS (2018),

scarce work opportunities, but in some cases also for housing, transportation, and language access support in navigating U.S. systems (nearly one-third of workers report that they cannot speak English).[103]

Sexual harassment and gender discrimination behaviors can continue for months or years in some cases, such as for the plaintiff named in an EEOC lawsuit against National Food Corporation headquartered in Everett, Washington.[104] A female laborer who worked in isolated conditions was pressured for sex on a weekly basis over the course of seven years. Co-workers tried to complain on her behalf and were fired in retaliation. The EEOC's general counsel commented, "This lawsuit is another in an unfortunate pattern of employers taking advantage of female agricultural workers who often work in isolation and are unaware of their rights."[105] Similarly, a 2021 consent decree ordered Great Columbia Berry Farms LLC, located near Walla Walla, Washington, to pay damages to several women who were raped or sexually assaulted by a supervisor, who used his position to threaten and fire workers when they complained.[106] The company must also create systems to protect workers in the future, including anti-discrimination and anti-retaliation policies; secure and anonymous complaint proceedings; annual employee trainings; and investigative procedures to respond to complaints. "Companies that know or should know that powerful managers are harassing and assaulting their employees, but do nothing to stop it, bear responsibility," said Washington State Attorney General Bob Ferguson. "Agricultural workers deserve to be heard — and they deserve a safe work environment free from abuse."[107] Besides civil remedies and civil accountability, sexual assault and coerced sex in the workplace may require criminal justice response. Since data on the prevalence on gender-based coercion, assaults, and related criminal and civil injuries occurring in the farm labor and

https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf. The 2018 U.S. National Agricultural Workers Survey found that 89% of U.S. farmworkers are Hispanic.

[103] *Id.*

[104] *Egg Giant National Food to Pay $650,000 to Settle EEOC Sexual Harassment Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (May 16, 2013), https://www.eeoc.gov/newsroom/egg-giant-national-food-pay-650000-settle-eeoc-sexual-harassment-lawsuit.

[105] *Id.*

[106] *AG FERGUSON: WALLA WALLA COUNTY BERRY FARM MUST PAY $350,000 OVER SEXUAL ASSAULT, HARASSMENT OF FARM WORKERS*, WASH. STATE OFF. OF THE ATT'Y GEN. (2021), https://www.atg.wa.gov/news/news-releases/ag-ferguson-walla-walla-county-berry-farm-must-pay-350000-over-sexual-assault.

[107] *Id.*

service industries is limited, Washington should strive to collect such data statewide. This would allow stakeholders to monitor the efficacy of laws and regulations in combating gender-based violence, identify gaps in protection for these vulnerable populations, and collaborate on providing better access to criminal and civil justice.

4. Other workplaces

There is some evidence that female workers in historically male-dominated workplaces face more gender-based harassment, based on studies of women working in academia, the courts, and the military.[108] "Chapter 4: The Impact of Gender and Race in the Courtroom and in the Legal Community" looks in depth at one such sector – the legal profession. While a full review of discrimination and sexual harassment in these specific sectors is beyond the scope of this review, it is worth noting that male workers in these sectors, especially Black, Indigenous, and men of color, also experience gender-based harassment: for example, Black men in the military experience higher rates of sexual harassment than their white counterparts.[109]

5. Religious employers

The exemption for religious organizations under WLAD leaves some workers vulnerable to discrimination. In 2013, the vice-principal of Eastside Catholic school in Sammamish resigned from his position, reportedly under pressure by the archdiocese, when it became known that he had married his same-gender partner.[110] And in 2020, two teachers left Kennedy Catholic school in Burien after each disclosed to school administrators that they had plans to marry their same-gender partners and were told by the archdiocese that their employment contracts would not be renewed for the following school year.[111] Though religious and sectarian non-profits are expressly exempted by the WLAD, other non-profit or for-profit employers are not exempted,

[108] Dana Kabat-Farr & Lilia M. Cortina, *Sex-Based Harassment in Employment: New Insights Into Gender and Context*, 38 LAW & HUMAN BEHAV. 58 (2014).
[109] Isis H. Settles, NiCole T. Buchanan & Brian K. Colar, *The Impact of Race and Rank on the Sexual Harassment of Black and White Men in the U.S. Military*, 13 PSYCH. MEN & MASCULINITY 256 (2012).
[110] Kristen Millares Young, *Seattle Catholic School ITFiring of Gay Teacher Pits State Law Against Religion*, GUARDIAN (Dec. 21, 2013), https://www.theguardian.com/world/2013/dec/21/seattle-catholic-schools-firing-gay-vice-principal.
[111] Dahlia Bazzaz, *Seattle Archbishop Puts Kennedy Catholic School President on Leave of Absence Until the End of the School Year*, SEATTLE TIMES (Feb. 25, 2020), https://www.seattletimes.com/seattle-news/education/seattle-archbishop-puts-kennedy-catholic-school-president-on-leave-of-absence-until-the-end-of-school-year/.

even if they hold the same beliefs. Further, there are likely some constitutional limits to the reach of the exemption under the Washington Constitution. In March 2021, the Washington Supreme Court held that the religious exemption in the WLAD is not unconstitutional as applied to "ministerial functions," or those positions that involve matters of "faith and doctrine."[112] The court, however, suggested that the exemption for religious organizations could violate the state constitution as applied to employees with non-ministerial functions.[113]

6. Parenting and discrimination

Finally, female workers who are married, pregnant, or parenting face discrimination in the workplace that has been well-documented in U.S. data. Empirical studies with lay audiences have found significant biases against female job applicants or workers who are married or who have children, a bias referred to by some researchers as the "motherhood penalty."[114] A review of cases alleging discrimination on family responsibilities found that 25% of workers alleging mistreatment were in the service sector, and 28% worked in manufacturing, office administration and sales.[115] The authors note that low-wage jobs are less likely to provide paid sick time or flexible time off for caregiving, and more than half of workers who make below 200% of the federal poverty level aren't covered by federal family leave laws, because their position or employer is exempt. Workers in low-wage jobs report being fired immediately or shortly after disclosing their pregnancy at work; being banned from holding certain positions; being denied accommodations while pregnant; harassment and mistreatment; and denial of legal rights. There is evidence that Black and Latina workers are treated more harshly than white workers when

[112] *Woods v. Seattle's Union Gospel Mission*, 197 Wn.2d 231, 252, 481 P.3d 1060 (2021).
[113] *Id.* (finding the exemption does not facially violate article I, section 12 of the Washington constitution, but recognizing it "may still be unconstitutional as applied to" the plaintiff).
[114] Stephen Benard & Shelley J. Correll, *Normative Discrimination and the Motherhood Penalty*, 24 GENDER & SOC'Y 616 (2010). Benard and Correll tested the how the attitudes of 252 undergraduate students towards male and female job applicants changed with the information that applicants were parents. *See also* Alexander H. Jordan & Emily M. Zitek, *Marital Status Bias in Perceptions of Employees*, 34 BASIC & APPLIED SOC. PSYCH. 474 (2012). Jordan and Zitek conducted a series of experiments with a total of 288 undergraduate students to assess how participants' ratings of male and female employment would change with the information that workers were married. The term "motherhood penalty" was first used in Correll et al. in 2007; they also found that male parents faced either no penalty, or the opposite: what they termed the "fatherhood bonus." Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM J. OF SOCIO. 1297 (2007).
[115] STEPHANIE BORNSTEIN, POOR, PREGNANT AND FIRED: CAREGIVER DISCRIMINATION AGAINST LOW-WAGE WORKERS (2011), https://worklifelaw.org/publications/PoorPregnantAndFired.pdf.

pregnant or parenting.[116] While much of the social science literature focuses on female workers, in certain fields male workers who engage in caregiving at home may also face gender-based harassment.[117] There is a gap in the literature regarding workplace treatment of LGBTQ+ workers who are pregnant and parenting, both nationally and in Washington State.

7. The impact of COVID-19

There is evidence to suggest that the COVID-19 crisis has shifted the landscape of workplace discrimination. With schools in many areas limiting or shutting down in-person learning, parents have had to find childcare alternatives—including working from home while caring for children. Workers may need to take time off from work to quarantine after potential exposures, or to care for sick family members. Front-line and essential workers need to be provided with personal protective equipment and other safety measures to lessen their risk of exposure. And Asian Americans are more likely than any other racial or ethnic group to report experiencing racial discrimination during the pandemic.[118] Many of these situations are likely to have a disproportionate gender impact. The Seattle Times notes that the majority of single parent households are headed by women, and social distancing guidelines may cut families off from family members who otherwise might be able to provide support with childcare.[119] In heterosexual two-parent households where both parents work full-time, mothers generally shoulder a greater part of household and childcare tasks.[120] See "Chapter 4: The Impact of Gender and Race in the Courtroom and in the Legal Community" for a more in-depth discussion of division of domestic and childcare duties by gender, and the impacts of COVID-19 on childcare

[116] *Id.*
[117] Jennifer L. Berdahl & Sue H. Moon, *Workplace Mistreatment of Middle Class Workers Based on Sex, Parenthood, and Caregiving: Workplace Mistreatment*, 69 J. SOC. ISSUES 341 (2013) (conducted studies in two populations, union workers in a female-dominated field, and public service workers in a male-dominated field, finding that caregiving fathers received more mistreatment than their female counterparts); BORNSTEIN, *supra* note 115 (from a survey of family responsibility discrimination cases).
[118] Neil Ruiz, Juliana Menasce Horowitz & Christine Tamir, *Many Black and Asian Americans Say They Have Experienced Discrimination Amid the COVID-19 Outbreak*, PEW RSCH. CTR. (July 1, 2020), https://www.pewresearch.org/social-trends/2020/07/01/many-black-and-asian-americans-say-they-have-experienced-discrimination-amid-the-covid-19-outbreak/.
[119] Megan Burbank, *COVID-19 Pits Full-Time Parenting Against Full-Time Work, and Women Are the Hardest Hit*, SEATTLE TIMES (Aug. 15, 2020), https://www.seattletimes.com/life/covid-19-pits-full-time-parenting-against-full-time-work-and-women-are-the-hardest-hit/.
[120] Titan Alon et al., *The Impact of COVID-19 on Gender Equality*, 4 COVID ECON. 62 (2020).

duties. Employment discrimination cases are already being brought during the pandemic claiming that employees have been denied family leave, fired in retaliation for raising concerns about safety protocols, denied opportunities to work remotely, and more.[121] Claims of workplace sexual harassment appear to have decreased during COVID-19. It's possible that sexual harassment is less common on virtual platforms; but experts warn that declines in claims may also signal that victims are less likely to report incidents for fear of retaliation with unemployment rates so high.[122] More research is needed to assess how the state of employment discrimination litigation in Washington has changed since the onset of the COVID-19 pandemic.

D. Retaliation

Both Title VII and the WLAD prohibit retaliation against employees who provide support for a charge of discrimination.[123] To prove retaliation under Title VII, the employee must show they suffered a materially adverse action that could "dissuade a reasonable worker from making or supporting a charge of discrimination."[124] The retaliatory action does not need to be related to the terms and conditions of employment.[125] It can be something harmful completely outside the workplace.

Under the WLAD, to establish a prima facie case of retaliation, an employee must show: (1) the employee took an action protected by law (such as filing a discrimination case in court), (2) the employee suffered an adverse employment action, and (3) the employee's protected activity caused the adverse employment action.[126] This requires proving the employer's knowledge of the protected activity.[127] For the third prong, the employee has to show that "retaliation was a substantial factor motivating the adverse employment decision."[128] If the plaintiff is successful, the burden shifts to the employer to show it had a legitimate reason for the adverse employment

[121] Tom Spiggle, *The Coronavirus is Causing More Employment Lawsuits*, FORBES (Sept. 22, 2020), https://www.forbes.com/sites/tomspiggle/2020/09/22/the-coronavirus-is-causing-more-employment-lawsuits/?sh=5c2d5d9634c7.
[122] *Id.*
[123] 42 U.S.C. § 2000e-3(a); RCW 49.60.210(1).
[124] *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006).
[125] *Id.* at 61, 64.
[126] *Cornwell v. Microsoft Corp.*, 192 Wn.2d 403, 411, 430 P.3d 229 (2019).
[127] *Allison v. City of Seattle*, 118 Wn.2d 79, 89 n.3, 821 P.2d 34 (1991).
[128] *Cornwell*, 192 Wn.2d at 412.

action.[129] The employee must then show the legitimate reason is merely pretext.[130] Anecdotally, Washington attorneys familiar with this area of law note that retaliation can be difficult to prove, as employers are often able to present other reasons for the alleged retaliatory action, and it is challenging for employees to prove that these reasons are pretexts.

The risks of retaliation may be much higher for farmworkers, the majority of whom are Hispanic/Latinx and immigrants and nearly half of whom do not have legal authorization to work in the U.S., than for workers in other industries.[131] For those who live in company housing, losing their job can also mean losing the roof over their heads. Retaliation on the job may target not only the worker in question, but also their families, who frequently work on the same farm. And due to the seasonal nature of the work, retaliation can be hard to prove, as a worker may simply not be re-hired at the beginning of the next work season with no reason given.[132] While the barriers to reporting are high, the few cases that have been filed with the EEOC show that threats of retaliation against workers may include threats of physical harm to the worker and their friends and family, firing, and even deportation.[133] Experts in Washington note anecdotally that employers engaged in harassing their female employees do use immigration and documentation status to discourage employees from reporting harassment or as a tool to coerce women into receiving unwanted sexual advances.

Of all sexual harassment charges filed with the EEOC in 2016-2017, over 70% of the charges included claims of retaliation.[134] These data are not disaggregated by identity of the complainant. It's not possible to know whether retaliation is this common in practice, or whether workers are more likely to file charges with the EEOC after experiencing retaliation for internal reporting of

[129] *Renz v. Spokane Eye Clinic*, 114 Wn. App. 611, 618, 60 P.3d 106 (2002).
[130] *Id.* at 619.
[131] TRISH HERNANDEZ & SUSAN GABBARD, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2015-2016: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS (2018), https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf.
[132] *Id.*
[133] WILLIAM R. TAMAYO, RETALIATION IN SEXUAL HARASSMENT CASES, THREATS TO DETER REPORTING AND THE IMPACT ON IMMIGRANT WORKERS (2013), http://employeerightsadvocacy.org/wp-content/uploads/2017/02/S0305_RetaliationInSexualHarassmentCases_TamayoW.pdf.
[134] Jocelyn Frye, *Not Just the Rich and Famous: The Pervasiveness of Sexual Harassment Across Industries Affects All Workers*, CTR FOR AM. PROGRESS (2017), https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/.

harassment. Nearly one-third of 2018 claims to the Washington State Human Rights Commission (WSHRC) included a claim of retaliation.

E. Consequences of workplace discrimination and harassment

Discrimination in the workplace causes deep emotional harm to those who experience and witness it; long-term individual health and economic impacts. This discrimination also contributes to persistent population-level inequities. Workers may experience disruptions to their work, including time and productivity loss due to mental anguish, reduction in hours and wages, reduced opportunities for professional development and advancement, and unemployment, leading to short- and long-term financial strain.[135] Female workers, transgender workers, and Black, Indigenous, and workers of color who experience discrimination and harassment on the basis of sex, gender identity, and race have reported short- and long-term mental health outcomes, from stress, anxiety, and depression.[136] Chronic stress from experiences of discrimination can spill over into negative impacts on physical health including chronic disease, accelerated aging, and poor health outcomes.[137] Importantly, there is some evidence that observing discrimination against others can be just as impactful, if not more so, than direct

[135] Heather McLaughlin, Christopher Uggen & Amy Blackstone, *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 GENDER & SOCIETY 333 (2017); ELYSE SHAW, ARIANE HEGEWISCH & CYNTHIA HESS, SEXUAL HARASSMENT AND ASSAULT AT WORK: UNDERSTANDING THE COSTS (2018).

[136] Ivy K. Ho et al., *Sexual Harassment and Posttraumatic Stress Symptoms Among Asian and White Women*, 21 J. AGGRESSION, MALTREATMENT & TRAUMA 95 (2012) (showing that self-reported sexual harassment frequency is associated with Post-Traumatic Stress symptom severity in a sample of 214 white and Asian female college students); Franco Dispenza et al., *Experience of Career-Related Discrimination for Female-to-Male Transgender Persons: A Qualitative Study*, 60 CAREER DEVELOPMENT Q. (2012) (from interviews with nine transgender participants, reporting negative emotional outcomes like stress, anxiety and depression from workplace discrimination); Jason N. Houle et al., *The Impact of Sexual Harassment on Depressive Symptoms During the Early Occupational Career*, 1 SOC. & MENTAL HEALTH 89 (2011) (using longitudinal data from the Youth Development Study and interviews with 33 female participants); SHAW, HEGEWISCH & HESS, *supra* note 135 (reporting results from a review of the literature); Marting results from a review of the literaturet Study and in*Perceived Workplace Racial Discrimination and its Correlates: A Meta-Analysis: PERCEIVED RACIAL DISCRIMINATION*, 36 J. ORGANIZ. BEHAV. 491rganiz. Beh (using a meta-analysis of studies on the relationship between racial discrimination and employee outcomes); Victor E. Sojo, Robert E. Wood & Anna E. Genat, *Harmful Workplace Experiences and Women E. Genat, ip between racial discrimination*, 40 PSYCH. WOMEN Q. 10 (2016) (from a meta-analysis of 88 studies with over 73,000 working women).

[137] Ronald L. Simons et al., *Racial Discrimination, Inflammation, and Chronic Illness Among African American Women at Midlife: Support for the Weathering Perspective*, J. RACIAL & ETHNIC HEALTH DISPARITIES (2020).

experiences of discrimination,[138] suggesting that legal interventions that deter future discrimination can have a positive impact on both those being targeted by the discrimination and those who observe it. There is some emerging evidence to suggest that experiences of discrimination and harassment for individuals with multiple marginalized identities (e.g., experiences of discrimination on the basis of gender and race or ethnicity, disability, sexual orientation, or more) can create a compounded effect; however, this field of study is still relatively new, and more research is needed.[139]

On a broader scale, discrimination in workplace practices may contribute to maintaining deep inequities in workplace advancement, wages, and earnings. A meta-analysis of field experiments studying hiring discrimination in the U.S. from 1974-2015 found that patterns of racial discrimination in hiring between white, Black, and Latino applicants have remained steady across the decades.[140] Data from the Bureau of Labor Statistics shows that management positions have an overrepresentation of white men and underrepresentation of every other gender/race group, and that professional jobs have an underrepresentation of Black men and women.[141] And the race and gender wage gap severely disadvantages Black, Indigenous, and women of color: nationally, for every dollar employers pay white men, they pay Asian women $0.90, white women $0.79, Black women $0.62, American Indian/Alaska Native women $0.57, and Hispanic or Latina women $0.54.[142] It is important to note that these board race and ethnicity categories mask wage inequities for subpopulations. See "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for more granular information on pay and wage disparities.

[138] Lindsay Y. Dhanani, Jeremy M. Beus & Dana L. Joseph, *Workplace Discrimination: A Meta-Analytic Extension, Critique, and Future Research Agenda*, 71 PERSONNEL PSYCH. 147 (2018).
[139] David R. Williams et al., *Understanding How Discrimination Can Affect Health*, 54 HEALTH SERVS. RSCH. 1374 (2019).
[140] Lincoln Qillian & Ole Hexel, Trends and Patterns in Racial Discrimination in Hiring in America, 1974-2015 (2016) (paper presented at the Meetings of the Population Association of America, Washington, D.C.).
[141] BERREY, NELSON & NIELSEN, *supra* note 9.
[142] ROBIN BLEIWEIS, QUICK FACTS ABOUT THE GENDER WAGE GAP (2020), https://cdn.americanprogress.org/content/uploads/2020/03/23133916/Gender-Wage-Gap-.pdf. Data from the U.S. Census Bureau 2018. Note that not aggregating all Asian Americans, for example, may hide further disparities.

IV. Disparities in civil litigation

A. Barriers to reporting

The social science literature suggests that very few workers who experience discrimination or harassment in the workplace file formal complaints or charges. Nationwide, between 6% and 13% of those who experience sexual harassment file a formal complaint,[143] and it is estimated that fewer than one percent of workers who suffer discrimination file a charge with the EEOC.[144] These estimates are not broken out by race, ethnicity, gender, sexual orientation, disability, or other protected status.

There are barriers to reporting claims with the EEOC or local agencies. In their review of the literature on sexual harassment, the EEOC reported that barriers to reporting include a fear of negative reactions and disbelief; concern that reporting will not lead to action; fear of being blamed; fear of social retaliation; and a fear of professional retaliation.[145] The Washington State workplace harassments survey found: "Approximately 44% of employees who experienced harassment in the past 18 months did not seek help. Of those who tried to get help, 65% were able to obtain some resolution of their problem(s), including 9% who obtained a complete resolution of their problem(s). The most commonly cited reasons for not searching help were fear of repercussions (60%), the status of the perpetrator (57%), lack of confidence in reporting practices (54%), and the belief that incident would be perceived as acceptable by the organization (50%)."[146]

The social penalties for reporting have been empirically demonstrated: in a survey of nearly 1,000 U.S. adults, participants were less willing to promote a female employee who self-reported sexual harassment, compared to a female employee whose harassment was reported by a coworker.[147] While there is no empirical evidence to show that these barriers have a disproportionate impact

[143] FELDBLUM & LIPNIC, *supra* note 63.

[144] BERREY, NELSON & NIELSEN, *supra* note 9. The authors use data from a 2002 Rutgers University study using nationally representative survey data on workplace discrimination; and compare rates of racial discrimination in Black respondents to EEOC charge data.

[145] FELDBLUM & LIPNIC, *supra* note 63.

[146] ARINA GERTSEVA, *supra* note 59, at 1. See Appendix C for the full survey report.

[147] Chloe Grace Hart, *The Penalties For Self-Reporting Sexual Harassment*, 33 GENDER & SOCIETY 534 (2019).

on historically marginalized groups, multiple experts in Washington State agree that the anticipation of economic impacts of job loss due to retaliation can reasonably be expected to form a greater barrier for individuals with lower socioeconomic position. In rural areas, where wages tend to be lower and rates of poverty are higher, these barriers could be particularly challenging, according to experts in Washington. And the consequences of retaliation are potentially more severe for workers who are undocumented or on work-related visas.[148]

There are time limits for complainants to file charges: with the EEOC, workers have up to 300 days of the last discriminatory act;[149] and with the WSHRC, workers have six months to file most discrimination charges (and one year to file pregnancy discrimination charges).[150]

The EEOC has an online portal through which complainants can file a charge; or they can file in person, by mail, or directly with the state or local fair employment agency (such as WSHRC).[151] In Washington, the EEOC's only field office is located in Seattle and is open during business hours, potentially limiting accessibility for workers unable to take time off or those in other regions of the state. The EEOC does have a phone line for questions, but claims cannot be filed over the phone. The EEOC website, when visited in January 2021, was easy to access, with plain-language explanations and options to translate the page to Spanish (which appeared to be a formal translation, rather than machine). For workers unable to access the internet, these options may be too limited to allow them to access the administrative process. Experts in Washington note that immigrant workers find it difficult to file charges with the EEOC without legal aid.

Meanwhile, the WSHRC has a webpage, but no online portal to file charges. Complainants may file in person, or by printing the intake questionnaire, filling it out, and returning it by mail (which requires access to both the internet and a printer). There is a phone line for questions and claimants can request accommodations by phone. The WSHRC has offices in Olympia, Spokane,

[148] Arthi Prasad & Charlotte Alexander, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069 (2014); Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561 (2010).
[149] *How to File a Charge of Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/how-file-charge-employment-discrimination.
[150] *Employment: Washington Law Against Discrimination*, WASH. STATE HUM. RTS. COMM'N (2018), https://www.hum.wa.gov/employment.
[151] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 149.

Yakima, and Wenatchee, making it more accessible to workers in Central and Eastern Washington; however, physical offices were closed during the COVID-19 pandemic. The WSHRC website has many language options but they appear to be machine translation, which are not always reliable. The employment complaint form is available in English and Spanish.[152] For workers with limited English proficiency, workers in rural areas, or workers lacking access to computers and printers, these reporting guidelines could be a barrier.

1. Claims filed with WSHRC

WLAD does not require claimants to file with WSHRC or EEOC before filing a case in federal court, so WSHRC data likely do not represent the entirety of workplace discrimination claims in Washington State. The WSHRC does not publish statistical analyses or reports on filings; WSHRC employees note that their data compiler position has been unfilled for several years due to lack of funding.[153] This is a significant impediment to understanding experiences of discrimination and harassment in Washington State, and to assessing levels of access to legal relief. However, unpublished data of WSHRC cases gives a small glimpse into the nature and resolution of employee discrimination cases filed there. In 2018, WSHRC opened an investigation into 510 cases, and 485 (95%) were closed. The majority of logged cases (91%) were filed simultaneously with the EEOC (complainants can bring charges in both forums if their claims also are covered under Title VII). Claimants can bring one or more discrimination charges in the same complaint. The most common claims were on the basis of disability (36%), sex (28%), age (17%), and race (15%). Seven cases (one percent) claimed sexual harassment. Nineteen (four percent) claimed discrimination on the basis of sexual orientation or gender. Nearly one-third (30%) of cases alleged retaliation. Of cases claiming sex or gender discrimination that had gender data included, 64% claimed discrimination based on female gender, 22% on male gender, and 14% on pregnancy. More than two-thirds (65%) of claimants brought just one claim, while 28% brought two simultaneous claims, six percent brought three, and one percent brought four.[154] Experts in

[152] WASH. STATE HUM. RTS. COMM'N, *supra* note 150.
[153] Personal communication with Laura Lindstrand (Jan. 19, 2021).
[154] Analysis of unpublished data from WSHRC, accessed January 2021. From personal communication with Debbie Thompson, WSHRC.

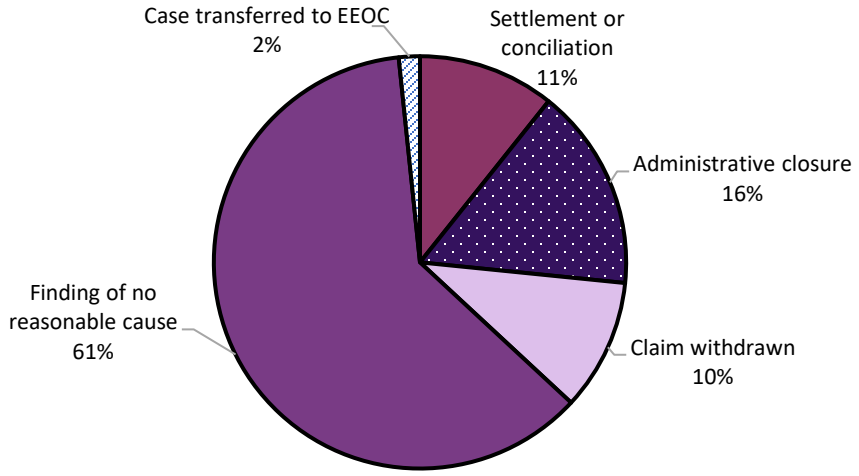
Washington State note that these numbers are very likely underestimates, due to barriers to reporting.

The majority of cases closed in 2018 (61%) had a finding of "no reasonable cause." Sixteen percent were closed for administrative reasons.[155] In 11% of cases, the employee and their employer reached a settlement before the WSHRC concluded its investigation. In 10% of cases, the claimant withdrew their claim for unknown reasons; and in a few cases (two percent), the case was transferred to the EEOC.[156] Claimants whose cases are closed with "no reasonable cause" can go on to file in court, but it is unknown how many do so, as there is a lack of consistent data on state court filings in Washington State. It is also unknown how many employees file WLAD cases in state court without first filing a claim with WSHRC. As noted above, employees have only six months to file a case with WSHRC, but they have three years to file in court.

Like the EEOC, the WSHRC's administrative process can provide resolution to workers without an attorney. However, the remedies available to workers in the administrative process are limited. While there is no limitation on damages when pursuing a claim in court, emotional distress damages are capped to $20,000 in the WSHRC's administrative hearing process.[157] According to practitioners and investigators, this limitation can hamper attempts to resolve cases in conciliation. Further, the agency has very few resources to enforce conciliation agreements to which they are a party. As a result, the agency has often demanded minimal injunctive relief in the form of reporting, training, and policy changes. According to practitioners, the injunctive relief is sometimes limited to one instance of employee training.

[155] Includes cases where the issue was resolved separately, or taken up through private litigation, or where WSHRC declined jurisdiction.
[156] Analysis of unpublished data from WSHRC, accessed January 2021. From personal communication with Debbie Thompson, WSHRC.
[157] *See* WAC 162-08-298(4).

Figure 1. Resolution of Washington State Employment Discrimination Claims Filed with the Washington State Human Rights Commission and Closed in 2018 (n=485)



Source: Analysis of unpublished data from WSHRC, accessed January 2021. From personal communication with Debbie Thompson, WSHRC.

It appears that WSHRC may not have sufficient investigators to address the volume of claims it receives. Its website notes, "The Washington State Human Rights Commission currently has a several month backlog of cases waiting to be assigned to an investigator. We apologize for this inconvenience." Of the 637 investigations opened in 2019, nearly a third had not yet been resolved as of January 2021.

2. Claims filed with EEOC

In 2020, there were 1,004 charges filed with the EEOC in Washington State. Nearly a third alleged race discrimination and nearly a third alleged sex discrimination (31.3% and 31.7%, respectively), and 40.4% alleged disability discrimination (note that individual filings can list multiple charges).[158] Sexual harassment charges are not broken out from discrimination charges here;

[158] *FY 2009 - 2020 EEOC Charge Receipts for WA*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/enforcement/charges-by-state/WA.

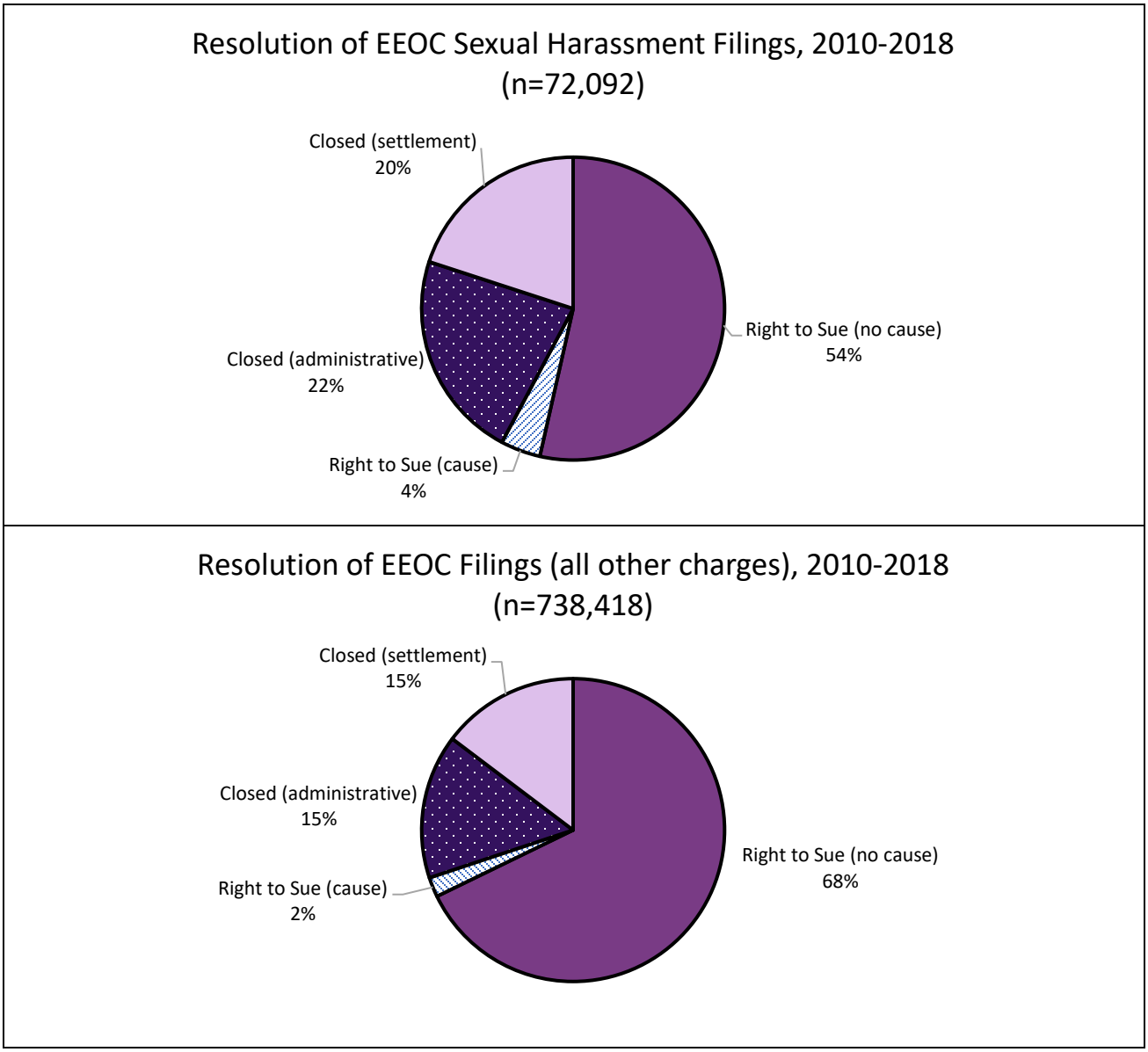
however, elsewhere EEOC reports that a total of 133 charges of sexual harassment were filed with both WSHRC and EEOC in 2019, 80% of which were brought by females.[159]

Given the public availability of EEOC reports and the centralized nature of federal courts, there is much more information and evidence available regarding the experiences of claimants bringing suits at the federal level. While not all the evidence here is broken out by the state of residence of the claimant, this may provide some context on how claimants fair when pursuing relief in the courts.

Most complainants will not find relief with the EEOC. An examination of national EEOC filings from 2010-2018 found that only 20% of sexual harassment filings and 15% of all other employment discrimination filings were resolved with a settlement negotiated by the EEOC. Meanwhile, the majority of claimants in both categories are given a "right to sue (no cause)," meaning the EEOC ends its investigation, and the claimant must file their own case in federal or state court to seek relief.[160]

[159] *EEOC & FEPA Charges Filed Alleging Sexual Harassment, by State & Gender FY 1997 - FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/eeoc-fepa-charges-filed-alleging-sexual-harassment-state-gender-fy-1997-fy-2020.
[160] Charlotte Alexander, *#MeToo and the Litigation Funnel*, 23 EMP. RTS. & EMP. POL'Y J. 17 (2019).

Figure 2. Resolution of National Sexual Harassment and Other Employment Discrimination Complaints Filed with the U.S. Equal Employment Opportunity Commission (EEOC), 2010-2018



Footnotes for Figure 2.

Source: adapted from Equal Employment Opportunity Commission resolution data, available from Charlotte Alexander, #MeToo and the Litigation Funnel, 23 EMP. RTS. & EMP. POL'Y J. 17 (2019).

Anecdotally, lawyers familiar with employment discrimination cases in Washington note that one of the benefits of filing with EEOC is that the agency may help the employee and their employer reach an agreement by providing a mediator, and in very extreme cases, may litigate the matter itself or refer the case to the Department of Justice[161] to initiate a case against the employer, where the charging party can intervene.[162] However, there are downsides to the process as well, including the 300-day window to file.

The EEOC's budget has remained functionally the same over the past four decades, and the number of investigators has decreased, while the size of the U.S. workforce has grown.[163] EEOC staff widely report not having the resources they need to do their jobs.[164]

The available data suggest that a relatively small proportion of employees who file Title VII claims with EEOC go on to file federal court cases. An analysis that compared nationwide EEOC filing data to federal court filings for workplace race discrimination claims in 2014 noted that while 31,043 charges were filed with the EEOC, 26,847 potential disputes were not resolved but remained viable for federal court charges; in the same time period, only 4,841 lawsuits were filed in federal court, or 18.0%.[165] In other words, fewer than 1 in 5 claimants who received a "right to sue" letter from the EEOC likely went on to file a case in federal court. These estimates were not disaggregated by gender.

B. Barriers to representation in court

There are demonstrated disparities in legal representation for workplace discrimination plaintiffs in federal courts. Black plaintiffs are 2.5 times more likely to be pro se (self-represented) than white plaintiffs, and Asian and Latinx plaintiffs are 1.9 times more likely to be pro se than white plaintiffs.[166] These data were only presented for white and Black race and are not disaggregated

[161] EEOC litigates cases against private entities, Department of Justice against public entities.
[162] The charging party has a right to intervene, but it's not automatic.
[163] Maryam Jameel, *More and More Workplace Discrimination Cases Are Closed Before They're Even Investigated*, THE CTR. FOR PUB. INTEGRITY (2019), https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/workplace-inequities/injustice-at-work/more-and-more-workplace-discrimination-cases-being-closed-before-theyre-even-investigated/.
[164] *Id.*
[165] BERREY, NELSON & NIELSEN, *supra* note 9. They note that these 4,841 court cases are 0.13% of the estimated Black individuals who experience racial discrimination in the workplace in a given year.
[166] *Id.*

by gender. An examination of nationwide EEOC cases from 1988-2003 shows that 1 in 5 plaintiffs were pro se throughout the duration of their case.[167] In the 2015 U.S. Transgender Survey, 15% of those who reported being fired for their gender identity or expression noted that they had contacted a lawyer; but a third of them were unable to get legal representation.[168] The survey did not note reasons why the respondents were unable to get representation.

In general, experts note that there are a number of reasons why a complainant may be unable to find legal representation for their case. They may lack information about and connections to lawyers.[169] Experts in Washington State note that individuals from low-income communities and those with limited English language proficiency may be less likely to know how to access legal help in any context, including workplace discrimination. Additionally, immigrant workers without legal authorization to work in the U.S. may fear their documentation status becoming public during a court case.[170]

Additionally, even when complainants do contact a lawyer, that lawyer may choose not to take the complainant's case. Attorneys with experience in employment law in Washington note anecdotally some reasons why attorneys may not take cases: they may feel the complainant isn't credible or has other character issues that might influence the chances of a successful case, or that the complainant doesn't have sufficient or compelling evidence on their side. Of course, it is also possible that lawyers are influenced by implicit biases that impact their assessment of a client's truthfulness. Many lawyers make very quick decisions about whether they are interested in a case or not, so as not to waste too much time (because every minute spent on a case not taken is a minute not spent on an existing case), and these quick decisions could lead lawyers to rely more heavily on implicit biases. There is some limited evidence to suggest that attorneys are more responsive to requests for representation from potential white clients facing criminal

[167] *Id.*
[168] SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY (2017), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.
[169] BERREY, NELSON & NIELSEN, *supra* note 9.
[170] *See State of Washington et al. v. Horning Brothers, LLC et al.*, 2018 WL 2208215 (E.D. Wash. 2018) (granting protective order and denying discovery into U visa immigration information for plaintiff because of the chilling effect of such inquiry). *But cf. E.E.O.C. v. Evans Fruit Co.*, 2011 WL 2471749, at *1 (E.D. Wash. June 21, 2011) (bifurcating trial because found immigration status was relevant to damages).

charges compared to potential Black clients;[171] however, not enough is known about if biases regarding race, ethnicity, gender, and other factors may influence attorney decision-making when evaluating employment discrimination cases.

Finally, complainants may face economic barriers to representation. While Title VII and WLAD contain provisions that allow successful plaintiffs to recover attorney's fees from their employer, employment attorneys don't necessarily get paid from the plaintiff's recovery. Some attorneys may choose to work on mixed fee agreements, guaranteeing payment from fee recovery and a percentage of damages won. For low-wage workers in small or informal employment agreements, their employer may not be insured or may not have substantial assets, meaning that even if damages are awarded, that money may never be collected. Overall, there is a greater financial incentive for attorneys to take cases with high potential for damages and a high probability of success.

While the federal court data on pro se plaintiffs cited above was not disaggregated by gender, it is reasonable to believe that the barriers to representation disproportionately impact female plaintiffs, especially female Black, Indigenous, and plaintiffs of color, due to the wage gap between female workers and their white male counterparts.[172] Female farmworkers in particular may face high barriers to representation due to the above factors as well as language access barriers.[173] Given that complainants only have 90 days from receiving a "right to sue" letter to

[171] Brian Libgober, *Getting a Lawyer While Black: A Field Experiment*, 24 LEWIS & CLARK L. REV. 53 (2020). In this audit study, the author sent emails purporting to be from potential clients with names indicating Black or white race to 96 lawyers in California, inquiring about representation for a criminal misdemeanor DUI case. *Id.* at 99. The study found that white potential clients got twice as many responses as Black potential clients. *Id.* A replication study in Florida with 899 lawyers inquiring about representation in criminal, divorce, and personal injury cases found no significant race effect; the author theorizes that the relatively greater competition among lawyers in Florida may have reduced the influence of bias as it incentivized lawyers to respond positively to requests. *Id.* at 94-98.

[172] WOMEN'S POL'Y RSCH., THE ECONOMIC STATUS OF WOMEN IN WASHINGTON (2018), https://statusofwomendata.org/wp-content/themes/witsfull/factsheets/economics/factsheet-washington.pdf. For every dollar employers pay to white men in Washington State, they pay white women $0.75, Hispanic women $0.47, Black women $0.62, Asian women $0.77, and American Indian/Alaska Native women $0.63. *American Community Survey: 2016*, U.S. CENSUS BUREAU, https://www.census.gov/acs/www/data/data-tables-and-tools/data-profiles/2016/. Note that when Asian race, for examples, is not disaggregated, it may mask disparities.

[173] TRISH HERNANDEZ & SUSAN GABBARD, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2015-2016: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS (2018), https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf (finding that over 70% of all farmworkers reported speaking and reading/writing English less than "well").

file their case in federal court, the above barriers may not be possible for workers to overcome in such a short time period.[174] Lack of access to representation in court has serious implications for plaintiffs, as will be shown below. There is a lack of evidence regarding rates and disparities in self-representation in Washington State courts. See "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for more information on disparities in access to legal representation.

C. Biases and disparities in court outcomes

While there is no data on outcomes in Washington's courts, the national data paint a bleak picture for employment discrimination plaintiffs in the federal courts. A comprehensive analysis of employment discrimination outcomes in federal courts found that only two percent of cases ended with a plaintiff win at trial; the majority settle, and most settlements result in much lower awards than cases that end in trial.[175]

Legal representation has a measurable effect on court outcomes. An examination of all employment litigation cases filed in the northern district of Georgia from 2010-2017 found that pro se plaintiffs were more likely than represented plaintiffs to have their cases dismissed. They were also less likely to receive a settlement.[176] From an examination of federal employment litigation court cases 1988-2003, pro se plaintiffs were three times more likely than their represented counterparts to have their case dismissed and were twice as likely to lose on summary judgment.[177] As noted above, Black, Asian American, and Latinx plaintiffs are more likely to represent themselves than white plaintiffs in employment litigation cases. It is difficult to parse out in the literature the causal pathway here. Being unrepresented may lead to worse

[174] Heydemann & Tejani, *supra* note 16.
[175] BERREY, NELSON & NIELSEN, *supra* note 9. An examination of a random sample of cases filed in federal courts from 1988-2003 found that only two percent of federal court cases ended in a plaintiff win at trial; and almost 40% of plaintiffs won nothing, either having their case dismissed outright or losing at summary judgment. The majority of cases ended in settlement (50% of all cases in early settlement, and an additional eight percent in late settlement), but many settlements included confidentiality agreements, limiting the ability to analyze outcomes for plaintiffs. For those that did include information from this dataset, the average settlement was $30,000. Plaintiffs who continued to jury trial generally received much higher awards than those who settle—the average award at trial was $110,000. See more details on the quantitative analysis of this dataset on pages 54-73.
[176] Alexander, *supra* note 160; see "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for more research on the correlation between legal representation and outcomes in court.
[177] BERREY, NELSON & NIELSEN, *supra* note 9.

outcomes, but attorneys with experience in employment law in Washington also note attorneys may be less likely to take cases they feel are difficult or unlikely to win.

Plaintiff race, particularly when intersecting with gender, appears to have an impact on court outcomes. In federal employment court cases, Black, Latinx, and Asian American plaintiffs are more likely to have their cases dismissed than white plaintiffs.[178] There is some evidence that plaintiffs bringing intersectional claims, or cases with claims based on multiple marginalized identities, fare worse in court—meaning, for example, a Black woman alleging both race and sex discrimination may be less likely to win her case than a white woman alleging only sex discrimination, or a Black man alleging race discrimination.[179] In the past, some courts explicitly refused to recognize that Black women may experience a form of discrimination that is unique to the intersection of their racial and gender identity.[180] While some intersectional claims do prevail today, their poorer success rate suggests that legal protections against discrimination are weaker for people who experience discrimination on the basis of multiple facets of their identity.

Additionally, there is evidence that may suggest that judges' gender and race influence rulings in discrimination and harassment cases, sometimes interacting with plaintiff gender and race. Female judges may be more favorable than male judges to female plaintiffs in sexual harassment

[178] *Id.*

[179] Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation: Multiple Disadvantages*, 45 LAW & SOCDISADV. 991 (2011). In a representative sample of over 1,000 judicial opinions between 1965-1999 circuit and district courts found that while intersectional claims have increased steadily over the decades, plaintiffs with multiple claims are less likely to win their cases than plaintiffs with single claims. *Id. See also* Emma Reece Denny, *Moma Reece Denny, sample of over 1,000 judicial opinlaimants in Employment Discrimination Litigation*, 30 LAW & INEQ. 339 (2012). In an examination of 162 employment discrimination cases from the Eighth Circuit Court from 2008-2010, over a third (32.7%) of cases were based on multiple claims; those cases were more likely to appear pro se, and less likely to make it past summary judgment. *Id.* Only one case survived summary judgment on all claims. *Id.*

[180] Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989). Dr. Crenshaw discusses three important Title VII cases and their relationship to intersectionality theory in the law: *DeGraffenreid v. General Motors*, *Moore v. Hughes Helicopter*, and *Payne v. Travenol*.

cases,[181] and to transgender plaintiffs in discrimination cases,[182] while judges of color may be more likely than white judges to find in favor of plaintiffs of color in racial discrimination cases.[183] However, the majority of federal judges are still white men.[184] Washington State court judges are slightly more diverse: as of 2014, 58% of state court judges were white men.[185] See "Chapter 4: The Impact of Gender on Courtroom Participation and Legal Community Acceptance" for more information on the current and historical demographics of the judiciary.

These disparities in court outcomes may be due at least in part to implicit bias functioning in the courtroom. Researchers note ample evidence suggesting that participants in courtroom proceedings can be influenced by unconscious biases that sway their feelings about people with marginalized identities, usually having a negative effect.[186] Based on studies done with the lay

[181] Pat K. Chew, *Judges CGender and Employment Discrimination Cases: Emerging Evidence-Based Empirical Conclusions*, 14 J. GENDER, RACE & JUST. 359 (2011). The author conducted a macro review of 14 studies on the effect of judge gender on employment discrimination cases in state and federal appeals court, and found evidence that female judges are more likely to support the plaintiff in sex discrimination cases – but not race discrimination cases. *See also* Matthew Knepper, *When the Shadow Is the Substance: Judge Gender and the Outcomes of Workplace Sex Discrimination Cases*, 36 J. LABOR ECON. 623 (2018) (describing that in a study of approximately 1,000 employment sex discrimination cases in federal district court between 1997-2006, female plaintiffs were found to be more likely to settle and more likely to win their case when female judges were assigned to their case).

[182] AndrIN ZOTERO_Ie & Rusty Juban, *Is There Transgender Bias in the Courtroom?*, 42 EMP. RELS. 1531 (2020). The authors examine cases from 12 regional circuit courts alleging workplace discrimination against transgender plaintiffs, a total of 97 cases from 1975-2018. During motions for summary judgment, female judges ruled in favor of plaintiffs more than male judges. Most of the transgender plaintiffs identified as female.

[183] Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and JudgesndRace*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 91 (2012). The authors examined the outcomes of motions for summary judgment for all 473 racial discrimination cases in six federal district circuits from 2002-2008 and found that Hispanic plaintiffs were 2.32 times more likely to be successful than plaintiffs of other races or ethnicities. White judges heard over 80% of all cases and were less likely to find in favor of the plaintiff. Black judges were 2.9 times as likely as judges of other races and ethnicities to find in favor of the plaintiff. And pairings of judges and plaintiffs of the same race or ethnicity increased the odds of plaintiff success 2.83 times. However, note that Dunham and Leupold did not find a relationship between gender or race of judge during the initial pleading stage in a sample of 160 federal cases alleging gender discrimination brought by female plaintiffs between 2010-2018. Catherine Ross Dunham & Christopher Leupold, *Third Generation Discrimination: An Empirical Analysis of Judicial Decision Making in Gender Discrimination Litigation*, 13 DEPAUL J. SOC. JUST. 1 (2019).

[184] DANIELLE ROOT, JAKE FALESCHINI & GRACE OYENUBI, BUILDING A MORE INCLUSIVE FEDERAL JUDICIARY 6 (2019), https://cdn.americanprogress.org/content/uploads/2019/10/02142759/JudicialDiversity-report-3.pdf ("As of August 2019, 80 percent of all the sitting judges on the federal bench were white (sic) and 73 percent were male. Together, white (sic) males comprise nearly 60 percent of all judges currently sitting on the federal bench.").

[185] TRACEY GEORGE & ALBERT YOON, AM. CONST. SOC'Y FOR L. & POL'Y, THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS? (2014), https://www.acslaw.org/wp-content/uploads/2018/02/gavel-gap-report.pdf.

[186] Catherine Ross Dunham, *Third Generation Discrimination: The Ripple Effects of Gender Bias in the Workplace*, 51 AKRON L. REV. 55 (2017); Jerry Kang, Judge Mark Bennett & Devon Carbado, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

population, judges and juries may also be subject to biases rooted in misperceptions of the nature and causes of sexual harassment and discrimination. Jury makeup matters (for the few cases that get to a jury trial), as studies have shown that the gender and race of lay people influences which behaviors they identify as harassment and discrimination.[187] A recent analysis of jury pool summons in Washington State notes that Black, Indigenous, and women of color are underrepresented on Washington juries, and LGBTQ+ people are underrepresented in King County juries.[188] The lack of representation on juries could have negative repercussions for plaintiffs bringing claims of discrimination on the basis of marginalized identities. See "Chapter 3: Gender and Barriers to Jury Service" for more information on the barriers to jury service, how they impact jury diversity, and how jury diversity impacts outcomes in court.

Class actions, collective legal action from multiple people with similar claims, are rare in employment discrimination litigation—less than 10% of cases—but when they do happen, they are more likely to achieve success for plaintiffs involved.[189] Class actions are an important tool to enable access to justice for low-income groups who face financial barriers to individual justice. However, changes in federal statute and Supreme Court decisions have narrowed the possibilities

[187] Sheila T. Brassel, Isis H. Settles & NiCole T. Buchanan, *Lay (Mis)Perceptions of Sexual Harassment Toward Transgender, Lesbian, and Gay Employees*, 80 SEX ROLES 76 (2019). A study with students at a large U.S. midwestern university found that when students perceived harassment as rooted in sexual attraction, they saw it as more acceptable than harassment perceived as rooted in power and prejudice. Acceptability was related to suggested remedies – participants were more likely to recommend the target report the behavior when it was seen as being rooted in power and prejudice. There was evidence that sexual harassment of transgender individuals may be seen as less acceptable than harassment of gay and lesbian cisgendered individuals, because participants perceived it as more likely to be rooted in power and prejudice. *See also* Elaine Howard Ecklund, Anne E. Lincoln & Cassandra Tansey, *Gender Segregation in Elite Academic Science*, 26 GENDER & SOC. 693 (2012) (from surveys and interviews with scientists at 30 American universities, women were more likely than men to say that discrimination is a main reason for underrepresentation of women in science); Katie R. Eyer, *Thatr, Reys and interviews with scientists at 30 American universities, women were mo*, 96 MINN. L. REV. 1275 (2012) (in a review of empirical studies on lay people, the authors note that the public are often unable or unwilling to recognize discrimination when it happens; and that persons with more power in society are more likely to believe that discrimination is rare, when compared to people with marginalized identities). Jin X. Goh et al., *Narrow Prototypes and Neglected Victims: Understanding Perceptions of Sexual Harassment.*, J. PERSONALITY & SOC. PSYCH. 1 (2021). In a series of experiments with over 4,000 U.S. adult participants, study authors found that participants were less likely to identify ambiguous harassing behavior as harassment, or were less likely to rate it as credible or harmful, when it targeted women seen as less protoypically feminine; See "Chapter 3: Gender and Barriers to Jury Service" for more research on how diversity of jury pools and seated juries impacts court outcomes.

[188] Peter A. Collins & Brooke Miller Gialopsos, *Answering the Call: An Analysis of Jury Pool Representation in Washington State*, 22 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 24 (2021).

[189] BERREY, NELSON & NIELSEN, *supra* note 9.

for class action litigation, and more and more employment contracts include clauses that require workers to waive their right to collective legal action.[190] To be enforced, however, class action waivers in employment agreements must meet the requirements of substantive and procedural fairness under state law. Employment agreements, like any other contract, may be invalidated if they are unconscionable.[191] For example, mandatory arbitration clauses in contracts are unenforceable if they are either (1) procedurally unconscionable—which applies during the formation of the contract and occurs where the individual lacked a meaningful choice in entering into the arbitration agreement;[192] or (2) substantively unconscionable—where a clause or term in the contract is one-sided or overly harsh.[193]

Some courts reportedly have recognized anti-discrimination and anti-harassment workplace policies as evidence against a plaintiff's claim.[194] This practice appears to have become increasingly common over the decades,[195] and evidence suggests that the practice of deferring to organizational policy is detrimental to plaintiff claims.[196] The fact that an organization has a written anti-discrimination policy does not necessarily mean that the policy is followed by all workers:

> Troublingly, organizations can win cases when they have antidiscrimination policies that exist on the books but are not followed in practice, when they have diversity training programs that do not result in greater diversity or better treatment of minorities and women, when they have grievance procedures that

[190] Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531 (2016).
[191] *Burnett v. Pagliacci Pizza, Inc.*, 196 Wn.2d 38, 47, 470 P.3d 486 (2020).
[192] *Zuver v. Airtouch Commc'ns*, 153 Wn.2d 293, 303, 103 P.3d 753 (2004).
[193] *McKee v. AT&T Corp.*, 164 Wn.2d 372, 396, 191 P.3d 845 (2008).
[194] Linda Hamilton Krieger, Rachel Kahn Best & Lauren B. Edelman, *When "Best Practices" Win, Employees Lose: Symbolic Compliance and Judicial Inference in Federal Equal Employment Opportunity Cases*, 40 LAW & SOC. INQUIRY 843 (2015).
[195] Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOCIO. 888 (2011). The authors examined over 1,000 written judicial opinions from federal district and circuit court civil rights cases from 1965 to 1999.
[196] Krieger, Best & Edelman, *supra* note 194. The authors examined a random sample of 1,024 federal civil rights opinions from federal district and circuit courts from 1965-1999.

employees are afraid to use, and when they have formalized personnel policies that are used post hoc to justify discriminatory decisions.[197]

There is also concern that neither the "disparate treatment" theory nor the "disparate impact" theory is adequate to address the modern psychological understanding of how implicit bias functions in discrimination. On the one hand, disparate treatment theory "assumes that discriminatory employment decisions result from discriminatory motives," rather than unconscious biases.[198] Disparate impact, on the other hand, requires that plaintiffs demonstrate that a similar group of employees (in the same protected class) were similarly negatively impacted by an employment practice.[199] However, this definition doesn't recognize how individual experiences of discrimination differ between members of the same group—such as in the case of individuals with multiple marginalized identities.[200] A group of Black employees may experience racial discrimination differently depending on their gender identity, sexual orientation, disability status, age, and more. This disconnect between the legal standard and lived experience may be part of why intersectional claims fare so poorly in court, as noted above.

Workplace sexual harassment claims must show "severe and pervasive" behavior to meet the standard for harassment under WLAD and Title VII.[201] A 2019 review of sexual harassment cases in the federal courts argues that since the standard was set, cases alleging more and more extreme behavior have been found not to meet that standard, with the result of setting the standard so high that "employers must only legally maintain a workplace where there is neither a severe nor a pervasive level of sexual harassment."[202] Again, it's relevant to note that almost three-quarters of the judges evaluating this standard in federal and state courtrooms are male.[203]

[197] *Id.* at 861.
[198] Kya Rose Coletta, *Women and (In)Justice: The Effects of Employer Implicit Bias and Judicial Discretion on Title VII Plaintiffs*, 16 HASTINGS BUS. L.J. 175, 195 (2020).
[199] *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977).
[200] C. Elizabeth Hirsh, *Beyond Treatment and Impact: A Context-Oriented Approach to Employment Discrimination*, 58 AM. BEHAV. SCIENTIST 256 (2013).
[201] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986).
[202] Heydemann & Tejani, *supra* note 16.
[203] ROOT, FALESCHINI & OYENUBI, *supra* note 184.

D. Damages and monetary awards

In Washington employment discrimination cases, jurors are told they can award "the reasonable value of lost past earnings and fringe benefits, from the date of the wrongful conduct to the date of the trial" and the "reasonable value of lost future earnings and fringe benefits."[204] There are no other standards given to jurors to make the determination, and they must base their decision on the evidence and testimony admitted at trial. Given the steep gap in wages that women, especially Black, Indigenous, and women of color, experience compared to men, female litigants who successfully argue discrimination cases in court may then experience the impact of discrimination again when damage awards are set based on prior wages.

Under Washington law, jurors may award general damages for the emotional harm caused by the employer's wrongful conduct.[205] Emotional harm can include emotional distress, loss of enjoyment of life, humiliation, pain and suffering, personal indignity, embarrassment, fear, anxiety, and/or anguish. The Washington pattern jury instruction specifically tells the jury there is no one way to evaluate these kinds of general damages:

> The law has not furnished us with any fixed standards by which to measure emotional distress, loss of enjoyment of life, humiliation, pain and suffering, personal indignity, embarrassment, fear, anxiety, and/or anguish. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.[206]

Washington courts have recognized the vague nature of general damages, noting that general damages like pain and suffering are "not readily susceptible to valuation in dollars."[207] Lawyers in Washington report anecdotal evidence that women's reactions to misconduct are sometimes downplayed, either because the woman is just "overreacting" or is being "too emotional," or if she wanted to work in a "man's job" she should be able to handle the environment. The same thing anecdotally occurs when the value of her worth to the household or her friendships or

[204] 6A WASH. PRAC.: WASH. PATTERN JURY INSTRUCTION—CIVIL, WPI 330.81 (7th ed. July 2019)
[205] *Id.*
[206] *Id.*
[207] *Bingaman v. Grays Harbor Cmty. Hosp.*, 37 Wn. App. 825, 831, 685 P.2d 1090 (1984).

relationships is at issue. One lawyer in Washington reports being on an arbitration panel where the other two arbitrators—both men—minimized a grandmother's general damages because they said a grandmother's losses were worth less than a man supporting his family. There is a lack of evidence to understand how gender, race, ethnicity, and other protected statuses may influence damages for harassment and discrimination claims based on wages or on emotional injury for litigants in Washington State. See "Chapter 6: Gender Impacts in Civil Proceedings as They Relate to Economic Consequences Including Fee Awards and Wrongful Death" for more information on how these demographic factors can impact wrongful death and loss of consortium awards generally.

E. Mandatory arbitration

The use of mandatory arbitration in workplaces has been increasing with a series of U.S. Supreme Court decisions allowing, and later affirming, the use of mandatory arbitration as an appropriate venue for discrimination claims.[208] It has been estimated that more than 60 million American workers are subject to a mandatory arbitration clause, or more than half of workers.[209] As noted above, many of these clauses also prohibit class action lawsuits. Mandatory arbitration is more common in workplaces with low-wage jobs, and in industries with a higher proportion of female, Black, and Hispanic workers.[210]

Arbitration may have benefits for some workers—for example, for employees who are unable to access the court system or find legal representation.[211] However, the use of mandatory arbitration in employment clauses has been particularly criticized in the context of the #metoo movement, in 2017 and on, during a time when stories of sexual harassment were shared openly on social media, complaints to the EEOC increased markedly, and journalists, legal scholars, and workers discussed the structural factors that had enabled workplace sexual harassment to

[208] *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010).
[209] Alexander JS Colvin, *The Growing Use of Mandatory Arbitration*, 7 ECON. POL'Y INST. 1 (2018). Colvin estimates that 56.2% of nonunion, private-sector workers are subject to mandatory arbitration clauses.
[210] *Id.*
[211] Kathleen McCullough, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo- and Time's Up Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 40 (2019).

continue unchecked for so long.[212] Gretchen Carlson, when discussing the arbitration of her sexual harassment allegations against Roger Ailes and employer Fox News, argued, "Arbitration is a sexual harasser's best friend: It keeps proceedings silent, findings sealed, and victims silent." This is because many employment arbitration clauses also include nondisclosure agreements, and so the results of arbitration can be kept confidential.[213] Nondisclosure agreements limit public information as to the patterns and practices of discrimination by employers, shielding them from the public accountability that a public court case would bring.[214] Additionally, when claims of sexual harassment are made publicly, it often encourages other victims to step forward.[215]

It is difficult to compare outcomes in court cases with outcomes in arbitration, because there may be differences between employees subject to mandatory arbitration and those able to bring cases in court. However, the available social science literature does suggest that employees may face worse outcomes in arbitration compared to litigation, with lower win rates and lower award amounts.[216] This is particularly the case when employers use the same arbitrator across multiple cases. Researchers call this the "repeat player" effect, whereby employers and arbitrators benefit from a cumulative advantage in the process over multiple arbitration events.[217] In this dynamic, privately hired arbitrators may have an economic motivation to work towards outcomes that are favorable to the employer in the hopes of being hired again; and large employers can afford to pay for experienced arbitrators. Meanwhile, individual employees often have little or no experience in arbitration.[218]

[212] *Id.*
[213] Lisa Nagele-Piazza, *Unaffordable Justice: The High Cost of Mandatory Employment Arbitration for the Average Worker*, 23 U. MIAMI BUS. L. REV. 39 (2014).
[214] Kaci Dupree, *#METOO, DUE PROCESS, AND MANDATORY ARBITRATION: THE PERFECT STORM FOR FUNCTIONAL STATE LEVEL ARBITRATION REFORM*, 11 ARB. L. REV. 5 (2019).
[215] *Id.*
[216] Pat K. Chew, *Comparing the Effects of Judges' Gender and Arbitrators' Gender in Sex Discrimination Cases and Why It Matters*, 32 OHIO STATE J. ON DISP. RESOL. 195 (2017). The author examined 121 arbitration sex discrimination and sexual harassment cases from 2010-2014 and found that employee plaintiffs experienced a positive outcome in 14% of cases, compared to the 27% success rate previously reported in litigation.; Alexander J. S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 ILR REV. 1019 (2015).
[217] Colvin & Gough, *supra* note 215.
[218] *Id.*

As discussed above, the U.S. Supreme Court has held that arbitration clauses are unenforceable if they are procedurally or substantively unconscionable. Washington courts have therefore invalidated some egregious mandatory arbitration clauses, such as those prohibiting class action lawsuits, or those mandating arbitration under oppressive conditions. For example, in *Scott v. Cingular Wireless*, Cingular Wireless imposed a mandatory arbitration clause in its contracts with its wireless users.[219] That clause also contained a prohibition on class actions. When the plaintiffs filed a class action lawsuit against Cingular alleging violations of Washington Consumer Protection Act, Cingular moved to compel arbitration. The Washington Supreme Court held that the prohibition against class actions was substantively unconscionable because it "drastically forestalls attempts to vindicate consumer rights."[220] The court noted that without class actions, "many meritorious claims would never be brought."[221] In these types of cases, damages to each consumer may be nominal, making individual lawsuits not financially feasible.[222] But spread out over hundreds or thousands of people, consumers were losing a significant amount of money. The court held the class action prohibition violated the state's public policy to "protect the public and foster fair and honest competition because it drastically forestalls attempts to vindicate consumer rights."[223]

More recently, the Washington Supreme Court held a mandatory arbitration clause in an employment agreement was unconscionable because it imposed a one-sided mandatory pre-lawsuit procedure on an employee, which if not followed would cause the employee to lose the right to raise the claim.[224] The court held these mandatory policies provided an unfair advantage to the employer and thus were unconscionable.[225]

Three years ago, the Washington State Legislature enacted a law aimed at invalidating any provision in an agreement that requires the confidential resolution of discrimination claims

[219] 160 Wn.2d 843, 161 P.3d 1000 (2007).
[220] *Id.* at 854.
[221] *Id.* at 853.
[222] *Id.* at 853-54.
[223] *Id.* at 854.
[224] *Burnett v. Pagliacci Pizza, Inc.*, No. 97429-2, slip op. at 18 (Wash. Aug. 20, 2020).
[225] *Id.* at 19.

outside of court.[226] While the issue has not yet been litigated, there is some question about how the statute interacts with the Federal Arbitration Act, 9 U.S.C. § 2, which expressly states that all written agreements to arbitrate are "valid, irrevocable, and enforceable," except under very narrow circumstances.

V. Conclusion

Black, Indigenous, and women of color, female workers with disabilities, female immigrant workers, and LGBTQ+ workers experience disproportionately high rates of discrimination and harassment in the workplace. So do females working in several low-paying sectors of the economy such as farmworkers, service workers, and hotel and restaurant workers. They experience negative short- and long-term outcomes to their financial status and to their physical and mental health. They face barriers to reporting these experiences, and they face barriers to legal relief in court.

Washington State's anti-discrimination laws provide broad protections for workers against discrimination or harassment in the workplace. These protections often go beyond the protections provided in Title VII. In Washington State, the WLAD applies to employers with eight or more employees, though the Washington Supreme Court has found smaller employers to be subject to wrongful discharge in violation of public policy.[227] This leaves a large chunk of the workforce without legal remedies for other kinds of discrimination and harassment. According to census data, approximately 11% of Washington's workforce work in firms with ten or fewer employees, which account for 77% of the total number of firms in Washington.[228] Currently, 15 states and Washington DC ensure workplace civil rights protections covering employers with one

[226] RCW 49.44.085.
[227] *Roberts v. Dudley*, 140 Wn.2d 58, 77, 993 P.2d 901 (2000).
[228] Based on calculations from the U.S. Census Bureau's Statistics of U.S. Businesses 2016 data.

or more employee.[229] It is unknown what impact extending civil rights protections to all employers might have on workers' experiences.

There is a lack of information regarding the experiences of individuals in Washington State bringing cases to WSHRC, and whether they face barriers in accessing information or filing claims. However, given the filing procedures, it seems likely that workers without access to internet or a computer, those with limited English proficiency, and those in rural areas face particularly high barriers to accessing this service. Additionally, WSHRC currently states that it has a backlog of several months of cases. WSHRC does not publish data on workplace discrimination complaints filed. This data would also help researchers understand which industries and populations are using that system—and, just as importantly, which workers and industries known to be vulnerable to discrimination and harassment are underrepresented in claims and therefore may be having difficulty using the system.

A lack of centralized data across Washington State makes it impossible to know the demographics of individuals bringing complaints under WLAD in the state. Case information cover sheets do not currently have a field to specify if a case brought is an employment discrimination case. For example, in the King County Superior Court case information cover sheet, the closest category provided is "Tort, Other."[230] A review of the Pierce County Superior Court, Clark County Superior Court, and Spokane County Superior Court websites shows that none include a specific category to track employment discrimination lawsuits. The lack of this data severely restricts the ability of researchers and the public to evaluate employment discrimination litigation in the state of Washington.

Non-disclosure clauses applicable to workplace discrimination claims, confidential settlement agreements, and confidential arbitration proceedings also obscure the public's knowledge of the prevalence and outcomes of workplace harassment complaints and litigation. Likewise lack of public access to workplace demographics for large companies (such as gender, race, ethnicity,

[229] MAYA RAGHU & JOANNA SURIANI, NAT'L WOMEN'S L. CTR. #MEETOOWHATNEXT: STRENGTHENING WORKPLACE SEXUAL HARASSMENT PROTECTIONS AND ACCOUNTABILITY (2017), https://nnedv.org/mdocs-posts/metoowhatnext-strengthening-workplace-sexual-harassment-protections-and-accountability/.
[230] King County Superior Court Case Assignment Area Designation and Case Information Cover Sheet (CICS), King County Superior Court, accessed August 2020.

wage, and salary data) makes it difficult to determine whether those companies have patterns of discriminatory behavior.[231]

Some researchers argue that, "...in applying standard rules for litigation and taking a position as a neutral arbiter of rights claims, they (the federal courts) ignored the asymmetry of power between plaintiffs and employers in the workplace and litigation," and that in practice, court decisions do little to fundamentally disrupt the operation of biases and discrimination in the workplace, even when plaintiffs win.[232] More research is needed to understand how Washington State courts treat employment discrimination litigants, and how effective civil litigation is in addressing past discrimination and harassment as well as deterring future acts.

Ordering employers to provide workplace sexual harassment training is not an uncommon outcome of litigation by the EEOC.[233] In Washington State, SB5258 passed in 2019 and requires employers in certain industries (including hotels and motels, retail, security, and others with employees working in isolated conditions) to provide mandatory workplace sexual harassment and discrimination training.[234] State government employees must complete sexual harassment training at minimum every five years.[235] However, the social science evidence regarding the effectiveness of sexual harassment training in preventing sexual harassment is mixed. A review of 60 published, empirical studies on sexual harassment training reported consistent findings that training increases knowledge of sexual harassment behaviors and increases internal reporting—but only mixed evidence supporting a reduction in prevalence of sexual harassment behaviors. The authors note a need for more research:

> …although the reviewed studies, considered in light of theory and research from the broader training and [sexual harassment] SH literatures, support the conclusion that training alone is very unlikely to significantly reduce SH in the

[231] BERREY, NELSON & NIELSEN, *supra* note 9.
[232] *Id.*
[233] See, for example, the settlement between EEOC and Marelli Tennessee USA in August 2020, *Marelli Pays $335,000 to Settle EEOC Sexual Harassment Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Sept. 14, 2020), https://www.eeoc.gov/newsroom/marelli-pays-335000-settle-eeoc-sexual-harassment-lawsuit ("Marelli also agreed to provide annual sexual harassment training and to conduct employee exit interviews.").
[234] ENGROSSED SUBSTITUTE S.B. 5258,66th Leg., Reg. Sess. (Wash. 2019).
[235] WAC 357-34-100.

> workplace, they also support the conclusion that training can play an important role in contributing to the prevention or reduction of SH if (a) it is conducted in accordance with science-based training principles and (b) the organizational context is supportive of the SH training efforts.[236]

The EEOC, in its comprehensive report on sexual harassment in the workplace, concluded that workplace training can be most effective when it takes place in an environment that also emphasizes accountability at all levels of management, when it is tailored to the specific workplace, and when it is accompanied by changes to workplace culture.[237]

A similar question occurs regarding anti-bias trainings. In Washington, all state agencies and institutes of higher education must provide training on implicit bias to all recruitment staff.[238] Jurors in federal courts are shown implicit bias trainings,[239] and the Washington Pattern Jury Instructions Committee is creating a video in implicit bias for jurors in state courts. Some groups, like the American Bar Association, advocate for implicit bias trainings for judges;[240] states such as Florida and New York provide anti-bias training for judges.[241] However, evidence supporting the effectiveness of anti-bias training is mixed.[242] Without better evidence supporting the effectiveness of trainings, these requirements will likely have limited effect in reducing discrimination and harassment in the workplace, or in the courtroom.

[236] Mark V. Roehling & Jason Huang, *Sexual Harassment Training Effectiveness: An Interdisciplinary Review and Call for Research*, 39 J. ORGANIZATIONAL BEHAV. 134, 146 (2018).
[237] FELDBLUM & LIPNIC, *supra* note 63.
[238] WASHINGTON STATE OFF. OF FIN. MGMT., STATE HUMAN RESOURCES HR DIRECTIVE 20-02 (2020), https://www.ofm.wa.gov/sites/default/files/public/shr/Directives/WorkforceDiversityDirective.pdf.
[239] *Unconscious Bias Juror Video*, U.S. DIST. CT., W. DIST. OF WASH., https://www.wawd.uscourts.gov/jury/unconscious-bias.
[240] Lee Rawles, *Judges Should Receive Anti-Bias Training, ABA House Says*, ABA JOURNAL (Aug. 15, 2017), https://www.abajournal.com/news/article/judges_should_receive_anti-bias_training_aba_house_says.
[241] *Judges Recieve Anti-Bias Training*, THE FLA. BAR (Feb. 15, 2016), https://www.floridabar.org/the-florida-bar-news/judges-receive-anti-bias-training/; JEH CHARLES JOHNSON, REPORT FROM THE SPECIAL ADVISER ON EQUAL JUSTICE IN THE NEW YORK STATE COURTS (2020), http://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf.
[242] Chloe FitzGerald, Angela Martin, Delphine Berner, Samia Hurst, *Interventions Designed to Reduce Implicit Prejudices and Implicit Stereotypes in Real World Contexts: A Systematic Review*, 7 BMC PSYCH. 1 (2019). This systematic review of 30 studies published 2005-2015 concluded that "currently the evidence does not indicate a clear path to follow in bias reduction." *Id*. at 9.

VI. Questions and Gaps in the Data

There are gaps in the data that prevent a better understanding of legal outcomes for civil litigants in employment discrimination cases. Data in state court outcomes are not tracked systematically in Washington State, which is why most of the studies cited here focus on federal court outcomes. Additionally, confidentiality in court and arbitration settlements complicates a full analysis of outcomes in these cases. The following questions remain:

- What is the state of employment discrimination cases filed in Washington State courts?
    - What is the demographic breakdown of plaintiffs bringing employment cases?
    - What kinds of discrimination are alleged in employment civils rights cases?
    - In what proportion of discrimination cases brought in Washington State courts does the plaintiff achieve a favorable outcome, either through settlement or jury trial?
    - Are there disparities by gender, race, ethnicity, sexual orientation, or other protected status, or by the combination of these statuses?
    - In what proportion of sexual harassment cases brought in Washington State courts does the plaintiff achieve a favorable outcome, either through settlement or jury trial?
    - Are there disparities by gender, race, ethnicity, sexual orientation, or other protected status, or by the combination of these statuses?
- What is the state of employment cases filed with the Washington State Human Rights Commission?
    - What is the demographic breakdown of plaintiffs bringing employment cases?
    - What kinds of discrimination are alleged in employment civil rights cases?
    - In what proportion does the WSHRC find merit?

- Are there disparities by gender, race, ethnicity, sexual orientation, or other protected status, or by the combination of these statuses?

- What is the state of self-represented employment discrimination cases in Washington State?
  - How many employment discrimination cases in Washington State courts are brought by pro se plaintiffs?
  - What proportion of pro se plaintiffs achieve favorable outcomes in court?
  - Are there disparities by gender, race, ethnicity, sexual orientation, or other protected status, or combination of statuses?
- What is the state of damages and monetary awards in Washington employment discrimination cases?
  - Do damages and monetary awards in Washington employment cases show disparities by gender, race, ethnicity, sexual orientation, or other protected statuses or combination of statuses (including lost earning and damages for emotional and other harms)?
- What is the state of mandatory arbitration for employment discrimination cases in Washington State?
  - How many workers in Washington State are subject to mandatory arbitration?
  - How many are subject to anti-class action clauses?
  - What proportion of plaintiffs win in mandatory arbitration compared to litigation?
  - Are there disparities by gender, race, ethnicity, sexual orientation, or other protected status?

VII. Recommendations

- Stakeholders should convene a workgroup – in consultation with AOC data management professionals – to outline ways to collect the court data that is needed to identify trends in harassment and discrimination case filings and resolutions by race, ethnicity, gender, and other demographic factors.
- Stakeholders should convene a workgroup to identify resources needed to ensure that the Washington State Human Rights Commission has capacity to: 1) investigate all claims in a complete and timely manner, 2) analyze barriers to reporting and any disproportionate impact barriers have on marginalized groups, and 3) regularly analyze and report on the demographics of workplace harassment and discrimination.
- To improve the effectiveness of measures, such as anti-bias training, to reduce bias towards litigants in court, the Gender and Justice Commission should authorize the creation of a list of trainings for judges, court staff, and potential jurors, which have proven to be effective at reducing bias in the judiciary and among jurors.
- Justice system partners should consider analyzing the number and demographics of employees and employers who are not covered by the Washington Law Against Discrimination (WLAD) because of its employer-size exemption (*see* RCW 49.60.040(11)). The analysis should address: 1) whether this exemption has a disparate impact on the groups whom the law intends to protect (*see* RCW 49.60.010), and 2) the demographics of WLAD-exempt business owners to better understand how these exemptions impact women and minority owned businesses.
- Adopt the recommendation described in "Chapter 8, Consequences of Gender Based Violence," to collect statewide data, including data on the prevalence and impact of coercion for sex and sexual assault in the workplace – especially for farm laborers and service workers.

Chapter 6

Gender Impacts in Civil Proceedings as They Relate to Economic Consequences Including Fee Awards and Wrongful Death

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I. Summary

In 1989, the Washington State Task Force on Gender and Justice in the Courts identified potential gender disparities in wrongful death and loss of consortium awards. Due to small sample sizes and limits on time and resources, however, that Task Force concluded that "definitive answers are impossible."[1] Since then, the research on this topic has not grown much, but recent court cases and scholarly discussion have elevated concerns related to gender- and race-based discrimination built into wrongful death and loss of consortium awards.

One recent area of concern is that Washington law allows only legally married individuals or those in Registered Domestic Partnerships to recover for the wrongful death of their partner. Other couples are barred from recovering for the wrongful death of their partner regardless of how long-lasting the relationship was. Recent national data show that same-sex couples are less likely than opposite-sex couples to be legally married—indicating that same-sex couples are more likely to be unable to recover damages for the loss of their partner and relationship. In addition, a kinship caregiver who does not have legal guardianship of a child cannot receive damages for the child's wrongful death. This likely disproportionately impacts women, elders, Black, American Indian/Alaskan Native, and Hispanic/Latinx caregivers as these populations are disproportionally represented among kinship caregivers in Washington.[2]

Another area of gender and race disparity identified by the research is in verdicts for wrongful death and loss of consortium cases. The majority of the scholarship on this issue has focused on the use of gender- and race-based tables to predict a person's life expectancy, work life expectancy, economic loss, and the number of hours of lost household services per week. These tables are based on historical data showing women and Black, Indigenous, and people of color earn lower wages, with women of color having the lowest wages. Life and work life expectancy

[1] WASH. STATE TASK FORCE ON GENDER & JUST. IN THE COURTS, GENDER & JUSTICE IN THE COURTS 23 (1989), https://www.courts.wa.gov/committee/pdf/Gender%20and%20Justice%20in%20the%20Courts--Final%20Report,%201989.pdf (hereinafter "1989 Study").

[2] The 2021 Gender Justice Study uses the race and ethnicity terms used in the underlying sources when citing data in order to ensure we are presenting the data accurately and in alignment with the how the individuals self-identified. When talking more broadly about the body of literature we strive to use the most respectful terms. See Section V of the full report ("2021 Gender Justice Study Terminology, Methods, and Limitations") for a more detailed explanation of terminology used throughout the report.

are also shorter for Black, Indigenous, and people of color compared to white populations. These disparities are a result of historical and structural discrimination and inequities. Relying on such tables, however, institutionalizes these past errors and perpetuates them with lower awards. Recently, some courts have viewed the use of race- and gender-based statistics as a potential constitutional violation. These issues merit further study.

II. Introduction

The 1989 Study Task Force's Subcommittee on the Economic Consequences of Other Types of Civil Litigation (Subcommittee) sought evidence of gender bias in Washington state courts in three primary areas: wrongful death awards, loss of consortium awards, and attorney fee awards pursuant to the Washington Law Against Discrimination.[3] For each of the three primary areas reviewed, the Subcommittee used the following to identify potential gender bias:

1. "Jury Verdicts Northwest" (now titled "Northwest Personal Injury Litigation Reports");
2. Reports from the Superior Court Management Information System;
3. A survey of the Washington State Bench and Bar; and
4. Information from public hearings.

Due to the small sample sizes available and time and resource limits, the Subcommittee concluded that at the time "definitive answers are impossible" and instead, focused on identifying problem areas for future study.[4] Since 1989, the research on this area has not increased substantively, though court cases and scholarly discussion of this topic have elevated concerns related to gender-based and race-based discrimination built into wrongful death and loss of consortium awards. Anecdotal evidence from practitioners suggests that juries tend to give lower non-economic damages and loss of consortium verdicts to women, and Black, Indigenous, and people of color.

[3] ch. 49.60 RCW.
[4] 1989 Study, *supra* note 1, at 86.

III. Wrongful Death Awards

The 1989 Subcommittee hypothesized that "plaintiffs seeking monetary awards for the wrongful death of women receive lower awards than plaintiffs seeking awards for the wrongful death of men."[5] While the 1989 Study does not explicitly outline the reasoning behind this hypothesis, the background information included in the report points to lower wages and lower workforce participation among women, as well as anecdotal information indicating that loss of income was more highly valued than loss of services.[6] The Subcommittee recognized that other variables such as age, marital status, work experience, earning potential, and the number of dependents, would make it difficult to clearly test gender as a separate variable without more complex statistical analysis.[7]

To test their hypothesis, the Subcommittee examined 100 wrongful death actions from Washington courts dated 1984 to 1988 with data from the Superior Court Management Information System and *Jury Verdicts Northwest*. In the 100 cases, there were 98 separate verdicts involving 68 male decedents and 30 female decedents. Plaintiffs with female decedents won more often (63% for females versus 47% for males) but the mean award for male decedents was higher, $332,166 for males versus $214,923 for females. In the survey, 72% of lawyers and 43% of judges noted that survivors of male decedents generally win large awards, although the surveyed lawyers also noted employment outside the home by female decedents resulted in larger awards. The Subcommittee concluded that their analysis of the data does not clearly support a hypothesis of gender bias in wrongful death awards due to the inability to isolate the variable of gender without more advanced statistical analysis. Nonetheless, the evidence showed that male decedents generally win larger awards. This was found to be largely correlated with higher wages earned by men and a higher likelihood of employment outside of the home.[8] It is important to note that the 1989 Study did not address gender beyond the binary and did not at

[5] *Id.*
[6] *Id.* at 87-88.
[7] *Id.* at 93.
[8] *Id.*

all explore awards for transgender or nonbinary individuals—which was likely at least in part a function of the data limitations.

While no similar studies have been done since 1989, practitioners still report issues with juror bias and note that their female and Black, Indigenous, and clients of color often received lower non-economic damage verdicts. Clients who look and sound Hispanic are reported to have an especially difficult time. One lawyer noted that a female Hispanic client needed assistance from a Spanish interpreter at trial and that led some members of the jury to believe that the client was not in the country legally. For more on communication and immigration status barriers to justice see "Chapter 2: Communication and Language as a Gendered Barrier to Accessing the Courts."

Further, issues with bias are not limited to the courtroom. Lawyers report that cases involving Black, Indigenous, or plaintiffs of color often receive lower settlement offers from insurance companies, many of which use proprietary software programs based on statistical data to calculate the value of non-economic damages. Those lower settlement offers leave female clients and clients of color with two options, neither of them good: Either (1) accept the low settlement offer likely based on biased data, or (2) end up in litigation, where Black, Indigenous, and people of color tend to do worse than their white counterparts.

A. Major changes to Washington's wrongful death laws since 1989

Washington has enacted several statutes allowing monetary recovery for certain family members for the wrongful death and the pre-death personal injuries of a deceased family member. The five different statutes are complementary and overlapping, which can create an analytical challenge:

- RCW 4.20.010: Allows recovery for wrongful death;
- RCW 4.20.020: Defines who may recover for wrongful death, typically referred to as the statutory beneficiaries;
- RCW 4.20.060: Special survival statute, which preserves all personal injury causes of action that result in death and allows recovery of the deceased person's pre-death

economic damages[9] and noneconomic damages,[10] as long as there are statutory beneficiaries;

- RCW 4.20.046: General survival statute, which preserves all causes of action a decedent could have brought before death, allows recovery for the deceased person's pre-death economic damages, and, if they are the statutory beneficiaries, noneconomic damages if the deceased later dies of unrelated causes; and
- RCW 4.24.010: Gives parents the right to sue for the injury or death of a child.

Before the Washington State Legislature implemented the wrongful death statutory scheme, the courts did not recognize a cause of action for wrongful death.[11] By enacting the wrongful death statutes, the Washington State Legislature provided a new cause of action to certain surviving family members.[12]

The wrongful death statutes allow certain classes of family members to recover their own damages caused by the wrongful death of the family member.[13] Currently, only two narrow classes of family members may recover their own damages for wrongful death.[14] The first tier of beneficiaries are the living spouse or children, including stepchildren.[15] If the deceased does not have a living spouse or children, then the second tier of beneficiaries who may recover are the surviving parents or siblings of the deceased.[16] Parents and siblings cannot recover if there are first-tier beneficiaries.[17] If none of the statutory beneficiaries exist, then no wrongful death

[9] Economic damages are "objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities." RCW 4.56.250(1)(a).
[10] Noneconomic damages are "subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship." RCW 4.56.250(1)(b).
[11] *Brodie v. Wash. Water Power Co.*, 92 Wash. 574, 576, 159 P. 791 (1916).
[12] *Id.*
[13] RCW 4.20.010(1).
[14] RCW 4.20.020.
[15] *Id.*
[16] *Id.*
[17] *Masunaga v. Gapasin*, 57 Wn. App. 624, 630, 790 P.2d 171 (1990).

action can be maintained, even if there are other family members dependent upon the deceased for support.[18]

The survival statutes focus on the damages suffered by someone who later dies, either from their injuries or from some other cause.[19] They were enacted to ensure the deceased's causes of action survived their death.[20] The special survival statute allows recovery of the deceased's economic and noneconomic damages arising out of personal injury resulting in death, but only if the deceased is survived by the statutory beneficiaries listed above.[21]

The general survival statute allows the estate to recover medical expenses and other economic damages of the deceased, regardless of whether the deceased is survived by any statutory beneficiaries.[22] If the deceased is survived by the statutory beneficiaries, then the estate can also recover the deceased person's pre-death pain, suffering, and other noneconomic damages arising out of personal injury.[23] If there are no statutory beneficiaries, then for purposes of the survival statutes, the deceased's pre-death noneconomic damages cannot be recovered.[24]

Only those who are legally married are spouses under the wrongful death and survival statutes.[25] Unmarried partners, regardless of how long-lasting the relationship is, may not recover for the wrongful death of their partner.[26]

Aside from RCW 4.24.010 and RCW 4.20.046, these statutes were largely identical in substance to the laws in place at the time the 1989 Study was released. The few amendments include the addition of state registered domestic partners to the beneficiary list,[27] and the corresponding addition of gender inclusive language (adding "her" to statutes so that they read "his or her") in 2008 and 2011.[28] In 2012, marriage of same-sex couples was approved and the status of

[18] *Tait v. Wahl*, 97 Wn. App. 765, 769, 987 P.2d 127 (1999).
[19] RCW 4.20.046; RCW 4.20.060.
[20] *Estate of Otani v. Broudy*, 151 Wn.2d 750, 755-56, 92 P.3d 192 (2004).
[21] RCW 4.20.060(1)-(3).
[22] RCW 4.20.046(1)-(2).
[23] RCW 4.20.046(2).
[24] *Tait v. Wahl*, 97 Wn. App. 765, 771, 987 P.2d 127 (1999).
[25] *Roe v. Ludtke Trucking*, 46 Wn. App. 816, 819, 732 P.2d 1021 (1987).
[26] *Id.*
[27] LAWS OF 2007, ch. 156.
[28] LAWS OF 2008, ch. 6; LAWS OF 2011, ch. 336.

Registered Domestic Partnership for same-sex couples was phased out. It now exists only for couples where at least one of the partners is 62 or older, so marriage is the primary mechanism that would entitle someone to recover for the wrongful death of their partner.[29] It is important to note that this "his or her" language still excludes gender non-binary individuals and other gender nonconforming individuals and "their" would be more inclusive terminology.

In 2019, the Washington State Legislature replaced gendered terms such as husband, wife, brother, sister, father, and mother with gender neutral terms such as spouse, siblings, and parent in RCW 4.20.020 and 4.20.060.[30] Terminology changes to statutes such as these acknowledge the fact that gendered language is often written into our policies, it has an impact, and is therefore worth amending to more gender neutral and inclusive language.

In 2019 RCW 4.20.010 was amended to allow the statutory beneficiaries to recover both economic and noneconomic damages for the wrongful death of a family member.[31] There is no appellate case law interpreting the new language, and it is too soon to say what, if any, impact this particular amendment will have on wrongful death awards.

The 2019 Legislature also heavily amended RCW 4.24.010 to clarify the recoverable damages for a parent or legal guardian when an adult child dies. Before this amendment, a parent could recover for the wrongful death of an adult child only if the parent was economically dependent on their child.[32] Now the statute allows recovery for the wrongful death of any adult child if the parent had a "significant involvement" in the child's life, defined as "demonstrated support of an emotional, psychological, or financial nature within the parent-child relationship, at or reasonably near the time of the incident causing death."[33] Finally, the 2019 Legislature changed the law such that "each parent is entitled to recover for their own loss separately from the other parent regardless of marital status, even though this section creates only one cause of action."[34]

[29] Tom Andrews, *Cohabiting with Property in Washington: Washington's Committed Intimate Relationship Doctrine*, 53 GONZ. L. REV. 293, 298 n.19 (2018).
[30] LAWS OF 2019, ch. 159.
[31] LAWS OF 2019, ch. 159, § 1.
[32] *Warner v. McCaughan*, 77 Wn.2d 178, 185, 460 P.2d 272 (1969).
[33] LAWS OF 2019, ch. 159, § 5.
[34] *Id.*

These changes recognize that the death of a child is a traumatic experience, no matter how old the child is. The changes also recognize the loss of a child is personal to each person and allows each parent to recover damages separately from the other, regardless of their marital status. These changes, however, still leave out "parent-like" relationships of those who are not related by birth or marriage.

For purposes of the survival statutes, prior to 1993, the noneconomic damages suffered by a decedent prior to death were not recoverable. The Washington State Legislature changed this to allow recovery of such damages but only if the deceased was survived by a spouse or children, and if not, then financially-dependent parents or siblings. If there are no statutory beneficiaries, there can be no recovery for the deceased's noneconomic damages. As with the wrongful death statutes, the limited definition of beneficiaries leaves out partners who live together but are not legally married.

Finally, in 2013 the Washington Supreme Court held that municipalities could be liable under tort law, including for wrongful death, for the actions of their police officers in serving an anti-harassment order where an officer fails to act reasonably to protect the victim from the foreseeable criminal conduct of the harasser.[35] In that case, the police officer served an anti-harassment order and then left, even though both the victim and the harasser were home at the same time, the order required the harasser to move out, and the harasser was known to have violent tendencies.[36] Later that day, the harasser murdered the victim and then killed himself.[37]

The court held that the officer created a situation that left the victim and the harasser together in a potentially explosive situation.[38] The purpose of imposing tort liability on police departments in serving antiharassment orders is to deter unreasonable behavior.[39] Because women; Black, Indigenous, and people of color; immigrants; those living in poverty; and Lesbian, Gay, Bisexual, Transgender, and Queer or Questioning (LGBTQ+) individuals are the victims of harassment and abuse at significantly higher rates than their counterparts, this opinion in theory should help keep

[35] *Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013).
[36] *Id.* at 739.
[37] *Id.* at 740.
[38] *Id.* at 760.
[39] *Id.* at 761.

these populations safer. See "Chapter 8: Consequences of Gender-Based Violence: Domestic Violence and Sexual Violence," for more information on rates of sexual abuse, and "Chapter 5: Gender and Employment Discrimination and Harassment," for more information on rates of harassment and abuse in workplaces.

IV. Loss of Consortium Awards

The 1989 Study Subcommittee also examined whether there was gender bias in loss of consortium cases.[40] Generally speaking, loss of consortium is the term used to capture the emotional loss of a spouse, parent, or child. For spouses, it means "the right of [one spouse] to the company, cooperation, and aid of the other in the matrimonial relationship. It includes emotional support, love, affection, care services, companionship, including sexual companionship, as well as assistance from [one spouse] to the other."[41] For the loss of a parent, it means "[l]oss to [child] of the love, care, companionship, and guidance of [parent]."[42]

To determine whether there was gender bias in loss of consortium claims, the Subcommittee examined a total of 85 awards to determine if there were gender disparities in jury awards or in awards decided through arbitration[43]. It found that the average jury award for female claimants was $7,843 compared to $8,337 for male claimants (approximately $500 more per claim). However, cases decided through arbitration saw higher awards for female claimants than male claimants (the average awards in arbitrations were approximately $1,316 more per claim for female claimants). When surveyed for the 1989 Study, a majority of judges and attorneys thought that the awards were comparable whether the decedent was male or female. The Subcommittee concluded that "no determination can be made from the raw data provided here as to whether the differences are statistically significant" (without using more complex statistical analysis that

[40] Loss of consortium is an aspect of damages for both wrongful death and personal injury cases.
[41] 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 32.04 (7th ed. 2019) (WPI).
[42] *Id.*; WPI 32.05.
[43] Arbitration is a less formal, faster, and less costly way for the parties to resolve smaller disputes. It usually involves a lawyer appointed by the court to act as the decisionmaker. *See* Washington Superior Court Civil Arbitration Rules 1.1-8.5.

would have allowed them to control for potential confounding factors) but that "the data gives no indication of gender bias in loss of consortium awards."[44]

Washington's loss of consortium law has been relatively static since the 1989 Study with two exceptions. First, in *Sofie v. Fibreboard Corp*., the Washington State Supreme Court held that the legislative cap on recovery of noneconomic damages, including loss of consortium, codified at RCW 4.56.250(2), violated the Washington Constitution's right to a trial by jury, which gives the jury the "traditional function to determine damages."[45] This is significant as many tort scholars note that noneconomic damages were of particular importance for women and Black, Indigenous, and people of color.[46]

Second, in 1995, the Washington State Legislature amended a workers compensation statute, RCW 51.24.030, to ensure the spouses and children of injured workers were allowed to keep their loss of consortium awards.[47] That way, the Department of Labor and Industries could not take those loss of consortium awards as part of its right to recover benefits it paid to the injured worker.[48]

Practitioners still report that, in general, women are likely to have a lower value placed on their household work and services. Anecdotal evidence also suggests that the testimony of women in loss of consortium cases may be less valued by lawyers who represent them, whether because of the personal biases of those lawyers or a belief that jurors would value their testimony less.

V. Analysis of Gender Bias in Tort Awards in the Literature

The literature highlights three primary areas of concern related to wrongful death and loss of consortium awards: 1) the inability of couples who are not married and are not in a Registered Domestic Partnership to recover for the wrongful death of their partner, 2) the inability of

[44] 1989 Study, *supra* note 1, at 99.
[45] 112 Wn.2d 636, 638, 771 P.2d 711 (1989).
[46] Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 530 (1998).
[47] LAWS OF 1995, ch. 199.
[48] *See also Carrera v. Olmstead*, 189 Wn.2d 297, 401 P.3d 304 (2017); *Hi-Way Fuel Co. v. Estate of Allyn*, 128 Wn. App. 351, 115 P.3d 1031 (2005).

caregivers in kinship caregiving arrangements to recover for wrongful death and loss of consortium, and 3) the use of gender- and race-based tables to predict life expectancy, work life expectancy, economic loss, and the number of hours of lost household services per week which institutionalize historical and structural discrimination and inequities into tort awards.

A. Couples who are not married or in Registered Domestic Partnerships cannot recover for the wrongful death of a partner

As noted above, while the 2007 Washington State Legislature added Registered Domestic Partners to the wrongful death beneficiary list,[49] when marriage of same sex couples was approved in 2012 the status of Registered Domestic Partnership for same-sex couples was phased out. Because registered domestic partnerships in Washington now exist only for couples where at least one of the partners is 62 or older, marriage is the primary mechanism that would entitle someone to recover for the wrongful death of their partner.[50]

Other unmarried couples may not recover for the wrongful death or the loss of consortium of their partner. Some version of wrongful death legislation has been on the books since 1854—before Washington officially became a state.[51] it is useful to examine the Washington State Legislature's rationale for limiting who can recover for wrongful death.

Early on, the purpose of the wrongful death statute was purely to provide financial support to those who were deprived of economic support by the wrongful death of a family member.[52] Similarly, the origin of the consortium action was to allow the "master to recover for tortious injury to his servant, since the loss of the servant's services would result in a financial injury to the master."[53] Thus, damages for the wrongful death of a child were based on "the economic value of the minor child to the parents."[54] In addition, parents and siblings could recover for the wrongful death of a child/sibling only if they were financially dependent on the deceased.[55]

[49] LAWS OF 2007, ch. 156.
[50] Andrews, *supra* note 29, at 298 n.19.
[51] *Armijo v. Wesselius*, 73 Wn.2d 716, 718, 440 P.2d 471 (1968).
[52] *Dahl v. Tibbals*, 5 Wash. 259, 263, 31 P. 868 (1892).
[53] *Philippides v. Bernard*, 151 Wn.2d 376, 389, 88 P.3d 939 (2004) (citing *Frank v. Superior Court of Arizona*, 150 Ariz. 228, 231, 722 P.2d 955 (1986)).
[54] *Id.* at 389 (internal citations omitted).
[55] *Masunaga v. Gapasin*, 57 Wn. App. 624, 628, 790 P.2d 171 (1990).

The more modern view has been to recognize the emotional aspect of the lost relationship. As the Washington Supreme Court recognized in 1963:

> [I]t is abundantly clear that the statute was not solely enacted to provide a means of support during life for the beneficiary due to the loss of a breadwinner. Other factors are important in determining damages, *e.g.*, companionship and society, services, care and attention, protection and advice. The action may be maintained even where the beneficiary was not dependent upon the injured deceased for support.[56]

As of 2021, the wrongful death and survival statutes protect the same narrow class of beneficiaries since at least 1917, with the exception of the addition of Registered Domestic Partnerships and stepchildren/stepparent relationships.[57]

Marriage rates in Washington have declined since 1989 (see "Chapter 7: Gender Impact in Family Law Proceedings" for more data on marriage rates), suggesting that marriage may be a less meaningful metric for wrongful death protections than it has been historically. In addition, national data indicates that same-sex couples may be less likely than opposite-sex couples to marry. National Gallup polls from 2020 indicate that the percent of LGBTQ+ adults living unmarried with a domestic partner was higher than the percent for all U.S. adults. Likewise, the percent of LGBTQ+ adults who were married was lower than the percent married for all adults in the U.S.[58] The 2019 Current Population Survey found that nationally, among same-sex couples living together, about 54% were married, and among opposite-sex couples living together, about 88% were married.[59] These disparities in marriage rates mean that LGBTQ+ and same-sex couples are disproportionately less likely to be permitted to recover damages for the loss of their partner. Due to a lack of publicly available local data, it is not clear if these trends exist in Washington, but

[56] *Gray v. Goodson*, 61 Wn.2d 319, 329, 378 P.2d 413 (1963).
[57] *See* LAWS OF 1917, ch. 123, § 2.
[58] Jeffrey M. Jones, *One in 10 LGBT Americans Married to Same-Sex Spouse*, GALLUP (Feb. 24, 2021), https://news.gallup.com/poll/329975/one-lgbt-americans-married-sex-spouse.aspx.
[59] Press Release, United States Census Bureau, U.S. Census Bureau Releases CPS Estimates of Same-Sex Households (Nov. 19, 2019), https://www.census.gov/newsroom/press-releases/2019/same-sex-households.html. The 2019 survey found there were 543,000 same-sex married couple households and 469,000 households with same-sex unmarried partners living together. *Id.* There were 61.4 million opposite-sex married and 8 million opposite-sex unmarried partner households. *Id.*

it merits further investigation. These national trends are particularly meaningful in the context of wrongful death awards given the income disparities experienced by LGTBQ+ communities (see "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for more information on financial disparities by gender and sexual orientation).

It may seem like a simple point to assert that same-sex couples now have a legal right to marry, thereby giving them potential access to damages for the loss of their partner. However, the scholarship in this area highlights complex considerations that may be unique to LGBTQ+ and same-sex couples as they decide whether to marry. For example, Professor Mary Bernstein asserts that the institution of marriage is a central part of the societal assumption that people will engage in oppositive-sex, monogamous relationships with the goal of marriage and children. Bernstein goes on to argue that this could create the feeling for same-sex partners that marriage means assimilation into this social expectation and therefore loss of one's identity. The author notes that the "dilemma" of assimilation may also intersect with race and class, thereby increasing the complexity of the decision-making.[60]

An analysis by Drabble et al. shows that research has consistently found that marriage equality has a positive impact on health outcomes for LGTBQ+ populations. The authors cite evidence showing couples have reported that marriage had decreased homophobic attitudes and increased their participation in society and ability to live more publicly. However, the authors also cite evidence showing that social stigma and discrimination against LGBTQ+ individuals persist.[61] And some same-sex couples have reported that their marriage, "caused disjuncture in relationships with their family of origin, as marriage made the relationship feel too real to family members and made their sexual identities more publicly visible."[62] This highlights that some same-sex couples may still feel they do not have access to marriage due to family and societal prejudice and stigmatization. Another study found that same-sex couples who "divorced after

[60] Mary Bernstein, *Same-Sex Marriage and the Assimilationist Dilemma: A Research Agenda on Marriage Equality and the Future of LGBTQ Activism, Politics, Communities, and Identities*, 65 J. HOMOSEXUALITY 1941, 1952-53 (2018).
[61] Laurie A. Drabble et al., *Perceived Psychosocial Impacts Of Legalized Same-Sex Marriage: A Scoping Review Of Sexual Minority Adults' Experiences*, 16 PLOS ONE 1 (2021).
[62] *Id.* at 10 (citing Heather MacIntosh, Elke D. Reissing & Heather Andruff, *Same-Sex Marriage in Canada: The Impact of Legal Marriage on the First Cohort of Gay and Lesbian Canadians to Wed*, 19 CAN. J. HUM. SEXUALITY 79 (2010)).

institutionalization of the right to same-sex marriage reported shame, guilt, and disappointment—given that they and others had fought so hard for equal marriage rights."[63] This added pressure on marriages for same-sex couples is just another example of a unique consideration that may be part of the decision-making for some couples. This small list of examples, while illustrative, is certainly not a comprehensive outline of the complex decision-making for LGBTQ+ and same-sex couples who are considering marriage.

In addition to the clear financial ramifications for someone who is not permitted to recover damages for the loss of their partner regardless of how long they have cohabitated, a lack of acknowledgement of their relationship in the wrongful death statutes may also cause unique mental health harms for members of an unmarried same-sex partnership. A national study found same-sex couples in relationships that were not legally acknowledged (i.e., because they were not married or in civil unions or registered domestic partnerships) were more likely to report higher levels of perceived unequal recognition[64] of their relationships. This perceived unequal recognition was in turn associated with psychological distress, depression, and problematic drinking. There was also a gendered effect with women experiencing greater symptoms then men. Transgender individuals were intentionally not included in the study due to the unique stressors these populations face.[65] Other research has found that interracial same-sex couples face additional challenges resulting from a lack of acknowledgment of their relationship resulting from racism and homophobic assumptions.[66] This suggests that race and sexual orientation may intersect and amplify adverse health outcomes.

While marriage for same-sex couples is now legal, the historical trauma and social stressors that emanate from long-time stigmatization and marginalization of same-sex relationships continue

[63] *Id.* (citing Kimberly F. Balsam, Sharon S. Rostosky & Ellen D. B. Riggle, *Breaking Up Is Hard to Do: Women's Experience of Dissolving Their Same-Sex Relationship*, 21 J. LESBIAN STUD. 30 (2017)).
[64] Perceived recognition of one's relationship was measured using a five-point scale on the following topics: "(a) Our relationship is treated like a "second-class" relationship by the federal government; (b) important milestones (e.g., buying a house or writing a will) are complicated for us; (c) it is difficult for us to keep up with the changing legal status of same-sex relationships; and (d) it is harder for us to file our tax returns than it is for other couples." Allen J. LeBlanc, David M. Frost & Kayla Bowen, *Legal Marriage, Unequal Recognition, and Mental Health Among Same-Sex Couples*, 80 J. MARRIAGE & FAM. 397, 401 (2018).
[65] *Id.* at 402.
[66] *See* AMY C. STEINBUGLER, BEYOND LOVING: INTIMATE RACEWORK IN LESBIAN, GAY, AND STRAIGHT INTERRACIAL RELATIONSHIPS (2012).

to impact the health of LGBTQ+ populations. The reliance of wrongful death statutes on the institution of marriage may further perpetuate both financial disparities for same-sex couples and the adverse health outcomes associated with a lack of perceived recognition of one's relationship.

B. Caregivers in kinship caregiving arrangements cannot recover for wrongful death or loss of consortium

The narrow definition of who can recover for wrongful death and loss of consortium claims excludes family members living in non-parent kinship care situations. Kinship care is "[f]ull-time care provided by a child's relative or close family friend."[67] A 2020 survey of kinship caregivers in Washington found that 89% of kinship care was "informal,"[68] meaning that the arrangement was organized by parents and other family members without involvement from a child welfare agency our juvenile court.[69] 90% of kinship caregivers who responded to the survey identified as female, 71% identified as grandparents, and a majority of respondents identified as white (80%).[70] However:

- Eight percent of caregivers who responded to the survey identified as Black,[71] compared to about four percent of the general Washington population in 2020;[72]
- Eight percent identified as American Indian or Alaskan Native,[73] compared to less than two percent in the general Washington population in 2020;[74] and

[67] ANGELIQUE DAY ET AL., PARTNERS FOR OUR CHILDREN, KINGSHIP CARE IN WASHINGTON STATE: A HISTORICAL COMPARISON 4 (2020), https://www.dshs.wa.gov/sites/default/files/ALTSA/hcs/documents/kinship/Report%20two-%20Kinship%20Care%20in%20Washington%20State.%20A%20historical%20analysis.pdf.
[68] *Id.* at 8.
[69] *Id.* at 4.
[70] ANGELIQUE DAY ET AL., PARTNERS FOR OUR CHILDREN, KINSHIP CARE IN WASHINGTON STATE 6 (2020), https://www.dshs.wa.gov/sites/default/files/ALTSA/hcs/documents/kinship/Report%20one-%20Kinship%20Care%20in%20Washington%20State_.pdf.
[71] *Id.* at 6.
[72] *Estimates of April 1 Population by Age, Sex, Race and Hispanic Origin*, WASH. STATE OFF. OF FIN. MGMT. (Feb. 2, 2021), https://ofm.wa.gov/washington-data-research/population-demographics/population-estimates/estimates-april-1-population-age-sex-race-and-hispanic-origin.
[73] DAY ET AL., *supra* note 67, at 6.
[74] WASH. STATE OFF. OF FIN. MGMT., *supra* note 72.

- 15% identified as having Hispanic, Latino, or Spanish origin,[75] compared to about 13% in the general Washington population in 2020.[76]

That a kinship caregiver who does not have legal guardianship of a child cannot receive damages for the child's wrongful death or loss of consortium, likely disproportionately impacts women, elders, Black, American Indian/Alaskan Native, and Hispanic/Latinx caregivers. The survey did not ask about the race or ethnicity of the child. However, to the extent that the race and ethnicity of the child may be reflected by their kinship caregiver, this suggests that Black, American Indian/Alaskan Native, and Hispanic/Latinx children may also be disproportionally excluded from accessing wrongful death damages upon the death of their primary caregiver.

While this survey did collect data for Asian, Native Hawaiian, and other Pacific Islander populations,[77] the report does not include analyses for these populations, likely due to small samples sizes. It is possible that these populations may also be disproportionally impacted.

C. Gender and race-based tables

It is important to note that only a small percentage of wrongful death and other tort cases are decided by a trial. A report by the Bureau of Labor Statistics using 2005 data found that, nationally, only 3.5% of civil tort cases were disposed of by bench or jury trial.[78] In 2019, 6,600 tort cases were filed in Washington, and 6,016 tort cases were resolved statewide.[79] However, merely 110 tort civil trails occurred in 2019.[80] Because many cases are filed and resolved in different years, we cannot use these 2019 numbers alone to calculate the proportion of tort cases that go to trial. Nonetheless, these numbers do demonstrate that only a small percentages of tort cases go to trial. The remaining cases were "dismissed for want of prosecution, granted default or summary judgments, settled or withdrawn prior to trial, settled through mediation or

[75] DAY ET AL., *supra* note 70, at 6.
[76] WASH. STATE OFF. OF FIN. MGMT., *supra* note 72.
[77] DAY ET AL., *supra* note 70, at 39–46 (Appendix 2. Statewide Caregiver Survey).
[78] THOMAS COHEN & KYLE HARBACEK, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., PUNITIVE DAMAGE AWARDS IN STATE COURTS, 2005 2 (2011), https://bjs.ojp.gov/content/pub/pdf/pdasc05.pdf.
[79] SUPERIOR COURT 2019 ANNUAL REPORT: ANNUAL CASELOAD REPORT 89, 98 (2019), http://www.courts.wa.gov/caseload/content/archive/superior/Annual/2019.pdf#search=superior%20court%20case%20report.
[80] *Id.* at 103.

another method of alternative dispute resolution, or transferred to another court."[81] While the following subsection highlights some potential gender and race disparities in the cases that go to court, a broader scope, including cases that are settled, would address areas that impact a broader population of people involved in tort cases.

Although the 1989 Subcommittee was unable to isolate gender bias as the cause of lower tort awards for women compared to men, scholars in the intervening years have confirmed the Subcommittee's hypothesis. Thomas Koenig, a sociologist, and Michael Rustad, a law professor, have conducted a number of empirical examinations of American tort law and concluded that there is a "his" and "her" tort world based on gender roles. Medical malpractice often involves female plaintiffs and products liability often involves male plaintiffs, with significantly different outcomes in awards, victory rates at trial, and systemic improvement.[82]

The scholarship on this issue addresses two main areas where gender and other disparities in awards seem to emerge: 1) awards for pain and suffering, and 2) awards for lost earnings. The very limited research on these areas suggests that there are not significant gender disparities in awards for pain and suffering after controlling for other factors. However, one study did find that racial inequities were present, with jurors awarding Black plaintiffs about 41% of the damages for pain and suffering as white plaintiffs. Gender and racial inequities were also clear for lost earnings awards in this study. Jurors awarded Asian plaintiffs 850% of what they awarded white plaintiffs and awarded female plaintiffs 59% of what they awarded male plaintiffs. Research, such as this study, that uses broad race and ethnicity categories may mask disparities within diverse populations that have been grouped into one category such as "Asian." For medical expenses, neither race nor gender were significant predictors of awards. It is important to note that a major limitation of this study was that the researchers coded race and ethnicity based on surname rather than self-identified race and ethnicity.[83] Of note, research shows that people often assume

[81] COHEN & HARBACEK, *supra* note 78, at 9.
[82] Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1, 87 (1995).
[83] Erik Girvan & Heather J. Marek, *Psychological and Structural Bias in Civil Jury Awards*, 8 J. AGGRESSION, CONFLICT & PEACE RSCH. 247 (2016).

Black people feel less pain than white people with similar injuries,[84] despite evidence that this assumption is not true.[85] It is possible that jurors could be influenced by this bias when determining damages for pain and suffering.

In an analysis of California, Florida, and Maryland caps on noneconomic tort damages, law professor Lucinda Finley explains that economic damages for lost wages benefit higher wage earners (white men) the most because wage projection data based on past race and gender specific wages assumes that "wage disparities will remain ensconced in the future."[86] Some scholars have questioned the ethics, constitutionality, and accuracy of using gender- and race-based projection tables. These tables are used to predict work life expectancy, economic loss, and the number of hours of lost household services per week. The tables are often presented by gender and race.[87] A 2006 national survey of forensic economists (who often serve as expert witnesses in tort trials) found that over 87% of respondents used gender-specific data to estimate economic loss, and over 45% used race-specific data for their estimates.[88] While the 2019 version of this survey did not ask a comparable question, it did ask how often a series of variables were used in calculating work life expectancy (0 being never and 100 being always). The answers to these questions also indicate that gender (mean=88, mode=100) was much more commonly considered than race (mean=25, mode=0) in these predictions.[89]

These tables are based on historical data which show women and Black, Indigenous, and people of color earn lower wages with women of color having the lowest wages (see "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for further discussion of wage gaps). Life and work life expectancy are also shorter for Black, Indigenous, and people of color compared to white

[84] Sophie Trawalter, Kelly M. Hoffman & Adam Waytz, *Racial Bias in Perceptions of Others' Pain*, 7 PLoS ONE 1 (2012).
[85] Yulin Yang et al., *Racial-Ethnic Disparities in Pain Intensity and Interference Among Middle-Aged and Older U.S. Adults*, J. GERONTOLOGY: SERIES A (2021).
[86] Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263 (2004).
[87] David Schap, Michael R. Luthy & David I. Rosenbaum, *A 2019 Survey of Forensic Experts: Their Methods, Estimates, and Perspectives*, 26 J. LEGAL ECON. 23 (2020).
[88] Michael L. Brookshire, Michael R. Luth
& Frank L. Slesnick, *2006 Survey of Forensic Economists: Their Methods, Estimates, and Perspectives*, 19 J. FORENSIC ECON. 29 (2006).
[89] Schap, Luthy & Rosenbaum, *supra* note 87.

populations.[90] This creates several major issues. First, these historical data fail to take into account progress toward gender and racial equity in areas such as life expectancy and wages that would have happened or will happen over the course of a person's life, suggesting the tables lack predictive accuracy.[91] Second, these disparities are a result of historical and structural discrimination and inequities that are then being institutionalized into tort awards.[92] Third, this population-level data is being used to stereotype people based on their gender and race. While experts can make more individualized projections for adults with a long work history, for individuals without a work history (such as children) these projection tables can be very heavily weighted. Fourth, these tables create lower expected damages for women and Black, Indigenous, and people of color, potentially making them less desirable clients in our contingency-fee based system.[93] Lastly, gender- and race-based tables devalue the lives of women and Black, Indigenous, and people of color (with an amplifying effect for women of color) and create an incentive for people to prioritize mitigating risk for white men because the potential costs are higher if that population is harmed.[94] Loren Goodman provides an example:

> Ultimately, some scholars suggest that situations like these create perverse incentives for tortfeasors. Because the cost of injuring these populations is reduced, potential tortfeasors may be less cautious when dealing with them. For example, consider a landlord who owns two residential buildings: one whose residents are all Caucasian males and one whose residents are all Hispanic females. If lead-based paint is found and the landlord is sued, the residents in the Caucasian male building will cost the landlord much more in damages than the residents in the Hispanic female building. Thus, if given the opportunity to choose between protecting the two groups, the rational self-serving landlord will exercise

[90] Catherine M. Sharkey, *Valuing Black and Female Lives: A Proposal for Incorporating Agency VSL Into Tort Damages*, 96 NOTRE DAME L. REV. 1479 (2021).
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*; Loren D. Goodman, *For What It's Worth: The Role of Race- and Gender-Based Data in Civil Damages Awards*, 70 VAND. L. REV. 1353 (2017).

> greater care to prevent harms to the Caucasian males than to the Hispanic females.[95]

In addition, race- and gender-based tables as currently used inherently introduce inaccuracies because they present only binary sex data (male, female) rather than data that more accurately captures gender.[96] Transgender individuals also experience significant income and wages disparities (see "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for analysis of wage disparities for transgender individuals), yet are not even represented in these tables. These tables devalue the lives of women, potentially without actually increasing accuracy given that they do not provide a comprehensive and accurate analysis of wages by gender. This is not to argue that the lives of transgender individuals should be devalued as women's lives are in these projections. That would further perpetuate the historical discrimination in wages as described above.

This same line of thought applies to race, a social construct which relies most commonly on five to six artificial categories. These categories, which lack granularity, fail to account for people of multiple races, those who do not identify with one of these races, or extreme variation in income and life expectancy between populations within these broad categories. In addition, it is not clear who would identify the person's race, particularly in cases such as wrongful death where someone cannot self-identify.

The one area where women are more highly valued then men is in projection tables for damages related to hours of lost household services. The 2019 forensic economist survey mentioned above found that 65% of respondents relied on the Dollar Value of a Day calculations to estimate lost hours of domestic work.[97] These tables indicate that women spend more time on domestic work each week based on time-use surveys, making women's dollar value per day for domestic work higher than for men (see "Chapter 4, The Impact of Gender on Courtroom Participation and Legal Community Acceptance" for further analysis on the lack of parity in unpaid domestic labor

[95] Goodman, *supra* note 94, at 1370. *See also* Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661, 685-92 (2017); Kimberly Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CALIF. L. REV. 325 (2018).
[96] Goodman, *supra* note 94, at 1375-76.
[97] Schap, Luthy & Rosenbaum, *supra* note 87.

by gender). However, many of these tables do have higher hourly values for men's work than for women's work for all combined "household production."[98] These tables embody the societal devaluation of women and their time. These tables also have the same inherent problems as wage projection tables: 1) they assume that all people fit into these population level trends and stereotypical gender norms where women do more domestic work, and 2) they fail to account for future progress toward more equitable division of household work.

In theory, judges and juries can partially correct the gender and race disparities described above through noneconomic damage awards.[99] On the other hand, jurors are not given any standards by which to decide a party's noneconomic damages, which raises the potential for biases to come into play. For the wrongful death of a spouse, the Washington pattern jury instruction tells jurors this:

> You should also consider what [name of decedent] reasonably would have been expected to contribute to [spouse] in the way of marital consortium. Marital consortium means the fellowship of husband and wife and the right of one spouse to the company, cooperation, and aid of the other in the matrimonial relationship. It includes emotional support, love, affection, care, services, companionship, including sexual companionship, as well as assistance from one spouse to the other.
>
> In making your determinations, you should take into account [name of decedent's] age, health, life expectancy, occupation, and habits [of industry, responsibility and thrift]. You should take into account [name of decedent's]

[98] EXPECTANCY DATA, THE DOLLAR VALUE OF A DAY: 2019 DOLLAR VALUATION (2020). For example, the 2019 Dollar Value of a Day tables show that married men of all ages, employed full-time (regardless of spousal employment) with a youngest child ages two through five do 12.57 hours of household work per week with an hourly value of $16.23, *Id.* at 18 (Table 2), while women in this same situation do 18.92 hours per week with an hourly value of $15.43, *Id.* at 133 (Table 117). From a mathematical perspective this disparity in hourly value by gender results from men reporting spending more time doing two subtasks under the "household production category" that are assigned a higher value per hour: 1) "Pets, Home & Vehicles" at $16.96 per hour and 2) "Obtaining Services" at $17.85 per hour. While women report spending more time on all other subtasks (e.g., inside housework, food cooking and clean up, etc.), most of these tasks are valued at less than $15 per hour. The exception to this is "Household Management" and "Travel for Household Activity" which are both valued at over $18 per hour. *Id.* at 18 (Table 2), 133 (Table 117).

[99] Chamallas, *supra* note 46, at 530.

> earning capacity, including actual earnings prior to death and the earnings that reasonably would have been expected to be earned in the future. In determining the amount that [name of decedent] reasonably would have been expected to contribute in the future to [spouse], you should also take into account the amount you find [name of decedent] customarily contributed to [spouse].
>
> The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.
>
> Your award must be based upon evidence and not upon speculation, guess, or conjecture.
>
> The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.[100]

The courts have recognized the difficult nature of valuing noneconomic damages, noting they are "not readily susceptible to valuation in dollars."[101] Anecdotal information from practitioners indicates that damage awards can be lower for women because traditionally women's work is seen as less inherently valuable.

Beyond questioning the ethics and accuracy of these race- and gender-based tables, some scholars and judges have questioned their constitutionality—though this debate is yet to be settled. For example, Professor Chamallas argues that the use of race and gender specific wage expectancy tables by courts violates the Constitution:

> Under the prevailing intermediate scrutiny standard for explicitly gender-based classifications, individual women are protected from damaging generalizations about their sex, unless the state proves that the classification is substantially related to the achievement of an important governmental objective. I contend

[100] 6 WASHINGTON PRACTICE: WPI 31.02.01 (7th ed. 2019).
[101] *Bingaman v. Grays Harbor Cmty. Hosp.*, 37 Wn. App. 825, 831, 685 P.2d 1090 (1984), *rev'd on other grounds by* 103 Wn.2d 831, 835, 699 P.2d 1230 (1985).

> that there is no persuasive justification – certainly not one that qualifies as a compelling or important justification – for relying on race-based or gender-based economic data in tort litigation. Equitable determination of loss of future earning capacity can be made by individualized determinations which look at the particulars of a plaintiff's situation. When such individualized determinations are not possible, courts and experts should rely on inclusive, race-neutral and gender-neutral statistical data.[102]

Several courts over the last few decades have addressed the inherent unfairness of the use of race-, ethnicity-, and gender-based statistics to determine life expectancy, work life expectancy, and loss of future earnings. For example, in 1987 in *Reilly v. United States*,[103] the plaintiffs sued the obstetrician for medical malpractice for the birth injury of their baby girl, Heather. At trial, one of the issues was of the lost earning capacity of Heather. The defendant's economist testified that it would be appropriate to reduce her earnings by 40% based on the work life table published by the Bureau of Labor Statistics showing that a female with 15 or more years of education would be active in the work force only 28 out of 48 years between the ages of 22 and 70.[104]

The trial judge rejected that proposition, noting that the reduction relied on outdated data and was legally suspect:

> As a factual matter, I seriously doubt the probative value of such a statistic with respect to twenty-first century women's employment patterns, particularly in light of current, ongoing changes in women's labor force participation rates. As a matter of law, moreover, I know of no case authority and none has been cited to me supporting [the defense economist's] 40% reduction. On the contrary, both federal and state authorities within the jurisdiction counsel against such disparate treatment.[105]

[102] Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73 (1994).
[103] *Reilly v. United States*, 665 F. Supp. 976 (D.R.I. 1987) *aff'd in part and rev'd in part on other grounds*, 863 F.2d 149 (1st Cir. 1988).
[104] *Id.* at 997.
[105] *Id.*

Similarly, in *Wheeler Tarpeh-Doe v. United States*, another birth injury medical malpractice case, the baby boy was born to a mother who was white and a father who was Black and from Liberia.[106] The defendant's economist argued that his future lost earnings should be based on the average earnings of Black men, instead of all men.[107] The trial court rejected that argument, noting it would "incorporate current discrimination resulting in wage differences between the sexes or races."[108] Instead, the judge decided to accept the calculation based on the average earnings of all people, which was "the most accurate means available of eliminating any discriminatory factors."[109]

Some courts have gone further, suggesting the use of race- and gender-based statistics is a potential constitutional violation. In 2005, in an opinion awarding restitution to homicide victims, the judge refused to consider the race or gender of the victims in calculating lost future earnings because of "possible constitutional and other problems in relying on race and sex assumptions."[110]

In 2008 and 2015, the use of race- and ethnicity-based statistics to predict life expectancy was expressly ruled unconstitutional. In *McMillan v. City of New York*, the trial court ruled that using race-based statistics for assessing tort damages violated both the Equal Protection clause and Due Process clause of the U.S. Constitution.[111] For purposes of the Equal Protection Clause, the judge reasoned the judicial use of race-based statistics was a classification based on race by the government, which is automatically suspect and subject to strict scrutiny.[112] Reliance on race for this purpose is unreliable given that race is largely a social construct and definitions change over time and is not the most important factor in predicting life expectancy.[113]

[106] *Wheeler Tarpeh-Doe v. United States*, 771 F. Supp. 427, 455 (D.D.C. 1991), *rev'd sub nom. Tarpeh-Doe v. United States*, 28 F.3d 120 (D.C. Cir. 1994).
[107] *Id.*
[108] *Id.*
[109] *Id.* at 456.
[110] *United States v. Bedonie*, 317 F. Supp. 2d 1285, 1314 (D. Utah 2004), *rev'd on other grounds and remanded sub nom. United States v. Serawop*, 410 F.3d 656 (10th Cir. 2005).
[111] *McMillan v. City of New York*, 253 F.R.D. 247 (E.D.N.Y. 2008).
[112] *Id.* at 255.
[113] *Id.* at 249-53.

For purposes of the Due Process Clause, the judge ruled there was a property right to compensation in negligence cases. To allow use of race-based statistics to calculate life expectancy would automatically burden a class of litigants based on race, which would be a denial of due process.[114]

Seven years later in *G.M.M. v. Kimpson*, the same court relied on *McMillan*, again ruling that minority-specific economic data "saddles those who do not conform to the data with adverse generalizations about their group, the very kind of stereotyping that antidiscrimination laws were meant to prohibit."[115] While noting that the court has not yet ruled on whether life, work life, and earnings tables based on other historically disadvantaged groups are permissible, the court quoted the rhetorical question of a professor related to the use of gender-based statistics:

> If [we] truly want[] to articulate a principle that would remove impermissible discrimination from the calculation of tort damages, I believe it is incumbent . . . to anticipate and answer the obvious question: If race cannot be used, what about gender? Statistically, both are correlated with dramatic differences in lifespan and earnings.[116]

The reliance on expert-testimony from forensic economists or others that uses suspect classifications to determine damages is an issue that should continue to be raised in judicial education and continuing legal education forums.

Legal scholars who have written about these issue have presented an array of possible solutions, including (1) statutory mandates requiring data used for projection calculations to be continually updated to avoid perpetuating historic systemic discrimination, (2) a ban on the use of race- and gender-based tables, (3) affirmative action-type calculations that would allow consideration of race and gender only if it raised the award for historically marginalized populations,[117] (4)

[114] *Id.* at 255.
[115] *G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 141 (E.D.N.Y. 2015) (internal quotations omitted) (quoting Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435, 1439 (2005)).
[116] *Id.* at 141 (alteration in original) (quoting Anthony J. Sebok, *Ruling Barring the Use of Race in Calculating the Expected Lifespan of a Man Seeking Tort Damages: An Isolated Decision, or the Beginning of a Legal Revolution?* (Oct. 22, 2008)).
[117] Goodman, *supra* note 94.

rejection of societal grouping statistics with a focus on more individual facts regarding the victim such as occupation or occupation of relatives,[118] (5) or the use of a uniform value of a statistical life that does not vary according to demographics.[119]

On this last point, Catherine Sharkey argues that a standard value of a statistical life (which has been largely adopted by federal agencies to conduct cost-benefit analyses using a range from $6-$9 million) is necessary to remove the effects of discrimination and inaccurate data that particularly devalue the lives of young Black, Indigenous, and women of color who don't have past earnings histories. Sharkey further argues that, "The adoption of a uniform [value of a statistical life] as a measure of tort wrongful-death damages would eliminate the perverse incentives for defendants to channel their most risk-laden behavior toward minority communities."[120] The use of a uniform value of life seems unlikely to be feasible in Washington, however, where the Washington State Supreme Court has already explicitly held the state constitution requires a jury to individually determine damages in each case.[121]

Some jurisdictions require—or have tried to require—the use of codified gender-neutral tables or have jury instructions that favor the use of gender-neutral tables.[122] The Federal Fair Calculations in Civil Damages Act of 2016 was introduced in the U.S. House and Senate. If adopted, the bill would have prohibited "courts from awarding damages to plaintiffs in civil actions using a calculation for projected future earning potential that takes into account a plaintiff's race, ethnicity, gender, religion, or actual or perceived sexual orientation."[123] The bill was reintroduced in 2019 but, again did not pass.[124] In July of 2019, California's Governor signed into law S.B. 41, which prohibits "the estimation, measure, or calculation of past, present, or

[118] Agustin Paneque, *Civil Rights and Tort Calculation: Challenging the Reliability and Constitutionality of Race-Based and Gender-Based Life Expectancy and Future Wage Earning Calculations*, 19 RUTGERS RACE & L. REV. 133 (2018).
[119] Sharkey, *supra* note 90.
[120] *Id.*
[121] *Sofie v. Fibreboard*, 112 Wn.2d 636, 638, 771 P.2d 711 (1989).
[122] Goodman, *supra* note 94; Sharkey, *supra* note 90.
[123] Fair Calculations in Civil Damages Act of 2016, S. 3489, 114th Cong. (2016), https://www.congress.gov/bill/114th-congress/senate-bill/3489#:~:text=Introduced%20in%20Senate%20%2812%2F01%2F2016%29%20Fair%20Calculations%20in%20Civil,gender%2C%20religion%2C%20or%20actual%20or%20perceived%20sexual%20orientation.
[124] Fair Calculations in Civil Damages Act of 2019, H.R. 4418, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/4418/related-bills.

future damages for lost earnings or impaired earning capacity resulting from personal injury or wrongful death from being reduced based on race, ethnicity, or gender."[125]

Washington's Pattern Jury Instructions for life expectancy suggests the use of gender-based tables is required, but makes no mention of race-based tables.[126] While the Pattern Jury Instructions are intended to be an accurate and neutral statement of the law, they are not the law and are not required to be used by the trial courts.[127] Nevertheless, anecdotal evidence from attorneys suggests that in practice, it is often difficult to convince a trial judge to deviate from the Pattern Jury Instructions.

While there is a substantive amount of legal scholarship on the problems associated with race- and gender-based projection tables for damages, there is very little data or research that explores the many other areas where bias could be impacting tort cases. As described above, one study found racial disparities in pain and suffering damages, but this area is not well researched.[128] While the focus on projection tables is important, even if this cause of disparate awards for women and Black, Indigenous, and people of color could be addressed, it is unclear if disparities in awards would persist as a result of other biases in the system. However, the normalized allowance of race- and gender-based projection tables makes disparities in awards "acceptable" or at least expected, which could be masking other biases fueling these disparities. This is an issue deserving of more study.

VI. Attorney Fee Awards in Discrimination Cases

In 1989, the Subcommittee also examined attorney fee awards in discrimination cases to see if any disparities were present. The Washington Law Against Discrimination (WLAD) provides that successful litigants may apply to the court for an award of "reasonable" attorneys' fees.[129] While

[125] S.B. 41, ch. 136, Reg. Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB41.
[126] 6 WASHINGTON PRACTICE: WPI 34.04 (7th ed. 2019).
[127] *In re Pers. Restraint of Domingo*, 155 Wn.2d 356, 369, 119 P.3d 816 (2005).
[128] Girvan & Marek, *supra* note 83.
[129] RCW 49.60.030(2).

in most civil cases each party pays their own attorneys' fees, in certain important circumstances, the Washington State Legislature has allowed the prevailing party injured by a violation of a statute to recover the reasonable cost of their own attorneys' fees.

For purposes of the WLAD, the Washington State Legislature has declared that "discrimination is a matter of state concern" that threatens "the institutions and foundation of a free democratic state."[130] As a result, the Washington State Legislature sought "to enable vigorous enforcement of modern civil rights litigation and to make it financially feasible for individuals to litigate civil rights violations."[131] One of the ways it encourages vigorous enforcement of civil rights protections is to allow the recovery of attorney fees. This in turn incentivizes attorneys to take cases seeking the "vindication of citizens' right to be free of discrimination and the deterrence of unlawful discriminatory conduct."[132]

Reasonable attorneys' fees are calculated by determining the reasonable amount of time required for the case based on the complexity of the issues and multiplying the hours by the reasonable hourly rate.[133] To set the reasonable hourly rate, judges can consider the attorney's usual billing rate, prevailing market rates, the level of skill required by the litigation, time limitations imposed on the litigation, the amount of the potential recovery, the attorney's reputation, and the undesirability of the case.[134] This amount is the so called "lodestar": the appropriate amount to be awarded unless other factors justify an increase. The judge may adjust the fee upward for risk and the quality of work performed.[135]

The Subcommittee in the 1989 Study analyzed 26 discrimination cases from "Jury Verdicts Northwest" along with attorney and judge surveys to try to determine whether fee awards to male and female attorneys in discrimination cases were comparable. They concluded that the small number of cases and survey responses "make generalizations difficult,"[136] but that the data,

[130] *Minger v. Reinhard Dist. Co.*, 87 Wn. App. 941, 948, 943 P.2d 400 (1997) (internal quotations and citation omitted).
[131] *Martinez v. City of Tacoma*, 81 Wn. App. 228, 235, 914 P.2d 86 (1996).
[132] *Minger*, 87 Wn. App. at 948.
[133] *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983).
[134] *Id.*
[135] *Highland Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 315, 202 P.3d 1024 (2009).
[136] 1989 Study, *supra* note 1, at 105.

a public hearing, and survey responses flag fee disparity as an "area of substantial concern" especially given the "broad discretion given to the trial judge regarding reduction and enhancement of the lodestar figure."[137] There are no published Washington or national studies of gender bias in attorney fee awards nor Washington appellate cases that address the issue.

The attorney fee provision in the WLAD has not substantively changed since the 1989 Study except that it now allows remedies pursuant to the federal Fair Housing Act in addition to remedies under state law and the federal Civil Rights Act of 1964.[138]

VI. Analysis of Gender Bias in Attorney Fee Awards

Today there is still a lack of data or research on attorney fee awards based on gender or other demographic variables. The need for data collection or research in this area should be informed by attorneys with experience in this area who can comment on if they have observed any issues with unequitable allocation of fee awards.

VII. Recommendation

In order to eliminate discrimination based on gender, race, and ethnicity in the calculation of tort damages, stakeholders should study whether Washington courts should discontinue use of race- and gender-based life expectancy, work life expectancy, loss of household services, and historical earnings tables for the calculation of economic damages. If the conclusion of such further study is that the race- and gender-based tables should no longer be used, stakeholders should then determine whether to promote other means of calculating economic damages, instead.

[137] 1989 Study, *supra* note 1, at 106.

[138] *See, e.g.*, *Johnson v. State Dept. of Transp*., 177 Wn. App. 684, 313 P.3d 119 (2013) (attorney fees and costs awarded using lodestar method in sex discrimination and retaliation case with some reductions for time spent on unsuccessful administrative claim and for time spent and costs accrued after the date of defendant's offer of judgment).

Chapter 7

Gender Impact in Family Law Proceedings

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I. Summary

Gender bias in family law proceedings[1] in Washington State is seldom obvious. Washington's family law statutes are gender neutral, and do not on their face provide parties with an advantage or disadvantage based on their gender. It is also extremely uncommon today for Washington courts in family law proceedings to make statements that explicitly demonstrate bias against a party based on their gender. Nonetheless, there continue to be serious concerns about gender bias in family law cases, particularly implicit biases that may not be recognized by judicial officers, guardians ad litem (GAL), parenting evaluators, mediators, lawyers, or the parties themselves. Gender bias should be broadly understood to include bias based on sexual orientation and gender identity.

Researchers have noted the difficulties in attempting to measure gender bias in family law proceedings, resulting in few comprehensive studies on the topic. However, research and data suggest that gender bias in family law proceedings remains a concern, which may influence judicial decision-making in dividing property and ordering maintenance; crediting allegations of domestic violence, sexual abuse, or child abuse; making residential time decisions in parenting plans; and ordering and enforcing child support obligations. For example, a national study found that courts often do not credit mothers' claims of child abuse by fathers; and in 14% of cases where a court credited a mother's claim of abuse by the father, the mother nonetheless lost residential time with the child to the father. Implicit biases based on race, ethnicity, and other factors may also exacerbate the problems caused by biases based on gender. Data is also unavailable on the consequences to a parent who fails to pay child support – specifically, on the extent to which such parents – usually men – are named in bench warrants or incarcerated for failure to appear or failure to pay.

Increasingly, couples in Washington and nationwide are forming committed intimate relationships without marrying. However, Washington law provides fewer remedies to help

[1] For the purposes of this chapter, "family law proceedings" generally refer to actions that arise under Title 26 of the Revised Code of Washington or that involve the application of the committed intimate relationship doctrine. This chapter does not address gender bias in child welfare proceedings under Title 13 of the Revised Code of Washington.

ensure the economic stability of both partners when an unmarried couple ends a committed intimate relationship, compared to the remedies available when a couple in a marriage or state-registered domestic partnership ends a relationship. Because women are more likely to be economically disadvantaged after a committed intimate relationship ends, this lack of remedies tends to have a greater impact on women, particularly Black, Indigenous, and women of color.[2] Nationally, in 2020, the poverty rate for families with children headed by unmarried mothers was 31%, compared to 15% for families with children headed by unmarried fathers. The poverty rates were even higher for Black (35%), Latinx (34%), and Native American (43%) families headed by an unmarried mother. In addition, only 30% of Washington families headed by a woman with one or more minor children received child support between 2017 to 2019.

Like most other civil cases, the vast majority of family law cases are resolved by agreement of the parties, rather than by contested trials. Unlike most other civil cases, however, contested family law cases are always decided by a judicial officer, rather than by a jury. These cases are decided under laws that give considerable discretion to the trial court, which has the authority to appoint third-party professionals such as GALs, court appointed special advocates (CASA), and parenting evaluators to make recommendations to the court regarding parenting plans. In most family law cases, neither party has legal representation. In addition, even when the parties resolve family law cases by agreement, women may face pressure to make economic concessions in order to avoid or resolve disputes over parenting plans.

All of these points are important considerations in developing recommendations to prevent gender bias in family law cases and to ensure that Washington's gender-neutral family laws are free of gender bias in their application. Recommendations include expanding funding to provide greater legal representation for both parties in family law cases, particularly in cases that involve allegations of domestic violence; evaluating which types of implicit bias and domestic violence trainings are most effective for court actors; improving data collection related to family law cases;

[2] The 2021 Gender Justice Study uses the race and ethnicity terms used in the underlying sources when citing data in order to ensure we are presenting the data accurately and in alignment with the how the individuals self-identified. When talking more broadly about the body of literature we strive to use the most respectful terms. See Section V of the full report ("2021 Gender Justice Study Terminology, Methods, and Limitations") for a more detailed explanation of terminology used throughout the report.

and providing increased remedies when unmarried partners in committed intimate relationships separate.

II. Treatment of this Topic in the 1989 Gender and Justice in the Courts Study

The 1989 Gender and Justice in the Court Task Force examined gender bias in family law proceedings primarily through its Subcommittee on the Consequences of Divorce. The Subcommittee "studied family law issues including divorce, maintenance, property division, child custody, and child support."[3] The Subcommittee summarized its work as examining "gender bias as it relates to economic and child custody decisions during divorce," with its concerns including "whether women and children were economically disadvantaged post-dissolution because of inadequate maintenance, property division, and child support awards and whether there was gender bias against fathers in child custody decisions."[4] Reflecting its focus on the economic consequences of "divorce," the 1989 Study did not examine gender bias in family law cases involving unmarried couples or parents. It also did not examine issues of bias in cases involving same-sex couples or relationships in which one or both partners were transgender or gender non-binary, nor did it consider how bias based on race, ethnicity, or other factors may intersect with gender bias.

The Subcommittee reviewed national and state data on the economic status of women and children, maintenance and child support orders, and residential time decisions. It also conducted a case file study of 700 dissolutions finalized in 11 Washington counties from September to November of 1987; however, the Subcommittee found that those files provided only limited data

[3] WASH. STATE TASK FORCE ON GENDER & JUST. IN THE CTS., GENDER AND JUSTICE IN THE COURTS 3 (1989), http://www.courts.wa.gov/subsite/gjc/documents/Gender%20and%20Justice%20in%20the%20Courts--Final%20Report,%201989.pdf [hereinafter "1989 Study"].

[4] *Id.* at 13. The 1989 Study recognized that "Washington's new Parenting Act replaces the terms 'custody' and 'visitation' with the concept of 'residential time,'" but nonetheless continued to use the term "custody" in the report because "most speakers referred to the more familiar terms used in the past." *Id.* at 67. However, the term "custody" should now generally be avoided in favor of using the term "residential time," the term used in the Revised Code of Washington. However, child support law still continues to use the term "custodial parent" to refer to a parent with whom a child resides the majority of the time and the term "noncustodial parent" to refer to the other parent.

on maintenance, child support, and residential time decisions.[5] The Subcommittee also gathered data from public hearings and from written testimony submitted to the Task Force, as well as from data from surveys sent to judges and lawyers that included 34 questions on fairness and gender bias in family law issues.[6]

The Task Force found an "existence of strong cultural traditions tending to minimize the role of women as economic producers and to minimize the role of men as fathers" such that "women may not always be treated fairly in economic decisions and men may not receive equal consideration in custody decisions."[7] These concerns existed despite the fact that "Washington's community property laws and dissolution statutes reflect a stated public policy of fair and equitable treatment" and the Subcommittee's assessment that "[w]omen's legal rights in Washington compare favorably to any other state in the country."[8] Although the Subcommittee found a lack of uniform data on the consequences of divorce in Washington, it noted the "adverse economic consequences of marital dissolutions on women and children are a matter of significant national and statewide concern," with 25% of white women and 55% of Black women falling below the poverty line after a divorce and 46.1% of children in families headed by a female being in poverty in the United States in 1987.[9]

The Subcommittee found that "a disturbing picture has emerged concerning the economic status of women and children following dissolutions in Washington."[10] The individual elements of this picture included:

- Limited maintenance awards, which were generally available only to women in divorce cases involving very long-term marriages.[11]
- Inadequate property awards that failed to take disparate earning capacities into account.[12]

[5] *Id.* at 13.
[6] Id.
[7] Id.
[8] *Id.* at 49.
[9] *Id.*
[10] *Id.* at 51.
[11] Id.
[12] Id.

- Child support orders that appeared to be inadequate.[13]
- Lack of affordable legal representation for low- and middle-income people with family law problems.[14]
- Child custody decisions that may be impacted by stereotypical thinking about traditional family roles.[15]

Ultimately, the Subcommittee found a "widespread perception" that gender stereotyping in divorce proceedings operated to frustrate the goal of equal justice under law; however, the Subcommittee also noted that "[h]ard data to validate such perceptions is not as complete as is desired."[16] For example, the Subcommittee indicated that the 700 case files it reviewed "contained scant data on the parties' incomes, employment situations, education, or property distributions."[17] However, the Subcommittee did find that of the case files it reviewed, only ten percent of divorced women received maintenance, which was lower than the national average; in addition, it found that 84% of those women who were awarded maintenance only received payments for a limited duration of time.[18] Additionally, the Subcommittee found that the child support orders it reviewed provided lower support than the national average, while the percentage of Washington fathers who had sole custody exceeded the national average.[19]

More generally, the Subcommittee found that both state and national data substantiated the existence of economic disparities by gender following divorce.[20] The Subcommittee concluded by acknowledging that while "the judicial system cannot end poverty for women and children, it can through understanding avoid contributing to it" by addressing the issues of property division, maintenance awards, custody and visitation, child support, and attorney fees in dissolution cases.[21]

[13] Id.
[14] Id.
[15] Id.
[16] Id.
[17] *Id.* at 52.
[18] *Id.* at 54.
[19] Id.
[20] *Id.* at 53.
[21] *Id.* at 55.

The Subcommittee made a number of recommendations for judges, the Washington State Legislature, the Washington State Bar Association, and the Gender and Justice Implementation Committee.[22] However, relatively few of those recommendations have been fully implemented.[23]

III. Current Status of this Topic in Washington

A. The feminization and racialization of poverty is a continuing problem

In the 1989 Study, the Subcommittee on the Economic Consequences of Divorce discussed the "feminization of poverty,"[24] a term coined by Dr. Diana Pearce,[25] who now serves on the faculty at the University of Washington School of Social Work. The 1989 Study did not delve substantially into racial or ethnic disparities in poverty levels among women, although it noted that 55% of Black women fall below the poverty line after a divorce, compared to 25% of white women.

Both the feminization and racialization of poverty continue to today, despite some improvement since 1989. Current statistics show:

- Employers in Washington pay women $0.79 cents for every dollar paid to men, lower than the national figure of $0.82.[26]
- Employers in Washington pay Black women $0.62 for every dollar paid to white men and pay Latina women $0.48 cents for every dollar paid to white men.[27] National data also shows that many Asian, Native Hawaiian, and other Pacific Islander populations experience dramatic pay inequities which are often masked when datasets combine

[22] *Id.* at 81–82. In 1994, the Gender and Justice Implementation Committee became the Washington State Supreme Court Gender and Justice Commission. *See* WASH. COURTS, GENDER AND JUSTICE COMMISSION 1999-2000 ANNUAL REPORT: HIGHLIGHTS OF A DECADE OF WORK (2000), https://www.courts.wa.gov/committee/?fa=committee.display&item_id=142&committee_id=85.
[23] *See* Appendix I to this chapter for a chart listing the recommendations and identifying which recommendations have been implemented.
[24] 1989 Study at 49.
[25] Diana M. Pearce, *The Feminization of Poverty: Women, Work, & Welfare*, 11 URB. & SOC. CHANGE REV. 28 (1978).
[26] *Washington*, NAT'L WOMEN'S LAW CTR. (2021), https://nwlc.org/state/washington/.
[27] Id.

diverse populations into one category. For example, nationally, employers paid Burmese women only $0.52 for every dollar paid to white, non-Hispanic men.[28]

- Nationally, 22% of women who divorced in the previous 12 months are below the poverty level, compared to 11% of men.[29]
- In 2020, the poverty rate for families with children headed by unmarried mothers was 31%, compared to 15% for families with children headed by unmarried fathers and five percent for families with children in married couple families.[30] The poverty rates were even higher for Black (35%), Latinx (34%), and Native American (43%) families headed by an unmarried mother.[31]
- Only 30% of Washington families headed by a woman with one or more minor children received child support between 2017 to 2019.[32]

The demographic literature suggests that both remaining unmarried and getting divorced produce a disproportionate economic strain on women in different-sex relationships that amplifies societal gender bias.[33] The Washington State Department of Health's (DOH) 2016 update to the report "Socioeconomic Position in Washington" explains the effect of remaining unmarried:

> In addition to the wage gap, being unmarried with children likely contributes to the large poverty differences between females and males in the younger age groups. Among unmarried Washington residents ages 25–34 years with children in the home, 40% (±2%) of women lived in poverty compared to 21% (±2%) of men. For residents ages 75 and older, higher poverty rates among women reflect

[28] NAT'L P'SHIP FOR WOMEN & FAMILIES, QUANTIFYING AMERICA'S GENDER WAGE GAP BY RACE/ETHNICITY (Mar. 2021), https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/quantifying-americas-gender-wage-gap.pdf.
[29] Diana B. Elliott & Tavia Simmons, U.S. Census Bureau, American Community Survey Reports: Marital Events of Americans: 2009 10 (2011), https://www2.census.gov/library/publications/2011/acs/acs-13.pdf.
[30] Amanda Fins, Nat'l Women's Law Ctr., National Snapshot: Poverty Among Women & Families, 2000 3 (2020).
[31] Id.
[32] *Female Headed Families Receiving Child Support in Washington*, ANNIE E. CASEY FOUND., KIDS COUNT DATA CTR. (2021), https://datacenter.kidscount.org/data/tables/10453-female-headed-families-receiving-child-support?loc=49&loct=2#detailed/2/49/false/1757,1687/any/20156,20157.
[33] Commentators have noted the need for more research regarding the post-divorce economic outcomes of same-sex couples and couples with at least one spouse who is transgender. Suzanne A. Kim & Edward Stein, *Gender in the Context of Same-Sex Divorce & Relationship Dissolution*, 56 FAM. CT. REV. 384, 387–88 (2018).

cumulative effects of lower life-time earnings, longer life expectancies and higher likelihood of widowhood.[34]

National studies indicate that divorce also frequently leads to serious economic impacts for women. Although women increase their participation in the labor force after divorce and show increased earnings, divorce is associated with decreased accumulation of wealth in older women and higher poverty rates. For example, 27% of women live in poverty if they divorce after age 50 and do not re-partner, compared to only 12% of men with the same relationship status.[35] For women with children who divorce, "women are more likely than men to be faced with the dual role of being a family's sole caregiver and primary breadwinner."[36] Historically, the average household income for women drops substantially after divorce, although the average drop in income post-divorce decreased from 44% during the 1980s to 23% in the 2000s.[37] Child support, maintenance, and property transfers after a divorce may help offset some of their spouse's lost earnings, acting as a safety net but one that "offered little extra cushion for cohabiting mothers in the wake of a dissolution."[38]

B. Same-sex couples now have the right to marry and divorce, as well as greater legal protections as parents

In 1989, Washington State law provided no legal recognition for same-sex couples.[39] In addition, when same-sex couples had children in 1989, the only potential way for both parents to be recognized as legal parents of the child under Washington law was a newly-developed legal procedure known as a "second-parent adoption," which commentators at the time described as

[34] WASH. STATE DEP'T OF HEALTH, SOCIOECONOMIC POSITION IN WASHINGTON (2016), https://www.doh.wa.gov/Portals/1/Documents/1500/Context-SEP2016-DU.pdf.
[35] R. Kelly Raley & Megan M. Sweeny, *Divorce, Repartnering, and Stepfamilies: A Decade of Review*, 82 J. MARRIAGE & FAM. 81 (2020).
[36] Cynthia Osborn et al., Family Structure Transitions and Changes in Maternal Resources and Well-Being, 49 DEMOGRAPHY 23 (2012).
[37] Laura M. Tach & Alicia Eads, Trends in the Economic Consequences of Marital and Cohabitation Dissolution in the United States, 52 DEMOGRAPHY 401 (2015).
[38] *Id*. at 426–27.
[39] In 1974, the Washington Court of Appeals rejected a same-sex couple's constitutional challenge to the refusal of King County to issue them a marriage license. *Singer v. Hara*, 11 Wn. App. 247, 522 P.2d 1187 (1974).

"the adoption of a child by the partner of the child's natural or legal parent."[40] Since 1989, however, the law in Washington and nationally has changed substantially to provide same-sex couples with the same right to marry and to divorce as different-sex couples. In addition, Washington law now provides multiple ways for LGBTQ+[41] parents to establish their legal rights as parents.

1. Relationship recognition

In 1998, the Washington State Legislature passed a "Defense of Marriage Act" to specifically bar same-sex couples from marrying in the state.[42] In the 2006 case of *Andersen v. King County*, the Washington Supreme Court upheld this law, holding by a five to four margin that it was constitutional under Washington law to prohibit same-sex couples from marrying.[43]

Prior to the 2006 decision in *Andersen*, other Washington appellate decisions had provided some legal rights for same-sex couples in the state. In 2004, the Washington Court of Appeals held that partners in a same-sex relationship could seek an equitable division of property after a relationship ended, a remedy that had long been available to unmarried different-sex couples in Washington.[44] And in 2005 the Washington Supreme Court recognized the common law doctrine of de facto parentage, which provided a means for both partners in a same-sex relationship to be legally recognized as parents of a child they had parented together, even though only one partner was biologically related to the child.[45] In addition, the Washington State Legislature

[40] Carrie Bashaw, *Protecting Children in Nontraditional Families: Second Parent Adoptions in Washington*, 13 U. PUGET SOUND L. REV. 321, 322 (1990) (noting that "[i]n 1988 and 1989, three Washington courts joined the courts of three other states in granting second parent adoptions").
[41] Lesbian, gay, bisexual, transgender, queer, or questioning
[42] Laws of 1998, ch. 1.
[43] *Andersen v. King County*, 158 Wn.2d 1, 138 P.3d 963 (2006) (finding Washington's Defense of Marriage Act was rationally related to the state's interests in procreation and children's well-being thus the prohibition against marriages of same-sex couples did not violate the state constitution's privileges and immunities or due process clauses). The Washington Supreme Court has since recognized that *Andersen* has been abrogated by the U.S. Supreme Court's 2015 decision in *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015). *See, e.g.*, *In re Marriage of Black*, 188 Wn.2d 114, 129, 392 P.3d 1041 (2017).
[44] *Gormley v. Robertson*, 120 Wn. App. 31, 83 P.3d 1042 (2004).
[45] *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005).

passed a law in 2006 that prohibited discrimination based on sexual orientation, gender identity, or gender expression in employment, housing, and places of public accommodation.[46]

Following the *Andersen* decision, the Washington State Legislature passed a series of domestic partnership laws, culminating in a bill passed in 2009 that provided state-registered domestic partners with nearly all the rights and obligations under state law that applied to married couples.[47] The 2009 domestic partnership law was approved by the voters in November 2009,[48] after opponents of the legislation gathered enough signatures on a referendum petition (Referendum 71) to require voter approval before the law could take effect.[49]

In 2012, same-sex couples gained the right to marry in Washington. That year, the Legislature passed a bill that amended RCW 26.04.010(1) to provide: "Marriage is a civil contract between ~~a male and female~~ two persons who have each attained the age of eighteen years, and who are otherwise capable."[50] Opponents of the bill once again gathered enough signatures on a referendum petition (Referendum 74) to require a vote of the people to approve the legislation before it could take effect. In November 2012, Washington voters approved Referendum 74 by a margin of 53.7% to 46.3%.[51] Three years later, the U.S. Supreme Court in *Obergefell v. Hodges*[52] held that it was unconstitutional for any state in the country to refuse to permit same-sex couples to marry.

Justice Mary Yu (then serving as a King County Superior Court judge) performed the first legal marriage of a same-sex couple in Washington State shortly after midnight on December 9, 2012,

[46] Laws of 2006, ch. 4.
[47] LAWS OF 2009, ch. 521; *see also* LAWS OF 2007, ch. 156 (2007 domestic partnership law, which provided a handful of legal rights to domestic partners); LAWS OF 2008, ch. 6 (2008 expansion of rights and responsibilities of domestic partners).
[48] Janet I. Tu, *Voters Approve Referendum 71*, SEATTLE TIMES (Nov. 5, 2009), https://www.seattletimes.com/seattle-news/voters-approve-referendum-71/.
[49] Under the 2012 law approved by voters as Referendum 74, same-sex registered domestic partnerships were automatically converted to marriages effective June 30, 2014 unless there were on-going proceedings for dissolution, annulment, or separation of the partnership, or unless one of the domestic partners was 62 or older as of June 30, 2014. *See* RCW 26.60.100(3).
[50] LAWS OF 2012, ch. 3, § 1.
[51] Alexa Vaughn & Brian M. Rosenthal, *A License to Marry: It's Official*, SEATTLE TIMES (Dec. 6, 2012), https://www.seattletimes.com/seattle-news/a-license-to-marry-its-official/.
[52] 576 U.S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

the first day marriages of same-sex couples were permitted in the state.[53] Thousands of same-sex couples have married in Washington since then[54] – and of course, some same-sex couples have also divorced, while others have chosen to maintain committed intimate relationships without marrying.

2. Parental rights

The Washington State Legislature has also taken substantial steps to provide greater legal protections for LGBTQ+ parents over the past ten years. In 2011, the Legislature amended Washington's version of the Uniform Parentage Act (UPA) to reduce the unnecessary use of gendered terms in the statute in order to recognize that a child may have parents of the same sex.[55] The law also provided that state-registered domestic partners would be treated the same under the law as married couples when a child was born during their relationship, including a presumption that both state-registered domestic partners are legal parents of the child when a child is born during the domestic partnership.[56] In 2018, the Legislature adopted an even more sweeping revision of the UPA that provided additional ways for parents in same-sex relationships to obtain legal recognition of their parental rights, including authorization of voluntary acknowledgements of parentage by same-sex parents, statutory adoption of the de facto parent doctrine, and legalization and regulation of compensated surrogacy agreements.[57]

Despite these advances, LGBTQ+ parents still may face concerns that their parental rights established under Washington law will not be recognized if they travel to other states or countries with less protective laws. As a result, Washington courts may still see LGBTQ+ parents seeking second-parent adoptions (also known today as "co-parent adoptions") – the first legal innovation developed in the 1980s to protect the rights of LGBTQ+ parents – because an adoption

[53] Julie Bolcer, *It's Wedding Day in Washington*, ADVOCATE (Dec. 9, 2012), https://www.advocate.com/politics/marriage-equality/2012/12/09/couples-begin-marry-washington.
[54] *See, e.g.*, Daniel DeMay, *Legal Gay Marriage Marks 5 Years in Washington*, SEATTLE P-I (Nov. 6, 2017), https://www.seattlepi.com/local/article/gay-marriage-Seattle-Washington-5-years-12336215.php#photo-4761789 (noting that more than 15,750 same-sex couples married in Washington between December 9, 2012 to the end of 2015).
[55] LAWS OF 2011, ch. 283.
[56] *See, e.g.*, *id.* at §§ 6, 8.
[57] LAWS OF 2018, ch. 6.

decree is considered to provide the greatest assurance that their parental rights will be recognized in other states or countries.[58]

C. Divorce and marriage rates have declined since 1989, while nonmarital births have increased

Between 1989 to 2017, Washington's population grew 54.6% (from 4,728,080 in 1989 to 7,310,300 in 2017).[59] However, the number of couples who marry each year in the state has changed little over the past 30 years. DOH reports that there were 45,960 marriages performed in Washington in 1991, compared to 45,456 in 2016.[60] This slight decline in the number of marriages in the state occurred despite substantial population growth; in addition, as noted above, same-sex couples have been able to marry in Washington since December 2012, which increased the number of people who were eligible to marry in the state. Of the 45,456 marriages performed in Washington in 2016, 2,091 (4.6%) were marriages of same-sex couples.[61]

The number of divorces that occur each year in Washington has declined significantly since 1989. DOH reported 29,428 divorces in the state (including at least 14,800 with children) in 1991, compared to 24,499 divorces (with at least 11,901 involving children) in 2016.[62] This is a 16.75% decrease in the number of divorces, even with a substantial increase in the population of the state over the same time period as well as the new eligibility of same-sex couples to obtain divorces.[63]

[58] *See, e.g.*, Sabra L. Katz-Wise*, Co-Parent Adoption: A Critical Protection for LGBTQ+ Families*, HARV. HEALTH BLOG (Feb. 25, 2020), https://www.health.harvard.edu/blog/co-parent-adoption-a-critical-protection-for-lgbtq-families-2020022518931 (noting that "[b]ecause adoption decrees must be honored in all US states and jurisdictions, they are the best way to ensure that the legal status of both parents is recognized").
[59] WASH. STATE OFF. OF FIN. MGMT., FORECASTING & RESEARCH DIV., 2019 POPULATION TRENDS 7 (August 2019), https://ofm.wa.gov/sites/default/files/public/dataresearch/pop/april1/ofm_april1_poptrends.pdf.
[60] *All Marriage Tables by Year*, WASH. STATE DEP'T OF HEALTH, https://www.doh.wa.gov/DataandStatisticalReports/HealthStatistics/Marriage/MarriageTablesbyYear.
[61] *Marriage Tables by Topic Years 1991-2016*, WASH. STATE DEP'T OF HEALTH, https://www.doh.wa.gov/DataandStatisticalReports/HealthStatistics/Marriage/MarriageTablesbyTopic.
[62] *All Divorce Tables by Year*, WASH. STATE DEP'T OF HEALTH, https://www.doh.wa.gov/DataandStatisticalReports/HealthStatistics/Divorce/DivorceTablesbyYear.
[63] The Washington State Department of Health's website does not provide figures on the number of same-sex couples who obtained divorces in 2016.

The number of children born each year in Washington State has increased since 1989. Overall, the number of children born in Washington increased from 79,962 in 1991 to 90,489 in 2016.[64]

Washington's decline in divorce and increase in the number of births corresponds to the national trend of declining rates of both divorce and marriage, along with an increase in nonmarital births. The Centers for Disease Control and Prevention reported that 39.6% of all U.S. births in 2018 were to unmarried women, down from a peak of 41% in 2009.[65] The 2018 nonmarital birth rates were 11.75% for Asian women, 28.2% for non-Hispanic white women, 51.8% for Hispanic-origin women, 68.2% for American Indian-Alaskan Native women, and 69.4% for non-Hispanic Black women.[66] In 1990, the percentage of nonmarital births was 28%.[67] It is important to note that datasets that lack granularity, such as those that combine all Asian, Native Hawaiian, and other Pacific Islander populations, often mask differences within those diverse populations. It is not uncommon for datasets to completely exclude data for Native Hawaiian and other Pacific Islanders or people who identify with more than one race, which is a form of erasure in the data that prevents us from understanding the full picture.

The Congressional Research Service explains this trend in nonmarital births and some of the policy implications that affect women:

> In the United States, nonmarital births are widespread, touching families of varying income, class, race, ethnicity, and geographic area. Many analysts attribute this to changed attitudes over the past few decades about fertility and marriage. They find that many adult women and teenage girls no longer feel obliged to marry before, or as a consequence of, having children. With respect to men, it appears that one result of the so-called sexual revolution is that many men now believe that women can and should control their fertility via contraception or abortion and have become less willing to marry the women they impregnate.

[64] *All Birth Tables by Year*, WASH. STATE DEP'T OF HEALTH, https://www.doh.wa.gov/DataandStatisticalReports/HealthStatistics/Birth/BirthTablesbyYear.
[65] Joyce A. Martin et al., *Births: Final Data for 2018*, 68 NAT'L VITAL STAT. REPS., no. 13, 2019, at 1, 5, https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_13-508.pdf.
[66] Id.
[67] Carmen Solomon-Fears, Cong. Rsch. Serv., R43667, Nonmarital Birth: An Overview 13 (2014), https://fas.org/sgp/crs/misc/R43667.pdf.

> Factors that are associated with the historically high levels of nonmarital childbearing include an increase in the median age of first marriage (i.e., marriage postponement), decreased childbearing of married couples, increased marital dissolution, an increase in the number of cohabiting couples, increased sexual activity outside of marriage, participation in risky behaviors that often lead to sex, improper use of contraceptive methods, and lack of marriageable partners. The data indicate that for all age groups, a growing share of women are having nonmarital births. Women ages 20 through 24 currently have the largest share of nonmarital births.
>
> Although there has been a rise in nonmarital births, it does not mean that there has been a subsequent rise in mother-only families. Instead, it reflects the rise in the number of couples who are in cohabiting relationships; in fact, recent data indicate that more than half of nonmarital births are to cohabiting parents. Because the number of women living in a cohabiting situation has increased substantially over the last several decades, many children start off in households in which both of their biological parents reside. Nonetheless, cohabiting family situations are disrupted or dissolved much more frequently than married-couple families. Moreover, the family complexity that sometime starts with a nonmarital birth may require different public policy strategies than those used in the past for mother-only families.[68]

Nonmarital births can amplify poverty for women and children. At the national level in 2012, 45.5% of never-married mothers with minor children were below the poverty line, with 23.9% with a family income below $10,000.[69]

Although Washington State does not recognize common-law marriages, the Washington Supreme Court has recognized legal rights that arise in the context of "committed intimate relationships" (formerly referred to as "meretricious relationships") between unmarried couples,

[68] *Id.* (quotation is from unpaginated "Summary" section of report).
[69] *Id.* at 15.

which is defined as a "stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist."[70] Duration of the relationship is a "significant factor" in determining the existence of a committed intimate relationship, but it is not determinative by itself.[71] In 1995, the Court held that the income and property acquired during a committed intimate relationship is subject to equitable division by courts, analogous to community property for married couple.[72]

However, in contrast to the statutes governing divorce in Washington, courts have not permitted separate property (i.e., property acquired by a partner before a relationship began) to be distributed from one partner to another in an action brought under the committed intimate relationship doctrine.[73] In addition, neither maintenance nor attorney fees may be awarded to parties in cases brought pursuant to the committed intimate relationship doctrine, even though such relief is available in divorce cases in Washington.[74] This disparity in the legal remedies exists despite research indicating that "the dissolution of cohabiting unions has an impact upon the economic welfare of women and children comparable to that of divorce, leaving a substantial number of former cohabitants in poverty," with a "particularly severe impact" on Black and Hispanic women.[75]

[70] *In re Marriage of Lindsey*, 101 Wn.2d 299, 678 P.2d 328 (1984). In 2007, the Washington Supreme Court began using the term "committed intimate relationship" instead of "meretricious relationship." *See Olver v. Fowler*, 161 Wn.2d 655, 658 n.1, 168 P.3d 348 (2007) ("While this court has previously referred to such relationships as 'meretricious,' we, like the Court of Appeals, recognize the term's negative connotation. Accordingly, we too substitute the term 'committed intimate relationship,' which accurately describes the status of the parties and is less derogatory.") (internal citations omitted).
[71] *Connell v. Francisco*, 127 Wn.2d 339, 346, 898 P.2d 831 (1995).
[72] Id.
[73] *Id.* at 350 ("We conclude a trial court may not distribute property acquired by each party prior to the relationship at the termination of a [committed intimate] relationship."); *see also Soltero v. Wimer*, 159 Wn.2d 428, 150 P.3d 552 (2007).
[74] *W. Cmty. Bank v. Helmer*, 48 Wn. App. 694, 699, 740 P.3d 359 (1987) ("Without a specific holding from our Supreme Court that RCW 26.09.140 applies to a [committed intimate] relationship, we conclude that it is for the legislature to change or amend the statute which now grants attorney fees only where there is or has been a marital relationship between the parties."); *Rowe v. Rosenwald*, No. 74659-1, 2017 WL 2242301, at *4 (Wash. Ct. App. May 22, 2017) (noting that no court has applied statutes authorizing maintenance or attorney's fees in dissolutions of marriage to dissolutions of committed intimate relationships).
[75] Cynthia Grant Bowman, Social Science & Legal Policy: The Case of Heterosexual Cohabitation, 9 J.L. & FAM. STUD. 1, 26 (2007).

Despite the fact that the committed intimate relationship doctrine has been recognized in Washington for many years, very few petitions to divide property from committed intimate relationships are filed each year in the state. In 2019, for instance, only 159 committed intimate relationship petitions were filed in the state, compared to more than 20,000 dissolution petitions and 1,147 petitions for legal separation.[76] Parties may find it difficult to bring an action under the committed intimate relationship doctrine for several reasons. First, as noted above, a court may not award attorney's fees to parties in such actions. Second, the committed intimate relationship doctrine is based on case law rather than statute, making it more complex for unrepresented parties to understand their legal rights. In addition, Washington courts have not developed mandatory pattern forms for parties to use in such cases.

D. Maintenance law in Washington has changed little since 1989

The 1989 Subcommittee on the Consequences of Divorce examined the economic inequalities that occur in dissolution cases. From its examination of dissolution case files from 11 counties, the Subcommittee found that women were awarded maintenance in only ten percent of those cases, compared to a national average of 15%.[77] Maintenance tended to range from zero to five years, with a mean duration of 2.6 years in the 700 cases analyzed in the 1989 Study. The Subcommittee found that this was unjust, arguing that "the ability of one or both spouses to earn income, developed through the course of the marriage, often represents one of the family's most important economic assets – one that is not easily equalized by property division….the awards of property and maintenance ought to be recognized as a proper tool to address the imbalance."[78]

Careful study and analysis of maintenance awards in Washington State, or nationally, has been under-examined by legal and economic scholars and the data is difficult to collect, a problem noted in the 1989 Study. More study is needed, especially regarding whether maintenance is equitably distributed in cases across racial and economic subpopulations.

[76] WASH. CTS., SUPERIOR COURT 2019 ANNUAL CASELOAD REPORT 118 (2019), https://www.courts.wa.gov/caseload/content/archive/superior/Annual/2019.pdf.
[77] 1989 Report at 54.
[78] *Id.* at 55.

The Washington State Legislature implemented one recommendation in the 1989 Study regarding maintenance. The 1989 Study recommended that the Legislature "[a]mend RCW 26.18.010 *et seq.* (or ch. 26.18 RCW) to authorize mandatory wage assignments for maintenance payments to the same extent as is currently provided for child support obligations."[79] In 1993, the Legislature took this step.[80] The 1993 legislation also amended RCW 26.18.010 to add the underscored language to this provision: "The Legislature finds that there is an urgent need for vigorous enforcement of child support <u>and maintenance obligations</u>, and that stronger and more efficient statutory remedies need to be established to supplement and complement" the statutory remedies.[81] In addition, the 1993 bill explicitly provided that courts may use their contempt authority to enforce maintenance orders.[82]

Otherwise, the Legislature has made few other changes to the statutes regarding maintenance since the 1989 Study. Indeed, the only change that the Legislature has made since 1989 to RCW 26.09.090 (the statute that outlines the factors courts must consider in deciding whether to order maintenance) has been an amendment adopted in 2008 to make state-registered domestic partners eligible for maintenance.[83] Otherwise, RCW 26.09.090 continues to provide, as it did in 1989, that the factors that courts must consider in determining whether to award maintenance are:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to that party, and their ability to meet their needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to their skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage or domestic partnership;

[79] *Id.* at 81.
[80] LAWS OF 1993, ch. 426, § 7 (amending RCW 26.18.090).
[81] LAWS OF 1993, ch. 426, § 1 (amending RCW 26.18.010).
[82] LAWS OF 1993, ch. 426, § 5 (amending RCW 26.18.050).
[83] LAWS OF 2008, ch. 6, §1012 (amending RCW 26.09.090).

(d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet their needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

The statute also continues to provide, as it did in 1989, that courts have wide discretion in determining whether to order maintenance (i.e., "the court may grant a maintenance order for either spouse or domestic partner," which "shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct").[84]

Several Washington cases since 1989 illustrate the basic legal issues that currently govern property distribution and maintenance. The court in *In re Marriage of Estes*[85] noted that the trial judge may consider marital property division when determining maintenance with the goal of equalizing the parties' standard of living for an appropriate period of time. The court in *In re Marriage of Anthony*[86] notes that "an award of maintenance is a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time" and that "ultimately, the court's main concern must be the parties' economic situations post dissolution," but the court must still take into account the ability of one party to pay maintenance to the other. In a high asset dissolution in *In re Marriage of Wright*,[87] the court applied this standard noting that the only limitation is that the "award must be just."

Other decisions since 1989 have emphasized that the purpose of maintenance is to support a spouse until the spouse is able to become self-supporting. In *In re Marriage of Luckey*,[88] a 61-year-old plastic surgeon and his 51 year-old wife who was a nurse in his practice were getting divorced. She had worked without compensation except for reimbursement of her expenses in the family business. The court applied the analytical factors of "age, physical and emotional

[84] RCW 26.09.090(1).
[85] 84 Wn. App. 586, 929 P.2d 500 (1997).
[86] 9 Wn. App. 2d 555, 564, 446 P.3d 635 (2019).
[87] 179 Wn. App. 257, 319 P.3d 4 (2013).
[88] 73 Wn. App. 201, 868 P.2d 189 (1994).

condition, and financial obligations of the spouse seeking maintenance; the standard of living during the marriage; the duration of the marriage; and the time needed by the spouse seeking maintenance to acquire education necessary to obtain employment." It concluded that because the husband was 61 and approaching retirement and experiencing diminished earning capacity and the wife received child support and unequal favor in the property division and she would be able to find full-time work soon, maintenance was not warranted beyond the first year of their separation.

The most recent change that affects maintenance law in Washington State is the federal Tax Cuts and Jobs Act of 2017,[89] which provided that for maintenance orders entered or modified after December 31, 2018, maintenance payments are not tax deductible by the payor and are not taxable income for the payee. Removing the federal tax implications from Washington maintenance orders and agreements should simplify negotiations in many cases.

E. Property distribution law in Washington has changed little since 1989

Other than the inclusion of state-registered domestic partners in 2008, the statute that authorizes courts to distribute property in a dissolution (RCW 26.09.080) has not changed since the 1989 Study.[90] As it did in 1989, this statute today continues to instruct courts to distribute property and liabilities "without regard to misconduct…as shall appear just and equitable after considering all relevant factors."[91] The factors include the nature and extent of both community and separate property,[92] the duration of the marriage or domestic partnership, and the economic circumstances of each spouse or domestic partner.[93] The statute specifically directs trial courts to consider "the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time."[94]

[89] Pub. L. No. 115-97, 131 Stat. 2054.
[90] LAWS OF 2008, ch. 6, §1011 (amending RCW 26.09.080).
[91] RCW 26.09.080.
[92] *In re Marriage of Kaplin*, 4 Wn. App. 2d 466, 421 P.3d 1046 (2018) (under appropriate circumstances in a marital dissolution case, the trial court need not divide community property equally, and it need not award separate property to its owner).
[93] RCW 26.09.080(1)–(4).
[94] RCW 26.09.080(4).

The case law interpreting and applying RCW 26.09.080 since 1989 is complex and often fact-driven, making it difficult to generalize. Future earning potential is not an asset to be divided at dissolution but can be considered when determining the just and equitable division of property and award of maintenance.[95] Equity rather than economic equality in dissolution property distribution is the goal. Washington's case law balances this "just and equitable" division with the legislative prohibition of consideration of "marital misconduct." Thus squandering of assets by one spouse,[96] concealment of assets,[97] or the sole generation of tax liabilities where the spouse has "a long history of not paying taxes"[98] may be considered by the trial court, but immoral or physically abusive conduct may not, even a finding that one spouse sexually assaulted and molested the couple's children.[99]

F. There have been significant changes in the law and in the data for parenting plans in Washington since 1989

1. Washington's Parenting Act

In general, parenting plans in Washington are governed by chapter 26.09 RCW, a section of the code that is known as the Parenting Act of 1987. This law was a major revision of prior Washington law and introduced the concept of "parenting plans" in Washington State, largely replacing previously used terms such as "custody" and "visitation." As the Washington Supreme Court has explained:

> The legislature invented the "parenting plan" in 1987 when it adopted the parenting act. The parenting act of 1987 fundamentally changed the legal procedures and framework addressing the parent-child relationship in Washington. The legislature explained the policy underlying the act: "The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent

[95] *In re Marriage of Leland*, 69 Wn. App. 57, 847 P.2d 518 (1993).
[96] *In re Marriage of Mathews*, 70 Wn. App. 116, 853 P.2d 462 (1993).
[97] *In re Marriage of Wallace*, 111 Wn. App. 697, 45 P.3d 1131 (2002).
[98] *In re Marriage of Steadman*, 63 Wn. App. 523, 527–28, 821 P.2d 59 (1991).
[99] *Urbana v. Urbana*, 147 Wn. App. 1, 195 P.3d 959 (2008) (20/80 division of community property in favor of wife was abuse of discretion where trial court took husband's sexual assault and molestation of wife's children into account).

> should be fostered unless inconsistent with the child's best interests." To realize its policy objective, the legislature significantly changed the legal terminology applicable to parenting. Previous statutes couched much of the parent-child relationship in terms of which parent had "custody" and which parent was allowed "visitation." As the drafting committee on the parenting act noted, these terms tended to treat children as a prize awarded to one parent and denied the other.[100]

The Parenting Act of 1987, as amended in 1989, provided that courts must consider the following seven factors when establishing a parenting plan, with the requirement that the first factor must be given the greatest weight:

(i) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;

(ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;

(iii) Each parent's past and potential for future performance of parenting functions;

(iv) The emotional needs and developmental level of the child;

(v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with their physical surroundings, school, or other significant activities;

(vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to their residential schedule; and

(vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.[101]

[100] *State v. Veliz*, 176 Wn.2d 849, 855, 298 P.3d 75 (2013) (internal citations omitted). *See also In re Marriage of Kovacs*, 121 Wn.2d 795, 800–01, 854 P.2d 629 (1993) (noting "Washington's Parenting Act represents a unique legislative attempt to reduce the conflict between parents who are in the throes of a marriage dissolution by focusing on continued 'parenting' responsibilities, rather than on winning custody/visitation battles. The Act replaced the terms 'custody' and 'visitation' with the concepts of 'parenting plans' and 'parental functions.'") (internal citations omitted).

[101] LAWS OF 1989, ch. 375, §10(3)(b) (codified at RCW 26.09.187).

The Parenting Act of 1987 also provided that a parent's residential time with a child must be limited for several different reasons, including "a history of acts of domestic violence" by a parent, unless the court "expressly finds that the probability that the conduct will recur is so remote that it would not be in the child's best interests to apply the limitation or unless it is shown not to have had an impact on the child."[102]

In 1993, the Washington Supreme Court interpreted the Parenting Act of 1987 for the first time in the case of *In re Marriage of Kovacs,* a dissolution case where a mother who had been the primary caregiver for the couple's children challenged the trial court's decision to make the father the children's primary residential parent.[103] The Court rejected the mother's argument that the Parenting Act of 1987 created a presumption that a child's primary caregiver should be the child's primary residential parent after a couple divorced. After tracing the legislative history and language of the Parenting Act at length, the Court held that it was "clear to us from the legislative history that the Legislature not only did not intend to create any presumption in favor of the primary caregiver but, to the contrary, intended to reject any such presumption."[104] The Court further held that "[i]n establishing the seven statutory factors set forth in RCW 26.09.187(3)(a), the Legislature has provided the trial court guidance, along with the flexibility it needs, to make these difficult decisions."[105] Consistent with prior case law, the Court also held that "[a] trial court's ruling dealing with the placement of children is reviewed for abuse of discretion," which occurs when a trial court's decision is "manifestly unreasonable or based on untenable grounds."[106]

In the late 1990s, the Washington State Supreme Court Gender and Justice Commission contracted with researcher Diane N. Lye to "conduct a study of the Washington State Parenting Act," which had the "overarching goal . . . to gather information about how parents seeking a dissolution of marriage make arrangements for parenting, and how those arrangements operate

[102] LAWS OF 1987, ch. 460, §10(2) (codified at RCW 26.09.191).
[103] *Kovacs*, 121 Wn.2d at 800.
[104] *Id*. at 809.
[105] Id.
[106] *Id*. at 801.

after the marriage is dissolved."[107] This study, which was more than 200 pages, drew upon information gathered from ten focus groups with parents with a court-approved parenting plan; interviews with 47 professionals with experience in working with the Parenting Act (including judges, court commissioners, attorneys, family law facilitators, mental health professionals, parenting evaluators, guardians ad litem, and activists); a "standardized analysis of the contents of a representative sample of nearly 400 recently approved final parenting plans" from eight counties; and a critical review of over 100 peer-reviewed articles and monographs on post-divorce parenting and child well-being.[108] The author indicated that the study's three most important findings were: (1) the Parenting Act works well for most Washington State families; (2) there is widespread, strong support for the policy goals of the Parenting Act; and (3) the provisions of the Parenting Act are consistent with the findings of scholarly research about post-divorce parenting and child well-being.[109]

The 1999 Parenting Act Study was not intended to assess gender bias in the application of the Parenting Act. However, the author noted that "[a]ll of the male focus group participants and many of the female participants believe that the civil justice system is biased in favor of mothers so that mothers are more likely to become residential parents."[110] But the author also indicated:

> This study was not designed to assess the extent of gender bias in the system, and thus we do not know whether this perception is accurate or not. To be sure, mothers are the primary residential parent in 75% of first parenting plans. But mothers and fathers are almost equally likely to be primary residential parent in modified parenting plans. Furthermore, the prevalence of mothers as primary residential parents does not by itself provide evidence of gender bias. The high prevalence of mothers as primary residential parents may reflect other factors such as the parents' preferences.

[107] DIANE L. NYE, WASHINGTON STATE PARENTING PLAN STUDY i (1999), https://www.courts.wa.gov/newsinfo/content/parentingAct/parentingplanstudy.pdf.
[108] *Id.* at i–iii.
[109] *Id.* at i.
[110] *Id.* at 1-21.

> Even so, the fact that most parents believe the civil justice system to be stacked in favor of mothers is worthy of note and attention. There may be widespread, systematic bias. Or the belief in bias could be based on parents hearing about a few isolated events, the behavior of a few individuals in the system, or events that happened in the past. Even when fathers had successfully become the primary residential parents, they still viewed the system as biased.[111]

In addition, the author also observed that "[d]omestic violence survivors . . . point out that there are countervailing biases that favor men and that abusive men are often able to exploit the civil justice system to continue their abuse."[112]

Among providers in the family law system (such as attorneys, guardians ad litem, parenting evaluators, and activists), the author noted that "[m]any providers agree that there is a gender bias in favor of mothers in the civil justice system.[113] Providers who held such views blamed numerous factors, including gender bias by judges, reluctance of attorneys to represent men, larger social patterns of parenting, and the language of the Parenting Act that gave "emphasis on who gave primary care in the past."[114] At the same time, the author also noted that "[p]roviders who work with domestic violence survivors, like the survivors themselves . . . tend to point to other more subtle patterns of gender bias in the civil justice system that work against women."[115] Such providers expressed views that "courts are much less likely to believe women than men" and that "in general the courts take women's problems much more seriously than men's."[116] In general, the author also noted that "providers tend to view gender bias in favor of mothers as far less automatic than do parents and as far weaker than it was before the Parenting Act."[117]

[111] Id.
[112] *Id.* at 1-22.
[113] *Id.* at 2-16.
[114] *Id.* at 2-16 to 2-17.
[115] *Id.* at 2-17.
[116] *Id.* (quoting an attorney: "I think in general the courts take women's problems much more seriously than men's. If a mother drinks or uses drugs it's a big deal. But they don't look at why she drinks—at the whole picture. That maybe that's how she copes with being abused and battered.")
[117] *Id.*

2. Major amendments to the Parenting Act Since 1989

The Parenting Act has undergone a number of changes since 1989. In particular, two bills made substantial revisions to the Parenting Act.

First, in 2000, the Washington State Legislature passed the Child Relocation Act, RCW 26.09.405 – 560, to establish rules when a person who is a child's primary residential parent wishes to relocate with the child. The Child Relocation Act establishes a rebuttable presumption that a primary residential parent will be permitted to relocate with the child; however, the presumption in favor of relocation may be rebutted by a parent opposing relocation after the court considers 11 non-exclusive factors.[118] The bill also included provisions intended to help ensure that domestic violence survivors may safely relocate with their children.[119]

In 2007, the Legislature passed another bill that made a number of important changes to the Parenting Act.[120] Perhaps most significantly, this bill amended the factors that courts must consider in establishing a parenting plan. As noted above, the original Parenting Act of 1987 provided that the factor that must be given the greatest weight was "[t]he relative strength, nature, and stability of the child's relationship with each parent, <u>including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child</u>."[121] The 2007 bill removed the underscored language from this factor, and moved it further down the list of factors that courts must consider; this change had the effect of continuing to require courts to consider whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child, but no longer making this consideration one that must be given the "greatest weight" in establishing a parenting plan.[122]

Some of the other provisions of the 2007 bill included:

- Providing that courts may order that a child frequently alternate their residence between the households of the parents for brief and substantially equal periods of time "if such

[118] RCW 26.09.520.
[119] RCW 26.09.460.
[120] LAWS OF 2007, ch. 496.
[121] LAWS OF 1987, ch. 460, §9(3)(a)(i).
[122] LAWS OF 2007, ch. 496, §603(3)(a).

provision is in the child's best interests," taking geographic proximity into account.[123] Previously, the Parenting Act had only permitted such a provision if the parents agreed to it, or if they had "a satisfactory history of cooperation and shared performance of parenting functions."[124] This provision had the effect of potentially expanding the number of cases where courts could order a residential schedule in which both parents had substantially equal residential time with a child.

- Providing that "[i]n establishing a permanent parenting plan, the court may consider the cultural heritage and religious beliefs of a child."[125]
- Expressing the Legislature's view that "[m]ediation is generally inappropriate in cases involving domestic violence and child abuse."[126]
- Requesting that the Supreme Court convene a task force to establish statewide protocols for dissolution cases.[127]
- Required parties to a divorce to file a "residential time summary report" on a form developed by the Washington Administrative Office of the Courts (AOC). This form was required at a minimum to include: a breakdown of how much time the child spends with each parent; whether each parent had legal representation; whether domestic violence, child abuse, chemical dependency, or mental health issues existed; and whether the case was resolved by agreement or was contested. The AOC was also required to provide an annual report on the compiled information from the residential time summary reports.[128]

3. Residential time summary report data

As noted immediately above, the 2007 amendments to the Parenting Act included a requirement for parties in divorce cases involving minor children to file "residential time summary reports." This requirement had the potential to provide information about changing trends in allocation of

[123] RCW 26.09.187(3)(b).
[124] LAWS OF 2007, ch. 496, 603(3)(b).
[125] RCW 26.09.184(3).
[126] RCW 26.09.016.
[127] LAWS OF 2007, ch. 496, § 306. The Task Force issued a final 79-page report on December 1, 2008. *See* WASH. STATE SUP. CT. DISSOLUTION TASK FORCE, FINAL REPORT (2008), https://www.courts.wa.gov/newsinfo/content/pdf/SupremeCourtDissolutionTaskForceReport_December2008.pdf
[128] LAWS OF 2007, ch. 496, §§ 701–02.

residential time in parenting plans. It also had the potential to provide information about how many family law cases are resolved by agreement or default compared to by trial, and what difference having legal representation may have in family law case outcomes.

However, there has consistently been very low compliance with the requirement that parties must submit residential time summary reports in divorce cases, which in turn has limited the reliability of the data collected from those who do comply with the requirement. Perhaps as a result, the Legislature relieved AOC of the duty of compiling annual reports in 2017.[129]

For example, the most recent "Residential Time Summary Report" published by the Washington State Center for Court Research, which covered the year 2016, included the following cautionary note titled "Limitations of the Data":

> It is known that the amount of RTSR [Residential Time Summary Report] filings is below the number of cases of dissolutions with children filed in Washington Superior Courts and that some information contained with the individual filings may be inconsistent. There were 11,726 dissolutions with children filed in Washington State during the 2016 calendar year, and every dissolution filed should be accompanied by a completed RTSR form, but no more than 31.2% of the expected number were processed. Analysis of the RTSR data at the court level shows that compliance with the request to complete and submit the RTSR form varied from court to court, with rates of RTSR forms per case ranging from a high of .769 per case filed in Lincoln County to a low of .000 per case in Columbia, Garfield, and Okanogan Counties during 2016. There is some possible bias in the data presented here, based upon which individuals actually submitted the RTSR. Perhaps, a more accurate assessment of residential time in Washington State would emerge from record review based on a sample of cases, which would likely result in a lower total cost in addition to a more accurate view of what happens in dissolution cases with children.[130]

[129] LAWS OF 2017, ch. 183, § 3.
[130] WASH. STATE CTR. FOR CT. RSCH., RESIDENTIAL TIME SUMMARY REPORT 3 (2016), http://www.courts.wa.gov/subsite/wsccr/docs/ResidentialTimeSummaryReport2016.pdf.

With that cautionary note in mind, it nonetheless appears from the most recent Residential Time Summary Report that residential time decisions in Washington parenting plans have changed significantly since 1989, particularly with respect to the amount of residential time that fathers receive in cases involving different-sex parents.

To provide historical context: In the 1989 Study, the Subcommittee on the Consequences of Divorce surveyed case files for 700 dissolution cases in 11 Washington counties.[131] The Subcommittee's review of these cases found that mothers "received the residential care" of children in 79% of the cases; fathers "received the residential care" in 18% of the cases; and "joint residential care" was provided in only three percent of the cases.[132]

By contrast, information from the 2016 Residential Time Summary Report indicates a substantial increase in the residential time of fathers in cases involving different-sex parents, particularly in terms of the number of cases where both parents have equal (i.e., "joint") residential time with children. The 2016 report indicated that both parents have equal amounts of residential time in 20.9% of cases, up from just three percent in the survey from the 1989 Study.[133] In 64% of the cases, mothers received more residential time, while fathers received the majority of residential time in 15.1% of cases.[134]

The disparity in residential time between women and men in parenting plans may result in part from the requirement in the Parenting Act for courts to consider whether one parent has "taken greater responsibility for performing parenting functions relating to the daily needs of the child" when establishing a parenting plan.[135] Studies show that, on average, women continue to spend more time than men on child care duties.[136] In families with children under age six, women spend

[131] 1989 Study at 67.
[132] Although not entirely clear, it would appear that the Subcommittee's use of the term "received the residential care" was related to which parent was the "primary residential parent" (i.e., the parent with more residential time with the child).
[133] WASH. STATE CTR. FOR CT. RSCH., *supra* note 130, at 3.
[134] Id.
[135] RCW 29.09.187(3)(a)(iii).
[136] U.S. DEP'T OF LABOR, BUREAU OF LABOR STAT., AMERICAN TIME USE SURVEY—2019 RESULTS 9 (Table 1) (2020), https://www.bls.gov/news.release/pdf/atus.pdf#:~:text=AMERICAN%20TIME%20USE%20SURVEY%20%E2%80%94%202019%20RESULTS%20In,the%20U.S.%20Bureau%20of%20Labor%20Statistics%20reported%20today

over twice as much time as men providing childcare.[137] The trend of women shouldering more childcare exists even among dual-income couples.[138] See "Chapter 4: The Impact of Gender on Courtroom Participation and Legal Community Acceptance" for more data on the distribution of childcare and domestic responsibilities by gender.

The 2016 Residential Time Summary Report also indicated that 86.9% of the cases included in the report had been resolved by agreement of the parties, 10.7% of the cases had judgments entered by default, and only 2.4% of cases were decided after a contested hearing or trial.[139] This statistic underscores a point from the 1989 Study, in which only a very small fraction of divorce case files reviewed in a random sample indicated that a case was ultimately resolved through trial, rather than by agreement or default.[140] As a result, it appears that only a very small fraction of dissolution cases in Washington State are ultimately decided by judicial officers through contested trials.

4. Abusive litigation in family law cases

Another key ongoing issue in family law cases involving children is the use of litigation as a tool for abuse by domestic violence perpetrators. As one commentator from the Seattle Journal for Social Justice noted in 2011, "if a batterer wants to, he can turn dissolution, child support, custody, and visitation proceedings into a nightmare, he can turn the courts into a new forum that allows his abusive behavior to continue."[141] The 2015 Washington State Domestic Violence Manual for Judges includes an appendix that analyzes the issue of abusive litigation against domestic violence survivors in depth.[142] It notes that courts have many tools available to prevent abusers from misusing family law cases against survivors, and suggests a number of steps that courts can take to curb abusive litigation while still upholding the right of access to the courts.

[137] *Id.* at 3, 20 (Table 9).
[138] Jill E. Yavorsky et al., *The Production of Inequality: The Gender Division of Labor Across the Transition to Parenthood*, 77 J. MARRIAGE & FAMILY 662 (2015).
[139] WASH. STATE CTR. FOR CT. RSCH., *supra* note 130, at 6.
[140] 1989 Study at 67 (noting that a maximum of five of the 700 dissolution cases studied were contested cases).
[141] Mary Przekop, One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of Their Victims Through the Courts, 9 SEATTLE J. SOC. JUST. 1053, 1055 (2011).
[142] Legal Voice Violence Against Women Workgroup, Wash. State. Admin. Off. of the Cts., 2015 DV Manual for Judges, Appendix H, Abusive Litigation and Domestic Violence Survivors (2015), https://www.courts.wa.gov/content/manuals/domViol/appendixH.pdf.

The Washington Legislation also responded to this problem by passing a bill in the 2020 legislative session to provide additional tools to curb abusive litigation against domestic violence survivors.[143]

G. Child support laws have changed at both the state and federal level since 1989

The 1989 Study indicated that "[i]nadequate child support orders and lack of enforcement of those orders reinforce the cycle of poverty for women and children after divorce."[144] The Subcommittee on the Economic Consequences of Divorce highlighted the following findings regarding child support:

- Although data was incomplete, it appeared the average child support in Washington ($198 per month) was below the national average of $218 per month.[145]
- Enforcement of child support orders was a continuing problem. The report noted that 94% of lawyers surveyed indicated that "judges never or only occasionally jail respondents for failure to pay child support."[146]
- An area of "particular concern" was "the fact that mothers barter child support in order to avoid child custody disputes." Almost half of judges also noted situations where mothers conceded property in order to avoid child custody disputes.[147]

Notably, the 1989 Study was issued shortly after Washington had adopted a statewide child support schedule, which was "presumptive, may not be varied by private agreement alone, and is subject in all cases to court review."[148] The new schedule also provided courts with discretion to depart from the child support schedule (known as a "deviation"[149]) if they make findings as to the reason.[150]

[143] LAWS OF 2020, ch. 311.
[144] 1989 Study at 16.
[145] Id.
[146] Id.
[147] Id.
[148] *Id.* at 73.
[149] RCW 26.19.011(4).
[150] 1989 Report at 73.

The Washington State Legislature adopted this new child support schedule in 1988[151] in response to a law passed by Congress in 1984 that required states to adopt child support guidelines.[152] Prior to the adoption of this law, Washington did not have uniform statewide child support guidelines, although many counties had adopted guidelines approved by the Washington Superior Court Judges Association.[153] In adopting the child support schedule, the Legislature expressed its intent that "child support obligation should be equitably apportioned between the parents."[154] The Legislature found that adopting a statewide child support schedule would benefit children and parents by: "(1) Increasing the adequacy of child support orders through the use of economic data as the basis for establishing the child support schedule; (2) Increasing the equity of child support orders by providing for comparable orders in cases with similar circumstances; and (3) Reducing the adversarial nature of the proceedings by increasing voluntary settlements as a result of the greater predictability achieved by a uniform statewide child support schedule."[155]

Washington's child support statutes are facially gender neutral. Generally speaking, a parent's presumptive child support obligation under Washington law is based on their percentage of the parents' combined net incomes; in cases where the court finds that a parent is voluntarily unemployed or underemployed or where a parent does not provide records of their actual earnings, the court imputes income to the parent.[156] Under Washington law, a parent with whom a child resides the majority of the time (referred to as the "custodial parent") presumptively satisfies their child support obligation by providing for the child in their home, and the other parent (referred to as the "noncustodial parent" or the "obligor") makes a child support transfer payment.[157]

[151] The child support schedule is codified at RCW ch. 26.19.
[152] Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305, codified at 42 U.S.C. § 667 (1988).
[153] Wash. Child Support Schedule Workgroup, Recommendations to the Washington State Legislature for Washington's Child Support Schedule Pursuant to RCW 26.19.025 8 (2019).
[154] RCW 26.19.001.
[155] Id.
[156] RCW 26.19.071.
[157] *In re Marriage of Holmes*, 128 Wn. App. 727, 739, 117 P.3d 370 (2005).

As noted earlier, women on average remain more likely than men to have the majority of residential time under parenting plans, and also are more likely to have lower incomes than men. As a result, it is more common for fathers to be the obligors for child support and mothers to be the recipient of child support transfer payments in cases involving different-sex parents. At the national level in 2017, the U.S. Census Bureau reported that mothers are custodial parents for child support purposes in approximately 80% of cases.[158] Similarly, a random sample of child support orders entered in Washington State between 2014-2018 indicated that fathers are the noncustodial parent in 78.6% of child support orders.[159]

Washington's child support laws were amended fairly often in the years immediately following the adoption of the new child support schedule in 1988, but have changed less frequently in recent years. The Legislature has periodically made changes to child support laws in response to recommendations by a gubernatorially-appointed workgroup that is required by statute to convene every four years to review Washington's child support guidelines and schedule.[160] This Child Support Schedule Workgroup last convened in 2019, and will convene again in 2023.[161]

The Legislature recently made changes to the child support statutes to help ensure that child support orders more accurately reflect an obligor's ability to pay. In 2020, the Legislature modified the factors that courts must consider in determining when a parent is voluntarily unemployed or underemployed for purposes of imputing income to a parent for child support purposes.[162] The new factors added to the statute include, but are not limited to, the parent's job skills, educational attainment, literacy, and criminal record, as well as the availability of employers willing to hire the parent and "other employment barriers."[163] This change was recommended by the 2019 Child Support Schedule Workgroup with the goal of ensuring that

[158] Timothy Grall, U.S. Census Bureau Current Population Reps., Custodial Mothers & Fathers and Their Child Support: 2017 3 (2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-269.pdf.
[159] WASHINGTON STATE 2018 CHILD SUPPORT ORDER REVIEW 3 (2019), https://www.dshs.wa.gov/sites/default/files/ESA/dcs/documents/2018%20Child%20Support%20Order%20Review%20NEW.pdf.
[160] RCW 26.19.025.
[161] *2019 Child Support Schedule Workgroup*, WASH. STATE DEP'T OF HEALTH & SOC. SERVS. (Sept. 27, 2019), https://www.dshs.wa.gov/esa/division-child-support/2019-child-support-schedule-workgroup.
[162] LAWS OF 2020, ch. 227, §2 (amending RCW 26.19.071).
[163] Id.

"child support orders are closer to a parent's actual or predictable earning potential, to avoid creating support orders that will likely only lead to increased arrears."[164]

The 2020 legislation also created a presumption (which may be challenged by the parent seeking child support) that an incarcerated parent is unable to pay child support.[165] In adopting this provision, the Legislature found that "a large number of justice-involved individuals owe significant child support debts when they are released from incarceration" and that such debts "are often uncollectible and unduly burdensome on a recently released justice-involved individual, and that such debts severely impact the ability of the person required to pay support to have a successful reentry and reintegration into society."[166]

Changes in federal law since 1989 have also significantly impacted child support policies at the state level. One sea change was the passage in 1996 of the federal Personal Responsibility and Work Opportunity Reconciliation Act,[167] which made major changes to social welfare programs and replaced the Aid to Families with Dependent Children program with the Temporary Assistance to Needy Families (TANF) program. Among other things, this law required states to create in-hospital paternity acknowledgment programs and provided that voluntary acknowledgments of paternity are entitled to full faith and credit in other states. The federal change was based, in part, on a 1991 report entitled "Paternity Acknowledgment Program" from Washington State's Office of Support Enforcement which showed that 37% of unmarried fathers willingly sign an acknowledgment of paternity at birth or shortly after.[168] The federal policy of identifying biological fathers without resorting to litigation in every case has increased the number of potential payers of child support. The law also required recipients of TANF to cooperate in child support enforcement requirements, including paternity establishment.[169] In

[164] Wash. Child Support Schedule Workgroup, Recommendations to the Washington State Legislature for Washington's Child Support Schedule Pursuant to RCW 26.19.025 23 (2019).
[165] LAWS OF 2020, ch. 227, § 4 (codified at RCW 26.09.320).
[166] LAWS OF 2020, ch. 227, § 3 (not codified).
[167] Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 42 U.S.C.).
[168] Paul K. Legler, The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act, 30 FAM. L. Q. 519, 528 (1996).
[169] *Major Provisions of the Welfare Law*, OFF. OF FAM. ASSISTANCE (Dec. 16, 1996), https://www.acf.hhs.gov/ofa/policy-guidance/major-provisions-welfare-law.

addition, the federal Child Support Performance and Incentive Act of 1998[170] restructured federal incentives for states to have highly performing child support recovery laws and implementation by tying federal funding to performance measures including paternity establishment, support order establishment, current support collections, and arrears collections.

Child support orders may be entered by Superior Courts or by administrative proceedings by the Washington State Division of Child Support.[171] A random sample of child support orders entered between 2014-2018 found that 57% of orders were entered by courts, while 43% were entered in administrative proceedings.[172] This random sample found that the median net income of a noncustodial parent in Washington is $1,789.50 per month and the median order amount is $285 per month, representing 15.9% of the noncustodial parent's income.[173] These relatively low median figures reflect the fact that child support orders often involve low-income parents. In 23% of cases, the trial court or administrative law judge exercised its discretion to deviate from the presumptive child support obligation under Washington's child support schedule; in 98% of these cases involving deviations, the noncustodial parent's child support obligation were reduced rather than increased, which the average downward amount being $262.90 per month.[174] Most child support orders in the random sample covered only one child (64.9%) or two children (24.5%).[175]

As noted above, the 1989 Study noted a concern that that mothers "barter" child support in order to avoid child custody disputes.[176] Judicial officers consulted for this report continue to note this concern, observing that they frequently observe parties submitting agreed orders in family law cases in which mothers agree to substantially reduce the presumptive child support obligations that the father would otherwise owe under Washington law. The judicial officers emphasize that courts must review such proposed orders carefully and cannot under Washington law grant a

[170] Pub. L. No. 105-200, 112 Stat. 645.
[171] WASHINGTON STATE 2018 CHILD SUPPORT ORDER REVIEW, *supra* note 159, at 3.
[172] *Id.* at 10.
[173] Id.
[174] *Id.* at 4.
[175] *Id.* at 10.
[176] 1989 Study at 16.

deviation from a parent's presumptive child support obligation based solely on the agreement of the parties.

As of 2018, the U.S. Census Bureau reported that 26.5% of U.S. children under age 21 have one of their parents living outside of their home.[177] Of those children, 30.1% (6.6 million children) were in poverty; by comparison, the poverty rate of children in households where both parents were present was 11.1%.[178] The study found that nationally, 69.8% of custodial parents who were supposed to receive child support received some payments, but only 45.9% received full payment and 30.2% received no payments at all.[179] In addition, approximately one-half of all parents who served as the custodial parent for a child did not have a legal or informal child support agreement.[180] Of the total $30 billion of child support that was supposed to have been received, only $18.6 billion (or 62.2%), was actually received.[181] This problem of unawarded or uncollected child support was noted in the 1989 Study. As of 2018, total child support arrearages in Washington totaled more than $1.9 billion.[182]

Child support enforcement is a complex area of the law. At the federal level, Congress enacted the Child Support Enforcement (CSE) program in 1975.[183] The CSE program has been described by the Congressional Research Service as a federal-state program "intended to help strengthen families by securing financial support for children from their noncustodial parents on a consistent and continuing basis and by helping some of those families to remain self-sufficient and off public assistance."[184] The CSE program operates in all 50 states, and provides "seven major services on behalf of children: (1) locating absent/noncustodial parents, (2) establishing paternity, (3) establishing child support orders, (4) reviewing and modifying child support orders, (5) collecting

[177] GRALL, *supra* note 158, at 1.
[178] *Id.* at 1, 5. The Census Bureau report does not break down poverty levels by the race or ethnicity of children.
[179] *Id.* at 13, 16.
[180] *Id.* at 1.
[181] *Id.* at 10.
[182] *State-by-State Child Support Data*, NAT'L CONF. OF STATE LEGISLATURES (June 25, 2019), https://www.ncsl.org/research/human-services/state-data-on-child-support-collections.aspx (under "Total Amount of Arrearages" tab).
[183] Carmen Solomon-Fears, Cong. Rsch. Serv., R44423, The Child Support Enforcement Program: A Legislative History (2016), https://crsreports.congress.gov/product/pdf/R/R44423/4.
[184] *Id.* (quoting unpaginated "Summary").

child support payments, (6) distributing child support payments, and (7) establishing and enforcing support for children's medical needs."[185]

In Washington, the Division of Child Support (DCS) provides child support enforcement services.[186] DCS provides child enforcement services to parents who are recipients of public assistance, as well as to other parents who request child support enforcement services.[187] DCS may refer child support enforcement actions to the Attorney General or a county prosecuting attorney, particularly when judicial action is required.[188] The collection tools used by DCS include, but are not limited to, payroll deductions, withholding, or assignments from the obligor's wages; suspension of the obligor's licenses, which may include suspension of a driver's license; asset seizures; liens; and referral for contempt proceedings.[189]

Under Washington law, a parent may be incarcerated under the civil contempt statutes for failure to pay child support obligations if the parent is capable of complying with the child support order.[190] Washington law also provides that if "the obligor contends at the hearing that he or she lacked the means to comply with the support or maintenance order, the obligor shall establish that he or she exercised due diligence in seeking employment, in conserving assets, or otherwise in rendering himself or herself able to comply with the court's order."[191]

In a 1975 case involving a parent's failure to pay child support obligations, the Washington Supreme Court held that "wherever a contempt adjudication may result in incarceration, the person accused of contempt must be provided with state-paid counsel if he or she is unable to afford private representation."[192] There has also been at least one appellate decision in

[185] Id.
[186] WAC 388-14A-1000.
[187] RCW 74.20.040.
[188] RCW 74.20.040(4), WAC 388-14A-1025(2)(a).
[189] WAC 388-14A-4020.
[190] *See, e.g.*, *State ex rel. Daly v. Snyder*, 117 Wn. App. 602, 72 P.3d 780 (2003) ("We hold that the court's authority to use contempt proceedings against recalcitrant child support obligors . . . includes incarceration"); RCW 7.21.030 (including imprisonment as a remedial sanction if a person "has failed or refused to perform an act that is yet within the person's power to perform"); *see generally* RCW 26.18.050 (authorizing contempt proceedings to be initiated for failure to comply with a child support or maintenance order).
[191] RCW 26.18.050(4).
[192] *Tetro v. Tetro*, 86 Wn.2d 252, 255, 544 P.2d 17 (1975). In 2011, the United State Supreme Court held that "the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a

Washington since 1989 when a trial court failed to comply with the right-to-counsel requirement in the context of ordering imprisonment of a parent for failure to pay child support.[193] In addition, Washington law provides that if a child support obligor is ordered to show cause why they should not be held in contempt for failure to pay child support and fails to appear at the show cause hearing, the court may issue a bench warrant for the obligor's arrest if the order to show cause includes a warning that an arrest warrant could be issued for failure to appear.[194] In such cases, an obligor is then subject to arrest without representation by counsel.

There does not appear to be any data collected since 1989 indicating how often incarceration is ordered in Washington State for failure to pay child support. Indeed, researchers and commenters have noted the lack of data on this issue nationwide. The National Conference of State Legislatures indicates that "the majority of states use civil contempt to enforce child support orders, though limited data is available on how often it is used and the costs associated with subsequent incarceration."[195] Others have observed that "[t]he extent to which noncustodial parents in the United States are jailed for failure to pay child support has not been extensively studied"[196] and that "[c]hild support agencies do not routinely report data on the use of arrest and incarceration as an enforcement tool."[197] Nationwide, estimates of how many parents are civilly incarcerated for failure to pay child support have ranged from 10,000 to 50,000.[198] Researchers have also raised "concerns about the demographics of delinquent parents incarcerated for failure to pay support," with a study in Wisconsin indicating "a higher rate of

year). In particular, that Clause does not require the provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings)." *Turner v. Rogers*, 564 U.S. 431, 448, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011).

[193] *State ex rel. Schmitz v. Knight*, 142 Wn. App. 291, 174 P.3d 1198 (2007).

[194] RCW 26.18.050(3).

[195] *Child Support & Incarceration*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 4, 2019), https://www.ncsl.org/research/human-services/child-support-and-incarceration.aspx.

[196] Tonya L. Brito, Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers & Their Families, 15 J. GENDER RACE & JUST. 617, 651 (2012).

[197] *Id.* at 652; *see also* Elizabeth Cozzolino, *Public Assistance, Relationship Context, and Jail for Child Support Debt*, 4 SOCIUS 1 (2018) ("Jailing for child support nonpayment is just one of many mechanisms of child support enforcement, but little is known about how frequently this tactic is used or against whom.").

[198] Tonya L. Brito, *Producing Justice in Poor People's Courts: Four Models of State Legal Actors*, 24 LEWIS & CLARK L. REV. 145, 156 n.34 (2020) (collecting estimates and studies).

arrests for nonpayment of child support for low-income minority parents than for other parents."[199]

In the 1989 Study, the Subcommittee on the Economic Consequences of Divorce noted a finding that 94% of lawyers surveyed in Washington indicated that "judges never or only occasionally jail respondents for failure to pay child support."[200] This finding could be read to suggest that incarceration for non-payment of child support was viewed by many at the time as an underutilized enforcement mechanism. However, the limited research available today raises concerns that incarceration for failure to pay child support is often counterproductive and disproportionately impacts low-income Black, Indigenous, and men of color.[201] Efforts should be made to collect reliable data about how often parents in Washington are incarcerated for failure to pay child support, whether such parents were afforded the right to counsel, and whether racial, ethnic, and gender disparities exist in the application of this remedy.

H. Accessibility of legal representation remains a problem

In 1989, the Subcommittee found that "the problem of the lack of legal representation (and thus lack of equal access to the legal system) appears to be considerably greater for women than for men."[202] Although not quantified in the 1989 Study, lack of access to justice remains a significant problem today in family law cases. As noted earlier, women on average continue to have lower earnings than men, with even greater disparities in earnings by Black, Indigenous, and women of color. As a result, women in general and women of color in particular are less able to afford the costs of legal representation in family law cases.

The 2016 Residential Time Summary Report by the Administrative Office of the Courts (the last report available) collected information about whether parties in dissolution cases had legal representation.[203] As noted above, there are limitations on the usefulness of the data in this

[199] Brito, *Fathers Behind Bars*, *supra* note 196, at 651.
[200] 1989 Study at 16.
[201] *See generally* Brito, *Fathers Behind Bars*, *supra* note 196. Brito also notes that incarceration for non-payment of child support also impacts women, pointing to a study in South Carolina that showed 12% of parents incarcerated for non-payment of child support were women. *Id.* at 618 n.8.
[202] 1989 Study at 75.
[203] WASH. STATE CTR. FOR CT. RSCH., *supra* note 130, at 6.

report due to substantial non-compliance with reporting requirements. Nonetheless, this report is consistent with other reports in demonstrating that most parties involved in divorce cases in Washington State do not have legal representation.

The report indicates that both parties were self-represented in 76.3% of dissolution cases where data was submitted by parties to the case, while only one party had a lawyer in 16.2% of cases and both parties had lawyers in only 7.5% of cases.[204] The report also notes that "[r]esults indicate that when either side had a lawyer, they were likely to get more residential time than when both parties were self-represented."[205] In addition, the report notes that when both sides have an attorney, "there are fewer extreme splits in residential time."[206]

In terms of breakdown of the results by gender, the report indicated:

> When fathers had an attorney and mothers were self-represented, fathers had the majority of residential time in 25.6% of cases and there was an even distribution of time in 35.0% of cases. When mothers had an attorney and fathers were self-represented, mothers received the majority of residential time in 72.5% of cases and there was an even distribution of time in 18.0% of cases. When both parties had an attorney . . . mothers receiv[ed] a majority of residential time in 62.8% of cases, and an even distribution of time in 23.7% of cases.[207]

The continuing need for legal representation is also illustrated by the 2015 Washington Civil Legal Needs Study Update,[208] which includes the following data points:

- Seven in ten low-income households in Washington State face at least one significant civil legal problem each year. The average number of problems per household increased from 3.3 in 2003 to 9.3 in 2014.[209]

[204] *Id.*
[205] *Id*. at 7.
[206] *Id*.
[207] *Id*.; See "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for an analysis of legal representation by gender as provided by residential time summary form data and for a further discussion of the financial barriers to accessing legal representation.
[208] Civil Legal Needs Study Update Comm., Wash. State Sup. Ct., 2015 Washington State Civil Legal Needs Study Update (2015).
[209] *Id.* at 3.

- The vast majority of low-income people in Washington face their legal problems alone. More than three-quarters (76%) of those who have a legal problem do not get the help they need (down from 85% in 2003).[210]
- Victims of domestic violence or sexual assault have the highest number of civil legal problems with an average of 19.7 per household, twice the average experienced by the general low-income population.[211]

Even if a civil legal services attorney is available for one of the spouses, it is unlikely that the other will get assistance due to conflicts of interest and the lack of alternatives.[212] The Washington State Bar Association's Moderate Means Program may help meet the needs of some domestic relations clients who fall between 200% and 400% of the federal poverty guidelines.[213]

Other data shows that a high percentage of domestic relations litigants represent themselves pro se. A 2001 study found that during the 1995 to 2001 sample period, "pro se litigant incidence in dissolutions with children has increased by less than 1% per year on average (42.7% in 1995-Q3 to 46.7% in 2001-Q1); dissolutions without children has a slightly higher trend (55.8% in 1995-Q3 to 62.3% in 2001-Q1)."[214] In 2013, the plain language family law forms project of the Washington State Plan for Integrated Pro Se Services, a joint project of the Access to Justice Board, the Administrative Office of the Courts, and the Office of Administrative Hearings, worked on the "general presumption based on the statistics [] that in about 50% of the cases, neither side is represented by an attorney, and that in about 80% of the cases, one side is not represented."[215]

[210] *Id.* at 15.
[211] *Id*. at 13; See "Chapter 8: Consequences of Gender-Based Violence: Domestic Violence and Sexual Violence" for more information on gender-based violence.
[212] The Northwest Justice Project (NJP) is Washington's largest publicly funded civil legal aid program and provides representation to low-income people in family law cases. *About Us*, NW. JUST. PROJECT (2021), https://nwjustice.org/about. NJP's priorities include providing legal representation in "disputed custody cases involving domestic violence or children at risk of harm," but is unable due to limited resources to provide representation to all low-income people who request assistance. *Priorities*, NW. JUST. PROJECT (2021), https://nwjustice.org/priorities. And of course, NJP cannot provide representation to both parties in a family law matter due to conflict of interest rules.
[213] *Clients of Moderate Means*, WASH. STATE BAR ASS'N (Jan. 4, 2021), https://www.wsba.org/connect-serve/volunteer-opportunities/mmp/mmpclients.
[214] WASH. ADMIN. OFF. OF THE CTS., JUDICIAL SERVS. DIV., AN ANALYSIS OF PRO SE LITIGANTS IN WASHINGTON STATE 1995-2000 (2001), http://www.courts.wa.gov/wsccr/docs/Final%20Report_Pro_Se_1_101.pdf.
[215] Charles R. Dyer et al., Improving Access to Justice: Plain Language Family Law Court Forms in Washington State, 11 SEATTLE J. FOR SOC. J. 1065, 1122 n.1 (2013).

The bench and bar have sought to address this lack of counsel with a number of initiatives, including statewide plain language divorce forms,[216] courthouse facilitators who assist self-represented parties in family law cases,[217] and volunteer lawyer programs.[218] Nonetheless, the unavailability of legal counsel for a large percentage of domestic relations litigants in Washington remains a problem that was highlighted in 1989 by the Subcommittee.

It also should be noted that since 1989, there were at least two significant initiatives aimed at increasing access to legal services in family law cases in Washington that were unsuccessful.

First, the Washington Supreme Court considered a case in 2007 that the Court described as presenting the question of "whether an indigent parent has a constitutional right, primarily under the Washington State Constitution, to appointment of counsel at public expense in a dissolution proceeding."[219] The case reached the Court at a time when the American Bar Association had "spearheaded a national movement to consider whether, in certain noncriminal cases, the issues for litigants are so fundamental or critical to their lives and well-being that governments ought to be providing those litigants with lawyers as a matter of right when faced with adversarial judicial proceedings."[220] However, by a seven to two margin, the Court held that indigent parents do not have a constitutional right to appointment of counsel in such cases.[221]

Second, in 2012 Washington became the first state in the country to approve a Limited License Legal Technician (LLLT) rule, which authorized non-lawyers who meet certain educational requirements to advise and assist clients in approved practice areas of law.[222] Under this rule, LLLTs were authorized to provide assistance to clients in certain domestic relations cases.[223]

[216] *Id.*
[217] *Courthouse Facilitators*, WASH. CTS. (2020), https://www.courts.wa.gov/committee/?fa=committee.home&committee_id=108.
[218] *Pro Bono Council*, THE ALL. FOR EQUAL JUST. (2021), http://allianceforequaljustice.org/for-the-alliance/statewide-pro-bono-council/.
[219] *King v. King*, 162 Wn.2d 378, 381, 174 P.3d 659 (2007).
[220] Deborah Perluss, *Civil Right to Counsel:* In re Marriage of King *and the Continuing Journey*, 9 SEATTLE J. SOC. JUSTICE 15, 17 (2010).
[221] Id.
[222] Anna L. Endter, *Washington Limited License Legal Technician (LLLT) Research Guide*, UNIV. OF WASH. SCH. OF L. (Aug. 20, 2015), https://lib.law.uw.edu/ref/wa-lllt.html.
[223] WASH. CTS., WASHINGTON ADMISSION TO PRACTICE RULE 28, REGULATION 2(B), http://www.courts.wa.gov/court_rules/pdf/APR/GA_APR_28_00_00.pdf.

However, in June 2020 the Washington Supreme Court announced that it was sunsetting the program. In a letter announcing the decision, Chief Justice Debra Stephens noted that while the program "was an innovative attempt to increase access to legal services," a majority of the Court "determined that the LLLT program is not an effective way to meet these needs."[224]

In 2015, a research project funded by a grant from the U.S. Department of Justice reported on the results of a study in King County, Washington, that sought to "test the hypothesis that legal representation of the IPV [intimate partner violence] victim in child custody decisions leads to greater legal protections being awarded in child custody and visitation decisions compared to similar cases of unrepresented IPV victims."[225] The study examined dissolution cases filed in King County from 2000 – 2010 where there was a "history of police- or court-documented intimate partner violence."[226] The study concluded that "[a]ttorney representation, particularly by legal aid attorneys with expertise in IPV cases, resulted in greater protections being awarded to IPV victims and their children" and that "[i]mproved access of IPV victims to legal representation, particularly by attorneys with expertise in IPV, is indicated."[227]

Researchers have also noted that providing legal representation to parents in family law cases is important to help to prevent parents from later facing possible incarceration for failure to pay child support. Noting that states generally only provide a right to counsel in family law cases when a parent faces incarceration for non-payment of child support, Professor Tonya Brito has observed that "[t]o provide counsel only at this eleventh hour is, to put it mildly, too little too late."[228] Professor Brito indicates that her "research examining the experiences of noncustodial parents in child support proceedings reveals that attorney representation earlier in the case and covering a broader scope of legal issues would substantially change cases outcomes" and that "[m]ost noncustodial parents in these cases are very low-income black fathers."[229] She notes:

[224] Letter from Chief Justice Debra L. Stephens to Stephen R. Crossland et al. (June 5, 2020), https://www.abajournal.com/files/Stephens_LLLT_letter.pdf.
[225] Mary A. Kernic, Final Report of the "Impact of Legal Representation on Child Custody Decisions Among Families with a History of Intimate Family Violence Study" ii (2015), https://www.ojp.gov/pdffiles1/nij/grants/248886.pdf.
[226] Id.
[227] *Id.* at iii.
[228] Tonya L. Brito, *The Right to Civil Counsel*, 148 DAEDALUS 56, 59 (2019).
[229] Id.

> [L]awyers-by-right are not made available when a child support order is established. They are also not provided when a parent must file a motion to modify an existing order to reflect a significant change in circumstances, such as losing one's job and income. In both instances, the timing and the scope of representation matter, whether the attorney provides full representation or is limited to performing only specific tasks. Having access to a full-service attorney earlier would ensure that initial orders are for appropriate amounts and are modified when circumstances warrant. Without counsel at these junctures and for broader purposes, pro se defendants are likely to fall behind in their child support payments and face mounting debts that result in contempt proceedings with a risk of civil incarceration and other harsh penalties.[230]

Professor Brito concludes that providing a right to counsel in family cases only when a parent faces a contempt action that may result in incarceration is "woefully insufficient."[231]

IV. Gender Bias in Trial Courts is Difficult to Address Through the Appellate Process

From a review of case law since 1989, it appears that there has not been a single case in which a Washington appellate court has found that a trial court exhibited bias based on gender against a party in a family law case, although there is one case in which an appellant successfully proved bias based on sexual orientation.[232] Indeed, a review of case law has identified only a few appellate cases in Washington since 1989 where a party explicitly raised concerns of gender bias

[230] Id.
[231] *Id.* at 61.
[232] The review of case law was conducted using several different searches of caselaw in Westlaw, focusing in particular on identifying cases that included: (1) citations to the primary family law statutes in Title 26 of the Revised Code of Washington; (2) the terms "bias" or "prejudice"; and (3) and either the term "gender" or "sex." It is possible that these searches did not identify every appellate case in Washington since 1989 in which a party alleged gender bias by the trial court.

by the trial court in a family law case; in each of such cases that have been identified, the concerns of gender bias were raised by the father.[233]

However, the lack of appellate cases finding gender bias in family law cases should not be construed to mean that family courts in Washington are free of gender bias. Instead, it suggests that it is rare for courts to express gender bias explicitly. It should also be noted that family law appeals are difficult to pursue, particularly for low or moderate-income parties, meaning that the vast majority of family law decisions by Washington trial courts are never reviewed on appeal.

A. Appellate cases involving LGBTQ+ parents

In the case of *In re Marriage of Black*,[234] the Washington Supreme Court found that bias against a lesbian parent when she sought a divorce from her different-sex spouse had "permeated the proceedings," pointing to a number of statements by the trial court and by the court-appointed guardian ad litem (GAL). Although the Court indicated that bias was based on the mother's sexual orientation, courts across the country have increasingly recognized that discrimination based on sexual orientation (as well as discrimination based on transgender status) is a form of discrimination based on sex. Indeed, the U.S. Supreme Court recently noted that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[235] The Court made this statement in the context of holding

[233] *See In re Marriage of Langford*, No. 35702-3-III, 2018 WL 6333858 (Wash. Ct. App. Dec. 4, 2018) (unpublished) (rejecting father's claim that a commissioner's decision "was the result of implicit gender bias"); *In re Parenting of A.C.*, No. 73897-6-I, 2016 WL 4184365 (Wash. Ct. App. Aug. 8, 2016) (unpublished) (rejecting father's suggestion that trial court "was influenced by gender bias"); *In re Marriage of Webster*, No. 63834-3-I, 2009 WL 4761600 (Wash. Ct. App. Dec. 14, 2009) (unpublished) (rejecting father's claim of gender bias by a court-appointed investigator and general claims of bias by the trial court judge); *In re Marriage of Fisher*, Nos. 36828-5-II, 36875-7-II, 37505-2-II, 2009 WL 2469282 (Wash. Ct. App. Aug. 13, 2009) (unpublished) (refusing to consider father's belief the trial court was "biased against him because of his gender" because it was unsupported by citation to authority); *In re Marriage of Presley*, No. 46129-0-I, 2001 WL 537883 (Wash. Ct. App. May 21, 2001) (unpublished) (rejecting father's claim that trial court "acted with prejudice and abused its discretion based upon gender" and alleging he was the victim of "a well orchestrated effort on the part of the court, government, radical feminists [and] society at large, to 'skew' recommendations and resulting court orders" in favor of mothers).

[234] 188 Wn.2d 114, 392 P.3d 1041 (2017).

[235] *Bostock v. Clayton County, Georgia*, __ U.S. __, 140 S.Ct.1731, 1741, 207 L. Ed. 2d 218 (2020). The U.S. Supreme Court's holding in the *Bostock* case stands in contrast to the Washington Supreme Court's now-abrogated decision in *Andersen v. King County*, 158 Wn.2d 1, 48, 138 P.3d 963 (2006), in which the Court held by a five to four margin that Washington's law prohibiting same-sex couples from marrying "does not discriminate on account of sex."

that discrimination based on sexual orientation or transgender status constitutes discrimination based on sex under federal Title VII employment law.

In the 2007 case of *Magnuson v. Magnuson*,[236] the Court of Appeals considered a case in which a parent alleged that the trial court had improperly taken her transgender status into account when establishing a parenting plan that made her former spouse the children's primary residential parent, contrary to the recommendations of the GAL assigned to the case. In a 2-1 decision, a majority of the Court held that trial court had not abused its discretion in establishing the parenting plan, finding that the trial court's focus in determining residential placement had been the needs of each child rather than the parent's transgender status.[237] The dissent disagreed, expressing its view that the residential time decision was not supported by substantial evidence and that the trial court had impermissibly based the residential time decision on the parent's transgender status.[238]

B. Cases involving misapplication of laws protecting domestic violence survivors

There have also been cases in Washington since 1989 in which appellate courts have found that trial courts have misapplied the law in dissolution cases to the detriment of domestic violence survivors. Because domestic violence survivors are disproportionately women,[239] such failures to follow the law also disproportionately impact women. Examples of such cases include:

- *In re Parenting & Support of L.H. & C.H.*,[240] in which the Court of Appeals reversed a trial court's failure to enter a finding required under RCW 26.09.191 based on the father's history of domestic violence.[241] The trial court stated that it had declined to make such a

[236] 141 Wn. App. 347, 170 P.3d 65 (2007).
[237] *Id.* at 352.
[238] *Id.* at 352–55.
[239] *See, e.g.*, Molly Dragiewicz & Yvonne Lindgren*, The Gendered Nature of Domestic Violence: Statistical Data for Lawyers Considering Equal Protection Analysis*, 17 AM. U. J. GENDER SOC. POL'Y & L. 229, 242–57 (2009) (setting forth statistical evidence showing that women are disproportionately victims of domestic violence).
[240] 198 Wn. App. 190, 391 P.3d 490 (2016).
[241] When a court finds that a parent has a history of domestic violence, RCW 26.09.191(1) prohibits the court from ordering mutual decision-making in a parenting plan and requires that any disputes over a parenting plan must be resolved by the court, rather than through alternative means like mediation. In addition, RCW 26.09.191(2)(a)(iii) provides that if the court finds a history of domestic violence by a parent, the court must limit that parent's residential time with the child, unless the court makes express findings pursuant to RCW 26.09.191(2)(n) that the

finding because it would "hate to have this record follow him around like some ghost" and that such findings would "haunt him, and [it didn't] think that's necessary."[242]

- *In re Marriage of Muhammad*,[243] in which the Supreme Court reversed a trial court's decision to unequally divide retirement benefits in favor of a husband because the wife had obtained a domestic violence protection order against him, which resulted in the husband losing his job in law enforcement. The Court held that the record showed "a clear inference that the [trial] court improperly considered [the wife's] decision to obtain a protective order against [the husband] as 'marital misconduct'" by the wife, in violation of RCW 26.09.080 which explicitly prohibits the consideration of "martial misconduct" in distributing property.[244] In reaching this conclusion, the Court noted that "[m]ost striking of all are the written findings of fact, which read like a logical syllogism linking [the husband's] unemployment and purported unemployability to [the wife's] decision to obtain the protective order."[245]

C. Family law appeals are difficult to pursue

Parties in family law cases have a right to appeal final decisions to the Washington Court of Appeals.[246] However, there are considerable barriers for parties who may seek to exercise their right to appeal, particularly for parties without the financial resources to pay for legal representation and the costs of pursuing an appeal (e.g., filing fees and transcription of trial court proceedings).

Parties may seek to represent themselves on appeal if they cannot afford legal counsel or obtain free representation by civil legal aid or pro bono counsel; however, "[t]here is no question that pro se appeals are generally less successful than the average."[247] Even if a party is able to pursue

child would not be harmed by the parent's contact with the child and that the probability that such conduct with recur is so remote that it would not be in the child's best interests to apply the limitation.

[242] *Id.* at 195.

[243] 153 Wn.2d 795, 108 P.3d 779 (2005).

[244] *Id.* at 806.

[245] Id.

[246] RAP 2.2.

[247] Colter L. Paulson, Will a Judge Read My Brief? Prejudice to Pro Se Litigants From the Staff Attorney Track, 76 OHIO ST. L.J. FURTHERMORE 103, 106 (2015).

an appeal, the length of time that it takes for appeals to be heard and decided poses additional barriers to obtaining effective relief through the appellate process. In addition, commentators have noted that few family law appeals are ultimately successful, particularly in light of the trial court's considerable discretion in such cases.[248] The Washington Supreme Court has emphasized that "trial court decisions will seldom be changed upon appeal," noting that "[s]uch decisions are difficult at best" and that "[t]he emotional and financial interests affected by such decisions are best served by finality."[249]

As one commentator has noted, the "costs, delays, and further uncertainty involved in bringing cases up for appeal means that as a practical matter, few family law matters will reach the appellate courts for adjudication and establishment of judicial precedent."[250] As a result, even parties who have meritorious claims of gender bias in family law proceedings may not be able to pursue appeals of the trial court's decisions. The challenges of seeking appellate review and the amount of discretion placed in trial courts in family law cases make it particularly important that: (1) parties have effective legal representation at the trial court level in contested family law cases; and (2) that trial courts are well-trained on domestic violence and on how implicit bias may impact their decision-making.

V. Implicit Bias in Family Law Cases is an Underexamined Subject of Academic Research

There is not a large body of research concerning implicit or explicit gender bias in family law cases. As Professor Jennifer Bennett Shinall of Vanderbilt University School of Law recently noted, "[r]esearch on implicit and explicit bias has abounded in the legal scholarship of the past two decades, yet remains noticeably absent from the family law literature."[251] Similarly, Professor Solangel Maldonado of Seton Hall Law School has noted that "[w]hile few scholars have examined

[248] See generally Ronald W. Nelson, Approaching the Appeal: If I Lose, I'll Just Appeal, 36 FAM. ADVOC. 10 (2014).
[249] *In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985).
[250] Adrienne Hunter Jules & Fernanda G. Nicola, *The Contractualization of Family Law in the United States*, 62 AM. J. COMPAR. L. 151, 166 (2014).
[251] Jennifer Bennett Shinall, Settling in the Shadow of Sex: Gender Bias in Marital Asset Division, 40 CARDOZO L. REV. 1857, 1862 (2019).

the role of implicit bias in family law decisions, unconscious biases may influence a judge's or custody evaluator's perception of a parent's behavior as defensive, passive, or impulsive based on racial or cultural stereotypes."[252]

The lack of research may be due to the difficulties in measuring bias; as Professor Shinall noted, "[t]esting for the presence of bias (whether explicit or implicit) in legal decision-making is difficult, if not impossible, using data collected from reported case outcomes. Although disparities in case outcomes experienced by historically disadvantaged litigants might be attributable to bias, they might also be attributable to other unobservable differences between disadvantaged and nondisadvantaged litigants, such as disparities in the quality of representation."[253] Furthermore, "[f]rom an empirical standpoint, the difficulty in resolving this debate stems from an inability to source reliable and representative data on divorces. Divorce cases are generally subject to simple, non-extensive filing requirements, particularly if they settle; the divorce cases in which more extensive filings and judicial opinions are available are highly contested, and arguably less representative, divorce cases."[254]

Seeking to address this lack of data in the context of gender bias in property distributions following divorce, Professor Shinall recruited 3,022 subjects throughout the country to divide assets between divorcing male and female spouses.[255] The study found that the subjects "consistently favored the male spouse over the similarly situated female spouse," results that were "consistent with gender bias."[256] Professor Shinall summarized the study and the results as follows:

> Subjects were randomly assigned to view one of several highly similar scenarios where a couple is divorcing after a long-term marriage, and asked to divide marital assets between them. In half of the scenarios, the male spouse was the sole breadwinner and the female spouse was the principal caretaker, consistent with

[252] Solangel Maldonado, Bias in the Family: Race, Ethnicity, & Culture in Custody Disputes, 55 FAM. CT. REV. 213, 214 (2017).
[253] Shinall, *supra* note 251, at 1879.
[254] *Id.* at 1869.
[255] *Id.* at 1885.
[256] *Id.* at 1858.

> traditional gender roles. But in the other half of the scenarios, the situation was reversed, with the female as the sole breadwinner and the male as the primary caretaker. Comparing results across subjects reveals that subjects consistently favored the male spouse over the similarly situated female spouse. On average, both male and female subjects assigned a greater share of the marital assets to the male breadwinner than to the female breadwinner. Male and female subjects also assigned a greater share of the marital assets to the male caretaker than to the female caretaker. The results are consistent with gender bias, as subjects penalize the female spouse in both the stereotypic (male-breadwinner/female-caretaker) and the nonstereotypic (female-breadwinner/male-caretaker) scenarios.[257]

Professor Shinall also noted that while "[t]he bias exhibited by male subjects was more than three times as large as the bias exhibited by female subjects," female subjects also penalized the female spouse "even though, in theory, they should have been empathetic towards the female spouse's position."[258]

Based on these results, Professor Shinall concluded not only that "[j]udges and mediators may be unconsciously biased towards awarding a greater share of the property to male spouses, regardless of the spouses' breadwinning status," but also that "lawyers and litigants may not demand as great of a share for female spouses as they demand for male spouses due to gender bias."[259] She noted that "[b]ecause litigants are not, for the most part, repeat players in the divorce process, the most promising interventions to counteract gender bias should be directed towards judges, mediators, and lawyers."[260]

In the context of gender bias in parenting plan decisions (also commonly referred to in studies as "child custody" decisions), there is a larger body of research, particularly in cases where there

[257] Id.
[258] *Id.* at 1902.
[259] Id.
[260] *Id.*

are allegations of domestic violence. As one commentator noted in summarizing research in the context of custody decisions in cases involving domestic violence:

> There is fairly substantial evidence that custody outcomes do not fall along rational lines and may well be distorted by gender bias. Despite a general recognition of the harm domestic violence has on children, as well as its general prevalence in family court cases, several studies show that individuals with a documented history of violence against their partners are at least as likely, if not more likely, to be granted custody or generous visitation rights than those without such a history.[261]

This commentator noted that researchers have several hypotheses for this outcome, including: (1) judicial officers "may favor stable, higher-earning parents, and victims of domestic violence often appear unstable"; (2) some judicial officers "remain unconvinced that violence by one parent against another parent is significant when deciding custody if the child was not directly abused"; and (3) "[p]reconceptions that fathers are typically less engaged parents may cause judges to see the effort of fighting for custody as an unexpectedly welcome sign of engagement by a father, instead of a possible continuation of a history of exercising control."[262]

A recent study, funded by a grant by the U.S. Department of Justice, examined child custody outcomes in cases involving allegations of parental alienation or abuse, based on a review of over 2,000 published court opinions over 15 years.[263] The authors indicated that the study was "aimed to gather data on how family courts across the United States are deciding child custody cases when parents accuse each other of abuse and/or parental alienation."[264] The authors noted that when a parent alleges that the other parent has engaged in domestic violence or child abuse, the accused parent in response often alleges that the accusing parent is engaged in "parental alienation" (i.e., that the claims of dangerousness or harm are not true, but are due to the

[261] Amy Barasch, Gender Bias Analysis Version 2.0: Shifting the Focus to Outcomes and Legitimacy, 36 N.Y.U. REV. L. & SOC. CHANGE 529, 548 (2012).
[262] *Id.* at 549.
[263] Joan S. Meier et al., *Child Custody Outcomes in Cases Involving Parental Alienation & Abuse Allegations*, GWU L. SCH., Public Law Research Paper No. 2019-56 (2019), https://ssrn.com/abstracte=3448062.
[264] *Id.* at 4.

accusing parent's anger or hostility, or pathology).[265] The authors summarized the results of the study as follows:

> Analysis of over 2000 court opinions confirms that courts are skeptical of mothers' claims of abuse by fathers; this skepticism is greatest when mothers claim child abuse. The findings also confirm that fathers' cross-claims of parental alienation increase (virtually doubling) courts' rejection of these claims, and mothers' losses of custody to the father accused of abuse. In comparing court responses when fathers accuse mothers of abuse, a significant gender difference is identified. Finally, the findings indicate that where Guardians Ad Litem or custody evaluators are appointed, outcomes show an intensification of courts' skepticism toward mothers' (but not fathers') claims, and custody removals from mothers (but not fathers).[266]

In addition, the report found that in 14% of cases where a court credited a mother's claim of abuse by the father, the mother nonetheless lost custody of the child to the father.[267]

It is also important to recognize that implicit bias based on racial and cultural stereotypes may impact judicial decision-making in family law cases. The Washington Supreme Court has also noted the importance of taking cultural factors into account in family law cases and the substantial potential for biases to impact decision-making. The Court has held that "[w]ithout a doubt, a trial court must consider cultural factors when imposing a parenting plan" and has emphasized that trial courts must identify specific harms to a child before ordering parenting plan restrictions to prevent leaving "families vulnerable to a trial court's biases."[268]

In the context of an individual's immigration status, scholars have observed biased outcomes for child custody cases, especially when one or more of the parents are undocumented, detained, or in deportation proceedings. Soraya Fata and other scholars note that immigration status is often

[265] *Id.* at 4.
[266] *Id*. at 3.
[267] *Id.* at 12.
[268] *In re Marriage of Chandola*, 180 Wn.2d 632, 655, 327 P.3d 644 (2014).

used to assert that the parent is not capable of adequately providing for their child.[269] Further, when immigration status is used and disclosed in a hearing, it often results in bias in the custody decision.[270] The National Immigrant Women's Advocacy Project highlights this as well in comments submitted to the courts supporting ER 413, an evidentiary rule to limit the introduction of immigration evidence into court for civil and criminal cases. The authors note that abusers often "raise lack of legal immigration status in a custody case in order to win custody of the children despite the perpetrator's history of abuse."[271]

Children of immigrants suffer tremendously in these processes. Of the 464,374 children under the age of 18 with one or more foreign-born parents in the state of Washington, 86% are U.S. citizens.[272] In custody disputes, custody is usually granted to the parent with a more secure lawful status.[273] Professor David Thronson and Judge Frank Sullivan cite an example where the courts did not allow the parent who was in deportation proceedings to attend her child's custody hearing despite being geographically nearby, noting: "The barriers to parent participation in such instances are often created by immigration detention policies and practices. That said, family courts enable immigration actors by failing to demand means to communicate with and ensure the participation of detained parents."[274]

In a recent essay examining caselaw from across the country involving child custody decisions, Professor Solangel Maldonado concluded:

> The facts in custody cases are often disputed and the best interests standard grants judges wide discretion so these decisions may be particularly susceptible to judges' feelings about the litigants. As illustrated by the cases discussed above,

[269] Soraya Fata et al., Custody of Children in Mixed-Status Families: Preventing the Misunderstanding and Misuse of Immigration Status in State-Court Custody Proceedings, 47 FAMILY L. Q. 191, 193–96 (2013).
[270] *See, e.g.*, *In re Welfare of Churape*, 719 P.2d 127 (Wash. Ct. App. 1986). For a discussion of the case, see Fata et al., *supra* note 269, at 198.
[271] Letter from Leslye E. Orloff & Tarja Cajudo, Nat'l Immigrant Women's Advoc. Project, Am. U. Wash. Coll. of L., to Susan L. Carlson, Clerk, Wash. State Sup. Ct., (Sept. 15, 2017), https://www.courts.wa.gov/court_Rules/proposed/2017May/ER413/Leslye%20Orloff.pdf
[272] *Immigrant Population by State, 1990-Present*, MIGRATION POL'Y INST. (2017), https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-state-1990-present.
[273] David B. Thronson & Frank P. Sullivan, *Family Courts and Immigration Status*, 63 JUV. & FAM. CT. J. 1, 9–11 (2012).
[274] *Id.* at 17.

> custody evaluators, guardians ad litem, and judges make assumptions about parents based on race, ethnicity, and culture. Implicit biases may influence perception of a parent's behavior and attitude based on stereotypes about the parent's race, ethnicity, or culture. Thus, legal actors must take steps to minimize the influence of implicit biases in their assessments and decisions.[275]

These studies suggest that implicit bias in family law cases, while an underexamined topic of research, remains a serious concern.

VI. Efforts to Address Gender Bias in Family Law Cases Must Include Non-Judicial Officers Who Play a Role in Family Law Cases

Parties in family law cases may be required to engage with a variety of different third-party professionals in addition to judges, court commissioners, and lawyers.[276] Efforts to address gender bias in family law cases must recognize the important role that these professionals can play, particularly court-appointed experts who make recommendations to the court about parenting plans. Commentators have noted that "[c]ourts follow an expert's custody recommendation up to 90% of the time," giving these experts considerable influence in family law proceedings.[277]

A. Family Law Facilitators

In 1993, the Washington State Legislature authorized counties to create "courthouse facilitator programs" to "provide basic services to pro se litigants in family law cases."[278] In 2002, the Washington Supreme Court adopted General Rule 27 (GR 27), which provides that the "basic services" courthouse facilitators may offer include, but are not limited to, referral to legal and social services resources; assistance with calculating child support; assistance in selecting forms and standardized instructions for family law matters, and assistance completing those forms;

[275] Maldonado*, supra* note 252, at 227.
[276] Wash. State Admin. Off. of the Cts., A Guide to Washington State Courts, 12th Ed. 12, 15, 21-22 (2011).
[277] Stephen J. Yanni, Experts as Final Arbiters: State Law & Problematic Expert Testimony on Domestic Violence in Child Custody Cases, 116 COLUM. L. REV. 533, 550 (2016).
[278] RCW 26.12.240.

processing requests for interpreters; explaining legal terms and court procedures; reviewing family law forms for completeness; assistance preparing court orders under the direction of the court; attending hearings to assist the Court with *pro se* matters; and preparing *pro se* assistance packets under the direction of the AOC.[279]

Counties may impose user fees to parties who use the facilitator program.[280] Counties may also require pro se parties in family law cases to use the facilitator program for certain tasks; for example, King County requires pro se litigants in uncontested family law cases to have a Courthouse Facilitator review their final orders before the orders are presented to the court.[281] See "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for more information on how this can pose financial barriers to accessing the courts that have disparate impacts by race, ethnicity, and gender.

The Courthouse Facilitator program was subject to a comprehensive review in 2007 by Washington State Center for Court Research (WSCCR).[282] The report notes that as of 2007, Courthouse Facilitator programs were operating in 35 of 39 Washington State counties. As part of their review, the authors gathered demographic data on the participants making use of the program and determined that the Facilitator programs' clients are overwhelmingly women (69% of all parties served).[283] It was also popular among users: 82% of respondents "strongly agreed" that their meeting with the facilitator was helpful, while 88% strongly agreed that the facilitator treated them with respect.[284] It should be noted that when this study was conducted, same-sex couples had considerably fewer legal rights in family law cases than today. In WSCCR's demographic survey of users of the facilitator program, the authors did not inquire as to sexual orientation or gender identity of participants.[285]

[279] GR 27(4).
[280] RCW 26.12.240.
[281] *See, e.g.*, King County Local Family Law Rule 5(2)(C).
[282] Thomas George & Wei Wang, Washington Courthouse Facilitator Programs for Self-Represented Litigants in Family Law Cases (2008), http://www.courts.wa.gov/subsite/wsccr/docs/Courthouse%20Facilitator%20Program.pdf.
[283] *Id.* at 26.
[284] Id.
[285] *Id.* at 27 (listing demographic information collected).

Pursuant to GR 27, the AOC supports a "Courthouse Facilitator Advisory Committee."[286] The Advisory Committee exists to "establish minimum qualifications and administer a curriculum of initial and ongoing training requirements" for family law courthouse facilitators.[287] This Committee has a very small public profile and it is difficult for members of the public to monitor the current status of its work from readily available public sources; for example, there does not appear to be a list available online of the Advisory Committee members, nor does it appear that the "curriculum of initial and ongoing training requirements" for facilitators is posted online.[288] As a result, it is not possible to determine from sources available online whether the training curriculum for Courthouse Facilitators includes training on gender bias or other forms of bias.

In 2015, the Washington State Access to Justice Board and the State Office of Civil Legal Aid submitted a proposed rule change to General Rule 27 that would have significantly expanded the oversight and certification process for courthouse facilitators.[289] The proposed rule changes would have expanded training and support for courthouse facilitator programs.[290] However, the rule was not considered or published for comment in light of the lack of available resources to implement the proposal.[291]

B. Guardians ad Litem

Washington law authorizes courts to appoint guardians ad litems (GALs) in family law cases to investigate the best interests of children whose care and support is at issue in the matter.[292] GALs in family law cases are sometimes referred to as "Title 26" GALs (the title of the Washington code that includes domestic relations law) to distinguish them from GALs who may serve in other types of cases, such as dependencies or guardianships. Family law GALs report factual information from

[286] GR 27(b).
[287] Id.
[288] A Google search of the term "Courthouse Facilitator Advisory Committee," the term used in GR 27, yielded only six results, none of which listed the members of the Advisory Committee or any training materials for facilitators.
[289] Jim Bamberger, *Email to BJA re AOC Courthouse Facilitator Funding Decision Package*, at 44 (June 9, 2016), http://www.courts.wa.gov/content/publicUpload/bja_meetings/BJA%202016%2006%2017%20MTG%20MTP.pdf (contained within Board for Judicial Administration Meeting Packet).
[290] Id.
[291] *Id.* (noting "in light of the lack of available resources, and without any comment on either the substance of the rule itself or its merits, the Court's Rules Committee has declined to consider or publish the proposed rule for comment").
[292] RCW 26.12.175(1)(b).

their investigations to the court and may make recommendations to the court about issues relating to the child's interests; this may include recommendations about parenting plans and residential schedules.[293]

Family law GALs are subject to statutes and court rules that regulate their functions.[294] A statute establishes that the courts are to determine their rates of compensation, which are generally paid by one or both parents unless both parents are indigent.[295] There are statutory training and professional qualification requirements uniformly imposed across the state.[296]

As noted earlier, the Washington Supreme Court recognized in the case of *In re Marriage of Black* that bias on the part of a family law GAL (in that case, bias based on a parent's sexual orientation and religion) can permeate the entire proceeding and require a new trial.[297] In *Black*, the Court noted that GALs are "unlike a typical witness," pointing to the fact that they are "appointed by the court, endowed with statutory powers, and required to engage in fact-finding and produce a final report on the court's behalf," act as "an arm of the court," and are "accorded quasi-judicial status."[298]

GALs have access to a curriculum designed by AOC, as required by law.[299] The statute requires this curriculum to include "specialty sections on child development, child sexual abuse, child physical abuse, child neglect, domestic violence, clinical and forensic investigative and interviewing techniques, family reconciliation and mediation services, and relevant statutory and legal requirements."[300] The statute does not require that GALs receive training on gender bias or any other form of bias.

The AOC's curriculum for GALs was originally developed and released in 1997, and was then ordered amended in 2007 when the Washington State Legislature added "domestic violence" to

[293] *Id.*; *see also* RCW 26.09.220.
[294] RCW 26.12.175–187; *Washington State Superior Court Guardian ad Litem Rules*, WASH. CTS., https://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=sup&set=GALR.
[295] RCW 26.12.183.
[296] RCW 2.56.030(15).
[297] *In re Marriage of Black*, 188 Wn.2d 114, 392 P.3d 1041 (2017).
[298] *Id.* at 134.
[299] RCW 2.56.030(15).
[300] *Id.*

the list of specialty sections the statute requires be included.[301] The 312-page guidebook for Title 26 GALs currently on the AOC website dates from 2008.[302] The guidebook includes a chapter on Cultural Competency, which includes a two-page discussion about "avoiding gender, same-sex, and transgender biases."[303] It should be noted that since the guidebook was lasted updated in 2008, Washington law has changed to provide greater legal recognition for same-sex couples and parents. Judicial officers who have been consulted for this report indicate that a new GAL training curriculum has been developed but not yet fully implemented; however, there is currently no information available to the public about the new training curriculum online.

In addition to the basic standards established by statute and the minimum training requirements included in the AOC curriculum, each individual county has its own GAL registry that may include additional qualifications. Several counties, including King, Pierce, Snohomish, Spokane, Thurston, Wahkiakum, and Yakima have dedicated GAL program administrators. Most other counties throughout the state have delegated the task of administering their GAL registry to the administrator for the Superior Court, or in some cases to an office specifically engaged in Juvenile and Family Court, as in Walla Walla County. See Appendix II to this chapter for a survey of Superior Court Alternative Dispute Resolution (ADR), CASA and Family Law Rulemaking by County. Judicial officers who were consulted for this report express concern that GAL programs and training vary widely by county, resulting in a lack of uniformity and consistency in services that families receive.

C. Court Appointed Special Advocates

Washington law also authorizes counties to establish a "court appointed special advocate" (CASA) program to provide services in family law cases.[304] Family Law CASAs are similar to Title 26 GALs and work in family court on cases involving the safety and best interests of children

[301] *Guardian ad Litem (GAL) Education & Training*, WASH. CTS., https://www.courts.wa.gov/committee/?fa=committee.display&item_id=317&committee_id=105.
[302] Wash. State Admin. Off. of the Cts., Washington State Title 26 Family Guardian ad Litem Guidebook (2008), http://www.courts.wa.gov/content/manuals/domviol/appendixe.pdf.
[303] *Id.* at 289–290 (chapter 12, pp. 7–8).
[304] RCW 26.12.175(2)(b). The nation's first CASA program was established in Seattle by Judge David W. Soukup in 1977. *Our History*, NAT'L CASA/GAL ASS'N FOR CHILDREN (2021), https://nationalcasagal.org/about-us/history/.

involved in family law cases.[305] Family law CASAs serve as volunteers and do not charge a fee for their services.[306] CASAs are also not required by statute to complete the same training requirements as GALs, but "may comply with alternative training requirements approved by the administrative office of the courts that meet or exceed the statewide requirements" for GALs.[307]

D. Parenting or mental health evaluators

Washington law also permits courts in family law cases to "appoint an investigator in addition to a guardian ad litem or court-appointed special advocate . . . to assist the court and make recommendations."[308] Washington law provides that "investigators" are third-party professionals "ordered or appointed by the court to provide an opinion, assessment, or evaluation regarding the creation or modification of a parenting plan."[309] These investigators are often referred to as "parenting evaluators," although that term is not used in the statutes. In terms of training requirements, Washington law provides that "[i]nvestigators who are not supervised by a guardian ad litem or by a court-appointed special advocate program must comply with the training requirements applicable to guardians ad litem or court-appointed special advocates as provided under this chapter and court rule."[310] In cases where a parenting evaluator is a psychologist, the Washington State Board of Health has adopted a rules that provides that the psychologist "shall not discriminate based on age, gender, race, ethnicity, national origin, religion, sexual orientation, disability, socioeconomic status, or any basis prohibited by law" in performing the parenting evaluation.[311]

Parenting evaluators may be asked by the court to investigate and file a report on a wide variety of issues, including mental health issues for one or both parents. Courts may also order a party in a family law case to undergo a mental health evaluation without appointing a parenting evaluator. Domestic violence advocates have noted a number of concerns with mental health evaluations in family law cases involving survivors of domestic violence, including the training of

[305] RCW 26.12.175; RCW 26.09.220(1)(a).
[306] *See* RCW 26.12.183 (authorizing fees for GALs and "investigators" appointed by the court, but not for CASAs).
[307] RCW 26.12.177(1).
[308] RCW 26.12.188(1); *see also* RCW 26.12.050(1)(b).
[309] RCW 26.12.188(2).
[310] RCW 26.12.188(3).
[311] WAC 246-924-445.

evaluators on domestic violence and its connections with trauma, substance abuse, and mental health.[312] Other concerns include evaluators failing to take into account the domestic violence or the other parent's abusive and coercive behaviors, use of psychological tests that were not designed to evaluate parenting or to take into consideration domestic violence, and failure of evaluations to accurately reflect survivor's parenting abilities.[313]

E. Family court services programs

Washington law also authorizes counties to establish family court services programs.[314] The authorizing statute provides that such programs "may hire professional employees to provide the investigation, evaluation and reporting, and mediation services, or the county may contract for these services, or both."[315] The statute does not specifically establish minimum training requirements for professionals employed by county family court services programs.

F. Mediators

Washington State law allows, but does not require, mediation in family law cases.[316] Mediation is a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.[317] Washington State law also provides that "[m]ediation is generally inappropriate in cases involving domestic violence and child abuse," although it may be permitted in such cases if requested by the victim and the court finds that mediation is appropriate under the circumstances and the victim is permitted to have a supporting person present during mediation proceedings.[318] Most counties in Washington State have adopted court rules that require mediation between the parties in family law cases – although, as noted above, mediation should not be required in cases involving allegations of domestic violence or child abuse.[319]

[312] Domestic Violence & Mental Health Collaboration Project of the Coal. Ending Gender-Based Violence, Family Law Toolkit for Survivors 3 (2016).
[313] *Id.* at 4.
[314] RCW 26.12.220.
[315] RCW 26.12.220(3).
[316] RCW 26.09.015.
[317] *Mediation*, BLACK'S LAW DICTIONARY 1176 (11th ed. 2019).
[318] RCW 26.09.016.
[319] *See* Appendix II to this chapter: Survey of Superior Court ADR and CASA Rulemaking by County, *infra* p. 75.

Washington law also authorizes courts, upon a majority vote of the Superior Court judges in the county, to require arbitration to be used to decide cases in which the "sole relief sought is the establishment, termination, or modification of maintenance or child support payments."[320] While mediation is a form of alternative dispute resolution (ADR) where the parties may seek to voluntarily resolve a dispute but are under no obligation to reach a final agreement, arbitration is a form of ADR in which a third-party – the arbitrator – decides the case, subject under Washington law to limited judicial review.[321]

Requiring mediation or other forms of ADR in family law cases raises concerns about possible gender and intersectional bias due to power imbalances between the parties. As one commentator has noted:

> Successful mediation assumes that the parties to the mediation begin from equal positions of power. Power comes in a number of forms; economic, intellectual, physical, emotional, and procedural. But many women are trapped in relationships—familial, employment, or contractual—that are characterized by power imbalances. Mediating in the face of these power imbalances undermines the premise that mediation gives the parties greater control and self-determination than traditional litigation.[322]

In domestic violence cases, for instance, "typically the batterer demands compromises that seem innocent to the mediator but speak only of power, control, and safety issues to the battered mother."[323]

It should be noted that some studies estimate that over half of all cases referred for mediation in divorce and child custody cases involve issues of domestic violence, even if they are not labeled as such cases.[324] Mediators often push parties towards compromise and joint custody agreements without considering the inability of the parties to work together in light of the domestic violence and may even tell the parent who has been a victim of domestic violence that

[320] RCW 7.06.020(2).
[321] *Davidson v. Hensen*, 85 Wn. App. 187, 192–93, 933 P.2d 1050 (1997).
[322] Leigh Goodmark, Alternative Dispute Resolution & the Potential for Gender Bias, 39 JUDGES J. 21, 22 (2000).
[323] *Id.* at 23.
[324] *Id.* at 24.

unwillingness to accept joint custody may result in awarding custody to the other parent.[325] Power imbalance created by one spouse's access to economic resources over the economically dependent spouse can have similar impact on the mediation.[326] As a result, the sensitivity and awareness of a mediator to gender bias is crucial in family law proceedings.

VII. Findings about the Existence or Non-Existence of Gender Disparities in Washington in Family Law Cases

There is little data related to the existence or non-existence of gender disparities in family law cases in Washington State. Washington's family law statutes are gender-neutral and do not facially exhibit bias based on gender. As discussed above, collecting data related to gender disparities as well as disparities based on race or ethnicity in family law cases is challenging and such disparities can be difficult to discern through reviews of case files. In addition, there do not appear to be any appellate court decisions in Washington since 1989 which explicitly held that a trial court exhibited gender bias in deciding a family law case, although there is one case in which the Washington Supreme Court recognized that a guardian ad litem in a case was biased against a parent based on her sexual orientation.

However, in the area of property distribution in divorce cases, the recent study by Vanderbilt Law Professor Jennifer Bennett Shinall illustrates continuing concerns about gender bias in dividing property when a couple separates, a decision where courts have broad discretion under Washington law. As discussed above, this study found that participants—both male and female—were more likely to favor men in distributing property in various hypothetical scenarios. And as Professor Shinall noted, this concern about gender bias applies not only to judicial officers in the relatively small number cases where property distribution is decided after a contested trial; it applies as well to lawyers, mediators, and litigants in reaching settlements of family law cases.

In the area of parenting plan decisions, the Residential Time Summary Reports that the Legislature required in legislation adopted in 2007 had the potential to provide more

[325] Id.
[326] Id.

comprehensive data about gender disparities in residential time decisions in Washington. However, as discussed above, there has been poor compliance with the requirement of parties to file RTSRs in dissolution cases, which raises questions about the reliably of such data. Nonetheless, the RTSR data collected through 2016 shows that while there has been a trend toward more equal division of residential time between men and women in cases involving different-sex parents, women in general continue to have more residential time than men in parenting plans for which RTSR data was collected.

However, it is not clear from the RTSR data why women, in general, are more likely than men to have a majority of the residential time in parenting plans entered in Washington. As noted above, the Parenting Act requires courts to consider whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child, and studies continue to indicate that mothers on average spend more time caring for children than fathers. In addition, the vast majority of parenting plans entered in Washington are the result of agreement of the parties, rather than the result of contested trials; as a result, the parties themselves appear to continue to be more likely to agree to a parenting plan where the mother has more residential time than the father. And as noted above, the RTSR reports suggest that having legal representation is a key factor in residential time decisions, with results indicating that "when either side had a lawyer, they were likely to get more residential time than when both parties were self-represented," and that "there are fewer extreme splits in residential time" when both parents have an attorney.[327]

Research indicates that men, particularly low-income Black, Indigenous, and men of color, are more likely to face possible incarceration for non-payment of child support than women. However, there is a lack of data both in Washington and nationally on how often parents are incarcerated for non-payment of child support and whether parents were afforded their right to counsel in such proceedings.

There have been appellate court decisions since 1989 which have held that trial courts improperly failed to apply Washington laws with respect to survivors of domestic violence, who are more

[327] WASH. STATE CTR. FOR CT. RSCH., *supra* note 130, at 7.

likely to be women. National studies raise similar concerns about the improper application of the law when women allege domestic violence in family law cases, as well as concerns that women's allegations of domestic violence or child abuse are less likely to be credited than a man's allegation of "parental alienation" by the mother.

In family law cases, the court may appoint third-party professionals to investigate and make recommendations to the court, particularly with respect to parenting plans. These professionals have differing levels of training and experience in domestic violence and bias based on gender, sexual orientation, or gender identity.

VIII. Recommendations

- Stakeholders should convene to consider proposing to the Washington State Legislature that it increase funding for civil legal aid in the 2022 legislative session to provide greater access to legal representation for both parties in family law cases, particularly cases involving minor children.
- Stakeholders should convene to propose to the Washington State Legislature during the 2022 legislative session that it fund a pilot project, in selected counties, that would provide appointed counsel at public expense to indigent parents in family law cases in which one or both parents are seeking restrictions on the other parent's residential time with a child. The pilot project should be tailored to the needs of the chosen county(ies), should provide metrics to evaluate the fiscal and justice impact by gender, race, ethnicity, and LGBTQ+ status, and should include a public report on the findings.
- In order to make Washington law's recognition of committed intimate relationships more accessible and understandable to people who cannot afford a lawyer, the AOC should develop forms to be used to file petitions brought under that doctrine.
- In the 2022 legislative session, the Washington State Legislature should consider repealing requirements related to the filing of "residential time summary reports" in dissolution cases involving children (RCW 26.09.231, RCW 26.18.230). In its place, the Legislature should consider adopting a requirement that an appropriate entity conduct

an annual record review based on a sample of cases to collect the data currently required by RCW 26.18.230, and to publish an annual report based on the data collected.

- In 2022, the AOC, in consultation with the Gender and Justice Commission and other relevant stakeholders, should develop and implement a plan to regularly collect data from Washington's Superior Courts to determine how often parents who owe child support are: (1) named in a bench warrant for failure to appear at a hearing for alleged failure to pay child support; (2) arrested and incarcerated, even temporarily, on that bench warrant; and (3) arrested and incarcerated for failure to pay child support. This data should include information about the gender, race, and ethnicity of the parent and whether the parent was represented by counsel before the bench warrant issued.
- In 2022, the Gender and Justice Commission should convene stakeholders to evaluate what evidence-based programs are most effective in educating judicial officers, attorneys, and third-party professionals in family law cases about domestic violence and racial or gender bias, including training on bias based on gender, sexual orientation, gender identity, and intersecting implicit biases.
- Based on the results of this evaluation, AOC should update and continue to publicize its training curricula for Title 26 Guardian ad Litem (GALs) and Courthouse Facilitators to include or expand training on domestic violence and on bias based on race, ethnicity, gender, sexual orientation, gender identity, and intersecting implicit biases. Training curricula should also be updated as needed to reflect changes in Washington law that have increased legal recognition and protections for gay and lesbian couples and parents.

Appendix I. Summary of Which 1989 Recommendations by the Subcommittee on the Consequences of Divorce Were Implemented[328]

Recommendations for Judges:

No.	Recommendation	Implemented?
1	The Superior Court Judges' Association and the Legislature should jointly study maintenance and property division to recommend changes which will achieve greater economic equality among family members following dissolution.	Yes.
2	The Superior Court Judges should consider whether maintenance guidelines or a maintenance schedule should be developed, and if so, develop one for use by the trial courts statewide.	No formal maintenance guidelines or a maintenance schedule were developed.
3	Judges should require and enforce dissolution decrees to explicitly address the following: a. Security for the child support obligation, such as maintenance of life insurance with a particular named beneficiary; b. The responsibility for maintaining medical insurance on behalf of the children, as required by statute; c. The responsibility for educational support of children beyond high school; and d. A specific provision for the allocation of employment related day-care expenses between the parents, as required by statute.	No studies have attempted to measure this recommendation.
4	Develop education programs for judges in the area of custody, to reinforce the concept of addressing each case on its merits, avoiding percentage goals and presumptions, and recognizing the diversity of the families who present themselves. Both judges and lawyers should conscientiously assess each family situation presented in the light of the factors required by the Parenting Act, without assumptions based solely on gender.	The extent to which this recommendation has been implemented is not clear.

[328] This chart is set forth for historical purposes and should not be construed as the renewal of these recommendations from 1989 by this study.

Recommendations for the Legislature:

No.	Recommendation	Implemented?
1	Enact legislation which makes the issue of a spouse's earning capacity a specific statutory factor in awarding maintenance or property division.	No
2	Consider replacing the term "rehabilitative" maintenance, with its negative connotation, with "compensatory" maintenance, reflecting the importance of evaluating the respective standard of living each party will experience after divorce in light of the contributions each has made to the marriage, whether financial or otherwise.	No. It should be noted that neither the term "rehabilitative" or "compensatory" maintenance were used in the Revised Code of Washington in 1989; as such, this recommendation appears to be geared toward use of these terms by courts. A search of Washington appellate decisions indicates that the term "rehabilitative maintenance" has been used occasionally by Washington courts since 1989.[329]
3	Reevaluate that portion of RCW 26.09.170 which automatically terminates maintenance upon the remarriage of the party receiving maintenance.	This provision of RCW 26.09.170 not been substantively changed.
4	Amend RCW 26.18.010 et seq. (or ch. 26.18 RCW) to authorize mandatory wage assignments for maintenance payments to the same extent as is currently provided for child support obligations.	Yes
5	Immediately address the need for reasonably affordable quality day-care for working parents. Consider incentives for public and private sector employer sponsored day-care facilities.	It is difficult to evaluate the extent to which this recommendation has been implemented; however, access to affordable child care remains a problem for many families.

[329] *See, e.g.*, *Moore v. Moore*, No. 70439-7-I, 2014 WL 4347591, at *7 (Wash. Ct. App. Sept. 2, 2014) (quoting trial court's use of term "rehabilitative maintenance"); *Floyd v. Floyd*, No. 20822-9-II, 1998 WL 97212, at *3 (Wash. Ct. App. Mar. 6, 1998) (use of term "rehabilitative maintenance" by Court of Appeals).

No.	Recommendation	Implemented?
6	Consider alternative dispute resolution methods for addressing marital dissolutions in appropriate cases.	Yes
7	Review the issue of divided military benefits and the *McCarty*[330] decision to determine if case law adequately addresses the problem or if additional legislative action is necessary.	Unknown whether this was reviewed.
8	The Superior Court Judges' Association and the Legislature should jointly study maintenance and property division to recommend changes which will achieve greater economic equality among family members following dissolution.	Yes[331]

Recommendations for the Washington State Bar Association:

No.	Recommendation	Implemented?
1	Develop continuing education programs on the effects of gender stereotyping in family law matters and the need for lawyers to provide adequate economic data and expert witnesses to the judges in marital dissolution cases.	Unknown[332]
2	Develop more programs for free or low cost counsel and use of expert witnesses in family law areas.	Moderate Means program established.

[330] *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981).
[331] This study does not appear to be available online. However, the records of the Gender & Justice Commission indicate that "[t]he study was conducted at the request of the Legislature at the recommendation of the Gender and Justice Task Force. The report was distributed to the state judiciary and legislators." *Gender and Justice Commission*, WASH. CTS. (2020), https://www.courts.wa.gov/committee/?fa=committee.display&item_id=144&committee_id=85.
[332] However, it should be noted that in 1998, a national report on implementation efforts by the 40-plus state task forces on gender bias in the courts stated that "[t]he Washington State Bar Association and Washington Women Lawyers were represented on the Task Force and have utilized Implementation Committee members in continuing legal education programs." NAT'L JUD. EDUC. PROGRAM, THE GENDER FAIRNESS STRATEGIES PROJECT: IMPLEMENTATION RESOURCES DIRECTORY 151 (1998), https://www.legalmomentum.org/node/213.

Recommendations for Judges, the Legislature, County Government, and Bar Associations:

No.	Recommendation	Implemented?
1	Address the barriers to court access which may significantly bar meaningful and equal participation by litigants, including: a. The lack of adequate legal assistance in family law matters; b. The high cost of attorney fees; c. The lack of alternative methods for addressing marital dissolutions; d. The lack of child care at courthouses; and e. Transportation difficulties for litigants in getting to the county courthouse.	In part. For example, funding for civil legal aid has increased since 1989, while the Moderate Means program has been established. Child care centers have been established at two Washington Superior Courts (Kent and Spokane). However, this recommendation has not been fully implemented.

Recommendations for the Gender and Justice Implementation Committee:

No.	Recommendation	Implemented?
1	Work with the Board for Trial Court Education and the Bar to develop and provide further education for judges and lawyers about the economic consequences for families following dissolution.	No
2	Develop a standard economic data form for inclusion in all dissolution decrees which the Supreme Court should require be filed by adoption of court rule.	No
3	Implement a prospective study of contested dissolution cases which will gather data on property division which could not be done in the retrospective dissolution case study.	No
4	Study and make recommendations for the court's use of contempt powers to enforce family law decrees.	No
5	Review the effects of the Parenting Act on maintenance and child support awards.	No

Appendix II. Survey of Superior Court ADR, CASA, and Family Law Rulemaking by County

Compiled by Laura Edmonston, Deputy Law Librarian (Reference), Washington Law Library

County	CASA	ADR	Family Court	Source
Adams	Not Found	Not Found	LCR 5(B); 14; 15	https://www.clark.wa.gov/sites/default/files/dept/files/superior-court/LOCAL%20RULES%202020.pdf
Asotin/ Columbia/ Garfield	LGALR 2(d); LGALR 7(2)	LCR 16(f)	LGALR 2; 7; LCR 7(9); LCR 16(7)(g)	http://www.courts.wa.gov/court_rules/pdf/LCR/02/SUP/LCR_Asotin_Garfield_Columbia_SUP.pdf
Benton/ Franklin	LGAL 2; LJCR 9.4	LMAR 1.1 - 8.7	LCR 94.04W - 96.00W;	http://www.benton-franklinsuperiorcourt.com/local-rules/current-local-rules/
Chelan	LSPR 94.04(F)(d)(iv)	Not Found	LSPR 94.04; 96.04; LGALR 98.10 -11	http://www.courts.wa.gov/court_rules/pdf/LCR/04/SUP/LCR_Chelan_SUP.pdf
Clallam	LGALR 7 (II)(a)	Not Found	LCR 94 (a-f)	http://www.courts.wa.gov/court_rules/pdf/LCR/05/SUP/LCR_Clallam_SUP.pdf
Clark	LGALR 7.0	LAR 0.2 (b)(4)	LAR 0.2 (b)(4); LAR 0.6; LCR 4.1; 40 (b) (7)	https://www.clark.wa.gov/sites/default/files/dept/files/superior-court/LOCAL%20RULES%202020.pdf
Cowlitz	CCLGALR 3, 7	LMAR 1.1 - 8.6	CCLGR 22; CCLCR 92; Civil Rule 91, 92	http://www.courts.wa.gov/court_rules/pdf/LCR/08/SUP/LCR_Cowlitz_SUP.pdf
Douglas	Not found	LR 94.04 (c)(1); LMAR 1.1-8.6)	LR 94.04, 96.04	http://www.courts.wa.gov/court_rules/pdf/LCR/09/SUP/LCR_Douglas_SUP.pdf
Ferry/Pend Oreille	LRGAL 1 - 10	LCR 16	LAR 4; LCR 16; LCR 93.04; 94.04	http://www.courts.wa.gov/court_rules/pdf/LCR/10/SUP/LCR_Ferry_Pend_Oreille_Stevens_SUP.pdf

County	CASA	ADR	Family Court	Source
Grant	LAR 5 (II)	LRMA 1.1 - 5.7; LRMM 1-5	LCR 7; 16 A, B, C; 26F (c); 79	http://www.courts.wa.gov/court_rules/pdf/LCR/13/SUP/LCR_Grant_SUP.pdf
Grays Harbor	LGALR 1 (c)	LFLCR 16	LFLCR 1, 16; LCR 1	http://www.courts.wa.gov/court_rules/pdf/LCR/14/SUP/LCR_Grays_Harbor_SUP.pdf; http://www.courts.wa.gov/court_rules/pdf/lcr/14/sup/LCR_Grays_Harbor_SUP_ER01.pdf
Island	SPR 94.04 (2)(iv); GALR (7)(d)	SPR 94.04(F)	SPR 94.04	https://www.islandcountywa.gov/SuperiorCourt/Documents/Local%20Court%20Rules%202020%20Final.pdf
Jefferson	LGALR 13 (VII)	LCR 16.2	LCR 7.12.4	http://www.courts.wa.gov/court_rules/pdf/LCR/16/SUP/LCR_Jefferson_SUP.pdf
King	LJuCR 2.3 (f); 3.8 [c](1); 4.2 [c]; 4.5 (d)(1)	LCR 4.2(b); LFLR 13(b); LFLR 15(f); LFLR 16	LFLR 1 - 21	https://www.kingcounty.gov/courts/clerk/rules.aspx
Kitsap	KCLGALR	KCLFLR 6	KCLFLR	https://www.kitsapgov.com/sc/Documents/2019-2020_Kitsap_County_Local_Court_Rules_Effective_Dec_1_2019.pdf
Kittitas	Not found	LCR 40 (E)(1)	LSPR 94.04	http://www.courts.wa.gov/court_rules/pdf/LCR/19/SUP/LCR_Kittitas_SUP.pdf
Klickitat/ Skamania	Not Found	Domestic Relations 7 - V(B)	Rules 7, 17, 20	http://www.courts.wa.gov/court_rules/pdf/LCR/20/SUP/LCR_Klickitat_Skamania_SUP.pdf
Lewis	Not Found	LMMR 1 - 12; LMSCR 1	LMPSR 1.1 - 6.1	https://lewiscountywa.gov/offices/superior-court/local-court-rules/
Lincoln	Not Found	Not Found	Not Found	http://www.courts.wa.gov/court_rules/pdf/LCR/22/SUP/LCR_Lincoln_SUP.pdf

County	CASA	ADR	Family Court	Source
Mason	Not Found	LCR 40	LSPR 94.04	http://www.courts.wa.gov/court_rules/pdf/LCR/23/SUP/LCR_Mason_SUP.pdf
Okanogan	Not Found	LSPR 94.04.03; Appendix B	LSPR 94.04.01 - .03	http://www.courts.wa.gov/court_rules/pdf/LCR/24/SUP/LCR_Okanogan_SUP.pdf
Pacific/ Wakiakum	Not Found	LCR 11	LCR 7-9; 13	Westlaw
Pierce	PCLSPR 94.04 (5)(d)	PCLSPR 94.04 (f)(3); (g)(3)	PCLSPR 93.04; 94.04; .05	https://www.co.pierce.wa.us/DocumentCenter/View/82768/Local-Rules---effective-September-1-2019?bidId=
San Juan	LJuCR 1.6	SPR 94.08.3	SPR 94.08.1; .2; .3	https://www.sanjuanco.com/DocumentCenter/View/104/Local-Court-Rules-2019-PDF?bidId=
Skagit	Not Found	SCLSPR 94.04.2 [c]	SCLSPR 94.04.1 - .5	https://www.skagitcounty.net/SuperiorCourt/Documents/LOCAL%20COURT%20RULES.pdf
Snohomish	SCLJuCR 11.4; 11 Supp. (X)(1)	SCLSPR 94.04[c] et seq.	SCLSPR 93.04; 94.04; 94.05	https://www.snohomishcountywa.gov/DocumentCenter/View/4225/Snohomish-County-Superior-Court-Local-Rules-PDF?bidId=
Spokane	LJuCR 2.3 (a)(b); 3.4 (f)	LSPR 92.0 (b); 94.04 (p)(q)	LSPR 93.04; 94.04; .05; 96.04	https://www.spokanecounty.org/DocumentCenter/View/26690/2019-Final-Local-Court-Rules-with-Amendments?bidId=
Thurston	LJuCR 4 (a)(5); LGALR (5)[c], 7 (k)(2)	LSPR 94.05	LSPR 94.00 - 94.14	https://www.thurstoncountywa.gov/sc/scdocuments/thurston-county-local-court-rules.pdf
Walla Walla	WWLJuCR 1.6; WWLGALR 2	WWLDRR 99.04W B	WWLAR 1E; WWLDRR; WWLGALR 4	https://www.co.walla-walla.wa.us/document_center/clerk/Local%20Court%20Rules%20-%20Walla%20Walla%20County.pdf

County	CASA	ADR	Family Court	Source
Whatcom	Not Found	WCSPR 94.08 (h)(i)(j)(k)(l)	WCSPR 93.04; 94.04 et seq.	http://www.co.whatcom.wa.us/DocumentCenter/View/569/Court-Rules-PDF?bidId=
Whitman	Not Found	WCLCR 2	WCLCR 2; 4	http://whitmancounty.org/DocumentCenter/View/595/Local-Court-Rules-PDF
Yakima	LSPR 94.04W (H)(1)(a)	LSPR 94.04W (A)(4)	LSPR 94.04W	https://www.yakimacounty.us/553/Local-Rules

Part III

Gender, Violence, Youth, and Exploitation

Chapter 8

Consequences of Gender-Based Violence: Domestic Violence and Sexual Violence

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Appendix I 422

I. Summary

Domestic and sexual violence are categories of gender-based[1] violence perpetrated against a person or group of people due to their actual or perceived sex, gender, sexual orientation, or gender identity. In the 1989 Gender and Justice in the Courts Study (1989 Study), the Task Force's Subcommittee on the Consequences of Violence evaluated the judicial system's response to domestic violence and adult rape to determine whether gender bias was evident in the implementation of domestic violence and sexual assault laws and in the treatment of victims.[2] The 1989 Study identified gender-related problems in both areas.

Since the 1989 Study was published, Washington has addressed remedies for victims of domestic and sexual violence primarily through the passage of criminal and civil laws. Despite numerous improvements in the law since 1989, these types of violence remain prevalent, and have a disproportionate impact on women; Black, Indigenous, and people of color; immigrants; those living in poverty; and LGBTQ+[3] people. For example, in Washington State from 2010-2012, 44.8% of women reported having experienced contact sexual violence in their lifetime, compared to 21.6% of men. National data from 2010 shows: 1) 55.5% of American Indian/Alaska Native[4] women reported having experienced physical violence by an intimate partner and 56.1% reported sexual violence in their lifetime, 2) nearly half of bisexual women (46.1%) reported having experienced rape in their lifetime, compared to 17.4 % of heterosexual women and 0.7% of heterosexual men; and 3) gay and bisexual men reported a significantly higher prevalence of sexual violence other than rape, compared to heterosexual men. A 2009 review of United States

[1] Please note that the data and research referenced throughout this section are limited based on the historically inadequate collection of data using a gender binary that causes erasure of many gender-diverse populations and masks disparities. Where datasets or research allowed for analysis for transgender or gender nonbinary populations we have done so, but where that is not done it is because the dataset did not allow for that analysis.
[2] Throughout this report, the terms "victim" and "survivor" will be used interchangeably, depending on context. We understand the limitations of each of these terms.
[3] Lesbian, gay, bisexual, transgender, queer, or questioning.
[4] The 2021 Gender Justice Study uses the race and ethnicity terms used in the underlying sources when citing data in order to ensure we are presenting the data accurately and in alignment with the how the individuals self-identified. When talking more broadly about the body of literature we strive to use the most respectful terms. See Section V of the full report ("2021 Gender Justice Study Terminology, Methods, and Limitations") for a more detailed explanation of terminology used throughout the report.

data found that approximately half of transgender individuals experienced unwanted sexual contact.

There is also an urgent need to respond to the crisis of Missing and Murdered Indigenous Women and People. Indigenous women are murdered at significantly higher rates than women of other races. Meetings of tribal nations and community members across the state highlighted barriers and solutions to addressing this crisis. Some of the mentioned solutions include collaboration between law enforcement, government, and community; training for law enforcement on aspects such as the missing person process, human emotions, and Native American culture; respect for the government-to-government relationship; and increased community resources.

Women, LGBTQ+ individuals, and youth who are incarcerated are also at particularly high risk of sexual assault while in confinement. And incarcerated individuals who experienced sexual victimization before incarceration are more likely to report being sexually victimized by other incarcerated individuals or staff while in prison or jail.

In addition to the prevalence of domestic and sexual violence, barriers to access remain for victims seeking to access civil and criminal legal remedies stemming from and related to the violence perpetrated against them. These barriers may contribute to the choice many survivors of domestic and sexual violence make not to report this violence to law enforcement or to engage with the justice system. An estimated 44% of intimate partner violence incidents and 65% of sexual assaults go unreported to law enforcement.

Research shows that domestic violence survivors also decline to report due to fear of unintended consequences, previous negative interactions with the system, lack of confidence in the ability of the legal system to improve their lives, or not identifying their experience as intimate partner violence. Research also indicates that some immigrant women report withdrawing their court case out of fear of deportation. Similarly, for survivors of sexual violence, rape myths, perceived false reports, negative system response and treatment of victims, and high rates of case attrition are deterrents to engaging with the justice process.

Moving forward, Washington needs to prioritize increasing access to legal aid attorneys for civil domestic and sexual violence cases. Washington needs to expand data collection and research

on gender-based violence, to increase evidence-based prevention efforts including treatment options for perpetrators of domestic violence such as Domestic Violence Moral Reconation Therapy (DV-MRT), and to promote and require education for justice system stakeholders working on cases involving domestic and sexual violence.

II. Introduction

For the 1989 Study mentioned above, the Task Force's Subcommittee on the Consequences of Violence gathered information from public hearings and surveys from domestic violence service providers, sexual assault service providers, judges, and lawyers.[5] The1989 Study found that gender bias was reflected in the Washington State Courts, reporting gender-related problems in the areas of domestic violence and sexual assault.[6] Largely focused on the criminal justice process in its evaluation of gender bias within the judicial system, the Task Force's recommendations to address bias as it impacted the treatment of victims and the interpretation and application of laws included the following:

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

[5] WASH. STATE TASK FORCE ON GENDER & JUST. IN THE CTS., GENDER AND JUSTICE IN THE COURTS (1989), http://www.courts.wa.gov/subsite/gjc/documents/Gender%20and%20Justice%20in%20the%20Courts--Final%20Report,%201989.pdf.
[6] *Id.* at 4.

These recommendations stemmed from a necessity to require institutions, including police, prosecutors, and the courts, to address domestic and sexual violence as serious crimes and to communicate that such violent behavior would not be excused or tolerated.

Since the 1989 Study was published, Washington has primarily addressed remedies for victims of domestic and sexual violence through the passage of criminal and civil laws. Please also note that in this section of the 2021 Gender Justice Study, we recognize the focus is Washington State; however, we have included information from other jurisdictions where we lack information, or where it is a valuable source for guidance.

Despite numerous improvements in the law since 1989, these types of violence remain prevalent, and have a disproportionate impact on women; Black, Indigenous, and people of color; immigrants;[7] those living in poverty;[8] and LGBTQ+ people:

- Nationally representative data from 2010-2012 show that 37.3% of U.S. women report a lifetime prevalence of intimate partner violence (sexual violence, physical violence, and/or stalking), compared to 30.9% of men and that 36.3% of women reported experiencing contact sexual violence during their lifetime, compared to 17.1% of men.[9]
- The majority of violence against men is perpetrated by acquaintances or strangers, whereas women are more likely to experience violence and abuse from their intimate partner, reinforcing an imbalance of power in the relationship.[10]
- In Washington State, from 2010-2012, 44.8% of women reported having experienced contact sexual violence in their lifetime, compared to 21.6% of men.[11]

[7] See e.g., Yeon-shim Lee & Linda Hadeed, Intimate Partner Violence Among Asian Immigrant Communities: Health/Mental Health Consequences, Help-Seeking Behaviors, and Service Utilization, 10 VIOLENCE 143 (2009) (summarizing evidence from community-based studies on Asian Immigrant populations and revealing high prevalence of intimate partner violence and chronic underreporting).
[8] *See e.g.* Matthew J. Breiding et al., *Economic Insecurity and Intimate Partner and Sexual Violence Victimization*, 53 AM. J. PREVENTIVE MED. 457 (2017).
[9] CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR INJ. PREVENTION & CONTROL, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010-2012 STATE REPORT 128 (2017), https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf (Table 5.7).
[10] PATRICIA MAHONEY ET AL., U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, VIOLENCE AGAINST WOMEN BY INTIMATE RELATIONSHIP PARTNERS (FROM SOURCEBOOK ON VIOLENCE AGAINST WOMEN, P 143-178, 2001, CLAIRE M. RENZETTI, JEFFREY L. EDLESON, AND RAQUEL K. BERGEN, EDS. -- SEE NCJ-201429) (2011), https://www.ojp.gov/ncjrs/virtual-library/abstracts/violence-against-women-intimate-relationship-partners-sourcebook.
[11] *Id.*

- Multiracial women, American Indian/Alaska Native women and Black women report higher rates of lifetime intimate partner violence (IPV) than their white, Hispanic and Asian, Native Hawaiian, and other Pacific Islander peers.[12] It is important to note that grouping diverse populations into one category (such as combining all Asian, Native Hawaiian, and other Pacific Islanders) frequency masks disparities.
- The Black population is disproportionately overrepresented among both victims and perpetrators of intimate partner violence, with 45.1% of Black women reporting an experience of sexual violence, physical aggression, or stalking from an intimate partner.[13]
- In 2010, 55.5% of American Indian/Alaska Native women reported having experienced physical violence by an intimate partner and data from 2010 also shows that 56.1% of American Indian/Alaska Native women have experienced sexual violence in their lifetime.[14]
- Nearly half of bisexual women (46.1%) report having experienced rape in their lifetime, compared to 17.4% of heterosexual women and 0.7% of heterosexual men.[15]
- Gay and bisexual men have a significantly higher prevalence of sexual violence other than rape, compared to heterosexual men.[16]
- A 2009 review of United States data found that approximately half of transgender individuals experienced unwanted sexual contact.[17] Transgender feminine individuals

[12] *Id.*
[13] Carolyn M. West, Widening the Lens: Expanding the Research on Intimate Partner Violence in Black Communities, 30 *J. Aggression Maltreatment & Trauma* 1 (2021).
[14] ANDRÉ B. ROSAY, NAT'L INST. OF JUST., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN: 2010 FINDINGS FROM THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (2016), https://www.ncjrs.gov/pdffiles1/nij/249736.pdf.
[15] MIKEL L. WALTERS, JIERU CHEN & MATTHEW J. BREIDING, CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR INJ. PREVENTION & CONTROL, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 FINDINGS ON VICTIMIZATION BY SEXUAL ORIENTATION (2013), https://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf.
[16] *Id.*
[17] *See e.g.*, Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 AGGRESSION & VIOLENT BEHAV. 170 (2009). Data from multiple sources (self-report surveys and needs assessments, hot-line call and social service records, and police reports) indicates that violence against transgender people starts early in life, that transgender people are at risk for multiple types and incidences of violence, and that this threat lasts throughout their lives.

have the highest risk of sexual victimization out of any other subset of the United States population.[18]

In addition to the prevalence of domestic and sexual violence, barriers to access remain for those victims seeking to access civil and criminal legal remedies stemming from and related to the violence perpetrated against them. These barriers contribute to the choice many survivors of domestic and sexual violence make not to report this violence to law enforcement or to engage with the justice system.[19] An estimated 44% of intimate partner violence incidents and 65% of sexual assaults go unreported to law enforcement.[20]

Research shows that in addition to a lack of understanding[21] and inaccessibility of the process,[22] domestic violence survivors also do not report due to the fear of unintended consequences,[23] previous negative interactions with the system,[24] lack of belief that engaging with the legal

[18] *See* Sara Matsuzaka & David E. Koch, *Trans Feminine Sexual Violence Experiences: The Intersection of Transphobia and Misogyny*, 34 AFFILIA 28 (2019). *See also* Daniela Jauk, *Gender Violence Revisited: Lessons from Violent Victimization of Transgender Identified Individuals*, 16 SEXUALITIES 807, 816 (2013) ("Transgender women face disadvantage because they choose to be feminine in a world in which women and men devalue femininity."); JULIA SERANO, WHIPPING GIRL: A TRANSSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY (2007).
[19] *E.g.*, BRYAN A. REAVES, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., POLICE RESPONSE TO DOMESTIC VIOLENCE, 2006-2015 (2017), https://bjs.ojp.gov/library/publications/police-response-domestic-violence-2006-2015; LYNN LANGTON ET AL., U.S. DEP'T OF JUST., BUREAU OF JUST., STAT., VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006-2010 (2012), https://bjs.ojp.gov/content/pub/pdf/vnrp0610.pdf.
[20] *Id.*
[21] *See e.g.*, Margaret E. Adams & Jacquelyn Campbell, *Being Undocumented & Intimate Partner Violence (IPV): Multiple Vulnerabilities Through the Lens of Feminist Intersectionality*, 11 WOMEN'S HEALTH & URB. LIFE 15 (Undocumented immigrant individuals may be unaware of the laws that exist to protect them in their communities, or may choose not to involve law enforcement due to fear of deportation of themselves or their partners). *See also* Emerson Beishline, *An Examination of the Effects of Institutional Racism and Systemic Prejudice on Intimate Partner Violence in Minority Communities*, 4 LAW RAZA 1 (2012).
[22] *See e.g.*, Margret E. Bell et al., *Battered Women's Perceptions of Civil and Criminal Court Helpfulness: The Role of Court Outcome and Process*, 17 VIOLENCE AGAINST WOMEN 71 (2011) (A qualitative study conducted with nearly 300 women, mostly low-income Black women and women of color involved in civil and criminal justice system in a mid-Atlantic city, yielded mixed perceptions of the helpfulness of civil and criminal court involvement).
[23] *See e.g.*, MIEKO YOSHIHAMA ET AL., LIFECOURSE EXPERIENCES OF INTIMATE PARTNER VIOLENCE AND HELP-SEEKING AMONG FILIPINA, INDIAN, AND PAKISTANI WOMEN: IMPLICATIONS FOR JUSTICE SYSTEM RESPONSES 123 (2010), http://www.ncdsv.org/images/LifecourseExpIPVHelpseekingAmongFilipinaIndianPakistaniWomenImpJusticeSystemResponse_10-2011.pdf. In a series of 143 interviews with Filipina, Indian and Pakistani women in the San Francisco Bay Area, nearly half of the women who reported lifetime IPV did not call the police. Among the most common reasons for not calling police were a lack of knowledge and familiarity with the system; concerns about immigration status; and fear, as well as personal, cultural and family factors. *Id.*
[24] *See e.g.* PURI SHAH, VAWNET, OVER-INCARCERATION OF TRANS SURVIVORS & IMMIGRATION DETENTION AS PART OF MASS INCARCERATION: REPORT FROM THE FIELD: ECONOMIC POLICY AND LEADERSHIP SERIES (2018), https://vawnet.org/material/over-incarceration-trans-survivors-immigrant-detention-part-mass-incarceration (finding that mass incarceration in Black, Indigenous, and communities of color may lead victims belonging to

system will improve their lives,[25] or not identifying their experience as intimate partner violence.[26] Similarly, for survivors of sexual violence, rape myths,[27] perceived false reports,[28] negative system response and treatment of victims,[29] and high rates of case attrition[30] are deterrents to engaging with the justice process.

these communities to avoid law enforcement involvement); Lauren B. Cattaneo, *The Role of Socioeconomic Status in Interactions with Police Among a National Sample of Women Experiencing Intimate Partner Violence*, 45 AM. J. CMTY. PSYCH. 247 (2010); LAMBDA LEGAL, PROTECTED AND SERVED? (2015), https://www.lambdalegal.org/protected-and-served; JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011) (Transgender and gender-nonconforming people are particularly unlikely to report abuse to police due to common experiences of harassment and discrimination).

[25] Sandra S. Park, Donna Coker, & Julie Goldscheid, *Advocates and Service Providers Criticize Police Response to Victims,* 10 FAM. & INTIMATE PARTNER VIOLENCE Q. 73, 73-79 (2018).

[26] Jenna M. Calton, Lauren B. Cattaneo, Kris T. Gebhard, *Barriers to Help Seeking for Lesbian, Gay, Bisexual, Transgender, and Queer Survivors of Intimate Partner Violence*, 17 TRAUMA, VIOLENCE, & ABUSE 585 (2016) (victims in same-sex relationships may not identify their experiences as domestic violence because of common depictions of intimate partner violence as existing in heterosexual relationships).

[27] "Rape myth" is a term used to describe attitudes or beliefs about rape that do not align with the best available evidence. Examples include assumptions about the "typical" rape and the "typical" rape victim, which can influence perceptions of credibility and blame. Katie M. Edwards et al., *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change,* 65 SEX ROLES 761 (2011). The stereotypical idea of rape is that it is committed by a stranger, in a public or semi-public place, and that the assailant uses force during the attack. In reality, studies have shown that most rapes and sexual assaults are committed by a person known by the victim; often take place in the victim's or suspect's home; and force is not always used. MICHAEL PLANTY ET AL., U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010 (2016), https://bjs.ojp.gov/content/pub/pdf/fvsv9410.pdf (for data set, *see* AM. PSYCH. ASS'N, https://doi.org/10.1037/e528212013-001).

[28] Estimates of false reporting hover around 5%. *See e.g.*, David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318 (2010); Claire E. Ferguson & John M. Malouff, *Assessing Police Classifications of Sexual Assault Reports: A Meta-Analysis of False Reporting Rates*, 45 ARCHIVES SEXUAL BEHAV. 1185 (2016); Cassia Spohn, Clair White & Katharine Tellis, *Unfounding Sexual Assault: Examining the Decision to Unfound and Identifying False Reports*, 48 LAW & SOC'Y REV. 161 (2014). Whereas surveys of law enforcement demonstrate false reporting is consistently overestimated. *See e.g.*, Annelise Mennicke et al., *Law Enforcement Officers' Perception of Rape and Rape Victims: A Multimethod Study*, 29 VIOLENCE & VICTIMS 814 (2014); Rachel M. Venema, *Police Officers' Rape Myth Acceptance: Examining the Role of Officer Characteristics, Estimates of False Reporting, and Social Desirability Bias*, 33 VIOLENCE & VICTIMS 176 (2018).

[29] For example, analysis of the National Women's Study showed that of rape survivors who reported their rape, over a quarter (29.7%) felt that the police did not believe them; and that among non-reporters, 42.6% did not report out of fear of the justice system. Kate B. Wolitzky-Taylor et al., *Is Reporting of Rape on the Rise? A Comparison of Women With Reported Versus Unreported Rape Experiences in the National Women's Study-Replication*, 26 J. INTERPERSONAL VIOLENCE 807 (2011).

[30] A Department of Justice-funded study of six (confidential) representative jurisdictions and cases involving nearly 3,000 female sexual assault victims from 2008-2010 provides the best current evidence on case attrition among cases reported to law enforcement. Melissa Schaefer Morabito, April Pattavina & Linda M. Williams, *It All Just Piles Up: Challenges to Victim Credibility Accumulate to Influence Sexual Assault Case Processing,* 34 J. INTERPERSONAL VIOLENCE 3151 (2019). It found that of all reported cases, only 1.6% end up being tried in court. The rest were dropped during investigation, charging, or a plea bargain was reached. In an earlier study, the researchers conducted an analysis of data combined from several sources and concluded that of 100 adult rapes committed in the U.S., between 0.2 and 2.8 ultimately result in incarceration for the offender. Kimberly A. Lonsway & Joanne

Additionally, Washington's "Civil Legal Needs Study Update (2015)"[31] found that domestic violence and sexual assault victims experience the highest number of legal problems per capita of any group.[32] "Low-income Washingtonians who have suffered domestic violence or been a victim of sexual assault experience an average of 19.7 legal problems per household, twice the average experienced by the general low-income population."[33] The Civil Legal Needs Study mentions the following as examples of legal issues that victims of domestic and sexual violence need assistance with: health, consumer and financial services, municipal services/utilities/law enforcement, employment, public benefits, housing, family law, estate planning, education.

Moving forward, the following goals should be prioritized to improve the system response to domestic and sexual violence:

1. Increase Access**:** This includes increased funding for civil legal aid attorneys who can assist victims with obtaining protection orders, protecting their privacy during a criminal case, keeping their housing, keeping their jobs, helping them access public benefits, or preventing them from losing their children.
2. Expand Data Collection and Research**:** In order to monitor the efficacy of laws and regulations in combating gender-based violence and to identify gaps,[34] a critical focus moving forward should be on continued data collection and analysis.[35] Relatedly, there should also be a focus on evidence-based prevention efforts, such as increasing the accessibility and effectiveness of perpetrator treatment.[36]

Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145 (2012).

[31] WASH. STATE SUP. CT., 2015 WASHINGTON STATE CIVIL LEGAL NEEDS STUDY UPDATE (2015), https://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf

[32] *Id.* at 13, 25.

[33] *Id.* at 13.

[34] *See e.g.*, MIA NEIDHARDT ET AL., KING CNTY. AUDITOR'S OFF., SEX OFFENSE CASES: SOME VICTIMS AND THEIR CASES MAY BE HARMED BY GAPS (2020), https://www.kingcounty.gov/~/media/depts/auditor/new-web-docs/2020/sai-2020/sai-2020.ashx?la=en.

[35] This should also include a component of "on-the-ground" feedback, such as using focus groups, to identify the nuances of how gender bias occurs in both subtle and overt ways.

[36] This is considered secondary or tertiary prevention because it is an intervention after the violence has occurred. For a discussion regarding prevention, see CTRS. FOR DISEASE CONTROL & PREVENTION, SEXUAL VIOLENCE PREVENTION: BEGINNING THE DIALOGUE (2004), https://www.cdc.gov/violenceprevention/pdf/SVPrevention-a.pdf.

3. Promote and Require Education**:** There also has been a recent emphasis on providing education opportunities for judges, law enforcement, attorneys, and other system stakeholders. Education opportunities should continue to be offered to and required for system stakeholders working on cases involving domestic and sexual violence, including mandatory continuing education.

This section of the study gives an overview of changes and developments that have been made in the laws related to domestic and sexual violence since 1989; discusses the disproportionate impact of these types of gender-based violence on women; Black, Indigenous, and women of color; immigrants; those living in poverty; and LGBTQ+ people; specifically examines violence perpetrated against immigrant and Indigenous women and girls;[37] highlights education opportunities and requirements for stakeholders to the justice system, both of which were prominent subjects in the 1989 Study. It concludes by making recommendations regarding the aspects of the responses to domestic and sexual violence that require change or ongoing monitoring.

III. Domestic Violence

Comparison of Washington State domestic violence prevalence data from 1989 to today is difficult because the state data that is now collected was not collected previously. Nationally, serious intimate partner violence rates appear to have declined 72% between 1993 and 2011.[38] However, more recent Washington-specific data indicates that domestic violence remains a significant problem in Washington State:

- From 1997 through June 2020, there have been over 1,300 domestic violence-related fatalities in the state of Washington.[39]

[37] The 1989 Study did not directly address these specific populations and others, which we hope to rectify in this study.
[38] SHANNAN CATALANO, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., INTIMATE PARTNER VIOLENCE: ATTRIBUTES OF VICTIMIZATION, 1993-2001 1 (2013), https://bjs.ojp.gov/content/pub/pdf/ipvav9311.pdf.
[39] Domestic violence fatalities include domestic violence homicide (984), death by suicide of the abuser (295), and abusers killed by law enforcement (63). *See Washington State Domestic Violence Fatalities by County*, WASH. STATE

- In 2018, there were 56,815 domestic violence incident reports to law enforcement.[40]
- In the state fiscal year ending June 30, 2017, 42 domestic violence shelter and advocacy programs in Washington State served 24,692 survivors of domestic violence and their children, including 5,672 who used emergency shelter. Shelter programs received 97,688 crisis hotline and information/referral calls.[41]

The Washington Supreme Court has found that Washington has evinced "a clear public policy to prevent domestic violence…." Instead of creating separate crimes of domestic violence, the Washington State Legislature has added specific procedures and requirements for addressing and preventing it:

> The legislature finds that the existing criminal statutes are adequate to provide protection for victims of domestic violence. However, previous societal attitudes have been reflected in policies and practices of law enforcement agencies and prosecutors which have resulted in differing treatment of crimes occurring between cohabitants and of the same crimes occurring between strangers.[42]

Domestic violence laws are codified primarily at chapter 26.50 RCW (domestic violence prevention) and chapter 10.99 RCW (addressing the official response to domestic violence by police). Chapter 70.123 RCW provides funding and requirements for community-based domestic violence services and shelters.

Current criminal legal reform efforts to reduce domestic violence in Washington focus on the following issues that will be discussed in-depth, including reduction of domestic violence (DV) perpetrator access to firearms and evaluation of perpetrator treatment, risk assessment, and

COAL. AGAINST DOMESTIC VIOLENCE (2020), https://wscadv.org/wp-content/uploads/2016/12/fatalities-by-county-through-06-30-2020.pdf.

[40] TONYA TODD, BROOK BASSETT, JOAN L. SMITH, 2018 CRIME IN WASHINGTON ANNUAL REPORT (2019), https://washingtonretail.org/wp-content/uploads/2019/11/Crime-In-Washington-2018-small.pdf. As discussed on the preceding page, the actual number of domestic violence incidents is likely much higher, as an estimated 44% of intimate partner violence incidents are not reported to law enforcement. REAVES, *supra* note 19.

[41] WASH. STATE DEP'T OF SOC. & HEALTH SERVS., WASHINGTON STATE EMERGENCY DOMESTIC VIOLENCE SHELTER AND SUPPORTIVE SERVICES (2017), https://wscadv.org/wp-content/uploads/2016/12/DVDATA.FY17.pdf.

[42] RCW 10.99.010.

mandatory arrest.[43] Additionally, many other reforms have been implemented at the state and national level, and there have been several appellate decisions by Washington State courts interpreting the laws related to domestic violence, which will also be discussed in this section.[44]

A. Reduction of domestic violence perpetrator access to firearms

Because firearms are used in over half of domestic violence homicides committed in Washington, one focus of the Washington State Legislature has been the attempt to significantly reduce lethality by limiting perpetrator access to firearms.[45] In 2014, the Legislature amended RCW 9.41.040 to strengthen the requirement to surrender firearms by parties subject to various types of protection orders.[46] This state law works in tandem with the 1994 amendment to the federal Gun Control Act, 18 U.S.C. § 922(g), prohibiting gun possession by those convicted of domestic violence crimes. These gun restriction laws are important efforts to attempt to reduce the lethality of domestic violence. In 1997, the Courts also amended CrR 4.2 and CrRLJ 4.2 to require written advisement of the effect of a guilty plea on the right to possess a firearm.[47] The Washington State Coalition Against Domestic Violence (WSCADV) has also recommended numerous strategies for advocates, courts, and law enforcement to ensure safe removal of firearms from perpetrators subject to protective orders, including the following: "[i]nclude Motion for Surrender and Order to Surrender in all Protection Order packets and with domestic

[43] Please note that there will be a separate discussion of missing and murdered Indigenous women and girls (MMIWG). We recognize that Indigenous women experience domestic violence and physical assault at rates as much as 50% higher than other populations when living on tribal reservations. STEVEN W. PERRY, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., AMERICAN INDIANS AND CRIME- A BJS STATISTICAL PROFILE 1992-2002 (2004), https://bjs.ojp.gov/content/pub/pdf/aic02.pdf.

[44] Please note that the best source for a systematic overview of domestic violence law in Washington is the Domestic Violence Manual for Judges, WASH. CTS., https://www.courts.wa.gov/index.cfm?fa=home.contentDisplay&location=manuals/domViol/index, most recently updated in 2016, produced by the Administrative Office of the Courts, and available on the Washington State Supreme Court Gender and Justice Commission's website.

[45] WASH. STATE COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE FATALITIES IN WASHINGTON STATE 8 (2016), https://wscadv.org/wp-content/uploads/2016/12/2016-DV-FATALITIES-IN-WA-STATE-updated-links.pdf (perpetrators used firearms in 56% of domestic violence homicides between 2006 and 2015).

[46] Please note that as of the time of writing this section, HB 1320 had just passed the Washington State Legislature in order to "modernize, harmonize, and improve the efficacy and accessibility of laws concerning civil protection orders." This legislation impacts surrender of firearms and dangerous weapons. *See* S.B. 5297, 67th Leg., Reg. Sess. (Wash. 2021); ENGROSSED SECOND SUBSTITUTE H.B. 1320, 67th Leg., Reg. Sess. (Wash. 2021).

[47] Former CrR 4.2 (1997); former CrRLJ 4.2 (1997).

violence forms on [Administrative Office of the Court] AOC website," and "[a]lways ask about guns in safety planning."[48]

To improve compliance with firearm surrender, in 2019, the Washington State Legislature amended RCW 9.41.800 (in SHB 1786) to emphasize the duty to immediately surrender all weapons.[49] This law also adds a new section to chapter 9.41 RCW explaining that:

> Because of the heightened risk of lethality to petitioners when respondents to protection orders become aware of court involvement and continue to have access to firearms, and the frequency of noncompliance with court orders prohibiting possession of firearms, law enforcement and judicial processes must emphasize swift and certain compliance with court orders prohibiting access, possession, and ownership of firearms.[50]

The new section instructs law enforcement to explain to respondents that immediate surrender is required at the time of service of process and that the officer shall take possession of all firearms, dangerous weapons, and concealed carry licenses at that time. Law enforcement is directed to alert the court of any failure to comply so that the court may issue a search warrant for the weapons.[51] In order to monitor compliance, information about weapons that respondents may own or possess should be made available and accessible to the courts.[52] This would help to ensure that there is adequate information available to a judicial officer to make compliance findings.

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

[48] *Strategies for Effective Protective Orders*, WASH. STATE COAL. AGAINST DOMESTIC VIOLENCE (Feb. 2018), https://wscadv.org/resources/strategies-effective-orders/.
[49] LAWS OF 2019, ch. 245.
[50] *See* RCW 9.41.801.
[51] Research and evaluation into how often search warrants are requested and issued, and the outcomes, would be informative to assess implementation of this provision.
[52] For example, this information could be obtained through police reports, protection order petitions, purchase history records from the Washington State Department of Licensing.

- Requires service by law enforcement of an order that includes a provision to surrender firearms, dangerous weapons, and any concealed pistol license;
- Establishes a procedure for surrender of firearms, dangerous weapons, and any concealed pistol licenses to law enforcement and authorizes courts to issue warrants to seize firearms and dangerous weapons when there is probable cause to believe the respondent has failed to comply with the order to surrender;
- Makes it Unlawful Possession of a Firearm when a respondent possesses a firearm in violation of a qualifying order that meets certain criteria and includes an order to surrender firearms and prohibition on possessing firearms; and
- Requires AOC to create a statewide pattern form and issue annual reports on the number of orders issued by each court, degree of compliance, and number of firearms obtained.

In 2020, the Washington State Legislature passed SHB 2622, and it took effect on June 11, 2020. SHB 2622 provides additional procedures for judges to ensure compliance with court-ordered firearms surrender as related to protection orders, no-contact orders and restraining orders.[53] The procedures include issuing an order to show cause at a compliance review hearing, requiring law enforcement to accomplish service of the order on the respondent and authorizing the court to impose remedial sanctions "designed to ensure swift compliance with the order to surrender weapons."[54]

The legal remedies for limiting access to weapons by domestic violence perpetrator are hampered by the fact that many perpetrators illegally keep weapons. For example, the Washington State Coalition Against Domestic Violence found that firearms were used in 369 of the 678 domestic violence homicides between 1997 and 2014; 54% of those perpetrators were prohibited from owning guns.[55] While there are no known studies of barriers to implementation

[53] LAWS OF 2020, ch. 126.
[54] RCW 9.94.801(7)(e). Please note that there have been Fifth Amendment challenges to firearms surrender laws related to the required declaration from the accused about weapons in their possession or control. *See* Andrew Binion, *Kitsap Judges: Law to Help Keep Guns Away from Abusers Violates the Fifth Amendment*, KITSAP SUN (July 8, 2020), https://www.kitsapsun.com/story/news/2020/07/08/kitsap-judges-law-help-keep-guns-away-abusers-violates-fifth-amendment/5394659002/.
[55] WASH. STATE COAL. AGAINST DOMESTIC VIOLENCE, ISSUE BRIEF: FIREARMS PROHIBITIONS & DOMESTIC VIOLENCE HOMICIDES (2015), https://wscadv.org/resources/issue-brief-firearms-prohibitions-domestic-violence-homicide/.

of Washington State's forfeiture laws, one out-of-state study "found that even when a protective order banned possession of a firearm, law enforcement officials failed to take effective steps to enforce those orders by seizing or otherwise removing those firearms from abusive households."[56] The conclusion of the study, surveying 782 female victims of IPV in New York and Los Angeles, was that "[b]ased on the perceptions of the IPV victims in this study, laws designed to disarm domestic violence offenders were either poorly implemented or failed to inform victims when their abuser's firearms were surrendered or confiscated."[57]

Although barriers to enforcement of forfeiture laws exist in both urban and rural communities, those barriers may be different based on the setting, and thus, local policies implemented may need to be framed differently based on the urban-rural divide. For example, a survey of professionals and law enforcement officers conducted in Kentucky, the state with the highest proportion of gun-related intimate partner deaths of both men and women between 2003-2012, found that while both urban and rural communities experienced difficulties preventing the purchase of new guns and perpetrators lying about or hiding their guns, every other issue related to ability to enforce gun confiscation showed significant urban and rural differences.[58]

In order to evaluate how the requirements of Washington's forfeiture laws are being applied across the state, a review of the number of Orders to Surrender Weapons issued, recovery rates, number of compliance hearings, compliance rates, and accounting of firearms, would be informative.[59]

[56] BATTERED WOMEN'S JUST. PROJECT, POLICE SEIZURE OF FIREARMS AT SCENES OF DOMESTIC VIOLENCE 5, https://www.preventdvgunviolence.org/assets/documents/legal-landscape/police-seizure-of-firearms-at-scenes-of-domestic-violence.pdf (citing Daniel W. Webster et al., *Women with Protective Orders Report Failure to Remove Firearms from Their Abusive Partners: Results from an Exploratory Study*, 19 J. WOMEN'S HEALTH 93 (2010)).
[57] Webster et al., *supra* note 56, at 93.
[58] Kellie R. Lynch, TK Logan & Dylan B. Jackson, *"People will Bury Their Guns before They Surrender Them": Implementing Domestic Violence Gun Control in Rural, Appalachian versus Urban Communities*, 83 RURAL SOCIO. 315 (2018). *See also* Kellie R. Lynch & TK Logan, *Implementing Domestic Violence Gun Confiscation Policy in Rural and Urban Communities: Assessing the Perceived Risk, Benefits, and Barriers*, 35 J. INTERPERSONAL VIOLENCE 4913 (2020).
[59] *See id.* at 77 (discussing the recommendations related to funding data collection and research which encompasses this evaluation).

B. Evaluation of perpetrator treatment, risk assessment, and mandatory arrest via legislatively-convened domestic violence work groups

Another area of legislative focus has been improving treatment and risk assessment of domestic violence offenders, in addition to evaluating the efficacy of mandatory arrest. In 2017, the Washington State Legislature enacted E2SHB 1163[60] which began the process of significantly reforming domestic violence law with the intent to reduce recidivism. The Senate Bill Report noted:

> DV offenders are the most dangerous offenders we deal with and have the highest recidivism rates among offenders. Fifty-four percent of mass shootings are related to DV and police are three times more likely to be murdered responding to a DV call than any other call with shots fired. Progression of violence is prevalent among offenders.[61]

The Legislature created domestic violence work groups to evaluate these interventions.

1. Domestic Violence Perpetrator Treatment/Intervention

Section 7 of E2SHB 1163, effective July 23, 2017, created the Domestic Violence Perpetrator Treatment Work Group (hereafter referred to as the Section 7 Work Group) co-chaired by Judges Eric Lucas and Marilyn Paja of the Gender and Justice Commission. This Work Group submitted a reported entitled "Domestic Violence Perpetrator Treatment: A Proposal for an Integrated System Response" to the Washington State Legislature in June 2018. The report called for the end of Washington's "'one size fits all' treatment regime, which is largely seen as unsatisfactory and in need of correction."[62] To move forward on the issue of domestic violence treatment, the Section 7 Work Group called for an Integrated System Response, coalescing around the new state rules for domestic violence treatment, WAC 388-60B, which replaces "one size fits all" treatment with a four-tiered cognitive behavioral therapy treatment approach. Additionally, the Section 7

[60] LAWS OF 2017, ch. 272.
[61] S.B. REP. ON ENGROSSED SECOND SUBSTITUTE H.B. 1163, 65th Leg., Reg. Sess. (Wash. 2017).
[62] E2SHB 1163 SECTION 7 WORK GROUP, DOMESTIC VIOLENCE PERPETRATOR TREATMENT: A PROPOSAL FOR AN INTEGRATED SYSTEM RESPONSE (ISR) 5 (2018), https://www.courts.wa.gov/content/publicUpload/GJCOM/DV_Perpetrator_Treatment_Sec7.pdf.

Work Group advocated for better information sharing via a therapeutic courts approach; a "reliable funding scheme for all court-ordered treatment,"[63] given that many batterers are unable to afford the current cost of domestic violence treatment, which is not covered by most health insurance; ongoing monitoring of system performance through data collection, research, and adaptation of treatment regulations; and the provision of training and resources to professionals working in the area of DV.

The 2019 Legislature responded to the Section 7 Work Group in E2SHB 1517[64] noting the pervasiveness of domestic violence, and that "victims and offenders are owed effective treatment and courts need better tools." In addition to reconvening the work groups, subsequently co-chaired by Judges Eric Lucas and Mary Logan, for further work related to DV Perpetrator Treatment, the Legislature directed Harborview Abuse & Trauma Center[65] to develop a "training curriculum for domestic violence perpetrator treatment providers that incorporates evidence-based practices and treatment modalities" consistent with the new Washington State Department of Social and Health Services (DSHS) regulations by June 30, 2020,[66] and authorized a domestic violence sentencing alternative.[67]

The E2SHB 1517 DV Perpetrator Treatment Work Group submitted its recommendations in a report entitled "Domestic Violence Intervention Treatment: Removing Obstacles to Implementation" to the Legislature in October 2020.[68] Its recommendations included fully funding Domestic Violence Intervention Treatment (DVIT); supporting ongoing education and outreach related to recent changes to the laws and regulations governing DVIT; and improving information-sharing practices for stakeholders in the system across disciplines and jurisdictions, and to enable data collection and research related to the efficacy of DVIT. With regard to

[63] As of the time of this report, there is no statewide funding scheme. There are currently pilot projects underway in Seattle and Whatcom County/Bellingham with fee for service reimbursement models. The Department of Children, Youth & Families also utilizes this approach.
[64] LAWS OF 2019, ch. 263.
[65] Previously named Harborview Center for Sexual Assault and Traumatic Stress (https://depts.washington.edu/uwhatc/abous-us/hatc-history/).
[66] *See infra* Part IV.
[67] *See infra* Part V.
[68] E2SHB 1517 DOMESTIC VIOLENCE PERPETRATOR TREATMENT WORK GROUP, DOMESTIC VIOLENCE INTERVENTION TREATMENT, REMOVING OBSTACLES TO IMPLEMENTATION: REPORT TO THE WASHINGTON STATE LEGISLATURE (2020), http://www.courts.wa.gov/content/publicUpload/GJCOM/FINAL_DV_Treatment_Work_Group_Report_2020.pdf.

funding DVIT, three strategies were suggested and outlined in the report. The first was to support the Administrative Office of the Courts' proposed budget package for "Responding to Behavioral Health Needs in Courts." It was envisioned that allocation of funding to therapeutic courts could be supported through this team. The second strategy discussed was for the state to fund pilot projects, in order to allow the simultaneous collection of data and monitoring of system performance. The report discussed several pilots currently underway in Washington State: City of Seattle's Domestic Violence Intervention Pilot (DVIP);[69] Whatcom County/City of Bellingham Pilot Project;[70] Okanogan County Remote Treatment Pilot Project;[71] and the DV-MRT Evaluation[72] conducted as a pilot project of this study.[73] The third strategy referred to as the "insurance option" outlined for DVIT to be covered by health insurance.

The recommendations related to supporting ongoing education and outreach related to DVIT were made because justice system stakeholders need to be aware of significant recent changes to the laws. These changes include the new DVIT treatment standards under Washington Administrative Code (WAC) 388-60B and the DV definition refinement which differentiates between domestic violence cases involving intimate partner violence and those involving violence between family or household members who are not current or former intimate partners.[74] As the report states, "[t]here will be no impact if treatment providers and others making decisions in these cases are not aware of new legal standards and best practices."[75]

With regard to recommendations related to improving information-sharing practices, the report highlights the need for two categories of information: 1) information for decision-makers in an

[69] *Id.* at 26-28. *See also* Paul Kiefer, *Domestic Violence Intervention Project Experiments with Restorative Justice for a Stigmatized Group*, PUBLICOLA (Nov. 20, 2020), https://publicola.com/2020/11/20/domestic-violence-intervention-project-experiments-with-restorative-justice-for-a-stigmatized-group/.

[70] E2SHB 1517 DOMESTIC VIOLENCE PERPETRATOR TREATMENT WORK GROUP, *supra* note 68, at 28-29.

[71] *Id.* at 29-31.

[72] *Id.* at 31-32.

[73] Amelie Pedneault, Samantha Tjaden, and Erica Magana. *Evaluation of Washington State Domestic Violence – Moral Reconation Therapy (DV-MRT) Programs Process and Outcomes* (2021) showed DV-MRT to be a promising practice in reducing domestic violence recidivism and addressing the lack of affordable domestic violence intervention options for justice involved individuals. The full evaluation is available in Appendix C of this report.

[74] At the 2021 Domestic and Municipal Court Judges Association (DMCJA) Conference, there was a training session offered on the new DVIT treatment standards. A subsequent training will be offered in 2021 regarding innovative practice related to domestic violence intervention, including DV-MRT.

[75] *Id.* at 4.

individual case to make informed decisions regarding DVIT and 2) data for future research and analysis related to DVIT.

2. Domestic Violence Risk Assessment

Section 8 of E2SHB 1163 created a Domestic Violence Risk Assessment Work Group (hereafter referred to as the Section 8 Work Group), also co-chaired by Judges Paja and Lucas, to "study how and when risk assessment can best be used to improve the response to domestic violence offenders and victims and find effective strategies to reduce domestic violence incidents in Washington State." The Section 8 Work Group submitted the report entitled "Domestic Violence Risk Assessment" to the Washington State Legislator and Governor Jay Inslee in June 2018. The report emphasized the need for additional research before adoption of any risk assessment tool. The Section 8 Work Group also made recommendations for consideration of expanded use of risk assessment by victim advocates, and additional training and resources for system stakeholders.

Risk assessments are tools used at various stages of the criminal justice process, from assessment of potential lethality of a batterer by law enforcement to decisions by judges on whether to release an alleged batterer on bail pending trial. The Section 8 Work Group noted the importance of developing validated risk assessment tools with the "highest degree of predictive accuracy" and of maintaining high-quality statewide data in order to test and refine the assessment tools over time. The Section 8 Work Group also acknowledged the need to avoid creating risk assessment tools that unfairly target racial or ethnic groups, either directly or indirectly through over-emphasis of general criminal history, as prior arrests and convictions can be affected by implicit racial bias.[76] In addition to reconvening the DV risk assessment work group pursuant to E2SHB 1517, the Legislature directed the Washington State University Department of Criminal Justice to develop a risk assessment tool to predict future domestic violence by convicted offenders.[77]

[76] For additional discussion regarding implicit bias, please see e.g., Sandra Mayson, *Bias in, Bias out*, 128 YALE L. J. 2218 (2019); Julia Angwin et. al, *Machine Bias*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.
[77] LAWS OF 2019, ch. 263, § 401 (which will be codified at RCW 9.94A).

One of the key issues identified by both the Section 7 and Section 8 Work Groups was that Washington's definition of domestic violence, RCW 26.50.010, since 1995, had been a "narrow range of behavior applied across a wide range of relationships." Because both intimate partners, former intimate partners, and all other people who are residing together were lumped into the same category under the law, it was impossible to isolate good data for risk assessment and treatment development and implementation. Effective DV treatment for intimate partners does not correlate to others who reside in the same household. In 2019, the Legislature remedied this problem in Laws of 2019, chapter 263, by separating intimate partner violence and other household member violence into separate sections of RCW 26.50.010(3):

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

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

3. Mandatory Arrest

The evaluation of Washington's mandatory arrest law was also a component of the Section 8 Work Group and E2SHB 1517 DV Work Groups' inquiry. Pursuant to E2SHB 1517, Part VIII, Section 4(a)(i), the Domestic Violence Risk Assessment Work Group was mandated to "[r]esearch, review, and make recommendations on whether laws mandating arrest in cases of domestic violence should be amended and whether alternative arrest statutes should incorporate domestic violence risk assessment in domestic violence response to improve the response to domestic

violence, and what training for law enforcement would be needed to implement an alternative to mandatory arrest…."

The E2SHB 1517 DV Risk Assessment Work Group submitted its recommendations to the Washington State Legislature in October 2020 in a report entitled "Evolving Practices for a More Comprehensive Response to Domestic Violence."[78] As summarized in that report:

> Mandatory arrest laws were implemented in the early 1980s as a public policy response to the critique that domestic violence offenses were not treated as seriously as other crimes, and to reduce domestic violence lethality and re-offense. They were also responsive to concerns that the burden regarding the decision to arrest was on the victim; a perpetrator would only be arrested if the victim signed the citation. This was a huge safety concern because the victim would have to answer to the perpetrator upon their release.[79]

This, combined with a Minnesota study,[80] which found that batterers randomly assigned to mandatory arrest were less likely to reoffend than those not subject to mandatory arrest,[81] resulted in the passage of arrest laws around the United States in the 1980's.[82]

Pursuant to RCW 10.31.100(2)(d), Washington's mandatory arrest law passed in 1984, a police officer is required to arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that the person:

- is 18 years of age or older, AND
- has assaulted a family or household member within the past four hours, AND
    - a felonious assault has occurred, OR

[78] E2SHB 1517 DOMESTIC VIOLENCE RISK ASSESSMENT WORK GROUP, EVOLVING PRACTICES FOR A MORE COMPREHENSIVE RESPONSE TO DOMESTIC VIOLENCE (2020), http://www.courts.wa.gov/content/publicUpload/GJCOM/FINAL_DV_Risk_Assessment_Work_Group_Report_2020.pdf.
[79] *Id.* at 19.
[80] Referred to as the "Minneapolis Experiment."
[81] Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOCIO. REV. 261 (1984).
[82] Arrest laws fall into three categories: mandatory, preferred, and discretionary.

- an assault has occurred which has resulted in bodily injury to the victim (whether observable to responding officer or not), OR
- any physical action has occurred which was intended to cause another person reasonably to fear imminent serious bodily injury or death.[83]

Additionally, in what is known as a primary aggressor provision, "[w]hen the officer has probable cause to believe that family or household members or intimate partners have assaulted each other, the officer is not required to arrest both persons. The officer shall arrest the person whom the officer believes to be the primary physical aggressor. In making this determination, the officer shall make every reasonable effort to consider: A) The intent to protect victims of domestic violence under RCW 10.99.010; (B) the comparative extent of injuries inflicted or serious threats creating fear of physical injury; and (C) the history of domestic violence of each person involved, including whether the conduct was part of an ongoing pattern of abuse."[84]

Since Washington's mandatory arrest law was passed, there have been no studies to evaluate its efficacy. It is difficult to assess the impact of mandatory arrest on homicide and arrest rates based on available research due to different laws and practices in other jurisdictions.[85] There are also many studies outlining the unintended consequences of mandatory arrest.[86]

[83] RCW 10.31.100(2)(d).
[84] *Id.*
[85] *See* April M. Zeoli, Alexis Norris & Hannah Brenner, *Mandatory, Preferred, or Discretionary: How the Classification of Domestic Violence Warrantless Arrest Laws Impacts Their Estimated Effects on Intimate Partner Homicide*, 35 EVALUATION REV. 129 (2011).
[86] *E.g.*, **Organizational policy may influence policy behavior and outcomes**: Richard R. Johnson & Dai Mengyan, *Police Enforcement of Domestic Violence Laws: Supervisory Control or Officer Prerogatives*, 33 JUST. Q. 185 (2016); Scott W. Phillips & James J. Sobol, *Twenty Years of Mandatory Arrest: Police Decision Making in the Face of Legal Requirements*, 21 CRIM. JUST. POL'Y REV. 98 (2010); **Diminishes batterers' perceptions of procedural justice**: Deborah Epstein. *Procedural Justice: Tempering the States' Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843 (2002); **Removes victims' autonomy**: Nicole Miras Mordini, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295 (2003); **Results in more frequent dual arrests with disproportionate impact on same sex couples, people of color, and women**: Alesha Durfee, *Situational Ambiguity and Gendered Patterns of Arrest for Intimate Partner Violence*, 18 VIOLENCE AGAINST WOMEN 64 (2012); David Hirschel & Lindsay Deveau, *The Impact of Primary Aggressor Laws on Single Versus Dual Arrest in Incidents of Intimate Partner Violence*, 23 VIOLENCE AGAINST WOMEN 1155 (2017); Carolyn M. West, *Sorry, We Have to Take You in: Black Battered Women Arrested for Intimate Partner Violence*, 13 J. AGGRESSION, MALTREATMENT & TRAUMA 95 (2008).

The E2SHB 1517 DV Risk Assessment Work Group in its above-referenced report, "Evolving Practices for a More Comprehensive Response to Domestic Violence," included the following statement regarding its consideration of mandatory arrest:

> The work group spent significant time considering the issue of mandatory arrest, and there is consensus that it has had unintended negative consequences. However, there are differing views on how to approach any amendments to mandatory arrest. The prevailing view is a strong discomfort with the idea of removing or amending Washington's mandatory arrest statute, due to the high stakes [increased DV fatalities] and the fear of reversion back to an era where DV was not taken seriously. The other view is for a hybrid approach, which would entail the rollout of diversionary and support services prior to amendment of mandatory arrest. That is, that if mandatory arrest is amended, it should be under certain specified (and limited) circumstances, and it would be coupled with immediate access to services for both victims and the accused.[87]

The work group's recommendations to the Legislature included collecting accurate Washington State data about domestic violence cases, expanding support for victims, increasing training and resources for system stakeholders, supporting prevention-focused options for perpetrators of domestic violence, continuing to focus on firearms surrender, adopting domestic violence-specific factors for pretrial release decisions, and utilizing domestic violence screening tools outside of criminal proceedings.

C. Additional changes and developments related to domestic violence law

Other notable changes to domestic violence law since the 1989 Study include:

- At the national level, the most significant change in domestic violence law has been building on the Family Violence Services and Prevention Act through the passage of the Violence Against Women Act (VAWA) of 1994.[88] VAWA has been reauthorized several

[87] E2SHB 1517 DOMESTIC VIOLENCE RISK ASSESSMENT WORK GROUP, *supra* note 78, at 18-19.
[88] Violence Against Women Act of 1994, Pub. L. 103-322 (1994).

times, has supported the National Domestic Violence Hotline, and has provided over a billion dollars in grant funding to states and localities to address violence against women.

- Pursuant to Washington's Crime Victim's Bill of Rights,[89] passed the same year as the 1989 Study, victims are afforded the right to "[t]o have, whenever practical, a victim advocate present at prosecutorial or defense interviews and at judicial proceedings."
- 2004 amendments to landlord tenant law to allow victims of domestic violence to end residential leases to address their safety.[90]
- RCW 5.60.060 was amended in 2006 to grant privilege to communications between a victim and their community-based domestic violence advocate.[91]
- The 2008 law requiring employers to allow "reasonable leave" for domestic violence victims to address legal and safety concerns.[92]
- 2011 amendments to the Domestic Violence Protection Act, clarifying standards for terminating or modifying domestic violence protection orders in situations where restrained parties allege that they are unlikely to resume acts of domestic violence if the protection order is terminated.[93]
- 2015 restructuring of domestic violence victim services to strengthen community-based services, non-shelter related programming and prevention and outreach to victims.[94]
- The 2018 amendment to chapter 49.76 RCW added provisions to ensure that "victims of domestic violence, sexual assault, or stalking should also be able to seek and maintain

[89] WASH. CONST. art. I, § 35,
[90] LAWS OF 2004, ch. 17, § 2.
[91] This privilege extends to community-based DV advocates, not system-based DV advocates. System-based advocates are typically employed by a criminal justice agency, and serve as the primary contact for victims with that particular agency and facilitate the victim's participation in the justice process. Community-based advocates are typically employed by a non-profit or other social service agency and provide services to victims regardless of whether they choose to participate in the justice process. The scope of services tends to be broader. Information about Washington Domestic Violence Programs in each county is available at https://wscadv.org/washington-domestic-violence-programs/.
[92] RCW 49.76.010 et seq.
[93] LAWS OF 2011, ch. 137, § 2.
[94] LAWS OF 2015, ch. 275, § 1.

employment without fear that they will face discrimination," prohibiting employment discrimination against victims and requiring workplaces to accommodate safety plans.[95]

- In 2018, Evidence Rule 413 was adopted. Pursuant to this rule, in criminal cases, "evidence of a party's or witness's immigration status shall not be admissible unless immigration status is an essential fact to prove an element of, or a defense to, the criminal offense with which the defendant is charged, or to show bias or prejudice of a witness pursuant to ER 607."[96]
- Immigrant victims are now eligible to gain authorized status in the U.S. under the 1994 VAWA, a positive development since the 1989 Study. VAWA allows women who have experienced sexual violence to self-petition for lawful permanent resident (LPR) status without their partner's involvement.[97]
- In addition to the reconvening of work groups regarding domestic violence treatment and risk assessment as discussed above, pursuant to E2SHB 1517,[98] the 2019 Legislature:
    - amended RCW 9.94A.500 to include a presentence investigation in drug offender sentencing alternative cases that include domestic violence convictions and RCW 9.94A.662 to require certification in domestic violence treatment in co-occurring drug and domestic violence cases;
    - included domestic violence in the community custody and re-entry statute RCW 9.94A.704;
    - restricted deferred prosecution if a defendant has previously participated in a domestic violence deferred prosecution; and
    - ordered the recognition and enforcement of Canadian domestic violence protection orders.

[95] This is an area where data, as well as focus groups, could be helpful to evaluate the efficacy of this provision. For example, does missing work for multiple protection order hearings result in discipline or dismissal on the grounds of poor performance?
[96] ER 413.
[97] CATALINA AMUEDO-DORANTES & ESTER ARENAS-ARROYO, POLICE TRUST AND DOMESTIC VIOLENCE: EVIDENCE FROM IMMIGRATION POLICIES 3 (2019), http://ftp.iza.org/dp12721.pdf.
[98] LAWS OF 2019, ch. 263.

- In 2019, the Legislature also amended RCW 10.99.030 to include traumatic brain injury as it relates to domestic violence in law enforcement training curriculum.
- Since the 1989 Study, the use of technology has become an increasingly important and pervasive part of our lives; however, it has also been used as a tool by perpetrators to further stalk, harass, and abuse their victims. These emerging forms of abusive behaviors via technology are referred to as Technology-Enabled Coercive Control (TECC), and this is a significant issue that should be acknowledged and addressed. A recent Whitepaper about TECC in Seattle noted that "those who abuse technology maintain the advantage as TECC continues to outpace current laws, despite a recent flurry of newly enacted cybercrimes legislation across the country, particularly in response to nonconsensual pornography and the disclosure of intimate images.[99]
- In 2021, the Legislature passed E2SHB 1320, "An act relating to modernizing, harmonizing, and improving the efficacy and accessibility of laws concerning civil protection orders." This purpose of this legislation is to streamline and promote consistency between Washington's six different civil protection orders. The bill also addresses recognition and enforcement of Canadian domestic violence protection orders; revises the law governing orders to surrender firearms and dangerous weapons; and adds provisions regarding the responsibilities of school districts and staff when children are subject to protection orders. Additionally, this new law requires the Washington State Supreme Court Gender and Justice Commission to work with stakeholders to develop standards and recommendations related to filing evidence; private vendors who provide services related to filing systems; jurisdiction; the use of technology; improving access to unrepresented parties; best practices when there are concurrent civil and criminal proceedings based on the same alleged conduct; data collection best practices; interjurisdictional information sharing between state courts, Tribal courts, military courts, and other jurisdictions; and how protection orders can more effectively address coercive control.

[99] Dana Cuomo & Natalie Dolci, Gender-Based Violence and Technology Enabled Coercive Control in Seattle: Challenges and Opportunities, TECC Whitepaper Series, 2019.

In addition to the preceding statutory changes and developments related to domestic violence laws, the Washington Supreme Court has issued a number of key decisions regarding domestic violence since the 1989 Study. These cases include:

- *Danny v. Laidlaw Transit Services, Inc.,* 165 Wn.2d 200, 193 P.3d 128 (2008) – Recognized that Washington State has established, through legislative, judicial, constitutional, and executive expressions, a clear mandate of public policy of protecting domestic violence survivor and their families and holding abusers accountable.
- *State v. Bunker*, 169 Wn.2d 571, 238 P.3d 487 (2010) – The former version of RCW 26.50.110 regarding violations of domestic violence no-contact orders criminalizes all no-contact order violations and is not limited to only those contacts where the perpetrator was violent, threatened violence, or where the contact occurred in a specifically prohibited place, overruling *State v. Hogan*, 145 Wn. App. 210, 192 P.3d 915 and *State v. Madrid*, 145 Wn. App. 106, 192 P.3d 909.
- *State v. Schultz*, 170 Wn.2d 746, 248 P.3d 484 (2011) – In a case of first impression, likely domestic violence is sufficient reason for the police to search a home under the emergency aid exception to the requirement for a search warrant, but a loud verbal fight including the man saying he wanted to be left alone was insufficient evidence of domestic violence, thus the drug evidence found in the home should not have been admitted. Note that U.S. Supreme Court has recently limited the availability of this community caretaking or "aid" exception to the warrant requirement, and the impact of that decision in Washington has not yet been addressed. *Caniglia v. Strom,* ___ U.S. ___, 141 S. Ct. 1596 (May 17, 2021).
- *State v. Gunderson*, 181 Wn.2d 916, 337 P.3d 1090 (2014) – The probative value of evidence of a prior domestic violence incident between the defendant and one of two alleged victims was outweighed by its prejudicial effect where the alleged victim testified that the defendant did not assault her during an argument over childcare in his truck and the prosecutor attempted to use evidence of prior domestic violence against her to impeach her testimony.

- *State v. Ashley*, 186 Wn.2d 32, 375 P.3d 673 (2016) – The defendant's prior acts of domestic violence were admissible to prove a pregnant mother's lack of consent as an element of unlawful imprisonment where the defendant forced she and their two-year-old to stay in a bathroom while he hid from police in the apartment. She stayed in the bathroom as directed by the defendant because of her fear of getting battered while pregnant, as he had done three times during her prior pregnancy. The prior acts of domestic violence were inadmissible to bolster the victim's credibility, but the error was harmless as they were already introduced for proper purpose.
- *Rodriquez v. Zavala*, 188 Wn.2d 586, 398 P.3d 1071 (2017) – The trial court's exclusion of infant son from protective order against father because he did not witness father strangling mother was reversed by a unanimous court. The court held that "exposure to domestic violence constitutes harm under the DVPA and qualifies as domestic violence under chapter 26.50 RCW."
- *Aiken v. Aiken*, 187 Wn.2d 491, 387 P.3d 680 (2017) – A father's due process rights were not violated when a court commissioner denied his request to cross-examine his fourteen-year-old daughter in a domestic violence protection order proceeding where evidence was presented that he had tried to suffocate her. The child had attempted suicide, was unable to confront her father, and would have been traumatized by the cross-examination. The Court noted that there was no statutory right to cross-examination and that because due process rights may warrant cross-examination in other cases, a "bright line rule prohibiting cross-examination or live testimony in protective order hearings is inappropriate."
- *State v. Granath*, 190 Wn.2d 548, 415 P.3d 1179 (2018) – The duration of a domestic violence no-contact order entered by a District Court pursuant to RCW 10.99.050 is limited to the length of the underlying sentence. The 2019 Legislature subsequently amended the relevant statutes and declared that the *Granath* interpretation "inadequately protects victims of domestic violence."[100]

[100] LAWS OF 2019, ch. 263, § 301.

Notable decisions from the Washington State Court of Appeals related to Domestic Violence include:

- *Juarez v. Juarez*, 195 Wn. App. 880, 382 P.3d 13 (2016) – Recognized that short-term relief does not fulfill the legislative intent of Washington's Domestic Violence Prevention Act to afford victims of domestic violence with a valuable instrument to increase safety for victims. Denying lengthy protection, because of the availability of other relief or the pendency of another court proceeding, runs contrary to RCW 26.50.025(2).
- *Maldonado v Maldonado*, 197 Wn. App. 779, 391 P.3d 546 (2017) – Courts must state in writing the reasons for declining the extension for a Domestic Violence Protection Order to the petitioner's children.
- *Smith v. Smith*, 1 Wn. App.2d 122, 404 P.3d 101 (2017) – Found that the pendency of a parallel criminal case does not entitle the defendant to a stay of the protection order proceedings.
- *Braatz v Braatz*, 2 Wn. App.2d 889, 413 P.3d 612 (2018) – Held that when the trial court issues a Domestic Violence Protection Order that includes an order for the restrained person to surrender firearms or other dangerous weapons, the restrained person must prove by a preponderance of the evidence that they have surrendered their firearms and other dangerous weapons.

IV. Sexual Violence[101]

Similar to the prevalence data for domestic violence, comparing Washington data on sexual violence from 1989 to today is difficult; the state data now collected was not collected previously, and definitions of sexual violence have evolved since 1989 to encompass a broader range of victimizations.[102] If we look to national data, sexual violence against women appears to have

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

[102] For example, in 2011, the federal definition of "forcible rape" was expanded from "the carnal knowledge of a female, forcibly and against her will" to "[t]he penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim." *See*

declined by 64% from 1994-2010.[103] Nevertheless, more recent Washington State data shows that sexual violence remains a disturbing problem in Washington State:

- In 2018, 6,826 sexual assault incidents were reported to law enforcement.[104]
- In 2016, 13,171 individual victims of sexual assault accessed victim services.[105]

Several major changes and additions to the laws related to sexual violence have occurred in Washington since 1989. These changes include interpretation of the rape shield statute; passage of the Prison Rape Elimination Act (PREA); civil commitment of sexually violent predators; efforts to address the backlog of rape kits; the creation of the sexual assault protection order; extension of the statute of limitations for sexual assault crimes; amendment of the laws granting privilege to include sexual assault advocates; and other amendments to the rights of sexual assault victims.

A. Rape shield

The Washington State Legislature enacted the rape shield statute, RCW 9A.44.020, in 1975 with the intent to encourage victims to report sexual assault and to ensure that the jury is not unduly influenced by a victim's irrelevant prior sexual history.[106] In *State v. Peterson*, the court stated that "[t]he rape shield law was enacted to remedy the practice of producing evidence of a victim's past sexual conduct and attempting to show that there was a logical nexus between chastity and veracity."[107]

The 1989 Study focused on the implementation of the rape shield law, noting that "[w]hile the 1975 'rape shield' statute has certainly reduced the incidence of victims being subjected to improper questions about prior sexual history, it has not eliminated it from the process."[108] The

An Updated Definition of Rape, U.S. DEP'T OF JUST. ARCHIVES (Jan. 6, 2012), https://www.justice.gov/archives/opa/blog/updated-definition-rape.

[103] MICHAEL PLANTY ET AL., *supra* note 27.

[104] TODD, BASSETT & SMITH, *supra* note 40, at 594. The actual number of sexual assault incidents is likely much higher; the most recent estimate from the Bureau of Justice Statistics is that 65% of incidents of sexual assault are not reported to law enforcement, compared with 58% of all crimes, 41% of robberies, and 44% of aggravated assaults. LYNN LANGTON ET AL., U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006-2010 18 (2012), https://bjs.ojp.gov/content/pub/pdf/vnrp0610.pdf.

[105] INFONET, OFFICE OF CRIME VICTIMS ADVOCACY, WASHINGTON INFONET STATEWIDE DATA REPORT (2016), http://www.commerce.wa.gov/wp-content/uploads/2016/10/ocva-infonet-report-2016.pdf.

[106] *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006).

[107] *State v. Peterson*, 35 Wn. App. 481, 485, 667 P.2d 645 (1983).

[108] WASH. STATE TASK FORCE ON GENDER & JUST. IN THE CTS., *supra* note 4, at 40-41.

study survey found that 34% of judges thought that victims were at least sometimes asked about their sexual history in depositions and other pre-trial interviews whereas 66% of sexual assault service providers thought that victims faced such questioning. The study concluded: "The very fact that a rape shield law is necessary suggests historical gender bias. Such bias is unfortunately still operating in the judicial system. The responses of rape victim service providers indicate that such biases still keep victims from making reports to police and from following through with prosecutions."[109] Since then, a number of appellate decisions have interpreted this law:

- *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006) – The Washington Supreme Court held that evidence that a victim had engaged in prostitution in the past was inadmissible to prove consent in subsequent sexual assault case due to the different nature of the incident at issue and the remoteness in time of the past sexual act. The factual similarities between the past sexual acts and the acts at issue in the case must be particularized, not general. Subsequently, the Legislature extended protection for evidence of past prostitution in 2013 by adding human trafficking, RCW 9A.40.100, to the list of crimes covered in the rape shield law.
- *State v. Posey*, 161 Wn.2d 638, 167 P.3d 560 (2007) – The defendant sought to introduce evidence of consent through an email from the victim to another that she would "enjoy" being raped and that she wanted a boyfriend who would "choke her" and "beat her."[110] The Court found that the trial court did not abuse its discretion when it precluded admission of the e-mail evidence; the email was not probative since it was not addressed or sent to the defendant, and because it violated the rape shield statute as it only described potential prior sexual misconduct or potential sexual mores.
- *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010) – The Court interpreted the rape shield law to apply only to past sexual behavior, not behavior contemporaneously connected to the assault. In a unanimous decision, the Court held that the defendant's testimony of the victim's consent during a sex party was highly probative evidence key to

[109] *Id.* at 42. It is unclear from the survey results whether any of these incidences of questioning about past sexual history were lawful pursuant to the rape shield statute. Future surveys should specify whether victims unlawfully questioned about previous sexual history.
[110] *State v. Posey,* 161 Wn.2d 638, 642, 167 P.3d 560 (2007).

the defendant's defense, thus the trial court violated the Sixth Amendment when it barred his testimony under the rape shield statute.

B. Sexual Assault in Prisons and Jails[111]

Another change since the 1989 Study is the implementation of the federal Prison Rape Elimination Act (PREA). Congress passed PREA in 2003; its goal is to prevent the sexual abuse of individuals incarcerated in custodial facilities.[112] The first stated purpose of PREA is to "establish a zero-tolerance standard for the incidence of prison rape in all prisons, jails, juvenile detention facilities, and immigration detention centers in the United States."[113] The PREA statute requires ongoing data collection by correctional and detention facility administrators in each state regarding the occurrence of custodial sexual abuse, and it provides financial grants for states to develop and implement policies and procedures to further the "zero-tolerance" goal.

The statute also directs the Bureau of Justice Statistics to perform "a comprehensive statistical review and analysis of the incidence and effects of prison rape" on an annual basis.[114] It is important to note that, though PREA's stated goal is to eliminate prison rape, it also incentivizes increased monitoring and surveillance technology in prisons to prove that rape occurs in prisons and increase data collection on the topic.[115] In its effort to eradicate rape in prisons, PREA provides funding for prisons that increases digital surveillance and monitoring.[116]

1. Washington PREA reports

As a result of PREA, prisons, jails, and detention facilities in Washington issue annual reports on the efforts made to comply with statutory requirements, along with statistics on the total number

[111] The 2021 Washington Supreme Court Symposium, *Behind Bars: Increased Incarceration of Women & Girls of Color*, presented research and testimony from impacted individuals on this issue. *2021 Supreme Court Symposium: Behind Bars: Increased Incarceration of Women & Girls of Color*, WASH. STATE COMM'N ON AFR. AM. AFFS. (June 2, 2021), https://caa.wa.gov/news-and-events/2021-supreme-court-symposium-behind-bars-increased-incarceration-women-girls-color.
[112] Prison Rape Elimination Act of 2003, 34 U.S.C. § 30301 et seq.
[113] 34 U.S.C. § 30302(1).
[114] 34 U.S.C. § 30303.
[115] Jessi Lee Jackson, *Sexual Necropolitics and Prison Rape Elimination*, 39 SIGNS: J. WOMEN IN CULTURE & SOC'Y 197 (2013).
[116] *Id.*

of prisoner complaints made and the number of complaints that the "Appointing Authority"[117] determined were sustained (i.e., proven), unsubstantiated (i.e., unproven), and unfounded (i.e., determined to be false). Sexual assault and misconduct allegations are conducted by incident review teams consisting of facility administration with input from supervisors, investigators, and medical or mental health professionals.[118] The Washington State Department of Corrections (DOC) has established more comprehensive definitions of sexual misconduct under the PREA than the definitions published by the Department of Justice.

The most recent Washington State PREA data published by DOC reported conducting investigations into 382 "inmate-on-inmate" allegations and 262 "staff-on-inmate" allegations for a total of 644 formal investigations of sexual assault, abuse, harassment, or misconduct in 2020.[119] Of these investigations, the Appointing Authority determined that only 33 of the inmate-on-inmate allegations and 12 of the staff-on-inmate allegations were "substantiated."[120] The total number of sexual abuse allegations in the 2020 PREA report continued a downward trend since the 1,076 sexual abuse allegations reported in 2015.[121] There has similarly been an overall decrease in substantiated, unsubstantiated, and unfounded allegations for both inmate-on-inmate and staff-on-inmate sexual abuse since 2015.[122]

2. Demographic information

Demographic information about the victims and perpetrators of the sexual abuse among Washington prison and work/training release populations is publicly available only for substantiated inmate-on-inmate allegations and substantiated staff-on-inmate allegations. Of

[117] According to DOC's PREA Investigation Process document, "When a new investigation is opened, it is assigned to an Appointing Authority (e.g., Superintendent, Health Services Administrator, Work Release Administrator)," and then the case is assigned to a staff member with "specialized training in administrative investigations." WASH. STATE DEP'T OF CORRECTIONS, PREA INVESTIGATION PROCESS: DOC 490.850 (ATTACHMENT 1) (2020), https://www.doc.wa.gov/information/policies/files/490850a1.pdf. The "Appointing Authority will review the investigation and, based upon the information and evidence presented, determine whether the case is substantiated, unsubstantiated, or unfounded." *Id.*
[118] STEPHEN SINCLAIR, WASHINGTON STATE DEPARTMENT OF CORRECTIONS ANNUAL PREA REPORT: CALENDAR YEAR 2020 (2021), https://www.doc.wa.gov/docs/publications/reports/400-RE004.pdf.
[119] *Id.* at 6.
[120] *Id.* at 7.
[121] *Id.*
[122] *Id.*

the substantiated inmate-on-inmate cases, women and white individuals were overrepresented as victims compared to their percentage of the prison population in 2020.[123] While women made up only 6.4% of the total prison and work/training release population in Washington, they were the victim in 33% of the substantiated inmate-on-inmate cases. Transgender individuals were the victims in 15% of substantiated inmate-on-inmate sexual abuse cases. There is no comparable demographic data about the number of transgender individuals in the total prison population. White individuals were the victim in 82% of the substantiated inmate-on-inmate cases and only make up 69.1% of the total prison population.[124]

The trends for substantiated staff-on-inmate cases were not consistent with those for inmate-on-inmate cases in 2020. Women were still over-represented in these cases (representing 14% of the cases and only 6.4% of the prison and work/training release population). However, white individuals were underrepresented in the staff-on-inmate cases while Black individuals were overrepresented (representing 43% of cases but only 18.1% of the prison and work/training release population). None of the substantiated staff-on-inmate cases involved a transgender individual.[125] It is not clear if these somewhat dramatic differences in trends by gender and race when comparing substantiated inmate-on-inmate cases to staff-on-inmate cases are a result of differences in targeting, differences in reporting, or differences in which cases are ultimately substantiated. It is important to note that datasets, such as those provided in the DOC PREA reports, which combine diverse populations into one racial category (e.g., combining all Asian, Native Hawaiian, and other Pacific Islanders) often mask disparities within those diverse populations. In addition, these reports do not provide any information about Latinx individuals.

Because there is no demographic data for unsubstantiated and unfounded sexual abuse allegations, there is no way of knowing if there is a correlation between gender, race, or the intersection of race and gender, with which cases the incident review teams determine to be substantiated. Those who do not report their sexual victimization would not show up in the demographic information for substantiated sexual abuse cases. These gaps in the data expose

[123] *Id.* at 13.
[124] *Id.*
[125] *Id.* at 16.

the need for collection and analysis of demographic information for unsubstantiated and unfounded sexual abuse allegations as well as substantiated cases to assess sexual abuse investigations.

Some populations are at particularly high risk of sexual assault while in confinement. These groups include women and LGBTQ+ and youthful individuals.[126] Although women are not specifically addressed as a vulnerable population in PREA standards, women in the criminal justice system report more extensive physical and sexual victimization histories when compared with men in the criminal justice system or women who have not been incarcerated.[127] incarcerated individuals who experienced sexual victimization before incarceration are more likely to report being sexually victimized by other incarcerated individuals or staff while in prison or jail.[128]

Under PREA standards, correctional agencies must assess all individuals housed in adult facilities for risk of being sexually abused or sexually abusive.[129] Information from these screenings is then used to inform housing, bed, work, education, and other assignments with the goal of separating those at high risk of sexual victimization from those at high risk of sexually abusing others.[130] The screenings take into account, among other factors, whether the individual has previously experienced sexual victimization.[131] Because women are more likely to have experienced sexual victimization prior to incarceration, "Women are more likely to screen as high-risk for sexual abuse related to past histories of child and adult trauma."[132]

There is very little research examining whether prior sexual victimization among incarcerated women varies by race. One study[133] of incarcerated women found that white women and non-

[126] ANGELA BROWNE ET AL., KEEPING VULNERABLE POPULATIONS SAFE UNDER PREA: ALTERNATIVE STRATEGIES TO THE USE OF SEGREGATION IN PRISONS AND JAILS (2015); Ashley G. Blackburn, Janet L. Mullings & James W. Marquart, *Sexual Assault in Prison and Beyond: Toward an Understanding of Lifetime Sexual Assault Among Incarcerated Women*, 88 PRISON J. 351 (2008).
[127] BROWNE ET AL., *supra* note 126, at 12.
[128] Nancy Wolff, Jing Shi & Jane A. Siegel, *Patterns of Victimization Among Male and Female Inmates: Evidence of an Enduring Legacy*, 24 VIOLENCE VICTIMS 469 (2009).
[129] BROWNE ET AL., *supra* note 126.
[130] *Id.*
[131] 28 C.F.R. § 115.41 (2015).
[132] BROWNE ET AL., *supra* note 126, at 11.
[133] This study is over 12 years old and may be outdated.

heterosexual women were significantly more likely to report lifetime sexual victimization. However, none of the demographic variables including race and sexual orientation were predictors of experiencing in-prison sexual abuse.[134]

A slightly more recent nationwide study of sexual violence found that an estimated 32.3% of multiracial women, 27.5% of American Indian/Alaska Native women, 21.2% of non-Hispanic Black women, 20.5% of non-Hispanic white women, and 13.6% of Hispanic women were raped during their lifetimes.[135] Additionally, an estimated 64.1% of multiracial women, 55.0% of American Indian/Alaska Native women, 46.9% of non-Hispanic white women, and 38.2% of non-Hispanic Black women experienced sexual violence other than rape in their lifetimes.[136] Although this study did not specifically focus on incarcerated women, the results suggest that white women are not the most likely racial group to have experienced sexual violence, that multiracial, Indigenous, and Black women are at higher risk for being victims of rape, and that multiracial and Indigenous women are at higher risk for being victims of other types of sexual violence. There is a need for more recent research examining differences in prior sexual victimization by race among incarcerated women, and this research is especially important as past sexual victimization is a risk factor for sexual victimization while in prison.[137]

A population at particularly high-risk for sexual assault in prisons and jails is LGBTQ+ individuals. One Department of Justice survey found that while 3.5% of heterosexual incarcerated men reported being sexually victimized by another incarcerated individual, 39% of gay men and 34% of bisexual men reported sexual this victimization.[138] Heterosexual incarcerated women reported lower rates of staff-on-inmate (4%) and inmate-on-inmate (13%) sexual victimization than incarcerated bisexual women (8% and 18%, respectively). Although incarcerated lesbian women

[134] Blackburn, Mullings & Marquart, *supra* note 126.
[135] MATTHEW BREIDING ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION MMWR, PREVALENCE AND CHARACTERISTICS OF SEXUAL VIOLENCE, STALKING, AND INTIMATE PARTNER VIOLENCE VICTIMIZATION- NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, UNITED STATES, 2011 5 (2014).
[136] *Id.*
[137] Wolff, Shi & Siegel, *supra* note 128; BROWNE ET AL., *supra* note 126.
[138] ALLEN BECK & CANDACE JOHNSON, SEXUAL VICTIMIZATION REPORTED BY FORMER STATE PRISONERS, 2008 52 (2012).

reported similar levels of inmate-on-inmate sexual victimization as heterosexual women, the rate of staff sexual victimization was twice that for heterosexual women.[139]

Transgender people face an especially high risk of sexual assault in confinement. One study of California prisons found that transgender women housed in a men's facility were 13 times more likely to have been sexually assaulted by other incarcerated individuals than non-transgender people.[140] While PREA standards also include protections for intersex people, there is very little comparable research to date.

PREA recognizes incarcerated youth as a vulnerable population at increased risk for sexual victimization in confinement. The statute states that "juveniles are five times more likely to be sexually assaulted in adult rather than juvenile facilities- often within the first 48 hours of incarceration."[141] Because of the high risk for juveniles housed in adult facilities, PREA imposes strict standards on contact between juveniles and adults in adult facilities, including that facilities may not place youth in a housing unit where they will have sight, sound, or physical contact with incarcerated adults, and that incarcerated juveniles may not interact with incarcerated adults without direct supervision.[142]

However, even among those who are over 18, age can be a risk factor for sexual victimization.[143] One study of incarcerated men found that teenagers age 18 to 19 were at particularly high risk for being sexually assaulted; although this age group made up only 3% of the prison population, they made up 17% of the sexual assault victims in the sample.[144] Perceived vulnerability, including being younger or a first-time offender, can increase the risk of sexual victimization, particularly among incarcerated men.[145] Among youth in custody, prior victimization and

[139] *Id.*
[140] VALERIE JENNESS ET AL., CTR. FOR EVIDENCE-BASED CORRECTIONS, VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT (2007).
[141] Prison Rape Elimination Act of 2003, 34 U.S.C. § 30301(4).
[142] 28 C.F.R. § 115.14 (2015).
[143] Richard B. Felson, Patrick Cundiff & Noah Painter-Davis, *Age and Sexual Assault in Correctional Facilities: A Blocked Opportunity Approach*, 50 CRIMINOLOGY 887 (2012); Tess Neal & Carl Clements, *Prison Rape and Psychological Sequelae: A Call for Research*, 16 PSYCH. PUB. POL'Y & L. 284 (2010).
[144] Felson, Cundiff & Painter-Davis, *supra* note 143.
[145] Neal and Clements, *supra* note 143.

identifying as non-heterosexual are additional risk factors for sexual assault.[146] Incarcerated youth may also experience more negative outcomes to their development and long-term wellbeing than older incarcerated individuals after being sexually victimized.[147] There is no data on youth as a risk factor for sexual victimization among incarcerated women, highlighting the need for gender to be studied along with other characteristics, including age, among incarcerated individuals.

In terms of race, numerous scientific studies focusing on incarcerated men have found that white individuals are disproportionately more likely to be sexually assaulted than members of other races for inmate-on-inmate sexual assault, while Black individuals are disproportionately more likely to perpetrate sexual assault while incarcerated than other races.[148] However, PREA finds that rape is "frequently interracial" and that interracial rape "increases the level of homicides and other violence against inmates and staff, and the risk of insurrections and riots."[149] It is necessary to acknowledge the racist connotations of this language and assertion. Simply painting Black men as perpetrators who rape white men in prison inherently ignores the reprehensible history of policy regulating interracial sex and upholding supremacist ideology. There are other explanations for data disproportionately implicating Black incarcerated individuals. As discussed more below, there is significant underreporting of sexual violence in prisons, so it is unclear if the reported cases are representative of all sexual violence in prisons. In addition, one study of incarcerated men found that Black and Hispanic men were significantly more likely to report sexual violence committed by staff members against them as compared to white men. In addition, when sexual violence perpetrated by staff and by other incarcerated individuals were combined, there was very little difference between the rates of sexual victimization by race.[150]

[146] Eileen M. Ahlin, *Risk Factors of Sexual Assault and Victimization Among Youth in Custody*, 36 J. INTERPERSONAL VIOLENCE 164 (2021).
[147] BROWNE ET AL., *supra* note 126; Ahlin, *supra* note 146.
[148] Christopher Man & John Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for Deliberate Indifference*, 92 J. OF CRIM. L. & CRIMINOLOGY 127, 161-63 (2001); Christopher Hensley, Richard Tewksbury & Tammy Castle, *Characteristics of Prison Sexual Assault Targets in Male Oklahoma Correctional Facilities*, 18 J. OF INTERPERSONAL VIOLENCE 595, 602 (2003); BECK & JOHNSON, *supra* note 138.
[149] 34 U.S.C. § 30301(9), (10).
[150] Nancy Wolff, Jing Shi & Cynthia Blitz, *Racial and Ethnic Disparities in Types and Sources of Victimization Inside Prison*, 88 PRISON J. 451 (2008).

There are comparably fewer studies focusing on race and sexual victimization of incarcerated women. One study of incarcerated women found that no demographic characteristics, including race, made an individual more likely than another to be sexually assaulted in prison.[151] Another study found that incarcerated women were more likely to be assaulted by white perpetrators than any other race, a finding that differed from incarcerated men, who were more likely to be assaulted by Black perpetrators.[152] This difference suggests that incarcerated men and women may have unique experiences when it comes to the connection between race and sexual assault and highlights the need for more research specifically focusing on race with regard to sexual assault among incarcerated women.

3. Impact of trauma

Incarcerated men and women also differ in their experience after an assault. While both experience trauma and negative consequences as a result of sexual assault, the few studies comparing the post-sexual assault impact based on gender indicate that incarcerated men suffer more negative consequences from sexual assault compared to incarcerated women.[153] However, it should be noted that these studies have notable limitations, including the use of self-reporting surveys and small sample sizes, especially for women, which may have influenced the results.

A comparison study of self-reports from ten southwestern correctional facilities examined sexual assault outcomes for incarcerated men and women.[154] The researchers found that similar percentages of male and female victims reported effects such as depression, distrust of people, nervousness around people, discomfort being physically close to others, and worry that it would happen again. While both reported feeling upset, depressed, and negatively affected by the assault at similar rates, 37% of the male victims reported having suicidal thoughts and 19% reported a suicide attempt compared to 11% and 4% of female victims, respectively. Additionally, 36% of male victims reported having become violent with others after the assault while 22% of

[151] Blackburn, Mullings & Marquart, *supra* note 126.
[152] Cindy Struckman-Johnson & David Struckman-Johnson, *A Comparison of Sexual Coercion Experiences Reported by Men and Women in Prison*, 21 J. INTERPERSONAL VIOLENCE 1591 (2006).
[153] *Id.*; Janine M. Zweig et al., *Using General Strain Theory to Explore the Effects of Prison Victimization Experiences on Later Offending and Substance Use*, 95 PRISON J. 84 (2015).
[154] Struckman-Johnson & Struckman-Johnson, *supra* note 152.

female victims reported violent outbursts post-assault. Incarcerated men also reported being concerned about their sex-role reputation, fear of catching AIDS, feelings of hatred, and being physically injured at a higher rate than incarcerated women.[155] Victims of rape in prison would benefit from comprehensive mental health programming, which is currently minimally available or accessible. There does not appear to be a standardized requirement among prison facilities to provide specific types or levels of care post-sexual assault.

Although men reported higher rates of some negative consequences after sexual assault, it is possible that a number of the consequences that the study measured for, such as causing violent outbursts and fear of catching AIDS, were the ones more likely to be experienced by men. Furthermore, there were a significant number of outcomes that the researchers did not evaluate, including PTSD, self-blame, guilt, denial, and self-harm, which other studies have found particularly affect female victims of sexual assault.[156] Beyond the limitations of this study, there is a significant gap in the research examining the impacts of sexual victimization during incarceration for other populations, particularly for transgender and non-binary individuals. There is also a need for more research comparing sexual assault victimization outcomes by race and whether the intersection of race and gender has unique outcomes for incarcerated Black, Indigenous, and women of color.

Trauma from sexual assault can also have a negative impact on victims post-release. A comparative analysis of interview data from formerly incarcerated individuals found that victims of sexual assault are more likely to engage in drug use and commit criminal acts within fifteen months after their release compared to non-victimized individuals.[157] When comparing the impact of male victimization and female victimization on post-release drug use and crime, only the males had a significant finding. This suggests that sexual victimization in prison had a greater effect on male victims' substance abuse and recidivism after release. However, the female

[155] *Id.*
[156] N. N. Sarkar & Rina Sarkar, *Sexual Assault on Woman: Its Impact on Her Life and Living in Society*, 20 SEXUAL & RELATIONSHIP THERAPY 407 (2005).
[157] Zweig et al., *supra* note 153.

sample in this study was small, as noted by the researcher, which may have influenced the findings. The study did not explore other negative outcomes post-release.

Males and females that had been sexually victimized while incarcerated reported higher rates of depression and hostility after release than non-victimized individuals.[158] Importantly, the few studies that compare the consequences of sexual victimization in prison treat gender as a dichotomy, exposing the need for more data on gender nonconforming individuals and more inclusive definitions of gender in scientific studies. Additionally, there is a significant gap in the research examining whether the intersectionality of gender with race and socioeconomic status impacts the consequences and trauma victims face from sexual assault during incarceration. Furthermore, although LGBTQ+ individuals are at high risk for sexual victimization during incarceration, there is little research examining the outcomes for these populations post-release.

4. Underreporting and perceptions of sexual violence against incarcerated people

One of the difficulties in determining the consequences and scope of sexual assault in prisons is getting an accurate estimate of the prevalence of sexual violence. Sexual violence is the most underreported act of violence within the prison system.[159] One study comparing allegations of sexual victimization reported in adult corrections facilities with sexual victimization disclosed in a confidential survey estimated that only 8.4% of prisoners reported at least one of their incidences of sexual victimization.[160]

For inmate-on-inmate sexual assaults, the ability to define the act as a sexual assault can be problematic, especially for male victims.[161] Reporting male sexual assault, even outside of prison, is hindered by complicated factors such as concerns about family and peer reactions, fear of not

[158] *Id.*
[159] Struckman-Johnson & Struckman-Johnson, *supra* note 152; Shannon K. Fowler et al., *Would They Officially Report an In-Prison Sexual Assault? An Examination of Inmate Perceptions*, 90 PRISON J. 220 (2010).
[160] Sheryl Pimlott Kubiak et al., *Reporting Sexual Victimization During Incarceration: Using Ecological Theory as a Framework to Inform and Guide Future Research*, 19 TRAUMA, VIOLENCE, & ABUSE 94 (2018).
[161] Helen M. Eigenberg, *Correctional Officers and Their Perceptions of Homosexuality, Rape, and Prostitution in Male Prisons*, 80 PRISON J. 415 (2000).

being believed by authorities, and concerns around feelings of loss of masculinity, resulting in an estimated 75% of sexual assaults of incarcerated males going unreported.[162]

Sexual assault in prison is not limited to sexual intercourse and can include coercion, harassment, fondling, sodomy, and other acts.[163] Threats do not need to be physical to be coercive. When incarcerated individuals do report sexual victimization, despite the requirement of taking all sexual assault reports seriously per PREA, some correctional staff will not respond. Others even participate in or facilitate assaults.[164]

Sexual acts between incarcerated individuals and correctional staff are inherently nonconsensual due to the power imbalance.[165] With officers as common perpetrators – a survey of three Midwestern prisons uncovering that 45% of incidents involved staff as perpetrators – an incarcerated individual's ability to report incidents of sexual assault to staff can be a possibly insurmountable challenge, particularly if an individual is concerned about lack of proof, lack of credibility, not wanting to be put into protective custody, and not wanting to be labeled a "snitch."[166]

A study of 500 wardens [in Washington, these officials are "superintendents"] found that wardens perceived that sexual assaults did not occur very often, with most wardens reporting that their prison's sexual assault rate was either zero percent or below one percent.[167] The wardens were able to identify sexual assault in situations where force and coercion were utilized; however, in situations without the presence of obvious force or coercion, wardens were unsure about whether it was sexual assault. A study of correctional officers' perceptions found that correctional officers had difficulty distinguishing rape from consensual sexual acts.[168] Officers

[162] Brett Garland & Gabrielle Wilson, *Prison Inmates' Views of Whether Reporting Rape Is the Same as Snitching: An Exploratory Study and Research Agenda*, 18 J. INTERPERSONAL VIOLENCE 1201 (2013).
[163] 28 C.F.R. § 115.6 (2015).
[164] Neal & Clements, *supra* note 143.
[165] *See e.g.*, Jim Harvey & Kelly Shelton, *Law Says Inmate Consent to Sex Is Nonexistent*, ALBUQUERQUE J. (July 10, 2017), https://www.abqjournal.com/1030674/law-says-inmate-consent-to-sex-is-nonexistent.html.
[166] Struckman-Johnson & Struckman-Johnson, *supra* note 152; Shannon K. Fowler et al., *Would They Officially Report an In-Prison Sexual Assault? An Examination of Inmate Perceptions*, 90 PRISON J. 220 (2010).
[167] Aviva N. Moster & Elizabeth L. Jeglic, *Prison Warden Attitudes Toward Prison Rape and Sexual Assault*, 89 PRISON J. 65 (2009).
[168] Eigenberg, *supra* note 161.

also had contradictory thoughts and beliefs regarding how to react to homosexuality and prostitution, which is concerning as it makes recognizing and responding to sexual assault more difficult.[169] However, both of these studies on the perceptions of prison staff toward sexual assault and rape are over ten years old, and the study on correctional officers' attitudes is over twenty years old. It is likely that perceptions of sexual victimization among prison staff have changed during this time, especially with the implementation of PREA, exposing the need for more recent research on the attitudes of prison staff regarding sexual assault of incarcerated individuals.

There is also an overall emphasis on the act of rape, a narrower definition than the definition of sexual abuse that appears in PREA.[170] One study surveying correctional officers found that overwhelming responses indicated rape required the use of force and the overpowering of the victim.[171] A considerable proportion of correctional officers were unwilling to define coercive acts of assault as rape. While most officers appeared reluctant to blame the victim, 16% of officers indicated that incarcerated homosexual individual get what they deserve if they are raped and almost one-fourth of officers believed that people deserved rape if they previously engaged in consensual sexual acts in prison.[172] Attitudes of victim-blaming and not defining coercive acts as rape among correctional officers may make incarcerated individuals more unwilling to report being sexually victimized.[173]

5. Criminal and civil remedies

In addition to the requirements of PREA, Washington also provides for the criminal prosecution of perpetrators of sexual violence in state prisons and municipal jails. Although Washington State law provides the means to punish these perpetrators, prosecution requires both a formal complaint and a determination that the allegation of sexual assault has merit. In other words, even if an incarcerated individual reports a sexual assault, if the incident review team in the

[169] *Id.*
[170] 28 C.F.R. § 115.6 (2015).
[171] Eigenberg, *supra* note 161.
[172] *Id.* Please note, again, that this study is over 20 years old.
[173] Neal & Clements, *supra* note 143.

prison determines that there is not enough evidence of a sexual assault, prosecution cannot go forward.[174]

If an individual has been sexually assaulted by another incarcerated individual or by a corrections officer or staff member, the perpetrator could be charged with a sexual offense such as rape or indecent liberties as described in chapter 9A.44 RCW or elsewhere in the Washington criminal code. Washington State also has specific laws pertaining to sexual misconduct perpetrated by an officer, staff member, or contractor of a correctional facility against an incarcerated individual. An officer, staff member, or contractor commits the crime of Custodial Sexual Misconduct in the First Degree (RCW 9A.44.160) when they have sexual intercourse[175] with an individual incarcerated in a jail, prison, or juvenile facility, and the perpetrator has the actual or perceived ability "to influence the terms, conditions, length, or fact" of incarceration or supervision. Consent of the victim is not a defense. This crime is a class C felony; therefore, the maximum possible term of incarceration is five years in prison. Custodial Sexual Misconduct in the Second Degree (RCW 9A.44.170) involves sexual contact rather than sexual intercourse, but the elements of the crime are otherwise the same. [176] Custodial Sexual Misconduct in the Second Degree is a gross misdemeanor, which means the maximum term is 364 days in jail.

Civil actions at the state and federal level may also be pursued as a result of sexual abuse in a custodial setting. In federal court, an incarcerated individual who has been victimized may seek damages by filing suit against the institution's superintendent under 42 U.S.C. § 1983, provided

[174] *See* WASH. STATE DEP'T OF CORRECTIONS, DOC POLICY 490.860 PRISON RAPE ELIMINATION ACT (PREA) INVESTIGATION (2020), https://www.doc.wa.gov/information/policies/files/490860.pdf.

[175] As defined in RCW 9A.44.010(1),

> (1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and
> (b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and
> (c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

[176] As defined in RCW 9A.44.010(2), "'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party."

that the individual can demonstrate a violation of their civil rights.[177] However, the Prison Litigation Reform Act (PLRA) requires an incarcerated individual to exhaust all available administrative remedies before filing suit.[178] There is a short period of time in which an incarcerated individual can report and file a complaint. In addition, damages for mental or emotional injuries cannot be sought without a showing of physical injury, or "the commission of a sexual act" as defined by 18 U.S.C. § 2246[179]. For an incarcerated individual whose sexual abuse or sexual harassment is outside the scope of these narrow definitions, they may seek damages in state court under tort law.

Relevant cases that have interpreted laws and policies related to sexual assault in prisons include the following:

- *PRP of Williams* (Order issued March 2021)[180] – Article I, Section 14 of the Washington State Constitution provides more protection than the Eighth Amendment to the United States Constitution.
- *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) — While ruling that an official's "deliberate indifference" to a substantial risk of serious harm does violate the Eighth Amendment, the Court found "deliberate indifference" to be a subjective standard, under which the official must be aware of the facts that would lead to inference

[177] Prison officials have a duty to provide humane conditions and to protect incarcerated individuals from violence under the Eighth Amendment. *See Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994), discussed further *infra*.

[178] 42 U.S.C. § 1997e.

[179] As defined in 18 U.S.C. § 2246(2), the term "sexual act" means:

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person[.]

[180] Order, *In re Pers. Restraint of Williams*, No. 99344-1 (Wash. Mar. 12, 2021), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/993441%20Public%20Order%20031221.pdf (court opinion to follow).

about the existence of the substantial risk of serious harm, and then also draw that inference.

- *Teamsters Local Union No. 117 v. Washington Dept. of Corrections*, 789 F.3d 979, 982 (9th Cir. 2015) —DOC did not violate Title VII of the Civil Rights Act of 1964[181] when it designated 110 correctional employee positions in Washington's two women's prisons to be filled only by women.[182] The court held that DOC's "individualized, well-researched decision to designate discrete sex-based correctional officer categories" was justified because sex is a bona-fide occupational qualification (BFOQ) for those positions.[183]
- *State v. Clapper*, 178 Wn. App. 220, 313 P.3d 497 (2013) — The Court of Appeals held that the statute defining Custodial Sexual Misconduct in the First Degree (RCW 9A.44.160) is not unconstitutionally vague, and that "an ordinary person would clearly understand that a corrections officer supervising inmates within a prison has the ability to influence the terms of incarceration."[184]
- *State v. Torres*, 151 Wn. App. 378, 212 P.3d 573 (2009) — For the crime of Custodial Sexual Misconduct committed when the victim is being detained, "detention" is broader than mandatory arrest. Within this context, detention means "restraint on freedom of movement to such a degree that a reasonable person would not have felt free to leave."[185]

6. PREA implementation

In 2012, the Department of Justice finalized standards that govern implementation of PREA, including a facility's responsibility to provide incarcerated survivors with access to confidential

[181] 42 U.S.C. § 2000(e).
[182] The positions in question involved sensitive tasks, including pat-down and strip searches of incarcerated women.
[183] In so holding, the court observed that Washington had "faced problems common to a number of states in their women's prisons: sexual abuse and misconduct by prison guards, breaches of inmate privacy, and security gaps," and that "a primary driver" of these problems "was the lack of female correctional officers to oversee female offenders and administer sensitive tasks[.]" *Teamsters Local Union No. 117*, 789 F.3d at 981-82.
[184] *State v. Clapper*, 178 Wn. App at 226-27.
[185] *State v. Torres*, 151 Wn. App. 378, 389, 212 P.3d 573 (2009).

sexual assault advocacy services.[186] In partnership with DOC and the Department of Commerce's Office of Crime Victims Advocacy (OCVA), the Washington Coalition of Sexual Assault Programs (WCSAP) has worked to coordinate advocacy services, including culturally specific supports, which are provided by community sexual assault programs around the state.[187]

To facilitate implementation of the PREA victim advocacy standards, in 2016, the United States Department of Justice's Office for Victims of Crime lifted their restrictions on using Victims of Crime Act funds to serve incarcerated victims.[188] This, plus the Violence Against Women Act 2013 addition of two new purpose areas specifically including services to men, including "purpose area 17, (focusing on programs addressing sexual assault against men, women, and youth in correctional and detention settings),"[189] has greatly expanded the ways that Washington programs can use federal funds to support victims of sexual assault, including incarcerated people.[190] Allowing incarcerated survivors to access services funded by these grant programs requires cooperation by prisons and jails to allow physical access to their facilities, confidentiality, and distribution of resources.

B. Civil Commitment

Another change since 1989 was the enactment of the Community Protection Act in 1990, making Washington the first state to create a system for the involuntary, indefinite civil commitment of sexually violent predators. A sexually violent predator is defined as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of

[186] U.S. DEP'T OF JUST., PRISONS AND JAIL STANDARDS: UNITED STATES DEPARTMENT OF JUSTICE FINAL RULE (2012), https://www.prearesourcecenter.org/sites/default/files/content/prisonsandjailsfinalstandards_0.pdf (specifically, 28 C.F.R. Part 115, Section 53).

[187] *See Working With Survivors*, WASH. COAL. OF SEXUAL ASSAULT PROGRAMS, https://www.wcsap.org/advocacy/focus-areas/incarcerated-survivors.

[188] *See New Voca Assistance Rule Means More Services, More Funds for* Victims, U.S. DEP'T OF JUST. ARCHIVES (Dec. 31, 2016), https://www.justice.gov/archives/opa/blog/new-voca-assistance-rule-means-more-services-more-funds-victims.

[189] *See* U.S. DEP'T OF JUST., OFF. ON VIOLENCE AGAINST WOMEN, FREQUENTLY ASKED QUESTIONS (FAQS) ABOUT STOP FORMULA GRANTS 1 (2014), https://www.justice.gov/sites/default/files/ovw/legacy/2014/02/06/consolidated-stop-faqs-bla.pdf (Question 2).

[190] *See* Allison Hastings, *Lifting of Funding Restrictions Paves the Way for Incarcerated Survivors of Sexual Abuse to Access Victim Services*, VERA INST. OF JUST. (Jan. 13, 2017), https://www.vera.org/blog/lifting-of-funding-restrictions-paves-the-way-for-incarcerated-survivors-of-sexual-abuse-to-access-victim-services.

sexual violence if not confined in a secure facility."[191] The process for such commitment can be initiated when the person's criminal sentence is about to expire or after the criminal trial if the person is found incompetent or not guilty by reason of insanity.[192] The statute allows for pleadings for conditional release to a less restrictive alternative or unconditional discharge.

There has been ample litigation in the Washington appellate courts regarding the standards of proof required for civil commitment and the procedural steps of the process. The most important foundational case is *In re Young,*[193] which upheld the constitutionality of civil commitment against challenges under the double jeopardy and ex post facto clauses of the state and federal constitutions. Several years later, the U.S. District Court for the Western District of Washington found that the statute violated the due process, ex post facto, and double jeopardy clauses of the federal constitution in *Young v. Weston,*[194] but that decision was remanded by the Ninth Circuit[195] in light of the U.S. Supreme Court's 5 to 4 decision in *Kansas v. Hendricks,*[196] which upheld the constitutionality of the Kansas Sexually Violent Predator Act based on the Washington statute. In 2001, the U.S. Supreme Court upheld the sexually violent predator statute in *Seling v. Young*[197] against not just facial, but also applied arguments.

In 2007, the Washington State Institute for Public Policy (WSIPP) published a study that examined the recidivism of 135 sex offenders who were referred for civil commitment, but for whom no petitions were filed.[198] The study's findings were that 50% of the subjects had a new felony as their most serious new conviction, with 23% convicted of new felony sex offenses; 19% of the group was convicted of failure to register as a sex offender; 10% of the group had at least one

[191] RCW 71.09.020(18).
[192] RCW 71.09.030(1).
[193] 122 Wn.2d 1 (1993).
[194] 898 F. Supp. 744 (W.D. Wash. 1995).
[195] 122 F.3d 38 (9th Cir. 1997).
[196] 521 U.S. 346 (1997).
[197] 531 U.S. 250 (2001).
[198] CHERYL MILLOY, WASH. STATE INST. FOR PUB. POL'Y, SIX-YEAR FOLLOW-UP OF 135 RELEASED SEX OFFENDERS RECOMMENDED FOR COMMITMENT UNDER WASHINGTON'S SEXUALLY VIOLENT PREDATOR LAW, WHERE NO PETITION WAS FILED (2007), https://www.wsipp.wa.gov/ReportFile/985/Wsipp_Six-Year-Follow-Up-of-135-Released-Sex-Offenders-Recommended-for-Commitment-Under-Washington-s-Sexually-Violent-Predator-Law-Where-No-Petition-Was-Filed_Full-Report.pdf.

additional referral for civil commitment by the end of the six-year period; and four percent of the group subsequently received sentences of life in prison without parole.[199]

C. Sexual assault kit backlog

There has been recent scrutiny and legislative initiative to solve the testing backlog of sexual assault kits. Addressing this backlog is critical for law enforcement to catch serial rapists. Further, it sends the message to both victims and rapists that sexual assault is taken seriously. In 2015, the Washington State Legislature enacted a law requiring the preservation and forensic analysis of sexual assault kits.[200] In 2016, the Legislature ordered the Washington State Patrol to create a statewide tracking system to address the testing backlog.[201] And then in 2019, the Legislature established the Sexual Assault Forensic Examination Best Practices Advisory Group (hereafter Advisory Group) to work with the Attorney General to remedy the backlog and appropriated $10.3 million for testing the nearly 10,000 untested kits.[202]

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

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

[199] *Id.*
[200] LAWS OF 2015, ch. 247.
[201] LAWS OF 2016, ch. 173.
[202] LAWS OF 2019, ch. 93; *See also* WASH. STATE. OFF. OF ATT'Y GEN., ANNUAL REPORT TO THE LEGISLATURE AND GOVERNOR: WASHINGTON SEXUAL ASSAULT FORENSIC EXAMINATION BEST PRACTICES ADVISORY GROUP (2019), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/SAFE%20Report%202019.pdf.

Following the publication of the report, during the 2020 legislative session, the Legislature passed ESHB 2318, which requires unreported[203] sexual assault kits to be stored with local law enforcement and retained for twenty years.[204] The purpose of this legislation was to ensure that evidence remains viable if and when victims choose to report an assault to law enforcement. It will also allow evidence to be more easily linked between cases with the intent of identifying serial offenders.

In ESHB 1109, passed by the Legislature in 2021, the Office of the Attorney General is required, in consultation with the Washington Association of Sheriffs and Police Chiefs, to collect status updates on cases tied to previously un-submitted sexual assault kits collected before July 24, 2015.[205]

D. Sexual Assault Protection Orders[206]

Washington State was one of the first states to enact a sexual assault protection order (SAPO). Before the Sexual Assault Protection Order Act was passed, civil protection orders were not available to many sexual assault victims. Based on the eligibility requirements for a Domestic Violence Protection Order or an Antiharassment Protection Order, victims who were assaulted one time by a non-family or household member were precluded from applying for a protection order. This gap was significant because many sexual assaults are perpetrated by acquaintances or persons known to, but not related to, the victim.[207] In 2006, the Washington State Legislature filled this gap. As stated in the legislative intent:

> Sexual assault is the most heinous crime against another person short of murder. Sexual assault inflicts humiliation, degradation, and terror on victims. According to the FBI, a woman is raped every six minutes in the United States. Rape is

[203] Not yet tied to a police report.
[204] LAWS OF 2020, ch. 26.
[205] LAWS OF 2021, ch. 118.
[206] Pursuant to the recently-passed E2SHB 1320, all of Washington's civil protection orders, including SAPOs, will have their different chapters repealed, and a new RCW chapter will be created to consolidate and harmonize protection order laws. As of the time of this writing, that new law had not yet been codified, so references are still made to relevant portions of chapter 7.90 RCW and E2SHB 1320.
[207] LUCY BERLINER, DAVID FINE & DANNA MOORE, SEXUAL ASSAULT EXPERIENCES AND PERCEPTIONS OF COMMUNITY RESPONSE TO SEXUAL ASSAULT: A SURVEY OF WASHINGTON STATE WOMEN (2001), https://depts.washington.edu/uwhatc/PDF/research/sexualassaultexpr2001-11.pdf.

> recognized as the most underreported crime; estimates suggest that only one in seven rapes is reported to authorities. Victims who do not report the crime still desire safety and protection from future interactions with the offender. Some cases in which the rape is reported are not prosecuted. In these situations, the victim should be able to seek a civil remedy requiring that the offender stay away from the victim. It is the intent of the legislature that the sexual assault protection order created by this chapter be a remedy for victims who do not qualify for a domestic violence order of protection.[208]

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

A victim may seek a SAPO by filing a petition alleging that they have been the victim of nonconsensual sexual conduct or nonconsensual sexual penetration committed by the respondent.[209] Previously, the law stated that the petition "shall be accompanied by an affidavit… stating the specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts, for which relief is sought." [210] Washington courts interpreted the "specific statements or actions" as required to be separate from the sexual assault itself.[211] Then, in 2019, the Washington State Legislature clarified its intent regarding requirements to obtain a SAPO[212] by amending RCW 7.90.020 to require that the petition "shall be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought."[213]

Denial of a remedy may not be based, in whole or in part, on evidence that the respondent was voluntarily intoxicated, the petitioner was voluntarily intoxicated, or the petitioner engaged in

[208] RCW 7.90.005.
[209] RCW 7.90.040(1).
[210] RCW 7.90.020(1).
[211] *Roake v. Delman,* 189 Wn.2d 775, 783-84, 408 P.3d 658 (2018).
[212] That "experiencing a sexual assault is itself a reasonable basis for ongoing fear." LAWS OF 2019, ch. 258.
[213] *Id.*

limited consensual sexual touching.[214] Where there is evidence of intoxication, the court must determine the petitioner's capacity to consent.[215]

The court shall issue a final order if the court finds by a preponderance of the evidence that the petitioner has been a victim of nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent.[216] Upon a full hearing, a final order may be granted for a fixed period or be permanent.[217] Pursuant to the recently passed HB 1320, the court must not grant a SAPO for less than one year unless specifically requested by the petitioner.[218] Additionally, if a court denies the protection order, it must state in writing the particular reasons for the denial.[219] Violations of a protection order are a gross misdemeanor but can be a class C felony if the respondent has at least two prior violations.[220]

Pursuant to RCW 7.90.070, the court may appoint counsel for an unrepresented petitioner when the respondent is represented; however, this provision is not widely used because many courts do not have a process to address the issue. This is a gap that should be remedied, given the disparity in outcomes for parties represented by counsel. For example, in its 2011 report, King County Sexual Assault Resource Center's CourtWatch program found "in all of the cases where the petitioner did not have an attorney and the respondent did, the SAPO was dismissed. Similarly, in 3 out of the 4 cases where the petitioner was represented but the respondent was not, the SAPO was granted."[221] As previously noted, the Washington State Legislature recently passed E2SHB 1320 in order to harmonize processes and legal requirements for Washington's six civil protection orders, including SAPOs, in order to make the process more accessible and to maintain their purpose of "fast, efficient means to obtain protection…."[222] One of the statutory mandates to the Washington State Supreme Court Gender and Justice Commission is to work

[214] RCW 7.90.090(4)(a)-(c).
[215] *Nelson v. Duvall*, 197 Wn. App. 441, 387 P.3d 1158 (2017).
[216] RCW 7.90.090(1)(a).
[217] RCW 7.90.120(2). This provision of the statute was amended by the Legislature in 2017; previously, SAPOs could be granted for a maximum period of two years.
[218] *See* ENGROSSED SECOND SUBSTITUTE H.B. 1320, 67th Leg., Reg. Sess. (Wash. 2021) (Part VI, Sec. 40(1)).
[219] *Id.* at Part V, Sec. 29(5).
[220] RCW 7.90.110(5); RCW 26.50.110.
[221] KING CNTY. SEXUAL ASSAULT RES. CTR., ANALYZING THE IMPACT AND APPLICATION OF THE SEXUAL ASSAULT PROTECTION ORDER IN KING COUNTY (2011), https://www.kcsarc.org/sites/default/files/CourtWatch-Report%20April%202011.pdf.
[222] *See* ENGROSSED SECOND SUBSTITUTE H.B. 1320, 67th Leg., Reg. Sess. (Wash. 2021) (Part I, Section 1(1)).

with other stakeholders to develop recommendations to improve access for unrepresented parties.[223] Its recommendations are due to the courts by July 1, 2022.

E. Extension of statute of limitations for sexual assault

In 2019, the Washington State Legislature passed SB 5649 to extend the statute of limitations for Rape in the First and Second Degree[224] from ten to twenty years, and remove the statute of limitations entirely for Rape of a Child in the First, Second, or Third Degree. In section 2 of the bill, the Legislature explained:

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

Greater opportunities to prosecute might also help with the process of clearing the backlog of sexual assault kits.

F. Sexual assault advocate privilege

Since the 1989 Study, Washington has extended protections to victim information communicated to community-based sexual assault advocacy programs.[225] In 2006, privilege was granted to communications between a victim and their community-based sexual assault advocate."[226] This privilege extends only to community-based sexual assault advocates, not system-based sexual assault advocates. For further discussion of the differences between these types of advocates please refer to Footnote 91. When sexual violence is perpetrated, it takes personal autonomy

[223] *Id.* at Part V, Sec. 36(1)(b).
[224] Victim is over age 16.
[225] Information about Community Sexual Assault Programs is listed by county on the Washington Coalition of Sexual Assault Programs (WCSAP) website: https://www.wcsap.org/help/csap-by-county.
[226] RCW 5.60.060(7).

away from the victim; these privilege protections allow a victim the choice to waive privilege and disclose any of their private information.

G. Other rights for sexual assault victims

In 2021, with the passage of ESHB 1109, the Legislature expanded statutory rights for sexual assault victims. This expansion includes the following:

- The right to consultation with a sexual assault advocate was modified to apply throughout both the investigation and prosecution of the case;
- Medical facilities, law enforcement officers, prosecutors, defense attorneys, courts, and other applicable criminal justice agencies are responsible for providing advocates access to facilities to fulfill a survivor's right to consult with an advocate;
- Survivors are entitled to receive written notice of benefits under the Crime Victim Compensation Program;
- Upon presenting at a medical facility for treatment related to an assault or when reporting to law enforcement, survivors have the right to receive a referral to an accredited community sexual assault program or, in the case of a minor, to be connected to services in accordance with that county's child sexual abuse investigation protocol, including referral to a children's advocacy center;
- The right to timely notification as to investigation status;
- The right to be informed regarding expected and appropriate time frames for receiving responses regarding inquiries to the status of the investigation and any related prosecution, and to receive responses in a manner consistent with those time frames;
- The right to access interpreter services where necessary to facilitate communication throughout the investigatory process and prosecution of the survivor's case; and
- Where the sexual assault survivor is a minor, the right to have the prosecutor consider and discuss the survivor's requests for remote video testimony, and the right to have the

court consider requests from the prosecutor for safeguarding the survivor's feelings of security and safety in the courtroom.[227]

These safeguards acknowledge the need to ensure that victims are treated respectfully throughout the process. The amendments regarding notice of rights and case status are of particular importance given that stakeholders report that the timeframes related to investigating and processing the cases through the judicial system can create additional hurdles to seeking justice.[228] This is an area where additional focus and data-collection, or a work group as the cited article suggests, could help inform how to improve and expedite the process.

V. Immigrant Women

Research shows that immigrant women are particularly vulnerable and experience higher rates of domestic and sexual violence compared to U.S.-born women.[229] Although there are no statistics correlating the prevalence of gender-based violence to specific immigration statuses, studies do demonstrate that immigration from one country to another may exacerbate abuse. For example, one study reported that 48% of Latina immigrants reported an increase in their partner's violence against them after they immigrated to the United States.[230] These immigrant women experience barriers that increase their vulnerability including lack of familiarity with their legal rights, potential misinformation about the U.S. legal system, lack of access to service providers, and language-barrier issues.[231] Among this female population, adolescents and girls

[227] LAWS OF 221, ch. 118.
[228] *See e.g.*, Jesse Franklin, *Prioritize Sexual-Assault Victims in Court Backlog*, SEATTLE TIMES (May 21, 2021), https://www.seattletimes.com/opinion/prioritize-sexual-assault-victims/.
[229] *SART Toolkit Section 6.12*, NAT'L SEXUAL VIOLENCE RES. CTR., https://www.nsvrc.org/sarts/toolkit/6-12. According to a review of 147,902 intimate partner homicides from 2003 to 2013 across 19 U.S. states, foreign-born victims were more likely than U.S.-born victims to be associated with intimate partner violence-related deaths. Bushra Sabri et al., *Intimate Partner Homicides in the United States, 2003-2013: A Comparison of Immigrants and Nonimmigrant Victims*, 36 J. INTERPERSONAL VIOLENCE 4735, 4735 (2018). In addition, foreign-born women killed by their intimate partners were more likely than U.S.-born women to be married, young, and killed by a young partner who strangled, suffocated, or stabbed them. *Id.* at 4736.
[230] *See* ELIZABETH MARSH DAS ET. AL., FAM. VIOLENCE PREVENTION FUND, UNDERSTANDING CHILDREN, IMMIGRATION, AND FAMILY VIOLENCE: A NATIONAL EXAMINATION OF THE ISSUES 3 (2005), https://brycs.org/wp-content/uploads/2018/09/immigrationDV.pdf.
[231] *SART Toolkit Section 6.12*, NAT'L SEXUAL VIOLENCE RES. CTR., https://www.nsvrc.org/sarts/toolkit/6-12.

who are undocumented or have temporary legal status are disproportionately prevented from reporting domestic and sexual abuse to officials.[232] These female victims are fearful of deportation if they report.[233]

Immigrant women with undocumented or lawful nonimmigrant[234] statuses are particularly reluctant to report domestic violence because they are often dependent on their partner for petitioning or changing their immigration status.[235] Orloff & Cajudo note that "[t]he rate of abuse is highest when U.S. citizen men marry immigrant women (59.5 percent) – three times the national average."[236] Many abusive partners threaten to notify authorities of their female partner's immigration status to prevent her from leaving the relationship.[237] This history, in addition to increased immigration enforcement in certain areas, has contributed to misunderstandings and fear regarding reporting.

Many of these women also are low-income and depend on their partner for financial resources related to changing immigration status.[238] Moreover, when language barriers exist between

[232] *See generally* AMUEDO-DORANTES & ARENAS-ARROYO, *supra* note 97; *SART Toolkit Section 6.12*, NAT'L SEXUAL VIOLENCE RES. CTR., https://www.nsvrc.org/sarts/toolkit/6-12; Michelle R. Decker et al., *Sexual Violence Against Adolescent Girls: Influences of Immigration and Acculturation*, 13 VIOLENCE AGAINST WOMEN 498 (2007); SCOTT H. DECKER ET AL., IMMIGRATION AND LOCAL POLICING: RESULTS FROM A NATIONAL SURVEY OF LAW ENFORCEMENT EXECUTIVES (2002), https://www.policefoundation.org/wp-content/uploads/2015/06/Appendix-G_0.pdf; Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Projections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER, SOC. POL'Y & L. 95 (2002)

[233] *See generally* AMUEDO-DORANTES & ARENAS-ARROYO, note 97, at 12, 17–18, 23; *SART Toolkit Section 6.12*, NAT'L SEXUAL VIOLENCE RES. CTR., https://www.nsvrc.org/sarts/toolkit/6-12; DECKER ET AL., *supra* note 232; Orloff & Kaguyutan, *supra* note 232.

[234] Lawful nonimmigrant status is for individuals who are admitted to the United States for a specified period of time, such as for temporary work or for education purposes. *Glossary*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/tools/glossary.

[235] *SART Toolkit Section 6.12*, NAT'L SEXUAL VIOLENCE RES. CTR., https://www.nsvrc.org/sarts/toolkit/6-12.

[236] Letter from Leslye E. Orloff & Tarja Cajudo, Nat'l Immigrant Women's Advoc. Project, Am. U., Wash. Coll. of L., to Susan L. Carlson, Clerk, Wash. State Sup. Ct., (Sept. 15, 2017), https://www.courts.wa.gov/court_Rules/proposed/2017May/ER413/Leslye%20Orloff.pdf (outlining the authors' endorsement of Washington's proposed evidence Rule 413).

[237] *See generally* AMUEDO-DORANTES & ARENAS-ARROYO, *supra* note 97; *SART Toolkit Section 6.12*, NAT'L SEXUAL VIOLENCE RES. CTR., https://www.nsvrc.org/sarts/toolkit/6-12; JESSICA MINDLIN ET AL., NAT'L IMMIGRANT WOMEN'S ADVOC. PROJECT (2013), https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/CULT-Man-Ch1-DyanimcsSexualAssaultImplications-07.10.13.pdf.

[238] AMUEDO-DORANTES & ARENAS-ARROYO, *supra* note 97, at 6. *See generally* Edna Erez et al., *Intersections of Immigration and Domestic Violence: Voices of Battered Immigrant Women*, 4 FEMINIST CRIMINOLOGY 32 (2009); [238] Robert C. Davis et al., *Access to Justice for Immigrants Who Are Victimized: The Perspectives of Police and* Prosecutors, 12 CRIMINAL JUST. POL'Y REV. 183, 186 (2001); Orloff & Kaguyutan, *supra* note 232.

victims and the authorities that the victims must report to, victims run the risk of relying on their abuser to interpret, which can result in the abuser distorting the facts and result in the victim getting arrested.[239] This points to the importance of language services in courtrooms and reducing the barriers many immigrant women experience when requesting court protection orders. See "Chapter 2: Communication and Language as a Gendered Barrier to Accessing the Courts" for more information on this topic.

It is also important to note that many immigrants are influenced by the justice system in their country of origin, and there are sometimes additional cultural elements where women may be ostracized by their communities if they leave their husbands.[240]

A coalition of seven national organizations sent a survey to victim advocates and attorneys to investigate immigrants' fear of reporting domestic and sexual violence to authorities. The coalition received 575 completed surveys from victim advocates who work with survivors of domestic violence across the United States. Of these advocates, 52% "reported that those survivors dropped their civil or criminal case because they were fearful."[241] The survey results do not provide a breakdown of responses by state. The results also do not provide specifics on gender identity. However, the results do include that immigrant women frequently withdraw their court case rather than separate from their family out of fear of deportation.[242] Moreover, 75% of those advocates surveyed said that immigrant survivors are concerned about going to court for domestic or sexual violence cases because of the abuser's immigration status (particularly if the abuser is a U.S. citizen). This also relates to family court proceedings regarding child support.[243] See "Chapter 7: Gender Impact in Family Law Proceedings" for further discussion of the impacts of immigration status in family law cases.

[239] *Domestic Violence Bench Guide for Judicial Officers*, WASH. STATE SUP. CT. GENDER & JUST. COMM'N (2016), https://www.courts.wa.gov/content/manuals/domViol/Complete percent20Manual percent202015.pdf.
[240] *See* Davis et al., *supra* note 238; Orloff & Kaguyutan, *supra* note 232.
[241] TAHIRIH, IMMIGRANT SURVIVORS FEAR REPORTING VIOLENCE (2019), https://www.tahirih.org/wp-content/uploads/2019/06/2019-Advocate-Survey-Final.pdf.
[242] *Id.*
[243] *Id.*

VI. Violence Against Indigenous Women and Girls

Violence has been perpetrated against Indigenous women for centuries. Abigail Echo-Hawk, Director of the Urban Indian Health Institute (UIHI) and Chief Research Officer for the Seattle Indian Health Board, described this history in the preface to the UIHI report "MMIWG: We Demand More:"

> Missing and murdered Indigenous women and girls (MMIWG) is not a new crisis in the United States. This continuous and pervasive assault on our matriarchs has existed since colonizers set foot on this land. Decades of advocacy and activism fell on deaf ears, while more and more of our women went missing and were murdered. And while their families sought justice, they were shown at every turn by police and government agencies that Indian women and girls don't count. [244]

The U.S. Department of Justice has found that 84.3% of Native women have experienced violence.[245] According to the research, 56% of Native women have experienced sexual violence and 85% of lesbian, bi-sexual and Two Spirit[246] Native individuals have experienced sexual violence.[247] It is reported that 97% of women victims experienced violence by an interracial perpetrator.[248]

A. Missing and Murdered Indigenous Women and Girls (MMIWG)

According to the Centers for Disease Control and Prevention, Indigenous women are murdered at significantly higher rates than women of other races.[249] There is a need for better data collection on the number of MMIWG. For example, in 2016 the National Crime Information

[244] URB. INDIAN HEALTH INST., MMIWG: WE DEMAND MORE, https://www.uihi.org/resources/mmiwg-we-demand-more/.
[245] *Id.*
[246] "Traditionally, Native American two spirit people were male, female, and sometimes intersexed individuals who combined activities of both men and women with traits unique to their status as two spirit people. In most tribes, they were considered neither men nor women; they occupied a distinct, alternative gender status." *Two-Spirit*, Indian Health Serv., https://www.ihs.gov/lgbt/health/twospirit/.
[247] *Id.*
[248] *Id.*
[249] Emiko Petrosky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence — United States, 2003–2014*, 66 MMWR MORBIDITY & MORTALITY WKLY. REP. 741 (2017).

Center reported 5,712 missing American Indian and Alaska Native women and girls, whereas NamUs, the United States Department of Justice's federal missing persons database, only reported 116 cases.[250] In a 2018 report, the UIHI, a division of the Seattle Indian Health Board, found that while 71% of Indigenous women live in urban areas, only 506 cases of MMIWG were identified in 71 cities from 1900-2018.[251] Reasons cited for the lack of quality data include "underreporting, racial misclassification, poor relationships between law enforcement and American Indian and Alaska Native communities, poor record-keeping protocols, institutional racism in the media, and a lack of substantive relationships between journalists and American Indian and Alaska Native Communities."[252]

Recognizing the lack of a comprehensive data collection system and the need for the criminal justice system to better serve Native American women, in 2018, the Washington State Legislature passed Substitute House Bill 2951. This legislation directed the Washington State Patrol to conduct a study "to determine how to increase state criminal justice protective and investigative resources for reporting and identifying missing Native American women in the state" and to submit a report to the Legislature by June 1, 2019.[253]

In its report, the Washington State Patrol reported 56 missing Native American women in Washington State based on National Crime Information Center statistics.[254] It also identified the following barriers to collaboration between tribes, urban communities and law enforcement that have led to undercounting of MMIWG: inconsistency in reporting methods; cultural misunderstanding and distrust; lack of focused, easily accessible resources; and communication

[250] *See NamUs: Missing Persons Search*, U.S. DEP'T OF JUST., NAT'L CRIME INFO. CTR. (2018), https://www.namus.gov/MissingPersons/Search.
[251] URB. INDIAN HEALTH INST., MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS: A SNAPSHOT OF DATA FROM 71 URBAN CITIES IN THE UNITED STATES (2018), http://www.uihi.org/wp-content/uploads/2018/11/Missing-and-Murdered-Indigenous-Women-and-Girls-Report.pdf.
[252] *Id.*
[253] LAWS OF 2018, ch. 101.
[254] CAPTAIN MONICA ALEXANDER, WASHINGTON STATE PATROL, MISSING & MURDERED NATIVE AMERICAN WOMEN REPORT (2019), http://www.wsp.wa.gov/wp-content/uploads/2019/06/WSP_2951-SHB-Report.pdf.

missteps.[255] The Washington State Patrol report further recommended the study and development of a centralized database.[256]

In 2019, but prior to the release of the Washington State Patrol's report, the Legislature passed Second Substituted House Bill 1713, which established two liaison positions within the Washington State Patrol for the purpose of improving law enforcement response to missing and murdered Native American women.[257] The Eastern Washington position was on hold due to a COVID-19-related hiring freeze, but was finally filled in late 2020.[258] In addition to building relationships between the government and Native communities, pursuant to this legislation, the Washington State Patrol is also required to develop a best practices protocol for law enforcement response to missing persons reports for Indigenous people.[259]

In September 2019, the UIHI issued a response to the Washington State Patrol's report entitled "MMIWG: We Demand More,"[260] stating that "the [WSP] report is an imprecise recounting of the ten meetings held with tribal nations and community members across the state with no meaningful or scientifically based analysis of the knowledge shared in those meetings."[261] It also cited a lack of meaningful analysis of quantitative data related to MMIWG.[262]

The UIHI response highlights the disparate rate of missing women in Washington State by race[263] as well as a high prevalence of racial misclassification of cases which is likely leading to an underestimate of the rate among American Indian/Alaska Native women. It also includes a qualitative analysis of the notes from the meetings convened by the Washington State Patrol and identifies the following themes that arose in the meetings: lack of proper data collection; no

[255] *Id.*
[256] *Id.*
[257] LAWS OF 2019, ch. 127.
[258] *WSP Welcomes Eastern Washington Tribal Liaison*, GORGE COUNTRY MEDIA (Nov. 25, 2020), https://gorgenewscenter.com/2020/11/25/wsp-welcomes-eastern-washington-tribal-liaison/.
[259] *Id.*
[260] URB. INDIAN HEALTH INST., *supra* note 244.
[261] *Id.* at 5.
[262] *Id.*
[263] Estimated 78.64 per 100,000 American Indian/Alaska Native women missing in 2018 compared to 18.56 per 100,000 white women. Notably the rate for African American women is also disparity high at 78.37 per 100,000. *Id.* at 12.

centralized resources for law enforcement, families, and tribes; lack of coordination between jurisdictions; and human trafficking.

The analysis also includes the most commonly mentioned barriers to addressing this crisis experienced by urban and rural tribal communities. The most often cited barriers were data (e.g., lack of data sharing across jurisdictions, racial misclassification, and misuse of data), and bias among law enforcement. The report provides ten community-defined solutions with the solutions most frequently mentioned at meetings including: collaboration between law enforcement, government, and community; training for law enforcement on aspects such as the missing person process, human emotions, and Native American culture; respect for the government-to-government relationship; and increased community resources.[264]

This issue continues to receive much-needed attention on a statewide and national level, including in mainstream media. In 2019, Rosalie Fish, a member of the Cowlitz Tribe and a senior at Muckleshoot Tribal School made national headlines when she painted a red handprint over her mouth, the fingers extending across her cheeks to honor the lives of missing and murdered Indigenous women.[265] At the Washington State 1B track and field championships, Fish also painted on her right leg the letters "MMIW," standing for Missing and Murdered Indigenous Women. As a member of the Cowlitz Indian Tribe, raising awareness for the issue was as natural as running. "I do like to think in native communities, the women are especially strong in the way they voice themselves," said Fish. "I do see a little bit of hope … I think that the MMIW movement is getting more attention than it has in the past."[266] In her four events, Fish won one silver and three gold medals.

Additionally, in the fall of 2020, the U.S. Department of Justice appointed David J. Rogers, a Nez Perce citizen and former Nez Perce police chief, as the federal Missing and Murdered Indigenous Persons program coordinator in Washington State.[267] "As coordinator, Rogers will work with

[264] *Id.*
[265] Megan Rowe, *Leaving her Mark: Native High Schooler Uses State Track Meet to Raise Awareness for Missing and Murdered Women*, SPOKESMAN Rev. (May 30, 2019), https://www.spokesman.com/stories/2019/may/30/leaving-her-mark-native-high-schooler-uses-state-t/.
[266] *Id*.
[267] *See* Donald W. Meyers, *Feds Hire Coordinator for Missing, Murdered Indigenous Cases in Washington* State, YAKIMA HERALD (May 5, 2021), https://www.yakimaherald.com/special_projects/vanished/solutions/feds-hire-

federal, tribal, state and local law enforcement agencies to develop procedures for responding to cases of missing and murdered indigenous people."[268] Washington is one of eleven states for which a coordinator was hired as part of this initiative.[269]

In May 2021, the Washington State Attorney general also announced the creation of a task force "to assess causes behind the high rate of disappearances and murders of Indigenous women."[270] The 21-member task force, which will include tribes and tribal organizations and policymakers among its members, will report its findings in two reports to the governor and Legislature in August 2022 and June 2023.

B. Child Welfare

The removal of Indigenous children from their families and communities can have devastating impacts on both the individual and the community. For example, according to a 2009 study conducted in Australia, "Indigenous women (with children) who had been removed from their natural family during childhood were at higher risk of experiencing violence as adults than those who had not been removed."[271] Other research from Canada shows that two-thirds of women involved in street prostitution in Winnipeg [Manitoba, Canada] had been taken into care as children.[272]

In 1978, Congress enacted the Indian Child Welfare Act (ICWA) "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes or institutions which will reflect

coordinator-for-missing-murdered-indigenous-cases-in-washington-state/article_71a855cf-469a-58c0-b4d3-5a13ed827818.html.

[268] *Id*.

[269] *Id*.

[270] *State Task Force Will Assess Causes Behind Crisis of Missing, Murdered Indigenous Women*, YAKIMA HERALD (June 12, 2021), https://www.yakimaherald.com/thevanished/state-task-force-will-assess-causes-behind-crisis-of-missing-murdered-indigenous-women/article_1fbaa8e1-c63c-5be2-a4ee-58b3f268f59e.html.

[271] Kyllie Cripps et al., *Victims of Violence Among Indigenous Mothers Living with Dependent Children*. 191 MED. J. AUSTL. 481 (2009).

[272] Anette Sikka, *Trafficking of Aboriginal Women and Girls in Canada*, 57 ABORIGINAL POL'Y RSCH. CONSORTIUM INT'L 201 (2009).

the unique values of Indian culture."[273] Washington's Indian Child Welfare Act codified in chapter 13.38 RCW was passed with the intent to commit to:

> …protecting the essential tribal relations and best interests of Indian children by promoting practices designed to prevent out-of-home placement of Indian children that is inconsistent with the rights of the parents, the health, safety, or welfare of the children, or the interests of their tribe. Whenever out-of-home placement of an Indian child is necessary in a proceeding subject to the terms of the federal Indian child welfare act and in this chapter, the best interests of the Indian child may be served by placing the Indian child in accordance with the placement priorities expressed in this chapter. The legislature further finds that where placement away from the parent or Indian custodian is necessary for the child's safety, the state is committed to a placement that reflects and honors the unique values of the child's tribal culture and is best able to assist the Indian child in establishing, developing, and maintaining a political, cultural, social, and spiritual relationship with the child's tribe and tribal community.

ICWA courts can play a role in improving outcomes for Indigenous children and families.[274]

C. Enforcement of protection orders issued by Tribal Courts

The interrelation between federal, state, and tribal court jurisdictions is complex. "Tribal governments are hampered by a complex set of laws and regulations created by the federal government that make it difficult, if not impossible, to respond to sexual assault in an effective manner."[275]

Both state and federal law require that any protection order issued by the court of a state or of an Indian tribe be accorded full faith and credit and enforced by the court of another state or Indian tribe.[276] Moreover, in August 2018, the Washington State Attorney General's Office issued

[273] 25 U.S.C. § 1901 et seq.
[274] It is also anticipated that the Administrative Office of the Courts will develop an ICWA bench card in 2022 to assist Washington State court judges regarding ICWA requirements of the Washington and federal statutes.
[275] *Maze of Injustice*, AMNESTY INT'L (Aug. 8, 2011), https://www.amnestyusa.org/reports/maze-of-injustice/.
[276] 18 U.S.C. § 2265; RCW 26.52.

an opinion concluding that "[f]ederal law requires that any protection order issued by the court of a state or Indian tribe be accorded full faith and credit and enforced by the court of another state or Indian tribe," and that "[r]egistration of the order in a state court is not a prerequisite to enforcement."[277]

However, difficulties with communication and information-sharing between state and Tribal courts can result in enforcement issues. This resulted in changes to Civil Rule (CR) 82.5 in 2019, to give "a framework to allow both state and tribal courts an efficient process to resolve jurisdictional issues and conflicts in orders to get to the substance of the disputes."[278] Additionally, with the passage of E2SHB 1320 (previously discussed in sections III.C., IV.D, and VI.C of this report), the Washington State Legislature mandated further discussion and recommendations regarding information sharing between state and Tribal courts.[279]

VII. Education for Justice System Professionals

Due to the emphasis in the 1989 Study on recommendations related to education for judges, prosecutors, and law enforcement, it is incumbent upon us to provide a summary of domestic and sexual violence-related training opportunities and requirements for these stakeholders, as well as other stakeholders such as advocates, interpreters, court administrators, and more. As one can see from this summary, there are many education opportunities available, including several mandatory introductory education requirements; however, there is no mandatory continuing education requirement specific to domestic or sexual violence.

[277] AGO 2018 No. 5, https://www.atg.wa.gov/ago-opinions/state-obligation-enforce-protection-orders-issued-courts-other-states-or-tribal-courts.
[278] *CR 82.5 – Tribal Court Jurisdiction*, WASH. CTS., https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=2700.
[279] LAWS OF 2021, ch. 215, § 36(1)(e).

A. Education for Judicial Officers

In addition to required domestic violence training at Judicial College for all newly appointed or elected judicial officers, the following educational programming related to domestic violence has been provided for judicial officers at state judicial conferences during the past ten years:

- What's New with Domestic Violence Intervention Treatment? (2021)
- Black Women Victims of Intimate Partner Violence: Addressing the Challenges (2021)
- Implementing Changes in Weapons Surrender Laws in Your Jurisdiction (2020)
- Evidence Issues in Domestic Violence Trials: *Crawford* and Beyond (2019)
- Sexual Harassment Liability and Enforcement in the Age of #MeToo (2019)
- Neurobiology of Trauma in the Courtroom (2019)
- The Crisis of Missing and Murdered Indigenous Women and Girls (2019)
- Reducing Gun Violence by Upholding Protection Order Related Firearm Laws (2019)
- Missing and Murdered Indigenous Women and Girls (2019)
- New Models for DV Treatment (2019)
- Understanding the Impact of Trauma (2018)
- Civil Protection Orders (2018)
- Understanding Technological Misuse in Domestic Violence Cases (2017, 2018)
- The Impact of Domestic Violence on Children (2017)
- In the News…(Protection Orders and Procedural Justice) (2017)
- Washington's Children: A Judicial Response to Sex Trafficking (2017)
- Developments and Challenges in the Commitment of Sexually Violent Predators (2017)
- Beyond Recidivism: A Safer Family, A Safer Community (2016)
- Forfeiture of Firearms Rights (2016)
- Strangulation: All Things Lethal, Medical, and Legal (2015)
- Firearms & HB 1840 (2015)
- Battle within the Courts...Abusive Litigation Tactics in DV Civil Cases (2015)
- Domestic Violence Hot Topics and Court Appointed Special Advocates (CASAs) (2015)
- How Language Helps Shape Our Response to Sexual Violence (2015)

- Domestic Violence: Working With Diverse Populations (2015)
- Human Trafficking: How Do These Cases Come to Court and How Should Judges Respond? (2015)
- Sexual Violence in Intimate Partner Relationships (2015)
- Adverse Childhood Experiences and Judicial Practice (2014)
- Nonconsensual Pornography (aka Revenge Porn) (2014)
- Violence Against Women's Act in Indian Country (2014)
- Complicated and Conflicting Protection Orders: All in a Day's Work (2013)
- Domestic Violence Batterers (2013)
- Sexual Assault & Protection Orders (2013)
- Trauma and Compassion Fatigue (2013)
- Cyberspace: A Stalker's New Playground (2010)
- Science of Domestic Violence (2010)

The Washington State Supreme Court Gender and Justice Commission has also sponsored roundtables and workshops on domestic and sexual violence, and has created comprehensive bench guides on these topics for judicial officers, including:

- The Domestic Violence Manual for Judges
- Sexual Violence Bench Guide
- The DV Criminal Trial Bench Guide
- Education for Prosecuting Attorneys

The Washington Association of Prosecuting Attorneys (WAPA), in conjunction with the King County Prosecuting Attorney's Domestic Violence Unit, has developed a Prosecutors' Domestic Violence Handbook, and oversees statewide education programming and sponsors conferences in the fall and spring. Domestic and sexual violence-related educational programming sponsored by WAPA during the past ten years includes:

- When Your Victim Is an Immigrant: U-Visas and ER 413 (2019)
- Evidentiary Issues Unique to Domestic Violence Cases (2019)
- Cyber Stalking and Intimate Images (2019)

- Dynamics of Domestic Violence (2019)
- U-Visas & RCW 7.98 (2019)
- Victim Rights, Protecting Victim Privacy, and How to Keep Victims on Board (2018)
- Working with DV Survivors (2018)
- Evidence: Hearsay, Confrontation Clause & 911 Tapes, *Smith* Declarations & Absentee DV Victims (2018)
- Vulnerable Victims & Witnesses (2017)
- Violations of No Contact Orders & Harassment via Social Media (2016)
- Domestic Violence Case Preparation (2015)
- U-Visas (2013)
- Jury Selection in Violence Against Women Cases (2013)
- Domestic Violence Manual and Treatment Efficacy Update (2013)
- Protective Orders (2013)
- Strangulation and Smothering – Medical Proof (2013)
- 404(b) after *Gresham* and Forfeiture by Wrongdoing (2013)
- Voir Dire: Strategies for DUI and Domestic Violence (2012)
- Domestic Violence: Full Faith & Credit, Plead & Prove, Firearms (2012)
- Understanding Victims' Rights: RCW 7.69.030 (2012)
- Victims' Rights: Historical Perspective and Future Outlook (2012)
- Protection Orders: The Ins and Outs (2012)
- Victim Awareness (2012)
- Working With Victims (2011)
- U-Visas (2011)
- Using Technology to Serve Victims (2011)

Additionally, there are local and national workshops that many Washington prosecutors have the opportunity to attend. Currently, there is no statewide requirement that prosecutors undergo training related to domestic and sexual violence; education specific to these topics is up to the individual prosecutors' offices.

B. Education for law enforcement

Domestic and Sexual Violence are taught as part of the mandatory Basic Law Enforcement Academy (BLEA) through the Washington State Criminal Justice Training Center (WSCJTC).[280] Following BLEA graduation, the WSCJTC offers continuing education and training through their programs and instructors and also through outside instructors. WSJCTC has a page that lists available training and any criminal justice agency can advertise trainings they are hosting regionally through WSCJTC's site.[281]

State law requires that every Washington State Peace Officer obtain a minimum of 24 hours continuing education every year.[282] This is often referred to as Police Skills Refresher (PSR) Training. The WSCJTC audits each agency every year for PSR compliance. PSR training is not standardized, but many agencies include refresher training in DV law, Human Trafficking, and/or Sexual Violence.

Pursuant to ESHB 1109 passed by the Washington State Legislature in 2021, the Criminal Justice Training Commission is required to conduct an annual case review program to review sexual assault investigations and prosecutions, for which one of the purposes is improving training.[283]

C. Multi-disciplinary education/additional stakeholders

- Domestic Violence Symposium**:** Since 2009, there has been an annual multi-disciplinary training exclusively on domestic violence issues.
- Children's Justice Conference**:** This conference is the largest welfare-related conference in the Pacific Northwest. While open to all, the attendees are typically involved with assessment, investigation, and prosecution of child abuse and neglect cases. The trainings focus on basic and advanced training and skill development in the identification, investigation, and prosecution of child maltreatment, including domestic and sexual violence.

[280] *WSCJTC Curriculum*, WASH. STATE CRIM. JUST. TRAINING COMM'N, https://www.cjtc.wa.gov/resources/curricula.
[281] *Training & Education*, WASH. STATE CRIM. JUST. TRAINING COMM'N, https://www.cjtc.wa.gov/training-education/Courses/all/.
[282] WAC 139-05-300.
[283] LAWS OF 2021, ch. 118.

- Domestic Violence Advocates**:** The required training for Domestic Violence Advocates is set out in WAC 388-61A-1080. It mandates that Domestic Violence Advocates receive at least 20 hours of initial training, which includes theory and implementation of empowerment-based advocacy; the history of the domestic violence movement; active listening skills; legal, medical, social service, and systems advocacy; anti-oppression and cultural competency theory and practice; confidentiality and ethics; safety planning; crisis intervention; working with culturally specific populations; and the policies and procedures of the domestic violence program.[284] This provision further requires that this training be undertaken before working with clients or their children.[285] Additionally, those staff providing supportive services to clients, engaged in prevention work, or who are in a supervisory role, are required to complete 20 hours of continuing training on an annual basis.[286]

- Sexual Assault Advocates**:** Staff employed at a Community Sexual Assault Program are required to undergo 30 hours of initial core sexual abuse/assault training and a minimum of 12 hours of ongoing training each year that meets the training certification requirements of the Washington Coalition of Sexual Assault Programs (WCSAP).[287]

- Domestic Violence Intervention Treatment Providers**:** In July 2020, Harborview Abuse & Trauma Center[288] developed a Cognitive Based Therapy manual for domestic violence intervention providers, along with an accompanying training and exercises.
- There have also been sexual assault and domestic violence trainings sponsored by the Gender and Justice Commission for court administrators, courthouse facilitators, attorneys, interpreters, and advocates.

[284] WAC 388-61A-1080(1).
[285] WAC 388-61A-1080(2).
[286] WAC 388-61A-1080(5)-(8).
[287] *See Training*, WASH. COAL. OF SEXUAL ASSAULT PROGRAMS, https://www.wcsap.org/training/approval/.
[288] Previously called Harborview Center for Sexual Assault and Traumatic Stress (https://depts.washington.edu/uwhatc/about-us/hatc-history/).

VIII. Conclusion

In the time after the 1989 Study was published, the legislative, executive, and judicial branches have undertaken dedicated efforts to address domestic and sexual violence in Washington. Unfortunately, despite this attention and the improvements made, high levels of domestic and sexual violence persist now, over 30 years later. These high rates of violence are amplified as we write this report in the midst of the COVID-19 pandemic.[289] Proposed recommendations to support and strengthen previous efforts are outlined in the recommendations section below.

IX. Recommendations

- In order to improve access to the courts for litigants in cases involving gender-based violence, the Washington State Legislature should allocate increased funding to the Office of Civil Legal Aid for more civil legal aid attorneys who can assist victims of domestic and sexual violence with their legal issues. Although Washington State has enacted laws that provide protections to victims of domestic and sexual violence, legal assistance is needed to enforce them.
- Stakeholders, including the District and Municipal Court Judges Association (DMCJA) and Superior Court Judges Association (SCJA), in coordination with AOC, should review the HB 1320 work group's future recommendations[290] and develop a model guidance memo to implement them.
- Given that the evaluation of Domestic Violence Moral Reconation Therapy (DV-MRT) showed it to be a promising practice in reducing domestic violence recidivism, and that litigants bear significantly lower costs to participate in the program, more courts in Washington State should consider implementing court-based DV-MRT programs.

[289] Refer to Appendix I of this chapter for information obtained from victim advocacy organizations related to increased reports of domestic violence in the first quarter of 2020.
[290] This work group will be convened by the Washington State Supreme Court Gender and Justice Commission, with its report due to the courts by July 1, 2022.

- The Gender and Justice Commission should support the Tribal State Court Consortium's efforts regarding a judicial branch response to the pervasive problem of Missing and Murdered Indigenous Women and People and enforcement of Tribal Court protection orders.
- To monitor the efficacy of laws and regulations that combat gender-based violence and to identify gaps in protection, statewide data on the following topics should be collected: the barriers to enforcement of firearms surrender orders; the efficacy of domestic violence perpetrator treatment (in light of our pilot project report on the value of DV-MRT treatment); the prevalence and consequences of sexual assault in prison – especially for understudied populations; the prevalence and consequences of coercion for sex and sexual assault in the workplace – especially for female workers in the farm labor, service, and related low-paying industries; and data on the investigation and processing of sexual violence cases, including time from the alleged assault to filing, to resolution via the court process, and the reasons for any delays. This work will require legislative funding.
    - One component of this data collection could be development of a statewide online dashboard where law enforcement reports its data, as it already does pursuant to the Safety and Access for Immigrant Victims Act (2018) and pursuant to SHB 1501 (2017) to track denied firearm transactions.
    - Requirements for the data could include the following: (1) data collected should include disaggregated demographic information, including gender information that goes beyond the male-female binary, and (2) that non-confidential data and information about the process should be transparent and available to the public to promote system accountability.
- The Legislature should fund Washington-specific primary research to evaluate the current requirement for mandatory arrest in domestic violence cases, including research regarding the impact on women; Black, Indigenous, and other people of color; immigrants; those living in poverty; and LGBTQ+ people.
- In light of the findings about the disparate impact of gender-based violence on women, Black, Indigenous, and people of color, immigrants, those living in poverty, and LGBTQ+

people and the continuing barriers to their access to justice, the Gender and Justice Commission should partner with stakeholders and experts to suggest modifications to judicial branch education on gender-based violence for judges, law enforcement, attorneys, and others working on such cases.

Appendix I.

From WSCADV
Provided by Kelly Starr, Public Affairs

Increased Violence
Seattle Police Department reported an increase in domestic violence calls by 21% in March. Domestic violence programs across our state do not have quantitative stats to share with us at this point, but anecdotally we are hearing a variety of responses. Some programs report many contacts from survivors in their communities who need a range of services, including from those that had left an abusive situation only to now be facing economic hardship (such as being laid off from their job) as a result of COVID-19. There's the very real concern that folks are facing the untenable choice of returning to an abusive partner or becoming homeless. Other programs are reporting a decrease in calls, noting that survivors trapped at home with an abuser cannot safely call for help.

Racially Disproportionate Impacts
Latinx people are 13% of the state population but make up 31% of the COVID-19 cases. Yakima County has over 1,000 cases (King County has about 6,000). Infection rates among African Americans and Native Americans are almost double the size of their populations in Washington. These rates reflect health inequality, and substandard working and housing conditions. Domestic violence programs serving these communities note that survivors lack access to basics – like running water – for health precautions in fruit packing and farm labor housing.

From Spokane Regional Domestic Violence Coalition
Provided by Annie Murphey, Executive Director

Spokane Regional Domestic Violence Coalition includes participants from the entire spectrum related to the issues of domestic violence: law enforcement, judicial officers, prosecution, defense counsel, victim-serving agencies, child-serving agencies, perpetrator treatment providers, prevention programs, healthcare, etc. As soon as school closures in Washington were announced mid-March due to COVID-19 there was significant concern from all of our child-serving organizations who respond to domestic violence and child abuse issues.

We quickly called a meeting and met with Spokane Regional Health District to issue a press release, and then worked to implement region-wide resource distribution. We know 1 in 3 women and 1 in 7 men in Spokane County are victims of Domestic Violence. We have approximately 4,000 confirmed victims each year but upwards of 14,000 potential victims based off 911 DV calls to law enforcement. The potential impacts of weeks of isolation, children out of contact with safe childcare and mandatory reporters are momentous.

We are now weeks into the Stay Home, Stay Healthy order and we know calls to law enforcement, medical cases brought to hospitals, as well as calls to victim service agencies are all down in comparison to last year. We do not believe that this means abuse is not occurring. We believe it is happening and people do to not have the means to safely report and access services. Additionally, those cases that are being reported, however, are ones of significant

abuse of children and teens who have the ability to use their own voices and seek their own services.

In this current environment, stressors like financial strain, unemployment, food scarcity, and housing instability are all realities. These are also the same risk factors for abuse, neglect, and violence. And in addition to these stressors, parents and caregivers also have the responsibility to help educate their children and provide constant supervision. Families are facing unprecedented stress during this time, and inequities that were present before are now being exacerbated, If you are a parent who is considered "essential" or whose job in necessary to keep our society going, you may have already have had to make tough decisions on childcare options. The constant stress also puts all persons at risk for mental health and substance abuse issues, in efforts to cope. Again, these risk factors can affect domestic violence and child abuse and we have examples here locally that show those results. Additionally, there is much data around ACES and the impact of children not only experiencing abuse, but also WITNESSING abuse at home. Schools and childcare facilities not only provide a break for parents, but they also can be the only safe place for a child and put them in touch with a caring, consistent adult which promotes their own resilience.

In Spokane, we have had homicides as well as significant child abuse cases seen in the media as a result of parents leaving children in the care of persons they thought they could trust. Recently, Spokane has been recognized as having the highest rates of domestic violence in Washington State. As a result, the SRDVC collaborated with media, business and community partners for a large awareness campaign, 'End the Violence.' which included creating a documentary which aired on all major networks simultaneously on September 30, 2019; it had billboards, print materials, commercials, TV, Radio, and Print media stories which continue to run. Please visit www.endtheviolencespokane.org to see our documentary and resources.

Spokane Regional Domestic Violence Coalition has a focus on prevention and education using a coordinated community response model. Our efforts are to reduce the catastrophic impacts of violence (specifically as we see them cyclically and systemically play out among children and families) in our community. We will achieve this through exploring and developing domestic violence prevention strategies such as our widescale resource distribution during the COVID-19 pandemic. During this time, we were able to successfully support printing and distribution of 35,000 domestic violence and child abuse resources in lunches and meal distributions across Spokane County. Additionally, we partnered with the City of Spokane and Spokane Police Department to distribute 85,000 fliers with utility bills for the month of May inside the City of Spokane.

We must be preventative and strategic in how we address domestic violence, along with child abuse and neglect. By getting paper resources directly into people's hands, inside of people's homes we decrease some of the barriers of knowing where or how to look for resources during this time, as well as knowing what is still open. All of our victim service agencies, as well as 911, also has texting abilities. Many involved with SRDVC believe we will see our local domestic violence and child abuse reports rise as we move through the re-opening phases. We need to

start planning now for what this will look like for both child and adult survivors and continue to advocate for our most vulnerable.

In the News…COVID-19 and Domestic Violence

1. Seattle Police Department reported an increase in domestic violence calls by 21% in March.
2. Police data shows domestic violence has not gone up because of quarantine
3. Domestic Violence Calls Mount as Restrictions Linger: 'No One Can Leave'
4. A Double Pandemic: Domestic Violence in the Age of COVID-19
5. Is Domestic Violence Rising During the Coronavirus Shutdown? Here's What the Data Shows.
6. It's hard to flee from your domestic abuser during a coronavirus lockdown
7. An increasing risk of family violence during the Covid-19 pandemic: Strengthening community collaborations to save lives
8. Why the Increase in Domestic Violence During COVID-19?

Chapter 9

Juvenile Justice and Gender and Race Disparities

Judge Judith Ramseyer

Claire Mocha, MPH

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I. Summary

Girls make up a small percentage of youth involved in the juvenile justice system. There are, however, differences in the ways that girls and boys enter the juvenile justice system, their needs, and the resources available once they enter the system. For example, nationally, girls with juvenile justice involvement are more likely than their male peers to have experienced sexual and physical abuse, neglect, or maltreatment. In Washington, girls are more likely than boys to already have a history of involvement in the child welfare system when they come into contact with the juvenile justice system. This suggests there are many places within the juvenile justice system where more nuanced gender disparities may arise beyond looking at just the total numbers of youth by gender.

In addition, there is a significant gap in understanding whether bias or inequities may be impacting transgender and gender-nonbinary youth in their interactions with the juvenile justice system. National research does show that Lesbian, Gay, Bisexual, Transgender, Queer and Questioning (LGBTQ+) youth are over-represented in the juvenile justice system and that they experience biases and trauma once they become involved with that system. The best available national evidence suggests that the rate of lesbian, gay, and bisexual (LGB) boys in detention is roughly proportional to the rate in the general population, but LGB girls may be disproportionately represented at 3.3 times the rate of the general population. In addition, LGBTQ+ youth take paths into the system that are specific to their sexual orientation or gender identity. For example, they may experience homelessness due to family rejection or abuse centered on their LGBTQ+ identity, or they may be arrested for committing survival crimes such as stealing or trespassing. Once involved in the system, LGBTQ+ youth report feeling invisible and experiencing discrimination and harassment. Some reported what they perceived as hostile treatment by court professionals and more severe sentencing because of their LGBTQ+ identity.

Further, research has identified disparities in the juvenile justice system by race, ethnicity, socioeconomic status, disability status, and the intersection of these factors. For example, the Washington State Center for Court Research (WSCCR) and the Washington State Supreme Court Minority and Justice Commission released a special research report on girls of color admitted to

juvenile detention in Washington State. Analyzing 2019 data, they found that American Indian/Alaska Native, Hispanic/Latinx girls, and Black girls[1] were overrepresented in juvenile detention. This all shows that we need more comprehensive Washington data on youth who have contact with the juvenile justice system – data that would allow for analysis by gender and the intersection of gender with other factors.

II. Introduction to Juvenile Justice

Juvenile law is complex. Since at least the late 1960s, when the U.S. Supreme Court held that juveniles charged with criminal offenses are entitled to the Constitutional Due Process protections of notice, right to counsel, confrontation and cross-examination of witnesses, and against self-incrimination, juvenile law has been something of a hybrid.[2] Within an adversarial legal framework, juvenile courts serve the equal, but sometimes conflicting, goals of accountability for criminal conduct, public safety, and rehabilitation of the youth engaged in the system.[3]

Juvenile justice is separated from adult justice systems because of the understanding that children's capacity for decision-making is still developing, therefore children are less accountable for their actions.[4] In Washington State, the modern juvenile justice system stems from the Juvenile Justice Act of 1977 and is governed under chapter 13.40 RCW. In 2017, the Department of Children, Youth & Families (DCYF) was created, merging the Department of Early Learning and the Children's Administration into one agency to enhance the continuum of care for children and families. In 2019, Juvenile Rehabilitation (JR) and the Office of Juvenile Justice were merged into DCYF, "[f]ostering the development of a more robust system of prevention and supports for pre-

[1] The 2021 Gender Justice Study uses the race and ethnicity terms used in the underlying sources when citing data in order to ensure we are presenting the data accurately and in alignment with the how the individuals self-identified. When talking more broadly about the body of literature we strive to use the most respectful terms. See Section V of the full report ("2021 Gender Justice Study Terminology, Methods, and Limitations") for a more detailed explanation of terminology used throughout the report.
[2] *In re Gault*, 387 U.S. 1, 31-57, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).
[3] TODD DOWELL, THE JUVENILE OFFENDER SYSTEM IN WASHINGTON STATE 2019 EDITION 30 (2019).
[4] *Id.*

teens and teens in the foster care and juvenile justice systems."[5] This merger was designed to further a collaborative and coordinated continuum of multidisciplinary services that addresses needs and supports the growth of stronger children, families, and communities, rather than simply responding to symptoms. This change, as well as legislative changes to juvenile justice law in recent years, represents efforts to reduce overall youth involvement in the juvenile justice system, reduce the use and length of detention, and increase access to community-based programs and treatment based on robust evidence.[6]

Since the early 2000s, Washington has seen a decrease in the number of youth arrested, a decrease in detention admissions, and a decrease in youth receiving a guilty verdict (either through plea or finding by the court)—overall, a significant decrease in the number of youth involved in the juvenile justice system.[7] In addition, following Governor Jay Inslee's "Stay Home, Stay Healthy" order signed on March 24, 2020 in response to the COVID-19 pandemic, admissions to juvenile detention centers statewide decreased by up to two thirds when compared to January and February of the same year. Of the youth in detention during a point-in-time count on the evening of April 13, 2020 100%were admitted for a criminal offense. These numbers stayed at this decreased level at least through June of 2020 (last available data).[8] Research is needed, however, to understand if and how specific legislative and administrative changes impact juvenile justice outcomes over time.

III. Gender and Pathways to Juvenile Justice Involvement[9]

[5] *See* WASH. DEP'T OF CHILDREN, YOUTH, AND FAMILIES, OFF. OF INNOVATION, ALIGNMENT, & ACCOUNTABILITY, ESTABLISHING THE DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES: REPORT TO THE WASHINGTON STATE LEGISLATURE 11 (2017).
[6] LAUREN KNOTH ET AL., WASHINGTON STATE'S JUVENILE JUSTICE SYSTEM: EVOLUTION OF POLICIES, POPULATIONS AND PRACTICAL RESEARCH (2020).
[7] *Id.*
[8] AMANDA GILMAN, WASH. STATE CTR. FOR CT. RSCH., WASHINGTON STATE JUVENILE DETENTION: A SNAPSHOT OF THE USE OF DETENTION DURING THE COVID-19 CRISIS (2020).
[9] The authors acknowledge that law enforcement policies and practices are an important element of juvenile justice and may contribute to disparities in system involvement. The topic is important and deserves attention but is beyond the scope of the current research question.

There are two pathways by which youth become involved in the juvenile justice system. The first is by referral for status offenses—civil actions initiated by petition and handled in juvenile court (though they are not criminal matters). The second is through delinquency proceedings. Schools are an important element of both, as youth spend much of their time in school. Factors such as gender, race, socioeconomic status, sexual orientation, disability, and others shape youth pathways to justice system involvement. While girls[10] are a small percentage of youth involved in the juvenile justice system, important disparities have been identified by gender, race, ethnicity, socioeconomic status, gender identity, sexual orientation, and disability. These disparities suggest that historic marginalization and under-resourcing of Black, Indigenous, and communities of color in Washington and the rest of the nation play a role in juvenile justice involvement and outcomes.

In Washington, as in the rest of the country, boys far outnumber girls in the juvenile justice system: in 2018, girls represented 19.6% of juvenile court sentences and 27.7% of admissions to juvenile detention in the state.[11] Nationwide, the delinquency caseload decreased between 2005 and 2017 at a similar rate for boys and girls—by 51% and 52%, respectively.[12] The proportion of girls involved in the juvenile system (for both delinquency and non-delinquency offenses) has been increasing over the past few decades, particularly among Black girls.[13] While girls' involvement has increased, data also show that girls are more likely than boys to be involved in the court due to nonviolent offenses. In Washington State:

> …the largest percentage of female admissions across racial groups were for misdemeanors. In fact, 39.3 percent of all female admissions in 2019 were due to

[10] Most data sources and reports cited here only provide two gender categories, so it is unclear if and how transgender youth are included in these counts. These data limitations also prevent us from providing an analysis for gender-nonbinary or other gender-nonconforming youth. However, a recent survey of youth in detention in California found that half a percent, or over 300 youth, identified as either gender-nonconforming or gender non-binary. Angela Irvine-Baker, Nikki Jones & Aisha Canfield, *Taking the "Girl" Out of Gender-Responsive Programming in the Juvenile Justice System*, 2 ANN. REV. CRIMINOLOGY 321, 329 (2019).

[11] AMANDA GILMAN & RACHAEL SANFORD, WASHINGTON STATE JUVENILE DETENTION 2018 ANNUAL REPORT (2019); DUC LUU, JUVENILE DISPOSITION SUMMARY, FISCAL YEAR 2019 (2020). Note: 2018 is the most recent year both datasets are available. The data do not explain why girls are admitted to detention at a greater rate than juvenile court sentences. Possible explanations are that initial referrals may be diverted or resolved without a sentence, and one individual may be admitted to detention on multiple occasions.

[12] SARAH HOCKENBERRY & CHARLES PUZZANCHERA, JUVENILE COURT STATISTICS, 2017 (2019).

[13] FRANCINE SHERMAN & ANNIE BALCK, GENDER INJUSTICE: SYSTEM-LEVEL JUVENILE JUSTICE REFORMS FOR GIRLS (2015).

> an alleged or adjudicated misdemeanor offense, compared to 28.9 percent of all female admissions for a felony charge, 11.5 percent for a criminal violation, and 16.0 percent for a violation related to a non-offender matter. By comparison, the foremost reason for male youth admission to detention was an alleged or adjudicated felony charge.[14]

Nationally, girls make up a higher proportion of status offense caseloads (43%) than delinquency caseloads (28%).[15]

There are some early indications in the Washington State juvenile admissions data which indicate that reductions in admissions following the start of the COVID-19 pandemic are not being distributed equally across all genders and racial or ethnic groups. When comparing the highest number of weekly admissions pre-COVID-19 (Feb. 19-25) with the lowest number of weekly admissions post-COVID-19 (May 20-26) during the first six months of 2020, boys saw a 76.9% decrease while girls saw a 53.8% decrease in admissions. In other words, post-COVID-19, a higher percentage of admissions were accounted for by girls compared to pre-COVID-19 times. These data also indicate that Black, Indigenous, and youth of color were disproportionately represented among youth in detention in Washington on April 13th, and that disproportionality was actually exacerbated during the "Stay Home, Stay Healthy" order for Black, Native American, and Latinx youth.[16]

[14] ALIYAH ABU-HAZEEM ET AL., WASH. STATE CTR. FOR CT. RSCH., GIRLS OF COLOR IN JUVENILE DETENTION IN WASHINGTON STATE 1 (2020).

[15] HOCKENBERRY & PUZZANCHERA, *supra* note 12. There are some early indications in the Washington State juvenile admissions data which indicate that reductions in admissions following the start of the COVID-19 outbreak are not being distributed equally across all genders and racial/ethnic groups. Looking at the first six months of 2020, and comparing the week with the highest number of admission pre-COVID-19 (Feb. 19-25) to the week with the lowest number of admissions post-COVID-19 (May 20-26) indicates that boys saw a 76.9 percent decrease while girls saw a 53.8 percent decrease in admissions. In other words, post-COVID-19, a higher percentage of admissions were accounted for by girls compared to pre-COVID-19 times. These data also indicate that youth of color were disproportionately represented among youth in detention in Washington on April 13, 2020, and that disproportionality was actually exacerbated during the "Stay Home, Stay Healthy" order for Black, Native American, and Latinx youth. Personal Communication with Dr. Amanda Gilman, Washington State Center for Court Research (Nov. 4, 2020) (based on an analysis of statewide juvenile admissions data).

[16] Personal Communication with Dr. Amanda Gilman, Washington State Center for Court Research (Nov. 4, 2020) (based on an analysis of statewide juvenile admissions data).

Girls enter the juvenile justice system with needs that are often distinct from boys' needs. Nationally, girls with juvenile justice involvement are more likely than their boy peers to have experienced sexual and physical abuse, neglect, or maltreatment.[17] In Washington, girls are more likely than boys to already have a history of involvement in the child welfare system when they come into contact with the juvenile justice system.[18] Given that the child welfare system is designed to respond to situations of neglect, abuse, or harm, children in foster care have histories of trauma and extreme hardship that would accompany them if they also become involved in the juvenile justice system. An analysis of youth involved in Washington's child welfare and juvenile justice systems from 2005 to 2017 found that youth with a history of involvement with both systems were more likely to be detained and committed; had a higher proportion of mental illness and substance use diagnoses; were more likely to have experienced homelessness; and were more likely to become teen parents, compared to youth with only juvenile justice involvement.[19]

Within Washington's female youth population, some girls are particularly vulnerable to contact with the juvenile justice system. Gertseva studied data on girls involved in probation during 2014 and 2015 and found the following groups of girls were over-represented in juvenile probation: Black, Indigenous, and girls of color (especially American Indian/Alaskan Native (AIAN) and Black girls); girls with a history of out-of-home placement; girls in foster or out-of-home care; and girls with a history of mental health problems.[20] Probation-involved girls are more likely than boys to have come from dysfunctional family situations; have a history of running away; display symptoms of Post-Traumatic-Stress Disorder (PTSD); and have a history of depression.[21]

[17] LEILA CURTIS & MELANIE NADON, GENDER RESPONSIVE JUVENILE JUSTICE: A GIRLS COURT LITERATURE REVIEW UPDATE (2018), https://ccyj.org/wp-content/uploads/2019/01/CCYJ.GirlsCourt.LitReview.6-30-18.pdf.
[18] CATHERINE PICKARD, PREVALENCE AND CHARACTERISTICS OF MULTI-SYSTEM YOUTH IN WASHINGTON STATE (2014). Juveniles involved in both the child welfare and juvenile justice system are sometimes referred to as "multi-system" youth or "dually-involved" youth. *Id.*
[19] MARNA MILLER & LESLIE KNOTH, DUALLY INVOLVED FEMALES IN WASHINGTON STATE: OUTCOMES, NEEDS, AND SURVEY OF APPROACHES TO SERVE THIS POPULATION (2019), https://www.wsipp.wa.gov/ReportFile/1709/Wsipp_Dually-Involved-Females-in-Washington-State-Outcomes-Needs-and-Survey-of-Approaches-to-Serve-This-Population_Report.pdf.
[20] ARINA GERTSEVA, GIRLS ON PROBATION: CHALLENGES AND OUTCOMES (2017).
[21] *Id.* 64% of probation-involved girls had experienced at least one form of child maltreatment (physical abuse, sexual abuse or neglect), compared to 41% of boys. Seventy percent had a history of running away, compared to 45% of boys. More than 50% had at least one symptom of PTSD, compared to 34.2% of boys, and they were twice

Indigenous girls have unique cultural and social experiences that may not be addressed in the Washington State juvenile justice system, and they face unique challenges such as high rates of sexual assault,[22] as well as sovereignty of law issues, historic racism and oppression, and the success or failure of cooperation between tribal and state or county agencies.[23]

LGBTQ+ youth are over-represented in the juvenile justice system and once involved, experience biases and trauma within the system. Estimates of the proportion of LGBTQ+ youth in the U.S. juvenile justice system are imprecise, as data collection methods vary by state. The best available national evidence suggests that the rate of lesbian, gay, bisexual (LGB) boys in detention is roughly proportional to the rate in the general population, but LGB girls may be disproportionately represented at 3.3 times the rate of the general population.[24]

Washington's Center for Children & Youth Justice conducted a study of the experiences of LGBTQ+ youth in child welfare and juvenile justice systems in 2015.[25] This is the first and most comprehensive study of LGBTQ+ youth and juvenile justice in the state and relied on focus groups and surveys to gather first-hand accounts of youth previously involved in the juvenile justice system. It notes that some LGBTQ+ youth have pathways to system entry that are specific to their sexual orientation or gender identity. For example, they may experience homelessness due to family rejection or abuse centered on their LGBTQ+ identity and then arrested for committing survival crimes such as stealing or trespassing. LGBTQ+ youth who respond to bullying and harassment at school by skipping school or getting in fights may be referred to the juvenile justice

as likely as boys to have a history of depression (40% and 22%, respectively). However only 17% of those with symptoms of a mental health disorder had been previously diagnosed, pointing to low rates of mental health care access and/or usage.

[22] MICHAEL PLANTY ET AL., U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010 (2013), https://www.ojp.gov/ncjrs/virtual-library/abstracts/female-victims-sexual-violence-1994-2010.

[23] ABIGAIL ECHO-HAWK, ADRIAN DOMINGUEZ & LAEL ECHO-HAWK, MMIWG: WE DEMAND MORE (2019).

[24] In 2017, Wilson et al. published their review of a nationally-representative 2012 survey concluding that 39.4% of girls and 3.2% of boys in the juvenile justice system identified as lesbian, gay or bisexual. For the purposes of this study "LGB" includes "gay, bisexual, and other non-heterosexual youth." Bianca D. M. Wilson et al., *Disproportionality and Disparities Among Sexual Minority Youth in Custody*, 46 J. YOUTH ADOLESCENCE 1547, 1547 (2017). For comparison, the most recent Health Youth survey in Washington found that 14.8% of tenth-grade students report their sexuality as gay or lesbian, bisexual, or "something else fits better." LOOKING GLASS ANALYTICS, HEALTH YOUTH SURVEY 2018: REPORT OF RESULTS 7 (2019), https://www.askhys.net/library/2018/StateGr10.pdf. These data were not disaggregated by gender. *Id.*

[25] SARAH GANZHORN, MICHAEL CURTIS & DARCY KUES, LISTENING TO THEIR VOICES: ENHANCING SUCCESSFUL OUTCOMES FOR LGBTQ YOUTH IN WASHINGTON STATE'S CHILD WELFARE AND JUVENILE JUSTICE SYSTEMS 172 (2015).

system in response. Once involved in the system, LGBTQ+ youth report experiences of invisibility, discrimination, and harassment. Some reported what they perceived as hostile treatment by court professionals and more severe sentencing because of their LGBTQ+ identity. Stigmatization of same-sex relationships may lead to LGBTQ+ youth being labeled as sex offenders. In some locations, transgender youth may be detained according to the sex assigned to them at birth rather than their gender identity. Finally, they note a lack of treatment options that are appropriate or competent to their sexual orientation or gender identity.[26] It should be noted that while some counties do, Washington State does not systematically gather data on sexual orientation, gender identity, or gender expression of juvenile justice-involved youth. These data are needed to understand the needs and experiences of LGBTQ+ youth in Washington.

Youth with intellectual and developmental disabilities appear to be over-represented in the juvenile justice system nationally,[27] and similar findings have been confirmed in Washington State:

> Court-involved students, as a group, were about twice as likely as their court non-involved peers to a) have a documented disability and b) to be eligible for special education services during the year of court involvement, as well as two years prior to and including the year of court involvement. The most common disabilities found among court-involved students were specific learning disabilities, health impairments, and emotional/behavioral disabilities.[28]

[26] *Id.* These findings echo findings from a national 2009 survey of juvenile justice professionals and youth who had experiences with the juvenile justice system. The authors reported that LGBTQ+ youth, particularly transgender youth, are subject to numerous biases against them that impact their experiences within the juvenile justice system. Further, harassment in school and family rejection may push LGBTQ+ youth into interactions with the juvenile justice system by way of status offenses such as truancy and running away, and these same experiences may be a factor in the disproportionate pre-trial detention of LGBTQ+ youth, as most courts consider 'supportive home environment' as a factor when deciding to detain youth. Finally, there is a lack of adequate services and detention facilities for LGBTQ+ youth, noted by LGBTQ+ youth themselves in focus groups and interviews. *See* KATAYOON MAJD, JODY MARKSAMER & CAROLYN REYES, HIDDEN INJUSTICE: LESBIAN, GAY BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS (2009).

[27] DEVELOPMENT SERVICES GROUP, INC, LITERATURE REVIEW: YOUTHS WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES IN THE JUVENILE JUSTICE SYSTEM (2017), https://www.ojjdp.gov/mpg/litreviews/Intellectual-Developmental-Disabilities.pdf.

[28] ARINA GERTSEVA, THE ACHIEVEMENT GAP: EDUCATION OUTCOMES OF COURT-INVOLVED STUDENTS 10 (2018), https://erdc.wa.gov/publications/justice-program-outcomes/achievement-gap-education-outcomes-court-involved-students (examining outcomes for court-involved youth in 8th or 9th grade in the 2010-2011 school year).

As noted below, students with disabilities are more likely to be referred to law enforcement by school administrators and subject to school-based arrests than their peers without disabilities. Additionally, as noted in "Chapter 2: Communication and Language as a Gendered Barrier to Accessing the Courts," among youth and adults, there is an overrepresentation of individuals with a wide spectrum of language disorders, which can impact their ability to understand the terms and consequences of justice involvement, release, detention, probation, and plea bargain agreements.

In summary, girls make up a small percentage of youth involved in the juvenile justice system. There are, however, differences in the ways that girls and boys enter the juvenile justice system, their needs, and the resources available once they enter the system. This suggests there are many places within the juvenile justice system where more nuanced gender disparities may arise beyond looking at just the total numbers of youth by gender. In addition, there is a significant gap in understanding of potential bias or inequities that may be impacting transgender and gender-nonbinary youth in their interactions with the juvenile justice system. In addition, research has identified disparities in the juvenile justice system by race, ethnicity, socioeconomic status, gender identity, sexual orientation, disability status, and the intersection of these factors. Overall, there is a need for more comprehensive Washington data on youth who have contact with the juvenile justice system that would allow for analysis by gender and the intersection of gender with other factors.

IV. Status Offenses

Status offenses are civil actions that are initiated by petition and handled in juvenile court. They are specific to youth because of their minor status. They include "running away, substance abuse, serious acting out problems, mental health needs, and other behaviors that endanger themselves or others."[29] At-Risk Youth (ARY) or Children in Need of Services (CHINS) proceedings are initiated by a parent or guardian or other adult in the community; or a youth can file a CHINS petition on

[29] RCW 13.32A.010.

their own behalf if in need of food, shelter, or services and unable to obtain them. This system stems from "Becca Laws" passed in 1995 following the death Rebecca Hedman.[30] The Becca Laws were meant to provide additional tools to families and schools to address chronic truancy and other behavioral challenges resulting in activities that can put a young person in danger.[31] DCYF notes that court involvement can be an intervention tool in the most extreme cases, though the risk of escalation to more serious court involvement is a concern to stakeholders across the state.[32] For example, even the use of probation for status offenders could lead to more serious consequences like detention for youth who fail to comply with the requirements of their probation.[33]

Statute requires school districts to initiate truancy actions if a youth has a designated number of unexcused absences, as youth under age 18 are required to attend school in Washington.[34] There are several tiers of responses depending on the total number of school absences, ranging from a call home to a required court appearance; the exact process and responses vary by county. Before landing in court, a truancy case in some parts of the state is referred to a local board made up of volunteers who attempt to resolve issues resulting in extensive truancy. Parents can be held responsible by the court if they contribute to the youth's chronic truancy. Truancy filings in Washington's juvenile courts have increased over the decades since the passage of the Becca Laws, even as the number of other juvenile court cases has decreased.[35] Most truant students, however, never receive a truancy petition. In the 2018-2019 school year, for example, the Washington State Office of Superintendent of Public Instruction (OSPI) reported 80,837 unique students meeting the definition of truancy (7.7% of the student population), but only 12.5% of

[30] Kery Murakami, *Would "Becca Bill" have saved Becca?*, SEATTLE TIMES (June 23, 1995), https://archive.seattletimes.com/archive/?date=19950623&slug=2127830. Rebecca had run away from home after having experienced sexual abuse and child welfare involvement. *Id.* She was commercially sexually exploited, raped and murdered at age 13. *Id.*

[31] ELIZABETH COKER & CARL MCCURLEY, TRUANCY IN WASHINGTON STATE: FILING TRENDS, JUVENILE COURT RESPONSES, AND THE EDUCATIONAL OUTCOMES OF PETITIONED TRUANT YOUTH (2015).

[32] WASH. STATE DEP'T OF CHILDREN, YOUTH & FAMILIES, FAMILIES AND YOUTH IN CRISIS (2019), www.dcyf.wa.gov.

[33] DEVELOPMENT SERVICES GROUP, INC, STATUS OFFENDERS LITERATURE REVIEW (2015), https://ojjdp.ojp.gov/mpg/literature-review/status-offenders.pdf.

[34] RCW ch. 28A.225.

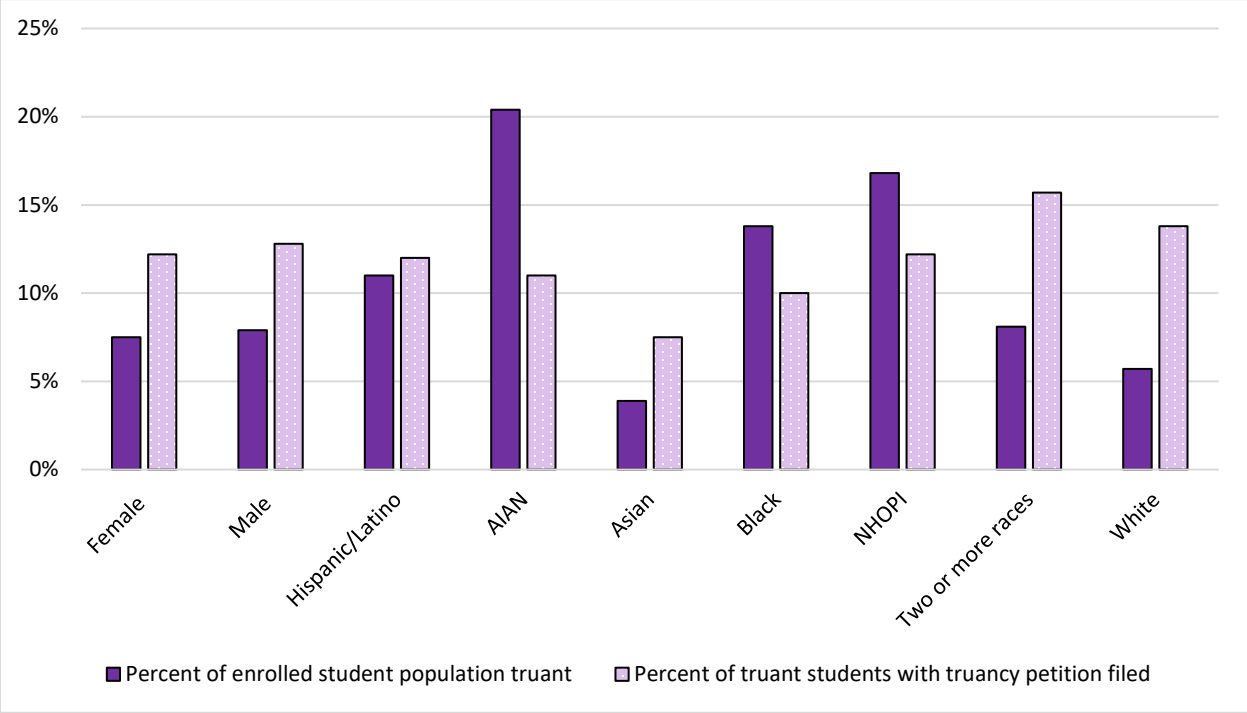
[35] COKER & MCCURLEY, *supra* note 31.

these students had a truancy petition filed.[36] In the 2018-2019 school year, OSPI began tracking the outcomes of truancy petitions, including referral to a community truancy board, court involvement, alternate dispositions, and detention.[37]

The most recent report from OSPI includes data on the number of truant students and truancy petitions filed but does not present information on longer term student outcomes. As shown in Figure 1, there does not appear to be a gender disparity in the percent of students who are truant or in the percent of truant students who have a truancy petition filed on them. The data, however, do show higher rates of truancy among AIAN, Native Hawaiian/Other Pacific Islander, Black, and Hispanic/Latino students compared to white and Asian students. In addition, AIAN, and Native Hawaiian/Other Pacific Islander truant students are less likely to have a petition filed than are white truant students. Low-income students are disproportionately likely to have truancy petitions filed, making up 81% of all petitions. While practitioners no doubt would offer anecdotal reports, to date the data do not support a conclusion that having a truancy petition filed is helpful or harmful to a student. Consequently, the long-term effects of these racial and ethnic disparities are unknown.[38]

[36] KRISSY JOHNSON, REPORT TO THE LEGISLATURE: UPDATE: TRUANCY REPORT 8 (2018), https://www.k12.wa.us/sites/default/files/public/legisgov/2018documents/2018-12-update-truancy-report.pdf.
[37] *Id.* at 5.
[38] *Id.*

Figure 1. Grades 1-12 Truancy Percentages, by Gender, Ethnicity, and Race, 2018



Footnotes for Figure 1.

* Gender data is presented using only the male-female binary. Consequently, no data are available to determine how students who identify as transgender or nonbinary are being coded in the dataset.

† The "Hispanic/Latino Ethnicity" category includes students also reported in any of the race categories (i.e., AIAN, Asian, Black, NHOPI, Two or more races, or white).

‡ AIAN means American Indian/Alaskan Native.

§ As with all racial categories with limited granularity, the "Asian" student population is made of diverse populations which may mask disparities experienced by some subpopulations within this group.

¶ NHOPI means Native Hawaiian/Other Pacific Islander.

Source: Adapted from information from Office of Superintendent of Public Instruction Comprehensive Education Data and Research System (CEDARS) data available from KRISSY JOHNSON, REPORT TO THE LEGISLATURE: UPDATE: TRUANCY REPORT (2018), https://www.k12.wa.us/sites/default/files/public/legisgov/2018documents/2018-12-update-truancy-report.pdf.

In 2014, the sum of all status offense filings (truancy, ARY, and CHINS) in Washington was roughly equivalent to the sum of all other juvenile offense filings.[39] However, detention for status offenses has been decreasing,[40] and due to 2019 legislation, will be phased out entirely by 2023.[41]

DCYF and the Office of Homeless Youth are working to develop voluntary, community-based services for youth experiencing family crises to prevent homelessness, including Family Reconciliation Services (short term, out-of-home placements and intervention to facilitate reentry to the home) or crisis beds (short-term emergency shelters for youth unable or unwilling to return home).[42] Many regions of the state have few community residential options to provide short-term emergency housing or longer-term specialized treatment for these youth. Anecdotally, experts familiar with this sector note that where residential options are far from the youth's home, the youth may experience significant disruption in being removed from community ties and far from school and support networks; they may also have histories of trauma that require specialized services not available in the crisis facility. Additionally, these experts note that DCYF's ability to work with counties to identify appropriate residential placements varies across the state. In locations where services and resources are lacking, youth may end up in child welfare placements or experiencing homelessness.[43] Youth in crisis may access three types of temporary emergency housing options funded by the state: Secure Crisis Residential Centers (SCRC), Crisis Residential Centers (CRS), and HOPE beds, with a total of 106 beds across the state.[44] While CRC and HOPE beds are run by non-profit organizations, SCRC are run by the state and require a court order for admission. They are co-located within juvenile

[39] COKER & MCCURLEY, *supra* note 31.
[40] GILMAN & SANFORD, *supra* note 11.
[41] ENGROSSED SECOND SUBSTITUTE S.B. 5290, 66th Leg., Reg. Sess. (Wash. 2019). Effective July 1, 2019, dependent youth may not be detained for violating a court order or under a warrant issued for failure to appear. Until the prohibition against the use of detention is fully implemented (July 1, 2020 for CHINS; July 1, 2021 for truancy; July 1, 2023 for ARY), these juveniles may only be detained with written findings of clear, cogent, and convincing evidence of factors that justify detention and the absence of a less restrictive alternative, for a maximum of 72 hours, and limited to no more than two detentions in a 30-day period.
[42] WASH. STATE DEP'T OF CHILDREN, YOUTH & FAMILIES, *supra* note 32.
[43] *Id.*
[44] *Id.*

detention facilities but separate from the juvenile offender population. There are two SCRCs in Washington, with a total of eight beds available.[45] There were 88 youth admitted to crisis beds in 2018, and a total of 108 admissions.[46]

V. School-Based Referrals

The public-school system is another pathway by which many youth—particularly Black, Indigenous, and youth of color—are referred to the juvenile justice system nationally and in Washington State. As noted above, Washington schools may file petitions for truant youth with the courts, but they also may refer students for delinquency or disciplinary offenses. These referrals have expanded in recent years as schools adopt "zero tolerance" policies towards student behavior.[47] Given that "willfully creat[ing] a disturbance on school premises" is a misdemeanor in Washington State,[48] a wide range of student behavior can potentially end in law enforcement referral and even arrest.[49] In some schools, law enforcement officers are physically present during part or all of the school day (known in Washington as School Resource Officers [SROs]). In 2017 in Washington, 84 of the state's 100 largest districts had SROs placed in at least some of their schools.[50] There is some evidence to suggest that in districts where SROs are only placed in some schools, they are more likely to be placed in schools where the proportion of low-income students and Black, Indigenous, and students of color is higher than the district average.[51] SROs were "initially deployed in response to school shootings," with the aim of keeping students safe.[52] However, qualitative research with Black and Latina girls in the Northeast and South reveals that girls see the presence, actions and priorities of SROs in a different light. Schools with

[45] *Id.*
[46] GILMAN & SANFORD, *supra* note 11.
[47] ACLU OF WASH., STUDENTS NOT SUSPECTS: THE NEED TO REFORM SCHOOL POLICING IN WASHINGTON STATE (2017), https://www.aclu-wa.org/docs/students-not-suspects-need-reform-school-policing-washington-state.
[48] RCW 28A.635.030.
[49] ACLU OF WASH., *supra* note 47.
[50] *Id.*
[51] *Id.*
[52] MONIQUE MORRIS, REBECCA EPSTEIN & AISHATU YUSUF, BE HER RESOURCE: A TOOLKIT ABOUT SCHOOL RESOURCE OFFICERS AND GIRLS OF COLOR 7 (2018), https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2018/05/17_SRO-final-_Acc.pdf.

zero-tolerance policies and harsh disciplinary practices can disrupt learning, push youth away from school and do little to intervene in safety concerns such as sexual harassment and bullying.[53] While schools without SROs can also refer students to law enforcement, nationally, students attending schools with SROs have higher rates of arrest for disorderly conduct, compared to their peers in schools without SROs, "consistent with the belief that SROs contribute to criminalizing student behavior."[54] More research is needed to understand the impact of SROs on students and juvenile justice involvement in Washington State.

Nationwide, schools account for five percent of all delinquency public order referrals, over 60% of all status offenses, and 97% of truancy petitions.[55] School referrals to law enforcement nationally show high racial disproportionality: while Black, Indigenous, and students of color make up 49% of U.S. public-school enrollment, they account for 61% of school-related arrests.[56] At 31%, Black students are the highest proportion of students subjected to school-related arrests, despite being only 16% of the enrolled student population.[57] LGBTQ+ youth, while understudied, appear to be particularly vulnerable to school-based referrals to law enforcement: a 2010 analysis of nationally-representative survey data found that LGBTQ+ youth are punished by school and criminal justice authorities at rates that are disproportionate to behavior, and that this effect is especially pronounced for LGB girls and youth of color.[58] A qualitative study of

[53] KIMBERLÉ CRENSHAW ET AL., BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED (2015), https://primarysources.brillonline.com/browse/human-rights-documents-online/black-girls-matter-pushed-out-overpoliced-and-underprotected;hrdhrd99782015002. Dr. Crenshaw and colleagues collected qualitative and quantitative data from public schools in Boston and New York City during the 2011-2012 school year. *See also* MONIQUE MORRIS, REBECCA EPSTEIN & AISHATU YUSUF, BE HER RESOURCE: A TOOLKIT ABOUT SCHOOL RESOURCE OFFICERS AND GIRLS OF COLOR (2018), https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2018/05/17_SRO-final-_Acc.pdf. In this study, the authors conducted focus group sessions with girls of color from schools with SROs in Alabama, Florida and Georgia.

[54] Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 285 (2009).

[55] HOCKENBERRY & PUZZANCHERA, *supra* note 12. "Offenses against public order includes weapons offenses; nonviolent sex offenses; liquor law violations; disorderly conduct; obstruction of justice" and other offenses within those categories as defined by the National Juvenile Court Data Archive. *Id.* at 98. For the purposes of this study "LGB" includes LGB youth as well as those who reported same sex attraction or same sex romantic relationships but who did not identify as lesbian, gay, or bisexual.

[56] DATA SNAPSHOT: SCHOOL DISCIPLINE (2014).

[57] *Id.*

[58] K. E. W. Himmelstein & H. Bruckner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 PEDIATRICS 49 (2011).

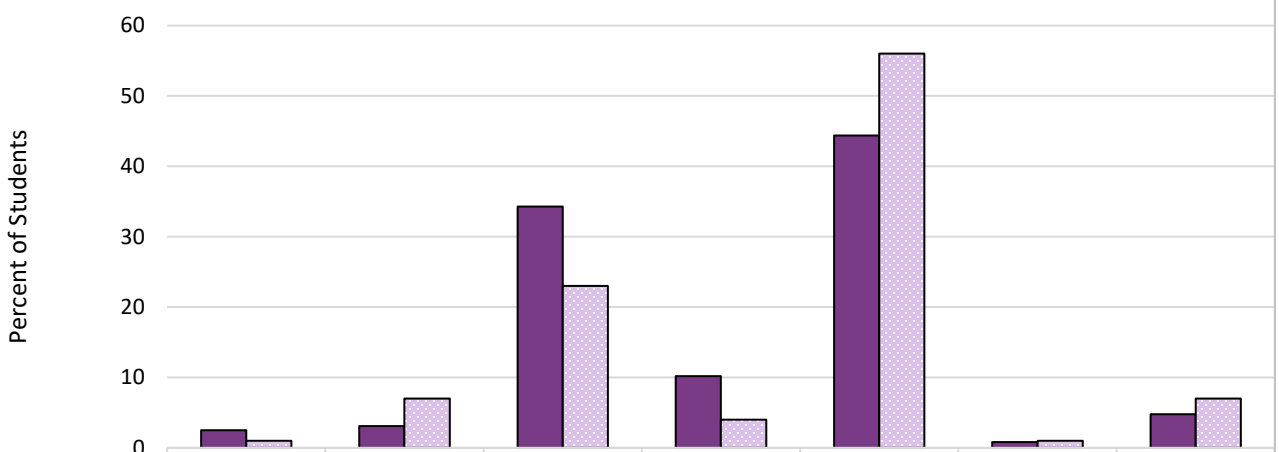
students and school administrators nation-wide found that LGBTQ+ youth report being subjected to school discipline for expressing their sexual identity and gender identity in ways that their heterosexual peers are not.[59]

There is a need for more comprehensive data collection in Washington. Though school districts are required to submit data on school-based arrests to the U.S. Department of Education's Office for Civil Rights (OCR), which compiles and publishes data, timely data for Washington State are not easily accessible and the OCR data is difficult to understand and draw conclusions from at the state level.[60] In addition, Washington State's Office of Superintendent of Public Instruction only includes suspension and expulsion under the category of 'discipline' on the State Report Card.[61] The most recent OCR data for Washington State are from the 2015-2016 school year. In that year, a total of 2,404 students (663 female students—27.6%) were referred to law enforcement by Washington public schools, and 1,027 students (334 female students—32.5%) experienced 'school-related arrests.'[62] Students with disabilities, while making up 14% of the enrolled student population that year, made up 27% of school-based arrests.[63] Black, Hispanic/Latinx, and AIAN female students were over-represented in referrals to law enforcement (see Figure 2), and Hispanic/Latinx and AIAN female students were overrepresented in female school-based arrests that year (see Figure 3). It is notable that only about half of school law enforcement referrals for female students end in arrest. It is unclear if that is because the referrals lack merit or if other, less punitive, responses are offered. The literature suggests that any contact with law

[59] Shannon D. Snapp et al., *Messy, Butch, and Queer: LGBTQ Youth and the School-to-Prison Pipeline*, 30 J. ADOLESCENT RSCH. 57 (2015).
[60] State-level data can be accessed by downloading Excel files with raw numbers and percentages disaggregated by gender, race, disability, and English Language Learner status.
[61] *Washington State Report Card*, WASH. STATE OFF. OF SUPERINTENDENT OF PUB. INSTRUCTION (2020), https://washingtonstatereportcard.ospi.k12.wa.us/.
[62] *2015-16 State and National Estimates*, OFF. OF CIVIL RIGHTS (2020), https://ocrdata.ed.gov/StateNationalEstimations/Estimations_2015_16#.
[63] OSPI does not disaggregate numbers of students with disabilities by gender, so it is not possible to compare female students with disabilities subject to school-based arrests to a total population of female students with disabilities in Washington.

enforcement increases the odds of future arrest for Black youth, regardless of engagement in criminal behavior.[64]

Figure 2: Percent of Female Students Referred to Law Enforcement by Race and Ethnicity, Compared to Washington School Enrollment, 2015-2016



	AIAN	Asian	Hispanic/Latinx	Black	White	Native Hawaiian/API	Two or more races
% referred	2.5	3.1	34.3	10.2	44.4	0.8	4.8
% enrolled	1.0	7.0	23.0	4.0	56.0	1.0	7.0

Footnotes for Figure 2.

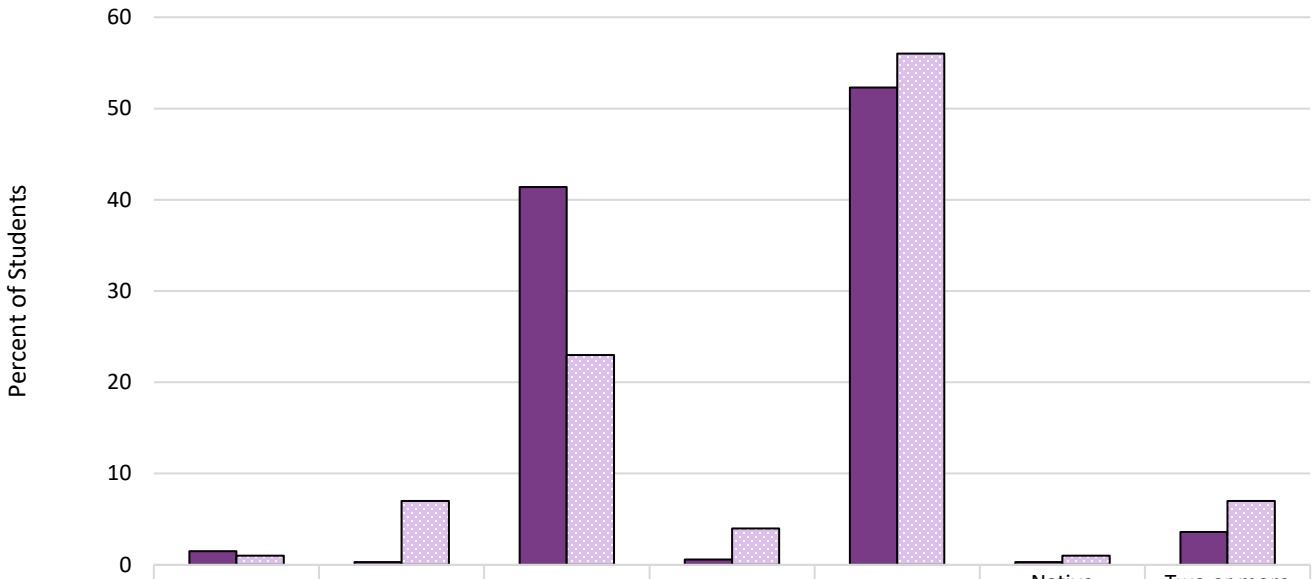
Note that school enrollment is for all students, not just female students, as OPSI does not break down enrollment data by gender plus race and ethnicity. However, the overall student

[64] A study using data from a stratified random sample of 8th grade students in the Seattle Public School District in 2001 or 2002 found that police contact in 8th grade was the strongest predictor of arrest at 10th grade. Youth with police contact at 8th grade were five times more likely to be arrested by 10th grade than their counterparts with no police contact at 8th grade, even after controlling for other environmental factors such as self-reported criminal behavior; and that Black youth are more likely to have police contact at 8th grade than their white counterparts. Robert D. Crutchfield et al., *Racial Disparities in Early Criminal Justice Involvement*, 1 RACE SOC. PROBS. 218 (2009). A separate study using the same dataset but following youth through to young adulthood found that Black youth who had contact with police at 8th grade were 11 times more likely to be arrested as young adults when compared to Black youth with no police contact, even when controlling for illegal behavior. This relationship was found to be not significant for white youth. Anne McGlynn-Wright et al., *The Usual, Racialized, Suspects: The Consequence of Police Contacts with Black and White Youth on Adult Arrest*, SOC. PROBS. (2020).

population is 48.4% female, so we assume near gender parity by race and ethnicity in the student population.

Source: Adapted from data available from OCR, U.S. Department of Education, and Washington State OSPI.

Figure 3: Percent of Female Students Arrested by Race and Ethnicity, Compared to Washington School Enrollment, 2015-2016



	AIAN	Asian	Hispanic/Latinx	Black	White	Native Hawaiian/API	Two or more races
% Arrested	1.5	0.3	41.4	0.6	52.3	0.3	3.6
% Enrolled	1.0	7.0	23.0	4.0	56.0	1.0	7.0

Footnotes for Figure 3.

Note that school enrollment is for all students, not just female students, as OSPI does not break down enrollment data by gender and race/ethnicity. However, the overall student population is 48.4 percent female, so we assume near gender parity by race/ethnicity in the student population.

Source: Adapted from data available from OCR, U.S. Department of Education, and Washington State OSPI.

These data are now outdated. There is a need for up-to-date, uniform data on school-based arrests and school-based law enforcement referrals to better understand which Washington

students are affected, and where; and to understand impacts on LGBTQ+ students. State statute requires schools and districts who choose to have SROs in place to follow consistent guidelines in SRO training, policies, and data reporting—including collecting and reporting data on all incidents regarding student referrals and their outcomes, "disaggregated by school, offense type, race, gender, age, and students who have an individualized education program [and/or 504 plan]," by the 2020-2021 school year.[65] However, this does not apply to referrals to law enforcement in schools without SROs. Note that the law does not require schools to collect data on sexual orientation of referred students.

There are alternatives for schools to engage with students exhibiting disruptive behavior without involving law enforcement. OSPI identifies restorative justice as one of a menu of "promising practices" and alternatives to exclusionary discipline.[66] Further research is needed to assess how many schools in Washington use alternative approaches to school discipline, and if these approaches have an impact on disproportionate law enforcement referrals for female students; Black, Indigenous, and students of color; LGBTQ+ students; and students with disabilities.

VI. Delinquency and Juvenile Offenders

Since 1988, the federal Juvenile Justice and Delinquency Prevention Act has required states to address disproportionate minority contact (DMC)—the higher rates of contact with the juvenile justice system that Black, Indigenous, and youth of color experience compared to their white, non-Hispanic peers.[67] DMC could result from two factors: differential offending (some groups commit more crimes than others) and differential treatment (some groups' crimes are treated differently in the justice system than others). The evidence regarding differential offending is beyond the scope of this review.

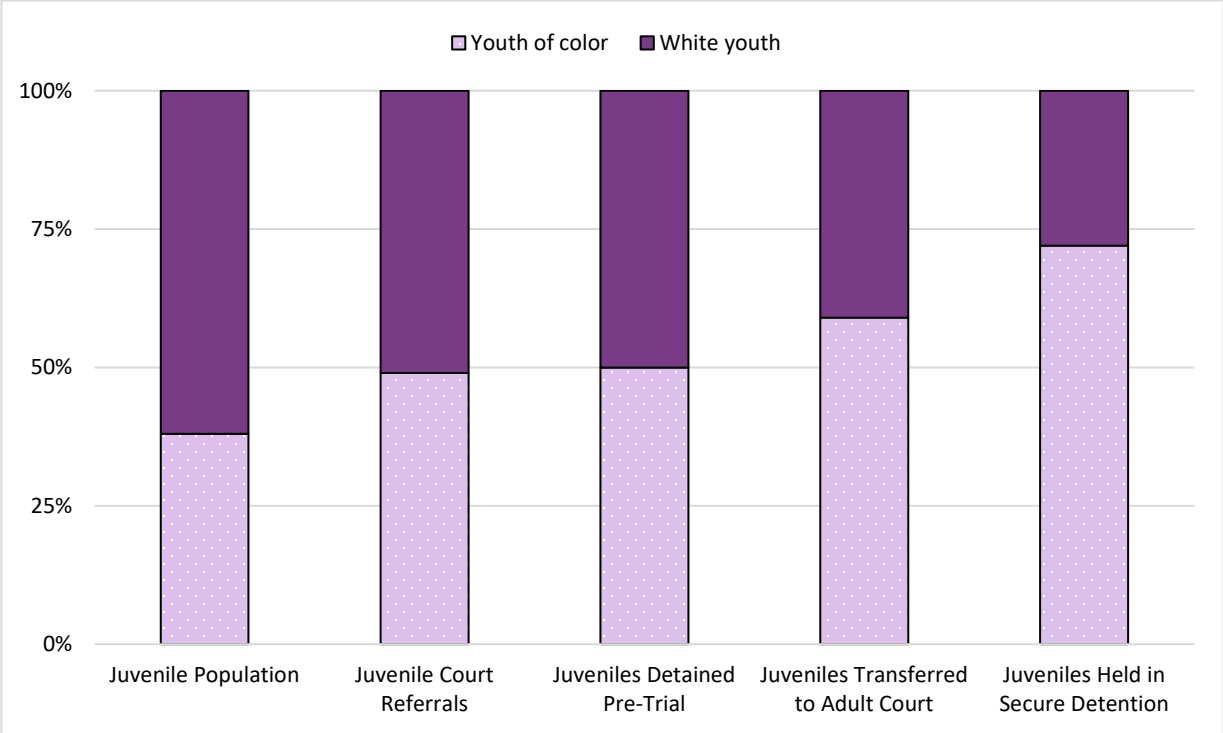
[65] RCW 28A.320.124.
[66] JOSHUA LYNCH, BEHAVIOR: MENU OF BEST PRACTICES AND STRATEGIES (2019), https://www.k12.wa.us/sites/default/files/public/lap/pubdocs/2019%20Behavior%20Menu%20with%20ADA%20Final-complete.pdf.
[67] Public Law 93-415, 42 USC 5601 et seq.

The exercise of discretion is one opportunity for differential treatment in the juvenile justice system. Discretion allows prosecutors and judges to make judgments about various aspects of a youth's experience based on that youth's individual factors. If certain groups of youth are systematically treated differently than others, even when taking into account factors such as environment, seriousness of the offense, age, and others, this may be a result of bias.[68] Disproportionality can be seen and measured at different decision points in the juvenile justice process, and the evidence indicates that it tends to accumulate as individuals move through the process. In 2016, Black, Indigenous, and youth of color were 38% of Washington State's juvenile population; 49% of juvenile court offense referrals; 50% of juveniles held in detention during the pre-adjudication phase; 59% of youth transferred to adult court; and 72% of youth held in secure state and local detention facilities.[69] Although the raw number of youth involved in Washington's juvenile justice system continues to decline, along the continuum of engagement the proportion of Black, Indigenous, and youth of color involved in the system increases, as shown in Figure 4.

[68] *Id.*

[69] WILLIAM FEYERHERM, COMPLIANCE WITH THE DISPROPORTIONATE MINORITY CONTACT (DMC) CORE REQUIREMENT (2018).

Figure 4: Proportion of Black, Indigenous, and Youth of Color in Washington State's Juvenile Justice System



Footnotes for Figure 4.

Source: Adapted from information available from WILLIAM FEYERHERM, Compliance with the Disproportionate Minority Contact (DMC) Core Requirement (2018).

The past few decades have seen a variety of studies estimating the rates of DMC for different groups and at different decision points. While most research has focused solely on racial and ethnic effects, more recent studies are starting to assess the interaction between gender and race and ethnicity, as well as other factors such as gender identity, sexual orientation, and disability. Below is an overview of the juvenile justice process in Washington State and a review of the evidence regarding racial and gender disproportionality at each point in the process, across the U.S. and in Washington State, where possible. For clarity, the process is divided into two parts: pre-adjudication (from arrest and court referral up to trial) and adjudication and disposition (trial and sentencing).

A. Pre-adjudication

When a youth alleged to have committed a criminal offense is arrested or brought into contact with the juvenile justice system, they may be cited and given a court date, released to parents or legal guardians, or detained if a judge finds the youth presents a risk of harm to self or others or is unlikely to appear for their next court hearing.

Some jurisdictions in Washington State mandate the use of a risk assessment instrument to decide whether youth should be detained before trial (the Detention Risk Assessment Instrument, or DRAI).[70] Risk assessment tools are meant to reduce bias and provide an objective measurement of an individuals' risk of harm or failure to appear for trial. An important factor to note is that some behaviors measured on a risk assessment tool, such as running away, may be self-protective behaviors for individuals living in traumatic or unwelcome home environments, as is more common among girls or LGBTQ+ youth in the juvenile justice system.[71]

In studies conducted across the U.S., while boys are more likely to be detained pre-disposition than girls, legal factors and past behavior are the biggest predictors of pre-dispositional detention.[72] Some researchers note that disproportionality begins outside of the justice system. Ecological factors such as lack of opportunity and resources in a community have been found to correlate significantly with pre-dispositional detention because offense seriousness and number of past offenses are likely a product of lack of opportunities in a youth's neighborhood.[73]

[70] AMANDA B GILMAN & RACHAEL SANFORD, JUVENILE DETENTION ALTERNATIVES INITIATIVE (JDAI), 2019 ANNUAL REPORT (2020), https://www.dcyf.wa.gov/sites/default/files/pdf/2019JDAIReport.pdf. In Washington, eight counties participate in the Juvenile Detention Alternatives Initiative (JDAI), and all use the DRAI to guide detention decisions. *Id.* In 2019, females made up 25.9% of youth admitted to detention in JDAI sites, and 28.1% of youth admitted to detention in non-JDAI sites. *Id.*

[71] GERTSEVA, *supra* note 20; MAJD, MARKSAMER & REYES, *supra* note 26.

[72] Scott R. Maggard, Jennifer L. Higgins & Allison T. Chappell, *Pre-dispositional Juvenile Detention: An Analysis of Race, Gender and Intersectionality*, 36 J. CRIME & JUST. 67 (2013). The authors found that while boys were more likely to be detained pre-trial than girls, race was not a factor. *Id.*

[73] Nancy Rodriguez, *The Cumulative Effect of Race and Ethnicity in Juvenile Court Outcomes and Why Preadjudication Detention Matters*, 47 J. RSCH. CRIME & DELINQUENCY 391 (2010). Rodriguez created an index variable for 'structural disadvantage' of the youth's home zip code by combining factors of disadvantage including percent of the population living in poverty, unemployment rate, and percent of adults with less than a high school education. *Id.* Analysis revealed that structural disadvantage significantly predicted pre-trial detention, and the author comments on the possible relationship between lack of access to community resources and delinquent behavior. *Id.*

The decision to formally bring charges lies with the prosecuting attorney.[74] They may use discretion to not file charges, to refer the individual to diversion, or to file charges and refer the case to juvenile court. For minor offenses, prosecutors have wide discretion to refer youth to diversion rather than charging the youth. This is not the case for serious offenses such as sexual or violent offenses. Cases referred to diversion are handled in the community through local resources. If the youth does not comply with diversion sanctions, the case may be sent back to the prosecutor. For juveniles formally charged with an offense, prosecutors may choose to offer juveniles a plea bargain before adjudication.[75] Washington State has wide racial disparities in referrals to juvenile court, with Black youth four times as likely and AIAN youth three times as likely as white youth to be referred to juvenile court.[76] And while raw numbers are decreasing, racial disparities in juvenile justice referrals are increasing: the gap between Black-white and AIAN-white referrals doubled between 2012 and 2017.[77] Black youth are 40 % less likely than white youth to be offered diversion or deferred disposition and are more likely to be declined to adult court.[78] Because there are both formal and informal ways to divert youth referred to the juvenile justice system before charging and there is no consistent reporting on informal diversions, there is a lack of data regarding gender, race, and other disparities in diversion before formal system involvement.

For youth charged with the most serious felony offenses (murder, rape, and assault), juvenile court jurisdiction can be "declined," and the case is processed in the adult criminal justice system. A decline of jurisdiction can be mandatory or discretionary: in the cases of specific violent and sexual offenses alleged to have been committed by a juvenile 16 or 17 years old, the youth is automatically declined to adult court.[79] Based on the circumstances, the prosecutor can elect to "waive" the decline, and the youth can remain under juvenile court jurisdiction. For those youth and offenses that do not come within the statutory definition for mandatory decline, the

[74] See "Chapter 13: Prosecutorial Discretion and Gendered Impacts" for more on prosecutorial discretion in adults cases.
[75] Dowell, *supra* note 2.
[76] WASHINGTON STATE PARTNERSHIP ON JUVENILE JUSTICE, ANNUAL REPORT TO THE GOVERNOR (2017).
[77] *Id.*
[78] *Id.*
[79] RCW 13.040.030.

prosecutor may seek to decline jurisdiction to the adult system on a case-by-case basis. If decline is sought, a hearing is held in juvenile court and the prosecutor must show why this youth cannot be adequately served in the juvenile system. The court determines if the youth should be retained in the juvenile system or if juvenile jurisdiction is "declined" in favor of adult prosecution.[80] If the juvenile is prosecuted as an adult, they are entitled to the attributes associated with adult court, primarily trial by jury (which is not available in juvenile court);[81] but they typically are subject to lengthier prison sentences,[82] and have less access to the treatment and rehabilitation options available to juvenile offenders.[83]

Nationwide, the rate of white youth declined to adult criminal courts decreased between 2005 and 2017, while the rate of Black youth declined to adult criminal court increased.[84] In Washington, the overall number of youth declined to adult court has declined since 2009, from over 250 in 2009 to a total of 114 youth in 2018, 10.6% of whom were females.[85] Black and Hispanic youth declined to adult court in 2018 were represented at rates above their share of the state population, at 30.7% and 34.2%, respectively. These data were not simultaneously disaggregated by race and gender.[86]

The 2018 Washington State Legislature passed a law (SSB 6160) that made significant changes to the process of discretionary decline, removing certain crimes subject to mandatory decline, such as Robbery 1, drive-by shooting, and others.[87] This law also extended to age 25 how long the most serious offenders can be kept under juvenile court jurisdiction. It is anticipated the

[80] Dowell, *supra* note 2.
[81] *State v. Chavez*, 163 Wn.2d 262, 180 P.3d 1250 (2008).
[82] ELIZABETH DRAKE, THE EFFECTIVENESS OF DECLINING JUVENILE COURT JURISDICTION OF YOUTHFUL OFFENDERS (2013), http://www.wsipp.wa.gov/ReportFile/1544/Wsipp_The-Effectiveness-of-Declining-Juvenile-Court-Jurisdiction-of-Youth_Final-Report.pdf.
[83] SIERRA ROTAKHINA & KELLY GILMORE, HEALTH IMPACT REVIEW OF HB 1674 (2015), https://sboh.wa.gov/Portals/7/Doc/HealthImpactReviews/HIR-2015-06-HB1674.pdf?ver=2015-03-05-161842-000. Department of Corrections (DOC and DSHS) staff indicated during a 2015 conversation that youth offenders under the jurisdiction of DOC "do not have access to all of the resources that are available to youth committed directly to a DSHS Juvenile Rehabilitation (JR) facility." *Id.* at 2.
[84] HOCKENBERRY & PUZZANCHERA, *supra* note 12.
[85] GORDON MCHENRY ET AL., WASHINGTON STATE JUVENILE JUSTICE REPORT TO THE GOVERNOR & STATE LEGISLATURE (2020), https://dcyf.wa.gov/sites/default/files/pdf/2020WA-PCJJgov.pdf.
[86] *Id.* at 99.
[87] KNOTH ET AL., *supra* note 5.

number of juveniles prosecuted and detained as adults will decrease.[88] It is too soon to know the effect these changes in law will have on practice.

B. Adjudication and sentencing/disposition

Washington State law allows four types of disposition for youth found guilty of an offense:[89]

- Under Option A, the judge can impose a sentence derived from the *standard range sanction*, a range of sentencing options resulting from the type of offense and youth's previous record. Less serious offenses are treated with local sanctions, in which the youth has community supervision and is connected with educational and/or treatment services in the community. Community service requirements and fines also may be imposed.[90] Youth who plead to or are found guilty of serious offenses may be sentenced to a range of confinement in a state facility operated by Juvenile Rehabilitation. The standard range derived by statute provides a minimum and maximum number of days for confinement.
- Option B allows the court to impose a sentence from the standard range but suspend the sentence on the promise of other sanctions, such as an evidence-based treatment program. Noncompliance with the treatment program may trigger the imposition of the original sentence.
- Option C is a chemical dependency/mental health disposition, allowing the court to sentence the youth to treatment in lieu of other sanctions.
- Option D is referred to as *manifest injustice*. If the court finds that the standard range disposition would be either too lenient or too harsh based on the specific circumstances, the court may increase or decrease the disposition as it deems appropriate. A manifest

[88] WASHINGTON STATE OFFICE OF FINANCIAL MANAGEMENT, MULTIPLE AGENCY FISCAL NOTE SUMMARY: 6160 2S SB, EXCLUSIVE ADULT JURISDICTION (2018), https://fnspublic.ofm.wa.gov/FNSPublicSearch/GetPDF?packageID=53119. The fiscal note for SSB 6160 found that the law will result in an increase of 48 beds for Juvenile Rehabilitation and a decrease of six beds from the Department of Corrections.
[89] RCW 13.40.0357.
[90] LUU, *supra* note 11.

injustice sentence must be supported by unique facts of the case that are not otherwise accounted for in the standard sentence range.[91]

Options B and C were created by the Washington State Legislature as part of the 1997 Community Juvenile Accountability Act,[92] expanding judicial discretion beyond the use of the standard range.[93] Although there are now many more options to keep a young person in the community engaged in educational and therapeutic activities, it has not been documented whether this has led to changes in recidivism, gender or racial disparities, and youth access to treatment. The Washington State Institute of Public Policy (WSIPP) is beginning a study of the impact of this change; an initial report is due in 2023.[94]

The evidence on disparities in juvenile disposition shows a complicated interaction between gender and race. Nationwide, Black and Hispanic youth are overrepresented among youth in detention, compared to the overall caseload.[95] Studies from regions across the U.S. have shown that Black, Indigenous, and girls of color receive harsher sentences than white girls, and that white girls are more likely to be sentenced to rehabilitation or treatment than all other groups, even when controlling for the seriousness of the offense.[96]

[91] Nicole I. Sussman, Terry G. Lee & Kevin A. Hallgren, *Use of Manifest Injustice in the Washington State Juvenile Rehabilitation Administration*, 47 J. AM. ACAD. PSYCHIATRY & L. 6 (2019).
[92] RCW 13.40.500.
[93] KNOTH ET AL., *supra* note 5.
[94] *Id.*
[95] HOCKENBERRY & PUZZANCHERA, *supra* note 12.
[96] *See, e.g.*, Lori D. Moore & Irene Padavic, *Racial and Ethnic Disparities in Girls' Sentencing in the Juvenile Justice System*, 5 FEMINIST CRIMINOLOGY 263 (2010); Joshua C. Cochran & Daniel P. Mears, *Race, Ethnic, and Gender Divides in Juvenile Court Sanctioning and Rehabilitative Intervention*, 52 J. RSCH. CRIME & DELINQUENCY 181 (2015); Michael J. Leiber & Jennifer H. Peck, *Race, Gender, Crime Severity, and Decision Making in the Juvenile Justice System*, 61 CRIME & DELINQUENCY 771 (2015); Jaya Davis & Jon R. Sorensen, *Disproportionate Juvenile Minority Confinement: A State-Level Assessment of Racial Threat*, 11 YOUTH VIOLENCE & JUV. JUST. 296 (2013); Rodriguez, *supra* note 73. A study in Florida found that Black, Indigenous, and girls of color were punished more harshly than white girls in most circumstances. Black girls were adjudicated more harshly than white girls even when controlling for the seriousness of the offense, a prior record, and the girl's age. A different study, also in Florida, found that of all gender/race combinations studied, white girls were the most likely to be sentenced to rehabilitation or treatment (rather than detention or other probation). An additional study looking at 28 juvenile courts in the Midwest, mid-Atlantic and Northeast found that being Black and female was associated with harsher sentencing. A review of 38 states, including Washington, found that Black youth were placed in residential placement 88% more often than white youth, controlling for arrest rates. A 2016 meta-review of youth referrals to behavioral health treatment assessed 20 years of research conducted in 15 states (including Washington) and affirmed that overall, girls were more likely to be referred for services; and that 63% of the studies reviewed demonstrated at least some racial

There is no research that specifically explores potential links between juvenile sentencing disparities and bias in prosecutors, judges, and other decision-makers, as bias is difficult to measure objectively. There is, however, evidence regarding perceptions of race and gender in youth and how those perceptions may impact decision-making in sentencing. Studies with juvenile justice officials and with the general population have shown that girls of color are perceived differently than white girls. For example, compared to their white counterparts, Latina girls are seen as overly aggressive and hypersexualized; Black girls are seen as more adult, needing less protection and nurturing, and being more knowledgeable about sex; and juvenile offenders of color are seen as more blameworthy and deserving of harsher punishment.[97]

The majority of juvenile offenders in Washington are sanctioned at the local level—less than 10% of youth offenders were committed to JR confinement in 2019.[98] Female youth spend less time on average in detention than male youth, and the average length of stay for female youth has been in decline: from 254 days (over 35 weeks) in 2018; 205 days (over 29 weeks) in 2019; and 168 days (24 weeks) in 2020.[99]

disparities in decisions to refer youth to treatment. Rodriguez found evidence for a 'cumulative effect' of race and ethnicity in Arizona juvenile justice courts, noting that while Black, Latinx and AIAN youth are treated more severely than white youth overall, youth who had received pre-adjudication detention were treated more severely.

[97] Lisa Pasko & Vera Lopez, *The Latina Penalty: Juvenile Correctional Attitudes Toward the Latina Juvenile Offender*, 16 J. ETHNICITY CRIM. JUST. 272 (2018); REBECCA EPSTEIN, JAMILIA BLAKE & THALIA GONZÁLEZ, GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD (2017), https://endadultificationbias.org/wp-content/uploads/2019/05/girlhood-interrupted.pdf; Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, 7 PLOS ONE (2012). A small, qualitative study of correctional officers and court officials in Colorado found that assumptions about Latina girls' behavior, culture, and attitudes impacted sentencing decisions. Latina girls were seen as being overly aggressive and hypersexualized, especially compared to their white peers. Interviewees admitted instances of recommending Latina girls to correctional facilities rather than treatment, even when their criminal record did not merit detention. In the broader population, studies of bias against Black, Indigenous, and girls of color have demonstrated perceptions that, if present in the courtroom, could influence outcomes. A nation-wide survey of adults from diverse racial, ethnic, and educational backgrounds revealed that participants saw Black girls as more adult than white girls, as needing less protection and nurturing, and as being more knowledgeable about sex. And a nationally-representative survey of white Americans found that when primed to think about Black juvenile offenders, participants were more likely to support the most severe penalty of life without parole in non-homicide cases as compared to priming for a white juvenile offender; and participants perceived youth as more similar to adults in blameworthiness when primed to think of Black juvenile offenders than white juvenile offenders.

[98] LUU, *supra* note 11.

[99] WASH. STATE DEP'T OF CHILDREN, YOUTH & FAMILIES, JUVENILE REHABILITATION LENGTH OF STAY TRENDS (FY 18-20) (2020), https://dcyf.wa.gov/sites/default/files/pdf/JR-LengthStayTrends.pdf.

Half of youth subject to local sanction were held in county detention (55.2%), which may not exceed 30 days post-disposition,[100] as well as sanctions such as community supervision, monitoring, and work crew.[101] These data were not broken down by gender or race. Treatment and educational services also are routinely required as a condition of community supervision. In general, however, there is a lack of comprehensive statewide data on local sanctions for juvenile offenders.

Sussman et al. examined the use of manifest injustice in Washington State.[102] They found that white youth were more likely than their Black or Multi-racial peers to have their sentences increased, and they hypothesized that geographical differences may explain this: jurisdictions with higher proportions of Black, Indigenous, and youth of color (mostly urban areas) also have greater access to diversion and treatment programs and tend to be more politically liberal.[103] The data in this study were not broken down by gender.

The Washington State Juvenile Detention Annual Report is created yearly by the Administrative Office of the Courts (AOC) to report juvenile detention rates; the most recent report available is from 2019.[104] Across the state, youth detention rates have been decreasing; in 2016, the youth detention rate statewide was 9.2 per 1,000, while in 2019 the rate was 7.2 per 1,000. In 2019, youth detention rates varied widely by county: in King County, the youth detention rate was 2.8 per 1,000 youth age 10-17 (the lowest in the state except for Garfield county, which had 0 detentions); while in Okanogan and Clallam counties, rates were over 20 per 1000 youth. Girls made up 27.2% of admissions to juvenile detention facilities in Washington (this is roughly equivalent to the proportion of girls among court-involved youth; see Gertseva, 2017). There was a wide range between counties: girls made up none of the four youth detained in Skamania, but 69.2% of the 39 youth detained in Pend Oreille. Just over nine percent of statewide detentions for all genders were for non-offender matters, such as status offenses, CHINS or ARY,—though

[100] RCW 13.40.185
[101] LUU, *supra* note 11.
[102] Sussman, Lee & Hallgren, *supra* note 91.
[103] *Id.*
[104] AMANDA GILMAN & RACHAEL SANFORD, WASHINGTON STATE 2019 JUVENILE DETENTION ANNUAL REPORT (2021), http://www.courts.wa.gov/subsite/wsccr/docs/Detention%20Report%202019.pdf.

detention for status offenses will be entirely prohibited by July 1, 2023, as noted above.[105] The counties with the highest proportion of detentions for status offenses were Pend Oreille, where they constituted 42.6% of detention admissions; Grey's Harbor, at 34.3%, and Stevens, with 36.6%. Meanwhile, while the ARY petition is the most common reason for non-offender detention admission statewide, 75 of the 99 youth admitted to detention for non-offender matters in Cowlitz county were admitted for truancy. Examining racial differences, Black, Indigenous, and youth of color made up over half of Washington youth admitted to detention in 2018.[106] These data are not disaggregated by race and gender.

The Washington State Center for Court Research and the Washington State Supreme Court Minority and Justice Commission conducted a special research report on girls of color admitted to juvenile detention in Washington State.[107] Analyzing 2019 data, they found that AIAN girls, Hispanic/Latinx girls, and Black girls were overrepresented in juvenile detention (Table 1).

Table 1: Representation of Racial and Ethnic Groups in the Female Youth Population and Among Juvenile Detention Admissions in 2019

	Native	Asian/ Pacific Islander	Black	Latinx	White	Other/ Unknown
Percent of female population	2.4	9.4	4.9	18.5	56.5	8.2
Percent of female admissions	7.0	3.1	14.6	24.6	49.0	1.7
Rate per 1,000	22.9	2.6	23.3	23.3	6.8	1.7

[105] GILMAN & SANFORD, *supra* note 11.
[106] GILMAN & SANFORD, *supra* note 104.
[107] ABU-HAZEEM ET AL., *supra* note 14.

Footnotes for Table 1.

The authors of the source report combined some racial and ethnic groups for analysis. For example, while court administrative data notes race and ethnicity separately, the report authors combined these data, grouping Hispanic youth with a single, non-white race with their non-Hispanic racial category, and categorizing white/Hispanic youth as Hispanic/Latinx. Additionally, they combined Asian and Pacific Islander into a single group for analysis. Grouping these populations together may mask disparities experienced within groups.

Source: Adapted from information available from ALIYAH ABU-HAZEEM ET AL., GIRLS OF COLOR IN JUVENILE DETENTION IN WASHINGTON STATE (2020).

Overall detention rates varied by county, as did rates of Black, Indigenous, and youth of color in detention: Native girls and Black girls were overrepresented in every county (where admission numbers were high enough to report), whereas Asian/Pacific Islander girls and Latinx girls were overrepresented in some counties and underrepresented in others. For girls of all racial and ethnic groups, the most common reason for detention in 2019 was an alleged or adjudicated misdemeanor offense. Girls were less likely than boys to be admitted to detention for a felony offense. Sixteen percent of girls were detained for violation of a court order related to a status offense (again, note that these detentions are being phased out due to changes in the law).[108] More data are needed to assess potential disparities by race and ethnicity, sexual or gender identity, and disability within the female youth detention population, and trends in these disparities over time.

VII. Programming and Treatment for Justice-involved Youth

Washington State currently has seven evidence-based, research-based, and promising treatment program options for court-involved youth:[109]

[108] *Id.*

[109] PAIGE WANNER, UPDATED EVIDENCE CLASSIFICATIONS FOR SELECT STATE-FUNDED JUVENILE JUSTICE PROGRAMS IN WASHINGTON STATE: A RESOURCE GUIDE (2020), https://www.wsipp.wa.gov/ReportFile/1720/Wsipp_Updated-Evidence-Classifications-for-Select-State-Funded-Juvenile-Justice-Programs-in-Washington-State-A-Resource-Guide_Report.pdf.

- Washington State Aggression Replacement Training (WSART) Program (promising for youth in state institutions)
- Coordination of Services (evidence-based for court-involved youth)
- Dialectical Behavioral Therapy (research-based for youth in state institutions)
- Education and Employment Training (EET) in King County (research-based, for court-involved youth)
- Functional Family Therapy (FFT) Program (evidence-based for youth post-release)
- Multi-Systemic Therapy (MST) Program (evidence-based, for court-involved and post-release youth)
- Multisystemic Therapy - Family Integrated Transitions (MST-FIT) (promising for youth in state institutions)
- Education and Employment Training (EET) Program

Youth may access treatment and other programs while detained or in the community. Experts familiar with Washington's juvenile justice system note the lack of data needed to assess how different youth respond to each type of programming, and whether there are differences by gender, race, ethnicity, socioeconomic status, disability, or other factor.

A. Programming and treatment for detained youth

Girls and young women in detention have unique needs, given the high rates of trauma, abuse and behavioral health needs they experience. Gender-responsive and culturally relevant services are needed for residents, especially now that youth potentially can be detained until age 25. Educational, treatment, and social needs vary greatly between a girl of 14 and a young woman of 24. In Washington State, because of the general decrease in institutionalization, DCYF now operates just one institution to house girls committed through the justice system, Echo Glen, a co-ed facility in Snoqualmie; and one community group home, Ridgeview, in Yakima. At Echo Glen, counselors work to develop individualized programs for youth, including general mental

health services and specialized treatment if needed.[110] Ridgeview uses a "gender-responsive" treatment program that emphasizes relationship-building, cultural competence, building on existing skills, and trauma-informed care.[111] These principals are aligned with gender-responsive treatment, discussed in more detail below.

In an internal evaluation of its integrated treatment model for all detained youth, DCYF noted barriers to treatment program success including undertrained staff, inefficient organization, and inconsistent quality monitoring.[112] The evaluation notes that while the treatment system has assessments meant to evaluate youth risk and need for treatment, currently assessments are either not being used to classify youth by treatment needs or are using eligibility criteria that are inappropriate to the treatment. Instead, "treatment activities are driven largely by [living unit] placement, which appears to be driven by procedures that do not include [assessment]." As a consequence, "youth in need of SUD [substance use disorder] treatment get the level of treatment offered at the institution to which they were remanded, regardless of their level of need/severity." And due to staffing issues, at the time the report was written "no girls in a JR (juvenile rehabilitation) institution receive SUD treatment…"[113] It is unclear what the outcomes might be for youth receiving services that are not matched to their level of need, or how many girls may have needed SUD treatment and not received it.

Any programming for youth in detention should work to help youth prepare for life back in the community; however, data from 2017 showed that 23% of youth leaving the criminal justice system experienced homelessness within 12 months of release.[114] SB 6560, passed in 2018, required DCYF and the Office of Homeless Youth to "to develop a plan that ensures no young person will be discharged into homelessness from a system of care."[115] In a report, the Office of Homeless Youth noted a lack of transition planning; youth leaving systems without important

[110] WASH. STATE DEP'T OF CHILDREN, YOUTH AND FAMILIES, ECHO GLEN PROGRAM HANDBOOK 11 (2020).
[111] WASH. STATE DEP'T OF CHILDREN, YOUTH AND FAMILIES, RIDGEVIEW COMMUNITY FACILITY PROGRAM HANDBOOK 32 (2020).
[112] ANDREW FOX & SARAH VEELE, JUVENILE REHABILITATION INTEGRATED TREATMENT MODEL: LEGISLATIVE REPORT 5 (2020).
[113] *Id.* at 1, 7, 8.
[114] JIM MAYFIELD ET AL., HOUSING STATUS OF YOUTH EXISTING FOSTER CARE, BEHAVIORAL HEALTH AND CRIMINAL JUSTICE SYSTEMS (2017), https://www.dshs.wa.gov/sites/default/files/rda/reports/research-11-240.pdf.
[115] LISA BROWN, IMPROVING STABILITY FOR YOUTH EXISTING SYSTEMS OF CARE (2020), https://www.commerce.wa.gov/wp-content/uploads/2020/02/Youth-Exiting-Systems-of-Care.pdf.

adult skills; and a need for diverse and broad partnerships to meet the diversity of needs of youth exiting juvenile justice and child welfare systems.[116] Since then, DCYF has hired housing navigators; partnered with homeless case management agencies; developed an individualized needs assessment for youth; and launched pilots to fund transition living programs and other potential solutions to youth exiting detention.[117] Updated data are needed to show if these interventions have impacted the number of youth exiting detention into homelessness.

B. Programming and treatment in the community

Similar challenges exist when providing access to services, programs, and treatment for court-involved youth in the community, and when coordinating re-entry issues upon release.[118] As Washington State experts note, youth who enter the system in their mid-teens may not have had the opportunity to mature and develop stability and independence compared to their non-incarcerated peers. Relevant education and job training, parenting and childcare needs, and safe, stable housing needs may be very different for a young teenage girl and a young woman in her 20s. Access to community-based services can be additionally challenging for girls who are pregnant or parenting. The demands of being involved in the juvenile justice system are stressful for any youth. Add to that the anxiety of being pregnant or raising a child with few resources and the stress level rises exponentially. There are alternative schools for teen mothers, but they are offered in specialized settings that require the youth to take a lot of initiative to continue with their education.[119] Transportation to and from appropriate services can be an issue for youth, as the availability of affordable housing drives families farther from urban centers. It is doubly

[116] LISA BROWN, IMPROVING STABILITY FOR YOUTH EXISTING SYSTEMS OF CARE (2020), https://www.commerce.wa.gov/wp-content/uploads/2020/02/Youth-Exiting-Systems-of-Care.pdf.
[117] WASH. STATE DEP'T OF CHILDREN, YOUTH AND FAMILIES, *Improving stability for youth exiting care* (2021), https://www.dcyf.wa.gov/sites/default/files/pubs/GC_0018.pdf.
[118] There are important differences in the needs of youth and programming logistics for community intervention (probation) and re-entry programming. This distinction merits a more detailed examination but is beyond our ability to address here.
[119] For example, the Graduation, Reality And Dual-role Skills (GRADS) programs are specialized programs for pregnant teens and young parents. These programs offer childcare on-site. As of November 2020, 23 of the 295 school districts in Washington State offer GRADS programs, showing that youth in many districts do not have access to this resource. WASH. STATE DEP'T OF CHILDREN, YOUTH AND FAMILIES, GRADUATION, REALITY AND DUAL-ROLE SKILLS (GRADS), https://www.k12.wa.us/student-success/learning-alternatives/graduation-reality-and-dual-role-skills-grads.

challenging if the young person must arrange for childcare or bring along a child. Consequently, if a community-based service provider is not conveniently located and does not have childcare available while services are being offered, these practical constraints can prevent the young woman from engaging in the service.

A survey of county courts reported a wide range of available evidence-based treatment programming options across the state, and numerous court-reported barriers to achieving equity in access to these programs for youth.[120] Relevant barriers included language barriers and lack of access to interpreters, especially for family-based interventions; a need for greater engagement with tribes; high time commitment needs of groups; transportation needs and geographic access; and low engagement with families, especially AIAN, Black, and Hispanic/Latinx families (particularly in programs like Family Functional Therapy, which require family involvement). Additionally, courts surveyed noted that unconscious bias throughout the system may be impacting policies or decisions made, and that program staff demographics don't match the demographics of the youth they serve. Unfortunately, the data were not reported by race, ethnicity, and gender.

Even when youth are able to access programming, there are gender and race disparities in outcomes. Among youth eligible for participation in an evidence-based treatment program in Washington, girls are less likely to start treatment and are more likely to drop out.[121] This is especially true of older girls, AIAN girls, girls in foster care or group homes, girls experiencing poverty, and girls with a history of child maltreatment.[122] This suggests that these programs are not successfully addressing the specific needs of these girls.

Washington State has a variety of treatment options, and an emphasis on evidence-based treatment. Access to these programs, however, varies across the state. It is unknown how access to programs may influence discretion—if a prosecutor or judge encounters a youth in need of programming but the program is not available in their area, does that influence their decision to

[120] WASH. STATE DEP'T OF CHILDREN, YOUTH AND FAMILIES, REPORT TO THE LEGISLATURE: RACIAL AND ETHNIC DISPARITIES IN JUVENILE COURT EVIDENCE-BASED PROGRAMS (2019), https://www.dcyf.wa.gov/sites/default/files/pdf/reports/RacialEthnicDisparities-JuvenileCourt2019.pdf.
[121] GERTSEVA, *supra* note 20.
[122] *Id.*

charge or not charge the youth or how the youth is sentenced? Additionally, the literature supports the idea that some girls and LGBTQ+ youth may benefit from treatment programs that are responsive to their particular needs. Availability of community-based treatment programs that incorporate gender-responsive approaches or that are specific to the needs of LGBTQ+ youth is uneven across the state. This may be relevant to the low number of girls and LGBTQ+ youth initiating and completing treatment.

C. Gender-responsive treatment

Gender-responsive treatment is an umbrella term for programming that takes into account the gender differences in pathways to juvenile justice, and the different strengths and needs of youth involved in juvenile justice.[123] Gender-specific services were a specific requirement of the 1992 reauthorization of the national Juvenile Justice and Delinquency Prevention Act, requiring states to assess availability of gender-specific services and make plans to provide those services.[124] Ideally, gender-informed programs should use traditional evidence-based practices while also considering the needs that are most relevant by gender.[125] Some states have implemented reforms to their juvenile justice systems to be more responsive to gender, prompted by findings in local data that juvenile justice-involved girls typically differ from their male peers in having higher rates of mental health needs, higher rates of family conflict including trauma and abuse, and have usually been charged with less serious offenses.[126] Gender-responsive treatment has most often been defined as programming that takes into account the needs of girls and women; this suggests that the unique needs of transgender and gender nonbinary youth may not be a focal part of the movement toward gender-responsiveness.[127]

[123] Sarah Cusworth Walker, Ann Muno & Cheryl Sullivan-Colglazier, *Principles in Practice: A Multistate Study of Gender-Responsive Reforms in the Juvenile Justice System*, 61 CRIME & DELINQUENCY 742 (2015); Irvine-Baker, Jones & Canfield, *supra* note 10.
[124] Wendy S. Heipt, *Girls' Court: A Gender Responsive Juvenile Court Alternative*, 13 SEATTLE J. FOR SOC. JUST. 54 (2015).
[125] Renée Gobeil, Kelley Blanchette & Lynn Stewart, *A Meta-Analytic Review of Correctional Interventions for Women Offenders Gender-Neutral Versus Gender-Informed Approaches*, 43 CRIM. JUST. & BEHAV. 301 (2016).
[126] GERTSEVA, *supra* note 20; Gobeil, Blanchette & Stewart, *supra* note 125; Walker, Muno & Sullivan-Colglazier, *supra* note 123.
[127] Irvine-Baker, Jones & Canfield, *supra* note 10.

A 2015 national review of gender-responsiveness in juvenile justice categorized example reforms and programs into the following areas:[128]

- Assessment and screening: using individualized assessment tools to screen for trauma, abuse, and trafficking to refer girls to programs that best fit their needs.
- Engagement: making programs as accessible as possible to encourage girls and their families to participate.
- Relational approach: centering healthy relationships in staff training, curriculum development, and intervention design.
- Safety: using diversion whenever possible and designing facilities to reduce risk of assault.
- Skills-based, strengths-based approach: involving girls in treatment planning and goal setting.
- Reentry and community connection: focusing on strengthening girls' relationships with family members and involving family in therapy programs (like Washington State's Family Functional Training).

They also note the importance of services for youth who are pregnant and parenting.[129] Most of the research on gender-informed programming has been conducted with the adult female population, and finds that on average, women have reduced recidivism rates following participation in gender-informed programming when compared to those in standard probation.[130] See "Chapter 12: Availability of Gender Responsive Programming and Use of Trauma Informed Care in Washington State Department of Corrections for more on gender-responsiveness for adults." While limited, the evidence on female youth is promising,[131] but

[128] Walker, Muno & Sullivan-Colglazier, *supra* note 123.
[129] *Id.*
[130] Gobeil, Blanchette & Stewart, *supra* note 125. A meta-analytic review in 2016 looked at 37 studies on correctional programming for adult woman to assess the effectiveness of 'gender-informed' programming across the U.S. Most of the programs studied used a trauma-informed approach and ensured a focus on behavioral health needs. The meta-analysis found strong evidence that women had improved rates of success (non-recidivism) after participating in gender-informed programming, compared those in standard probation.
[131] Valerie R. Anderson et al., *Gender-Responsive Intervention for Female Juvenile Offenders: A Quasi-Experimental Outcome Evaluation*, 14 FEMINIST CRIMINOLOGY 24 (2019). This quasi-experimental study used propensity matching to

highlights the need to differentiate between youth who may have "gender-sensitive risk factors," and who may respond better to gender-informed programming, compared to girls without those specific risk factors.[132]

There are few programs that cater to LGBTQ+ youth in Washington State, including residential programs and counseling services.[133] However, gender-responsive programming and treatment for girls is increasing in Washington State. As noted, above, Ridgeview Community Home employs a gender-responsive approach to treatment. Additionally, a new program called Girls Only Active Learning (GOAL) was created as an alternative to Aggression Replacement Therapy and has been piloted with females referred from five juvenile courts across Washington State, with positive outcomes and acceptance by participants.[134]

D. Girls' Court

Over the past two decades, several jurisdictions around the country have experimented with creating alternative juvenile justice tracks for girls, often called "girls' courts." A notable example is found in Honolulu, where a pilot girls' court began in 2004. Girls' court does not actually replace the juvenile justice process; rather, it begins after sentencing, and is a gender-responsive, therapeutic process to oversee girls on probation. A 2011 evaluation of Honolulu Girls' Court found that it reduced overall recidivism, especially for runaway offenses, perhaps indicating its effectiveness in addressing trauma-response behaviors in girls.[135]

examine outcomes between girls in group homes and girls on probation in a Midwest juvenile court from 2005-2012 (n=986) and found that the girls who participated in a gender-responsive group home were less likely to recidivate at two years compared to the girls who had served probation (28.4% compared to 42%).

[132] Jacob C. Day, Margaret A. Zahn & Lisa P. Tichavsky, *What Works for Whom? The Effects of Gender Responsive Programming on Girls and Boys in Secure Detention*, 52 J. RSCH. CRIME & DELINQUENCY 93 (2015). This small study in Connecticut found that girls' response to gender-informed programming depended on their existing needs and risk. Girls with "gender-sensitive risk factors," such as history of trauma, mental and behavioral health disorders, responded well to gender-informed programming. However, girls without those risk factors have better outcomes in traditional evidence-based programs, indicating the potential pitfalls of generalizing across all girls.

[133] GANZHORN, CURTIS & KUES, *supra* note 25.

[134] Sarah C. Walker et al., *A Tailored Cognitive Behavioral Program for Juvenile Justice-Referred Females at Risk of Substance Use and Delinquency: A Pilot Quasi-Experimental Trial*, 14 PLOS ONE (2019). The 57 youth who participated in GOAL demonstrated "reduced self-reported delinquent behavior" at six months. *Id.* The researchers are currently waiting for 12-month court outcome data and also planning to implement a larger study to try to replicate the initial findings.

[135] Janet T. Davidson, Lisa Pasko & Meda Chesney-Lind, *"She's Way Too Good to Lose": An Evaluation of Honolulu's Girls Court*, 21 WOMEN & CRIM. JUST. 308 (2011).

The Kitsap Juvenile Court began piloting Washington State's first girls' court in 2019. Originally designed for post-adjudicated girls considered moderate to high-risk to reoffend, the program will be soon expanded to include pre-adjudicated girls. Program goals include reducing recidivism, improving school performance, strengthening communication skills, developing individual self-worth, and building positive relationships and support systems. To achieve these goals, the program provides non-court interventions by linking the girls to community resources, social service agencies, and mentors. This extensive community outreach component of the program enables girls to be served in their local communities instead of relying on services available within the juvenile justice system. The program model incorporates theoretically informed gender-responsive elements from feminist pathways theory (e.g., addressing trauma, abuse, and neglect) and relational/cultural theory (e.g., focusing on the centrality of relationships, inclusion of girls' voices, and sense of connection to others).[136] Treatment practices and program activities are anchored in core elements of gender-responsive approaches: 1) relation-based; 2) strength-based; 3) trauma-informed; 4) culturally competent; and 5) holistic. All of these elements of gender-responsive approach are known to create supportive spaces in which participants can build the foundations for health, social, and education success.[137]

The three-year pilot is currently being evaluated by the Washington State Center for Court Research. Some preliminary results of this evaluation show that girls' court program participants share many of the same challenges with girls entering the juvenile justice system statewide. Among eighteen first-year program participants, 66% had a history of running away from home, 33% were victims of neglect, 33% had a history of dependency, and 28% had a history of out-of-home placement. The majority of program participants (89%) experienced family conflict/domestic violence. For example, looking specifically at the problem of family conflict, more than half (55%) of first-year participants experienced verbal intimidation, yelling, and heated arguments in the family, while 28% experienced domestic violence. Half (50%) of program participants witnessed violence, 39% were victims of physical abuse, and 44% were victims of

[136] Valerie R. Anderson et al., *Gender-Responsive Intervention for Female Juvenile Offenders: A Quasi-Experimental Outcome Evaluation*, 14 FEMINIST CRIMINOLOGY 24 (2019). .
[137] *Gender-Responsive Strategies for Women Offenders*, U.S. DEP'T OF JUST., NAT'L INST. OF CORRECTIONS, https://nicic.gov/series/gender-responsive-strategies-women-offenders.

sexual abuse. Of eight first-year program participants who were sexually abused, 63% (n=5) were abused by a family member. The preliminary results from the evaluation suggest that 65% of girls participating in the program showed improvement in skills building and 57% showed improvement in attitudes and behaviors related to emotional stability and cognitive reasoning by the end of probation. More data will be available when evaluation is finished.[138]

VIII. Recent Policy Changes Impacting Discretion in Juvenile Justice

A. State policy

Three policy changes impacting discretionary decisions are worth examining to assess their impact on gender, racial, and ethnic disparities:

- The 1997 law adding Options B and C described above to the juvenile sentencing structure greatly increased options for dispositions. Its impact is being studied by WSIPP with a report due in 2023. However, many policy assessments only look at race/ethnicity and gender separately, an approach that masks the important ways that various aspects of a person's identity can interact in situations of bias and inequity.
- In 2018, the Washington State Legislature changed the structure of judicial decline, reducing the crimes subject to mandatory decline. In theory, this should reduce the number of juvenile cases declined to adult criminal justice jurisdiction. It is unknown whether this also will change the proportion of girls and Black, Indigenous, and youth of color whose cases are declined to adult criminal justice jurisdiction.
- In 2018, the Washington State Legislature passed ESSB 6550, which increased the discretion of prosecutors by allowing them to offer diversion to juveniles accused of a wider range of offenses.[139] It is unclear if and how rates of diversion have changed since

[138] Personal communication with Dr. Arina Gertseva, Washington State Center for Court Research (June 1, 2021).
[139] Josh Gordon, *Washington Passes Bill Diverting Youth from Justice System*, NAT'L JUV. JUST. NETWORK (Mar. 27, 2018), https://www.njjn.org/article/washington-passes-bill-diverting-youth-from-justice-system.

the passage of this bill, and whether rates of diversion vary by county, by youth demographic, or by availability of community diversion programs.

- In 2019, the Washington State Legislature passed a law to phase out the use of detention for juveniles a court has found to be dependent due to abuse or neglect in the home, and youth who have pending ARY, CHINS, and truancy petitions. As of July 1, 2023, these youth will not be detained in Washington. It remains to be seen the impact this change will have on the makeup of the detained female population and entry to the offender juvenile justice system.
- In 2021, the Washington State Supreme Court adopted JuCr 7.16, which prohibits issuance of warrants for juvenile offenders for violation of conditions of supervision or failure to appear unless there is a finding that the individual circumstances pose a serious risk to public safety. The rule is controversial, in part because there is no agreement as to whether "serious risk to public safety" encompasses a serious risk to the safety of the youth or is intended to apply only to the risk the youth presents to others. A majority of courts endorse the former reading so judges have a tool to protect a juvenile offender from personal harm, but those who advocate that all detention of juveniles is harmful endorse the latter interpretation.

IX. Conclusion

In Washington State, existing statistics show that Black, Indigenous, and youth of color of all genders face wide disparities in court outcomes. When looking at the intersection of race, ethnicity, and gender, Indigenous girls and Black girls are disproportionately involved in the system and experience more severe outcomes. LGBTQ+ youth are likely overrepresented in the system as well, where they face challenges specific to their sexual orientation and gender identity. As raw numbers of youth formally involved in the justice system decrease, racial disproportionality appears to be increasing in the juvenile justice system. From a gender justice frame, how status offenses are handled is important, as girls (especially Black, Indigenous, and girls of color) are overrepresented in the status offense population.

Since the state Juvenile Justice Act of 1977, prosecuting attorneys have wielded the bulk of discretion when dealing with juvenile offenders. Washington's juvenile justice system is designed to constrain judicial discretion by requiring standard dispositions based on static factors such as offense charged and criminal history. With a series of decisions in the past decade, however, the Washington Supreme Court has made clear that judges are not bound by statutory dispositions when compelling factors associated with youth affect culpability and sentencing in a specific case.[140] It is too early to tell the effect this emerging precedent will have on the disposition of offenders. Gender-based data on filing decisions, disposition recommendations, and dispositions across the state would be valuable to determine how discretionary decisions affect youth and gender equity in Washington's juvenile justice system.

There are several areas where incomplete data collection or analysis (such as not separately tracking data by both gender and race) prevents us from seeing highly relevant distinctions among the youth served. Agencies must collect accurate race, ethnicity, disability, gender, and sexual orientation data to understand the experiences of these youth. More explicit demographic information, as well as system entry, charge, and disposition, will help us identify whether decisions impacting youth are affected by bias and gender stereotypes. Equipped with this information, we may better devise solutions to comprehensively address systematic inequities.

X. Recommendations

- To reduce disparities in arrest, detention, and resolution of juvenile cases, and to reduce the number of girls detained for status and misdemeanor offenses, stakeholders should:
    - Identify and develop, throughout the state, community-based resources that address the needs of youth involved in the juvenile justice system for status offenses so they may be safely served in the community.

[140] *See, e.g.*, *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017); *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015).

    - Identify and develop, throughout the state, culturally-competent community mentoring programs upon which schools, law enforcement, prosecutors, and courts can draw instead of referring low-risk criminal behavior for prosecution.
- To assess and develop gender-responsive and culturally-competent resources for status and juvenile offenders that respond to individualized needs derived from individualized assessment, stakeholders should:
    - Follow the status of the Kitsap County girls' court, including WSCCR's current evaluation, and consider new recommendations based on this data.
    - Maintain an inventory of gender- and LGBTQ+-specific programming and services offered at Echo Glen Children's Center and Ridgeview Group Home and track their progress. Based on tracking of these programs (and any others), identify gaps in gender-responsive programming and build programs to address the gaps.
    - Maintain an inventory of the gender- and LBGTQ+-specific programming and services offered through Washington's juvenile courts. Track program effectiveness, identify program gaps and deficiencies, develop solutions to deficiencies, and fund effective program development.
- WSCCR and juvenile justice stakeholders should develop standards to collect and report demographic data by entities operating in all phases of the juvenile justice system (initial referral, diversion/prosecution, detention, adjudication, disposition, use of manifest injustice/decline, and outcome). Data should include self-identified sexual orientation, gender identity, gender expression, race, and ethnicity; age; developmental challenges; and status as a parent.
- WSCCR should maintain and publish uniform data on the rate of youth arrests in each Washington county by subpopulations, including gender, race, ethnicity, age, and referral charge.
- WSCCR should expand the annual juvenile detention report to examine county detention admissions by gender, race, ethnicity, age, admission reason, and length of stay.
- WSCCR and juvenile justice stakeholders should develop uniform standards to collect and report demographic data for school-based referrals. Data should include self-identified

sexual orientation, gender identity, gender expression, race, and ethnicity; age; developmental challenges; and status as a parent. Use this data to (1) identify student populations and geographic locations with the greatest need, (2) develop restorative programs tailored to specific needs at the local level, and (3) reduce criminal referrals.

Chapter 10

Commercial Sex and Exploitation

Judge Barbara Mack (ret.) and Dr. Dana Raigrodski, LLB, SJD

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I. Summary

Commercial sexual exploitation (CSE), including sex trafficking, mainly targets women, children, young adults (up to age 24), and individuals identifying as LGBTQ+, primarily in communities in poverty, Indigenous communities, and communities of color. Economic and social marginalization drives people into the commercial sex industry and exploitation, which in turn perpetuates that economic and social marginalization. The most targeted and marginalized populations have been doubly harmed by exploitation and by poor treatment within the legal system.

While data is limited, CSE is widespread in the sex industry in Washington State and nationally. State and national data show significant disparities based on gender and gender identity, sexuality, age, class, race, ethnicity, and Indigenous identity. Prior experiences of abuse, trauma, homelessness and alienation from one's family increase vulnerability and risk, now exacerbated by the COVID-19 pandemic. Washington data indicates that CSE survivors are mostly female, although male and LGBTQ+ survivors are likely significantly undercounted. A significant number of those trafficked and exploited in the commercial sex industry are children and youth (up to age 24). Third-party exploiters and many sex buyers target women and girls of color, which contributes to their overrepresentation among those who are sexually exploited. Sex buyers are almost exclusively men and high-frequency buyers are often high earners. In Washington, human trafficking is deeply and historically connected to missing and murdered Indigenous women and people.

Inequities in the justice system amplify disparities for survivors of exploitation and for individuals in the sex industry generally. Washington's justice system addresses commercial sex through overlapping frameworks: sex industry offenses such as prostitution and patronizing, commercial sexual abuse of minors (CSAM), and human trafficking. Those frameworks are often in tension with each other due to misconceptions about the pathways into the sex industry and the barriers to leaving it. Individuals in the sex industry, including the many who are exploited, have been criminalized rather than recognized as victims or survivors, and have been sanctioned disproportionately to their exploiters. Washington data shows that women and girls have been

disproportionately criminalized. The data does not provide much information about the criminalization of LGBTQ+ populations, though national data suggests they are also disproportionately criminalized. Washington data also shows the disproportional criminalization of Black, Indigenous, and people of color. Exploiters, on the other hand, have often escaped prosecution or faced limited sanctions.

Increased knowledge about the impacts of sexual exploitation has led to greater recognition that sex work often masks sexual exploitation. As a result, the criminal justice system now is better equipped to identify and serve survivors. Since the early 2000s, Washington has made significant progress on issues of human trafficking and CSE, due in large part to a concerted effort to provide cross-disciplinary training to identify and respond earlier to CSE children and youth. Washington has also reduced the disproportionate gender and race impact of the justice system response to individuals in the sex industry, including victims of exploitation. Current responses focus on holding exploiters accountable, on ending the cycle of CSE-related crime, and on facilitating a way out of the sex industry by providing services and enhancing economic and social safety nets. Washington has increased the accountability of traffickers and exploiters, who are almost exclusively men, and has legislated a survivor-centered approach to sexually exploited minors and, to some extent, adults. The number of arrests and charges for trafficking, CSAM, and patronizing is increasing, while the number of prostitution arrests and charges is decreasing. Washington has made significant progress in reducing the involvement of CSE minors in the justice system, many of whom are at-risk girls, LGBTQ+ minors and young adults, boys, and Black and Brown minors and young adults. These actions are helping to alleviate the historic gender, racial, and socioeconomic inequities in the justice system.

However, many of the new protections apply only to minors. Even with new protections and better identification, lack of services and facilities statewide remains a challenge. Adult prostitution is still a criminal offense. Where no force or coercion is involved, until the recent passage of SB 5180 (effective date 7/25/21), adults had few available defenses to the charge or easily accessible ways to vacate prostitution convictions. Challenges still exist for sexually exploited people, both minors and adults, who are arrested and adjudicated for other crimes. The bulk of current research shows that most people who are sexually exploited have histories

of child abuse and became involved in the sex industry as minors, when coerced into prostitution by families, by third parties or because of poverty, substance abuse, or homelessness. The lack of protective legislation and policies for 18 to- 24-year-olds constitutes a failure to recognize this reality. CSE survivors and sex workers suffer from shame and stigma imposed on them by society because of a pervasive belief that they are responsible for the harm, violence, and criminalization they suffer. Explicit and implicit biases at various decision points in the justice system can perpetuate disparities and inequities. Protective CSE laws and policies may only be available when individuals are identified as victims or survivors. Bias can affect whether or not a person is identified as a victim or survivor and at which stage of their involvement in the justice system, which means gender and race may determine outcomes.

To reduce CSE and the disproportionate gender and race impact of the justice system's response, Washington should continue to develop multidisciplinary systems-wide responses with a focus on "upstream" prevention and a public health approach. Washington should also strive to further reduce justice system involvement for minor and adult CSE survivors, increase accountability of exploiters, provide for comprehensive continuing cross-sector education, and improve data collection on commercial sexual exploitation.

II. Background

A. Commercial sex in Washington and nationally

To understand issues surrounding commercial sex, exploitation, and justice system responses, we must use consistent, easily understood, terms. On these issues, many of the terms used in the law and in society are contested and reflect complex histories, policies, and practices. This chapter aims to prioritize the lived experiences and terminology of those most directly impacted—those who self-identify as survivors of sexual exploitation, those who self-identify as sex workers, or both. Focusing this study on systemic disparities and inequities within laws and policies, and drawing on available data, this chapter also uses legal and social science terminology such as "victim" or "prostitution." The latter, for example, is often disfavored due to the stigma and criminality it connotes; this chapter uses it sparingly as indicated by the context.

In this report "child" and "minor" mean a person under the age of 18; young adult refers to those between the ages of 18 and 24; "Youth" is a person up to the age of 24.[1] This report uses CSEC and CSE Youth interchangeably unless specifically noted.[2] A "victim" or "survivor" is a person who has suffered direct harm, whether emotional, physical, or financial, as a result of being sexually exploited by others. The legal system primarily refers to individuals who are sexually exploited as "victims;" service providers and exploited individuals mostly prefer "survivors." As used in this chapter, "survivor" may describe a person who was or is still engaged in the sex industry. The words "sexual exploitation" or commercial sexual exploitation (CSE) may be used interchangeably. For many, the word "trafficking" implies the need for forced travel or control by a third party. But as statutorily defined, "trafficking" of an adult requires use of force, fraud, or coercion, which is not required where the victim is a minor; travel or movement is not required. Sexual exploitation and trafficking are far more complex in today's world, particularly because exploiters target individuals by preying on systemic and personal vulnerabilities, and sexual exploitation is a more accurate descriptor of the dynamic. "Sex work" is used to mean the exchange of sexual services between consenting adults for some form of remuneration, with the terms agreed between the seller and the buyer. The term "sex work" is often used to describe situations where adults engaging in commercial sex have consented to do so, and exclude situations where consent is absent for reasons including threat or use of force, deception, fraud, abuse of power, or involvement of a minor.[3] "Consent" due to poverty, homelessness, substance abuse, or mental health does not fit within this definition.

The issue of adult sex work and sexual exploitation of adults (when not clearly amounting to trafficking) generates differing perspectives, including among survivors and sex workers. Some view adults engaged in commercial sex as victims or survivors of exploitation and see sex work as part of the spectrum of sexual exploitation of adults. Others view adults as sex workers opting

[1] As used in this report, "youth" may include minors, unless specifically noted.
[2] The CSEC acronym connotes "children," which may be perceived as minors under the age of 18, but data, studies, and services often cover youth up to age 24.
[3] AMNESTY INT'L, AMNESTY INTERNATIONAL POLICY ON STATE OBLIGATIONS TO RESPECT, PROTECT AND FULFIL THE HUMAN RIGHTS OF SEX WORKERS 3 (2016), https://www.amnesty.org/download/Documents/POL3040622016ENGLISH.PDF.

to engage in the sex industry like any other labor market. Adult involvement in commercial sex exists on a spectrum of coercion, circumstances, and choice. Some are coerced into the sex industry by violence, fraud, or threats. Some engage in sex work by choice, free of economic or other pressures. Most trade sex for economic or physical survival—such as out of necessity for safety, subsistence, housing, healthcare, or childcare—where other labor pathways may be blocked or insufficient to meet basic needs. Opinions vary greatly on where and how to draw the line between consent and coercion, between choice and exploitation.

This report strives to give voice to the different perspectives concerning adults in the sex industry. It critically examines the notion of "consenting adults" and expands our understanding of coercion. Research and data on adults engaged in commercial sex suggest that many were groomed and coerced into the sex industry as minors, and were controlled by third parties, experienced multiple traumas, and faced significant barriers to exiting "the life."[4] Many others, especially those already marginalized because of gender identity, race and ethnicity, immigration status, and abilities, are specifically targeted by exploiters and forced by poverty, survival needs, substance use disorder, or mental health conditions, to engage in prostitution.

Without comprehensive, accurate data we cannot understand the extent or demographics of human trafficking and sexual exploitation. Lack of data means lack of public awareness, and even where there is data, the databases (e.g., child welfare, law enforcement, courts, public health) may not speak to each other either within the state or between states. Thus, a child who has run away from foster care in Washington, may be trafficked in Las Vegas, and get picked up for theft in Arizona, and the child welfare, juvenile justice, and health care databases for each state may not know about the history in the other states. For adults in the sex industry, criminalization and marginalization compound the problems.[5]

[4] "The life" is a short-hand term many survivors use to describe their history of exploitation: "Some call it sex trafficking, commercial sexual exploitation, sex work, prostitution. But many survivors just call it the Life." THE LIFE STORY: MOMENTS OF CHANGE, https://thelifestory.org/assets/downloads/about/handouts/en/TLS_Handouts_TheLife.pdf.

[5] The sex industry is a criminalized industry. Adults who identify as sex workers are often not connected to services or other efforts to collect data. Moreover, among those who are sexually exploited, young adults and adults,

In Washington, there is little statewide data on the prevalence of commercial sex and commercial sexual exploitation.[6] However, a national study published in 2014 estimated that between 2003 and 2007, the commercial sex economy in Seattle alone doubled in size from $50.3 million to $112 million and was the fastest growing venue in the country.[7] In King County alone, it is estimated that about 500 youth are sold every night.[8] Commercially sexually exploited children and youth are overrepresented among those who are experiencing homelessness or who have run away, both nationally and in Washington. At the national level, data about missing and exploited children is reported to and collected by the National Center for Missing and Exploited Children (NCMEC) as authorized by Congress. Child welfare agencies are required to report children missing from care to NCMEC (and law enforcement) within 24 hours.[9] In 2020, of 29,800 reported cases of missing children, 26,500 (91%) were endangered runaways and one in six of them were likely victims of child sex trafficking.[10] In Washington State, based on the population of 13,000-15,000 homeless youth and young adults in Washington State who are surviving homelessness on their own, a 2019 report estimated that in 2018 the CSEC prevalence statewide ranged from 2,000 to 3,000.[11]

particularly boys, men, and LGBTQ+ people, are less likely to self-identify or be identified and treated as victims and survivors of sexual exploitation.

[6] To the extent that arrest and charging data sheds light on the scope of the problem in Washington State, it is discussed later in this report.

[7] URB. INST., ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR US CITIES 22 (2014), http://www.urban.org/sites/default/files/publication/22376/413047-estimating-the-size-and-structure-of-the-underground-commercial-sex-economy-in-eight-major-us-cities.pdf. In 2010, the National Institute of Justice funded the Urban Institute's Justice Policy Center to measure the size and structure of the underground commercial sex economy in eight major U.S. cities, including Seattle. *Id.* at 1.

[8] Hanna Scott, *Parents, Pay Attention – Backpage Is Out, Sugaring Is In*, MYNORTHWEST (May 15, 2021), https://mynorthwest.com/2900940/backpage-out-sugaring-in-parents-pay-attention.

[9] Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, 128 Stat. 1919 (2014).

[10] *Missing Children Statistics*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN (2021), https://www.missingkids.org/footer/media/keyfacts#missingchildrenstatistics.

[11] DEBRA BOYER, COMMERCIALLY SEXUALLY EXPLOITED CHILDREN IN SEATTLE/KING COUNTY 2019 UPDATE 17 (2019), https://static1.squarespace.com/static/5b71c32bec4eb7c684a77ff4/t/5dee96855704156dcb240b01/1575917194777/Commercially+Sexually+Exploited+Children+in+King+County+2019+Update+%28003%29.pdf. In 2019, Dr. Debra Boyer issued *Commercially Sexually Exploited Children in Seattle/King County 2019*, updating her 2008 report *Who Pays the Price? Assessment of Youth Involvement in Prostitution in Seattle*. *Id.* at 7. While informative, these studies are limited because only children and youth who accessed legal and social services in 2018 are included, so the vast majority of CSE youth are not included. The 2019 study was only able to evaluate sexually exploited minors and youth who had engaged with social and legal services in 2018. Nevertheless, Dr. Boyer was

The rise of online platforms has exacerbated the scope, size and nature of the commercial sex industry.[12] Prior to the 2018 passage of the Stop Enabling Sex Traffickers Act (SESTA) and Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), and before the shutdown of Backpage.com, the King County Prosecuting Attorney's Office identified at least ten websites (and there are likely many more) offering sex for sale in the greater Seattle area. According to King County Prosecuting Attorney's Office data from that time, Backpage.com alone (taken down in 2018 by the Department of Justice [DOJ]) featured an average of 36,897 sexual services ads in Seattle per month for May – September, 2016, with an average of 1,720 unique phone numbers per month in the Seattle escort section alone (out of specific sections for 12 cities across Washington State). In January 2016, authorities seized The Review Board, a local internet platform established to post reviews on sex acts and prostitutes. Its owner reported the site had 18,000 members.[13] Many adult sex workers and advocates assert that FOSTA-SESTA put their

able to conclude that service planning estimates should cover 500-700 youth 24 and under, and 300-400 for those under 18 in King County. *Id.* at 8.

[12] Prior to 2018, Backpage.com and other websites were posting ads selling sexually exploited children and adults for sexual acts. Backpage and others asserted that the Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (1996), codified as 47 U.S.C. §§ 230, 560, 56, (CDA), provided immunity from prosecution and from liability, since it was simply posting the ads. A number of lawsuits were filed across the country, including in Washington. In 2018, in response to public outrage and the lawsuits, Congress passed as a package the Stop Enabling Sex Traffickers Act (SESTA) and Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), Pub. L. No. 115-164, §4, 132 Stat. 1253 (2018), amending the CDA. It states that the CDA "was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims; (2) websites that promote and facilitate prostitution have been reckless in allowing the sale of sex trafficking victims and have done nothing to prevent the trafficking of children and victims of force, fraud, and coercion."

While FOSTA-SESTA has led to the shuttering of some websites and platforms that facilitated sex trafficking and commercial sexual exploitation, others have resumed or started, and many are now on the dark web. For example, in June 2020, a U.S. Attorney's Office in Texas shut down the website CityXGuide.com — a leading source of online advertisements for sex work and sex trafficking that users described as "taking over from where Backpage left off." The site was seized and its owner charged in a 28-count federal indictment. *See* Press Release, Erin Dooley, Office of the United States Attorney, N. Dist. of Tx., U.S. Attorney's Office Shuts Down Website Promoting Prostitution and Sex Trafficking, Indicts Owner (June 19, 2020), https://www.justice.gov/usao-ndtx/pr/us-attorney-s-office-shuts-down-website-promoting-prostitution-and-sex-trafficking.

[13] *See* Lynsi Burton, *Online Sex Forum Leader Gets 3 Years After 'Unprecedented' Prostitution Sweep*, SEATTLEPI (Dec. 6, 2018), https://www.seattlepi.com/local/crime/article/Online-sex-forum-leader-gets-3-years-after-13447512.php; Juju Chang & Jackie Jesko, *Inside the Fight to Take Down Online Prostitution Review Boards*, ABC NEWS (June 27, 2017), https://abcnews.go.com/US/inside-fight-online-prostitution-review-boards/story?id=48308991; Lynn Thompson, *Busted: How Police Brought Down a Tech-Savvy Prostitution Network in Bellevue*, SEATTLE TIMES (July 26, 2017), http://projects.seattletimes.com/2017/eastside-prostitution-bust.

lives and livelihood at risk by eliminating an online infrastructure they had come to depend on. They suggest that SESTA-FOSTA pushed people from online-based work with pre-screening and negotiations into riskier street-based work, exposed people to increased violence and exploitation by both clients and the police, and took away many sex workers' income, destabilizing their economic and housing security.[14] However, it is well documented that the online environment makes it much easier for those looking to sexually exploit minors and young adults. For example, in 2018, there were an estimated 1,971 to 2,475 buyers responding over a 24-hour period to Chat Bots (posing as children) run by Seattle Against Slavery.[15] Online platforms have made it easier to groom and recruit children and youth on gaming and social networking sites, and for families and others to abuse children and sell online access to the abuse.

The explosion of social networking, gaming, and cryptocurrencies has added an increasingly dangerous, hidden, and anonymous way for individuals and organized groups of predators to groom, recruit, stalk, and exploit children as young as six. According to federal and state law enforcement officials nationwide, organized groups of predators operate on every single gaming

[14] *See e.g.*, Liz Tung, FOSTA-SESTA Was Supposed to Thwart Sex Trafficking. Instead, It's Sparked a Movement WHYY (July 10, 2020), https://whyy.org/segments/fosta-sesta-was-supposed-to-thwart-sex-trafficking-instead-its-sparked-a-movement. Some urban areas have seen an increase in sex trafficking on the street. WASH. STATE DEP'T OF COM., OFF. OF CRIME VICTIMS ADVOC. & PUB. SAFETY, HUMAN TRAFFICKING LAWS AND INVESTIGATIONS 4 (2019), https://deptofcommerce.app.box.com/s/aocg76el1m0zydezrm1cuck3syhsl1bt. The ACLU cited research from two surveys of sex workers by sex worker organizations indicating FOSTA-SESTA had negative consequences on sex workers' safety, including having to take on riskier clients, receiving physical and/or verbal threats or being physically exploited, lacking a dependable screening mechanism and being more desperate for clients. ACLU, IS SEX WORK DECRIMINALIZATION THE ANSWER? WHAT THE RESEARCH TELLS US 6 (2020), https://www.aclu.org/report/sex-work-decriminalization-answer-what-research-tells-us. There have been reports that in 2019, the amount of sex work on Aurora Avenue in Seattle increased dramatically, driven, in part, by the shutdown of Backpage.com. David Kroman, *With Alternatives Stretched and Neighbors Angry, Seattle Police Return to Arresting Sex Workers*, CROSSCUT (Oct. 2, 2019), https://crosscut.com/2019/10/alternatives-stretched-and-neighbors-angry-seattle-police-return-arresting-sex-workers.

[15] BOYER, *supra* note 11, at 9.

site.[16] "'Sugaring' is another trend that poses a threat to children and young adults."[17] According to King County Senior Deputy Prosecuting Attorney Benjamin Gauen, "[s]ugaring is a concept where you are essentially signing up for some sort of relationship or construct where you have a sugar baby and a sugar daddy. The sugar daddy is the one with the resources and the power and the privilege, and they give things of value, which could be a trip or a dinner or cash or clothing or jewelry, whatever it is, to the sugar baby in exchange for something."[18] Sugar daddies are usually older men, and often target vulnerable young college and high school students. To be sure, "sugar daddies" have been around for a long time – but without the added dangers of the on-line and social media saturated environment. In this context, "[I]t's a new frontier of exploitation. It's marketed in a way where you're trying to sanitize the harms of exploitation or prostitution. And it's packaged in a way where folks think they're avoiding legal liability, when in fact, this is still exploitation. It's just got a creative marketing lingo to it."[19]

A local survivor, who became a "sugar baby" as a homeless 14-year-old in order to survive, explained: "It's not all hunky-dory, like, yes, I'm getting my tuition paid and they are paying for an apartment," explained the former sugar baby, who shared her story on the condition of anonymity. "I had experienced sexual abuse, you know, sex was desensitized, and it was kind of like, I get this has already been taken from me, like, at least let me monetize off of it. Like, I mean, you know, on my terms."[20] But "[w]hen you get down to the nitty gritty, it's also you have a lot of clients who will retaliate if you don't text them back fast enough…if you are not holding up

[16] The DOJ held a series of nationwide video discussions in March and April, 2020 in preparation for a DOJ report to congress under the PROTECT Our Children Act. Judge Mack participated. There was detailed discussion and widespread agreement among federal and state officials (FBI, local law enforcement, state and federal prosecutors, Homeland Security), victim advocates, as to the following: the biggest change in child sexual abuse materials in the last four years, particularly affecting law enforcement and victim resources, is that groups of offenders are targeting and grooming hundreds of thousands of children and youth on TikTok and other sites, then migrating to other sites, often on the dark web. Thorn (www.thorn.org) has been working with Microsoft to implement use of a tool to prevent grooming on gaming sites.
[17] Scott, *supra* note 8; *The Bitter Truth About Sugar Dating*, NAT'L CTR. ON SEXUAL EXPLOITATION (Feb. 2, 2020), https://endsexualexploitation.org/articles/the-bitter-truth-about-sugar-dating.
[18] Scott, *supra* note 8.
[19] *Id.*
[20] *Id.*

exactly like what the standard is in their eyes. Like they own you. And that is what they feel is that they own you because they are giving you this monetary thing."[21]

Due to the COVID-19 pandemic, 2020-21 has been particularly fraught with danger for children, youth, and marginalized communities, including those targeted for sexual exploitation. In pre-pandemic 2019, the Polaris Project, home of the national human trafficking hotline, saw a 20% increase in the number of victims and survivors who contacted the hotline directly about their own situations. In the first month after COVID-19 shelter-in-place orders in the spring of 2020, the number of crisis trafficking cases handled by the hotline increased by more than 40%.[22] NCMEC, mentioned above, also manages the national CyberTipline.[23] In pre-pandemic 2019, NCMEC received 16.9+ million cybertips,[24] and responded to more than 10,700 reports regarding possible child sex trafficking. In 2020, NCMEC's online enticement reports doubled compared to 2019; all CyberTipline reports increased 28% from 2019 to 2020.[25] With school closures, children and youth increased their online activities, often without supervision. Almost every child has a camera on their phone, and most children are comfortable performing on camera. This normalized behavior makes it easier to do things with and for peers, which becomes exploitable by offenders who pretend to be peers. Many parents and caregivers are unaware of security settings or the dangers of new smartphone applications where grooming and exploitation occur. The lack of caregiver knowledge, social isolation, and increased proximity to strangers online makes young people more vulnerable to online grooming and exploitation. The person seeking

[21] *Id.*
[22] Crisis cases are those where some assistance (shelter, transportation, or LE) is needed within 24 hours. These numbers include sex and labor trafficking of youth and adults.
[23] *CyberTipline*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN (2021), https://www.missingkids.org/gethelpnow/cybertipline. The CyberTipline deals with reports of suspected child sexual exploitation/abuse, usually internet-based abuse/exploitation.
[24] *CyberTipline* NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, https://www.missingkids.org/gethelpnow/cybertipline. The 2019 reports to the CyberTipline included 69.1 million files, with 27,788,328 images, 41,280,816 videos, and 89,053 other files. Kirollos Barsoum, *Protecting America's Families Since 1984*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN (Dec. 9, 2020), https://www.missingkids.org/blog/2020/protecting-our-nations-children-since-1984.
[25] Brenna O'Donnell, *COVID-19 and Missing & Exploited Children*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN (APR. 30, 2021), https://www.missingkids.org/blog/2020/COVID-19-and-missing-and-exploited-children. NCMEC defines enticement as "online enticement of children for sexual acts." *The Issues: Online Enticement*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN (2021), https://www.missingkids.org/theissues/onlineenticement.

to victimize children is no longer outside the schoolyard, he is on a phone in the child's bedroom or bathroom.

B. Vulnerability to exploitation and harm caused

Sexual exploitation is driven by two powerful market forces: the demand for sex from women and children by men; and economic marginalization that particularly affects LGBTQ+ people, people with disabilities, and Indigenous and other marginalized communities.

It is undisputed that a high percentage (estimates range from about 70% to over 90%) of people who are trafficked experienced physical and/or sexual violence prior to being victims of sexual exploitation. According to the National Advisory Committee on the Sex Trafficking of Children and Youth in the United States:

> The sex trafficking of children and youth is one of the most complex and least understood forms of child abuse. Individuals who cause or induce children and youth to engage in commercial sex take advantage of societal, community, relationship, and individual vulnerabilities for personal or monetary gain. Children and youth who have experienced trafficking often experience significant mental, physical, and sexual trauma due to their exploitation. A child's victimization can last for days or years, but the consequences can be severe and prolonged regardless of the duration of the trafficking experience. No child is immune to the crime of sex trafficking. However, research shows that lesbian, gay, bisexual, transgender, queer (or questioning), Two-Spirit, and other (LGBTQ2S+) children and Black, Latinx, and Native American children are disproportionately victimized by this crime. While research suggests that boys are under-identified among this victim population, the majority of studies to date have found girls represent a significantly larger percentage of identified victims. Additional research is needed to understand the impact of these demographic characteristics on the sex trafficking of children and youth. However, as states move forward in addressing this issue, they should seek to assess and mitigate systems, structures, and policies that may contribute to and sustain the

> disproportionate victimization of these populations. As an issue that affects the health, safety, and well-being of individuals, families, communities, and societies, it is appropriate to consider human trafficking as a major public health problem.[26]

The voices and experiences of victims and survivors underscore complex vulnerabilities and intersectional systemic issues for those from marginalized communities, from birth into inequality, adverse childhood experiences and underlying trauma, to failed social and institutional safety nets and systemic discrimination. As Ne'cole, a survivor and service provider, says: "So many factors are at play. Early sexual abuse, generational trauma, economic status... Just being a person of color—there's an X on your back."[27] Racial disproportionality in rates of sexual exploitation is discussed in more detail in subsection C below.

Research shows that nearly one in four girls and one in 13 boys experience sexual abuse in childhood.[28] The number for boys may be as high as one in six.[29] According to the Centers for Disease Control and Prevention (CDC), 91% of child sexual abuse is perpetrated by someone whom the child or the child's family knows.[30] Individual, family, and community factors significantly increase the risk of vulnerability of children and youth, adding to issues related to adolescent brain development and hormonal changes. Children and youth with prior sexual or physical abuse or neglect; those from families with substance abuse, family violence, or behavioral health issues; those who are experiencing homelessness or have run away; and those who have been kicked out of their homes, are at "especially high risk."[31]

[26] NAT'L ADVISORY COMM. ON THE SEX TRAFFICKING OF CHILDREN & YOUTH IN THE U.S., BEST PRACTICES AND RECOMMENDATIONS FOR STATES 7-8 (2020), https://www.acf.hhs.gov/sites/default/files/documents/otip/nac_report_2020.pdf.
[27] THE LIFE STORY, https://www.thelifestory.org.
[28] *Preventing Child Sexual Abuse*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 30, 2021), https://www.cdc.gov/violenceprevention/childsexualabuse/fastfact.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Fchildabuseandneglect%2Fchildsexualabuse.html.
[29] 1IN6, INC., THE 1 IN 6 STATISTIC (2016), https://www.acesdv.org/wp-content/uploads/2014/06/1-in-6-factsheet.pdf; CATHERINE TOWNSEND, ESTIMATING A CHILD SEXUAL ABUSE PREVALENCE RATE FOR PRACTITIONERS: A REVIEW OF CHILD SEXUAL ABUSE PREVALENCE STUDIES (2016), http://www.d2l.org/wp-content/uploads/2017/02/PREVALENCE-RATE-WHITE-PAPER-D2L.pdf.
[30] *What Is Child Sexual Abuse?*, CTRS. FOR DISEASE CONTROL & PREVENTION (2021), https://www.cdc.gov/violenceprevention/childsexualabuse/fastfact.html.
[31] Jordan Greenbaum & James E Crawford-Jakubiak, *Child Sex Trafficking and Commercial Sexual Exploitation: Health Care Needs of Victims*, 135 PEDIATRICS 566 (2015).

It is no surprise that disability, particularly intellectual disability, is a risk factor for CSE for both children and adults. According to Tina Frundt, founder and executive director of Courtney's House in Washington, D.C., 32% of the more than 70 trafficked minors in her program are on the autism spectrum.

According to the Administration for Children and Families Child Welfare Information Gateway, "children with disabilities are at least three times more likely to be abused or neglected than their peers without disabilities, and they are more likely to be seriously injured or harmed by maltreatment." [32] The risk of maltreatment may vary depending on the particular kind of disability. While this data does not relate specifically to sexual exploitation, we know that child abuse puts children at higher risk for future commercial sexual exploitation. The risk factors for children with disabilities may be societal (isolation, discrimination, lack of support); disabilities can affect family dynamics; and children and adults with disabilities are more vulnerable to coercion and manipulation.[33] "Children with disabilities may have a limited ability to protect themselves or to understand what maltreatment is or whether they are experiencing it."[34] In addition, "children with disabilities who rely on caregivers for their daily needs may experience a lack of independence and privacy and not know when the behavior is inappropriate."[35] A study of 54 juvenile sex trafficking cases in Dade County, Florida, found that nearly 30% of those juveniles had intellectual disabilities.[36]

Other parts of this chapter show that youth with full mental capacity may not understand what abuse and exploitation are. It follows that those with mental disabilities may not understand what is happening to them, are less likely to be able to leave caregivers, may be less able to communicate, and if they disclose, may be disbelieved due to their disability. Just as sexual

[32] CHILD WELFARE INFO. GATEWAY, THE RISK AND PREVENTION OF MALTREATMENT OF CHILDREN WITH Disabilities 1 (2018), https://www.childwelfare.gov/pubPDFs/focus.pdf (internal citations omitted).
[33] *Id.* at 3 (internal citations omitted).
[34] *Id.* at 4 (internal citations omitted).
[35] *Id. See also* Joan A. Reid, *Sex Trafficking of Girls With Intellectual Disabilities: An Exploratory Mixed Methods Study*, 30 SEXUAL ABUSE 107 (2018).
[36] *id*.

exploitation subjects people to shame and stigma, so do physical, mental, and cognitive disabilities, compounding the effects of both.

There is a growing, though still small, body of research on familial trafficking and family involvement in commercial sexual exploitation. The Counter-Trafficking Data Collaborative (CTDC) is a new data portal initiated by the UN Migration Agency, in partnership with the Polaris Project. The CTDC reports that almost half of child human trafficking cases began with some family member involvement.[37] The most comprehensive U.S. study to date found "high rates of family members trafficking children for illicit drugs; high severity of abuse using the Sexual Abuse Severity Score, with higher severity of abuse for children living in rural communities," among other findings.[38] More than half of the children in the sample had attempted suicide in their lifetime. Eighty-two percent of familial traffickers traded their children in order to get drugs, and in all cases the caregiver used threats, bribes, intimidation, physical force, parental authority, or weapons to recruit and maintain control. The most common motivation of familial traffickers was financial gain, and for some, the primary motivation was money for drugs. These children often regularly attend school, may get good grades, participate in extracurricular activities, and are cautious about what they tell adults. "When trauma emanates from within the family children experience a crisis of loyalty and organize their behavior to survive within their families."[39]

Judge Robert Lung is a Colorado judge and national voice in efforts to provide more services for boys. He serves on the National Advisory Committee on Sex Trafficking of Children and Youth and speaks nationally about familial sex trafficking, commercial sexual exploitation of boys, trauma, and resilience. Judge Lung was groomed (abused) by his physician father from the age of two to three years and trafficked by his father as part of a pedophile ring until he was about 12. He

[37] COUNTER-TRAFFICKING DATA COLLABORATIVE, FAMILY MEMBERS ARE INVOLVED IN NEARLY HALF OF CHILD TRAFFICKING CASES 1, https://www.iom.int/sites/default/files/our_work/DMM/MAD/Counter-trafficking%20Data%20Brief%20081217.pdf.
[38] Ginny Sprang & Jennifer Cole, *Familial Sex Trafficking of Minors: Trafficking Conditions, Clinical Presentations, and System Involvement*, 33 J. FAM. VIOLENCE 185, 185 (2018).
[39] *Id.* at 187 (quoting B. A. van der Kolk, *Developmental Trauma Disorder: Toward a Rational Diagnosis for Children with Complex Trauma Histories*, 35 PSYCH. ANNALS, 401, 406 (2005)).

corroborates the research about how children who are trafficked by their families adapt in order to survive.[40]

Adults who are involved in commercial sex often have histories of childhood abuse and exploitation. A Canadian controlled study of 45 women formerly involved in prostitution found 73% had been sexually abused in childhood, compared to 29% of a control group in a random population survey.[41] It was modeled on a 1982 study of 200 women engaged in prostitution in the San Francisco area in the United States.[42]

Sexually exploited children and adults share many common characteristics both in the pathways leading into the sex industry and the barriers to exiting. Prostitution-involved adults likely started in their youth, average age of entry being between 12-15. Research and data on youth ages 18-24, as well as on many adults in commercial sex work, suggests that many adults in the sex industry entered as minors, experience multiple traumas, and face many barriers to exiting.[43] Traditionally, "juvenile prostitution" and commercial sexual exploitation have evoked images of force and abusive male dominance by third party exploiters and clients alike. While this is true for some, it does not account for the social and economic factors that funnel children and youth – particularly teenagers age 15 and older – into survival sex.

One study of over 600 active sex workers and pimps from 2008-2013 found minors were almost twice as likely as adults to "self-initiate" into the sex industry due to the social and economic

[40] Steven Mayer, *Expert Discusses Complexities of Human Trafficking in Virtual Forum*, BAKERSFIELD CALIFORNIAN (Feb. 25, 2021), https://www.bakersfield.com/news/expert-discusses-complexities-of-human-trafficking-in-virtual-forum/article_d60a6c8e-7706-11eb-a1a5-9f4675de2b7f.html. https://www.bakersfield.com/news/expert-discusses-complexities-of-human-trafficking-in-virtual-forum/article_d60a6c8e-7706-11eb-a1a5-9f4675de2b7f.html

[41] Chris Bagley & Loretta Young, *Juvenile Prostitution and Child Sexual Abuse*: *A Controlled Study*, 6 CAN. J. CMTY. MENTAL HEALTH 5, 5-23 (1987).

[42] *See* Mimi H. Silbert & Ayala M. Pines, *Entrance Into Prostitution*, 13 YOUTH & SOC'Y 471 (1982).

[43] *See infra*. *See also* ENDING EXPLOITATION COLLABORATIVE, https://www.endingexploitation.com/about-ending-exploitation-collaborative.html. The "Ending Exploitation Collaborative" is a partnership including the Washington Attorney General's Office, King County, the Seattle City Attorney's Office, the survivors-led Organization for Prostitution Survivors (OPS), Businesses Ending Slavery & Trafficking (BEST), and Seattle Against Slavery.

environments that required selling themselves to survive.[44] Lack of employment that allows financial stability, lack of access to education, and lack of financially accessible or transitional housing push CSE youth into the sex industry. In the sex industry, they develop complex peer networks outside of "pimps" and "traffickers."[45] In two studies, 86% to 93% of youth wanted to leave sex work, and their pimp/trafficker wasn't the barrier to leaving.[46] Rather, barriers to leaving were similar to the social and environmental factors that resulted in their entrance into commercial sexual exploitation. Those barriers often remain into adulthood and may increase for adults in the sex industry.

A disproportionate number of Black, Indigenous, and youth of color; LGBTQ+ youth; and particularly LGBTQ+ youth of color, are forced by their circumstances to exchange sex for necessities. LGBTQ+ youth seem to be some of the most targeted for exploitation due to a lack of family support and social safety nets, and biases against LGBTQ+ identities.[47] Lack of acceptance and discrimination against LGBTQ+ youth include religious persecution, abuse in their homes, communities and schools, and lack of access to health care, often resulting in homelessness. In 2013, LGBTQ+ youth comprised 20-40% of the more than 1.6 million young people who experienced homelessness.[48] This speaks to the disproportionate number of young people

[44] ANTHONY MARCUS ET AL., NAT'L INST. OF JUST., CONFLICT AND AGENCY AMONG SEX WORKERS AND PIMPS: A CLOSER LOOK AT DOMESTIC MINOR SEX TRAFFICKING (2014), https://nij.ojp.gov/library/publications/conflict-and-agency-among-sex-workers-and-pimps-closer-look-domestic-minor-sex; The 2021 Gender Justice Study uses the race and ethnicity terms used in the underlying sources when citing data in order to ensure we are presenting the data accurately and in alignment with the how the individuals self-identified. When talking more broadly about the body of literature we strive to use the most respectful terms. See Section V of the full report ("2021 Gender Justice Study Terminology, Methods, and Limitations") for a more detailed explanation of terminology used throughout the report.

[45] MEREDITH DANK ET AL., URB. INST., SURVIVING THE STREETS OF NEW YORK: EXPERIENCES OF LGBTQ YOUTH, YMSM, AND YWSW ENGAGED IN SURVIVAL SEX 79 (2015), https://www.urban.org/sites/default/files/publication/42186/2000119-Surviving-the-Streets-of-New-York.pdf. *See also* Jasmine Phillips, *Black Girls and the (Im)Possibilities of a Victim Trope: The Intersectional Failures of Legal and Advocacy Interventions in the Commercial Sexual Exploitation of Minors in the United States*, 62 UCLA L. Rev. 1642, 1646 (2015). *See also* Brendan M. Conner, *In Loco Aequitatis: The Dangers of Safe Harbor Laws for Youth in the Sex Trade*, 12 STAN. J. C.R. & C.L. 43 (2016).

[46] DANK ET AL., *supra* note 45, at 60-62: "Almost all youth wanted to stop trading sex: three- quarters of respondents wanted to stop at some point (67%), while another 21 percent said they had already recently stopped." *See also* Phillips, *supra* note 45, at 1665.

[47] CTR. FOR CHILDREN & YOUTH JUST., THE IMPACT OF COVID-19 ON COMMERCIALLY SEXUALLY EXPLOITED CHILDREN IN WASHINGTON (2021) (on file with authors).

[48] MARY CUNNINGHAM ET AL., URB. INST., HOMELESS LGBTQ YOUTH 1 (2014),

from the LGBTQ+ community who have no supportive housing and experience intersectional marginalization in their families, religions, and communities. As a consequence, LGBTQ+ youth engage in the illicit economy in order to survive.

Abundant literature documents the trauma experienced by individuals in the sex industry. Researchers studied 30 years of records of 1,969 women known to have been involved in sex work in Colorado Springs, CO, including health records, death records, and law enforcement records.[49] The data are harrowing. The average age of death was 34, with the leading causes of death being homicide (19%) drug ingestion (18%), accidents (12%) and alcohol related causes (9%).[50] Of 21 murders, nine occurred within three years of the first observed sex work, all nine victims were actively in the sex industry at the time of their deaths, eight of whom were killed while soliciting.[51] Although murder accounted for 19% of all confirmed deaths, it accounted for half of the deaths in the active sub cohort.[52] "[T]he vast majority of murdered women in our sample were killed as a direct consequence of prostitution."[53] The Colorado study noted that buyers perpetrate a large proportion of the lethal and nonlethal violence experienced and cited a study from Canada with similar findings. The Colorado study indicated that its research probably reflects the circumstances of nearly all people involved in the sex industry in the United States and other countries, and is consistent with studies on murder rates in Canada and the UK. The researchers concluded "Women engaged in prostitution face the most dangerous occupational environment in the United States."[54]

The COVID-19 pandemic has exacerbated the vulnerability of, and harm to, sexually exploited youth and adults in Washington State. Survival sex is high due to the economic impact of the COVID-19 pandemic.[55] Actual (as opposed to fictional) CSAM victims in charged cases in King

https://www.urban.org/sites/default/files/publication/22876/413209-Homeless-LGBTQ-Youth.PDF.

[49] John J. Potterat et al., *Mortality in a Long-Term Open Cohort of Prostitute Women*, 159 AM. J. EPIDEMIOLOGY 778, 778 (2004).

[50] *Id.* at 781.

[51] *Id.*

[52] *Id.* at 782.

[53] *Id.*

[54] *Id.,* at 784.

[55] *Episode 2: Impacts of COVID-19 on CSE Survivors in King County*, OPS TALKS, http://seattleops.org/ops-talks/.

County rose 162.5% in 2020 over 2019.[56] Young people (up to age 24) are particularly at risk due to unmet basic needs worsened by the pandemic, increasing the trading of sex for housing, drugs, food, places to shower, and other basic needs.[57] Risky behavior among CSE youth has also increased, including substance use, foregoing condoms, staying with unsafe people, and sharing personal contact information on public forums and social media.[58] Internet-based sexual exploitation dramatically increased, with young people turning to dating apps, sugaring sites, and social media as tools to meet basic needs.[59] There is heightened concern about increased familial trafficking in homes where adults lost jobs and income sources.[60]

Similarly, data collected by Dr. Debra Boyer through interviews with survivors, both staff and those seeking services, at three agencies serving commercially sexually exploited individuals in Seattle/King County, show that women are experiencing more physical and sexual violence from sex buyers and that women who have exited sex work are facing challenges to their stability and security.[61] Many women who may have worked indoors are now forced to the street: as many as 50% of women on the Aurora "track" were new to the area.[62] Competition and more dangerous buyers make this environment more aggressive, violent, and unsafe.[63] Loss of income, food insecurity, and housing instability remain core issues. Many are unsheltered due to diminished income and lack of access to motel rooms.[64] Many women who previously exited sex work lost their current jobs and income and were in danger of losing their housing, so returned to sex work.[65] Young people who felt unsafe at home or who were groomed online were increasingly on the street or living outside the home.

[56] BENJAMIN GAUEN, KING COUNTY. PROSECUTING ATT'YS OFF., KING COUNTY SEXUAL EXPLOITATION CASES: THE DATA BEHIND THE CHARGES 2020 UPDATE (2021), available at KING COUNTY. CSEC TASK FORCE, https://www.kingcountycsec.org/data.
[57] CTR. FOR CHILDREN & YOUTH JUST., THE IMPACT OF COVID-19 ON COMMERCIALLY SEXUALLY EXPLOITED CHILDREN IN WASHINGTON (2021).
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] Debra K. Boyer, *Prostitution During the Pandemic: Findings Show Need for Nordic Model*, 5 DIGNITY 1, 7 (2020).
[62] *Id.* at 4.
[63] *Id.*
[64] *Id.*
[65] *Id.* at 4-5.

Trauma, and particularly sexual exploitation of youth and adults engender enormous social and economic costs (medical, mental health, housing, criminal justice involvement, and substance abuse treatment, among others). Those social and economic impacts should inform the search for solutions.

C. Prevalence and disparities among targeted and marginalized populations

Nationally and in Washington State, poverty, racism, and gender inequality significantly increase vulnerability to commercial sexual exploitation.[66] Exploiters target minors and youth who are vulnerable due to poverty and who belong to marginalized groups.[67] Gender-based discrimination and violence increase the vulnerability of women, girls, and transgender youth and adults to CSE. Sex buyers are almost exclusively men and those who buy frequently are "much more likely than other men to make $100,000 or more annually."[68] Although most of those who are subject to CSE are women and girls, several studies have found that among youth experiencing homelessness, the proportion of boys and girls who disclose sexual exploitation is similar. Even when men, boys, and transgender people are exploited, the buyers are men. As noted earlier, age, prior experiences of physical or sexual abuse, and alienation from family increase vulnerability and risk. People experiencing homelessness, or who have been "kicked out" of their homes, people who are socially marginalized and criminalized, youth who identify as LGBTQ+, and Black, Indigenous, and people of color are particularly at risk.[69] The following subsections focus on data about gender, sexuality, age, and race or ethnicity.

[66] *See generally* WASH. STATE DEP'T OF COM., STATEWIDE COORDINATING COMMITTEE ON SEX TRAFFICKING: REPORT ON COMMITTEE ACTIVITIES AND PLAN TO ADDRESS SEX TRAFFICKING (2014), http://www.commerce.wa.gov/wp-content/uploads/2016/03/Commerce-Sex-Trafficking-Final-2014.pdf.
[67] While these groups have historically been targeted and still are, unfettered online access makes every child vulnerable to exploitation.
[68] DEMAND ABOLITION, WHO BUYS SEX? UNDERSTANDING AND DISRUPTING ILLICIT MARKET DEMAND 4 (2018), https://www.demandabolition.org/wp-content/uploads/2019/07/Demand-Buyer-Report-July-2019.pdf.
[69] *Id.*

1. Gender and sexuality

It is widely believed that girls and women constitute the majority of those sexually exploited. Available Washington State data seems to support that. However, the proportion of sexually exploited boys and men may be much higher than most people believe. Data about non-binary and transgender individuals is even scarcer, since often data is only presented in binary male-female genders. In a 2012 analysis of New York City cases, identified victims were primarily women of color (young Black and Hispanic, older Asian), although a growing number of transgender women and gay male victims were being identified.[70]

Some recent research indicates that there are likely similar numbers of boys and girls involved in child sex trafficking.[71] A national study in 2016 found that 36% of youth ages 13 through 24 involved in the study were assigned male at birth, 60% were assigned female at birth, four percent were transgender female, and less than one percent were transgender male.[72] A 2008 study on CSE youth in New York City estimated that of the total CSE population age 18 and under in 2005 and 2006: an estimated 53.5% were male, 42% were female, and 4.5% were transgender male and female (though the report authors emphasized that this was likely an underestimate for transgender youth).[73] Another New York City study of survival sex among LGBTQ+ youth, young men who have sex with men, and young women who have sex with women, found that 47% of the study sample identified as male, 36% as female, 16% as transgender, and three percent as any other gender (i.e., androgynous, femme, non-binary, and genderless).[74] The Cole and Sprang study of familial trafficking cited above found 41.9% of familial trafficking victims

[70] *See* Toko Serita, *In Our Own Backyards: The Need For a Coordinated Judicial Response to Human Trafficking*, 36 N.Y.U. REV. L. & SOC. CHANGE 635 (2012).
[71] OFF. OF JUV. JUST. & DELINQUENCY PREVENTION, COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN/SEX TRAFFICKING 3 (2014), https://www.ojjdp.gov/mpg/litreviews/CSECSexTrafficking.pdf.
[72] RACHEL SWANER ET AL., CTR. FOR CT. INNOVATION, YOUTH INVOLVEMENT IN THE SEX TRADE: A NATIONAL STUDY 35 (2016), https://www.courtinnovation.org/sites/default/files/documents/Youth%20Involvement%20in%20the%20Sex%20Trade_3.pdf.
[73] RIC CURTIS ET AL., CTR. FOR CT. INNOVATION, COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN NEW YORK CITY, VOLUME ONE, THE CSEC POPULATION IN NEW YORK CITY: SIZE, CHARACTERISTICS, AND NEEDS 34 (2008), https://www.ojp.gov/pdffiles1/nij/grants/225083.pdf;
[74] DANK ET AL., *supra* note 45, at 13.

were boys.[75] Other research supports that the total percentage of CSE youth who are boys likely falls in this range.[76]

Washington State data indicates that sexually exploited children and youth are mostly female, although male victims are likely significantly undercounted due to underscreening. Similarly, statewide data show that sexually exploited adults are mostly female, though adult male victims may likewise be undercounted due to underscreening. National Human Trafficking Hotline data from Washington indicates that a large proportion of those accessing the Hotline identify as female (Table 1). That is consistent with the knowledge that males are less likely to disclose.

[75] Sprang & Cole, *supra* note 38, at 187. All data were extracted from clinical records so it is not clear if this is self-identified gender or sex assigned at birth. The authors indicate that 58.1% of the sample was female but do not clarify if the remaining part of the sample was male or another gender.
[76] OFF. OF JUV. JUST. & DELINQUENCY PREVENTION, *supra* note 71, at 3.

Table 1. National Human Trafficking Hotline Data,[77] Reported Cases & Victim Demographics, Washington State, 2014-2019

Reported Cases & Victim Demographics	Total Reported Cases*	Adults	Minors	Female	Male	Transgender and Gender Non-Binary	U.S. Citizens/ Lawful Permanent Residents	Foreign Nationals
2019	272	183	45	210	43	7	25	40
2018	228	118	44	149	24	--	33	17
2017	167	111	37	136	23	< 3	46	26
2016	170	121	58	140	27	< 3	49	29
2015	135	90	33	121	11	< 3	49	23
2014	122	84	37	104	12	< 3	42	22

Footnotes for Table 1.

*The total reported cases encompass sex trafficking, labor trafficking, sex and labor cases, and unspecified cases. Of these, the majority of cases involve sex trafficking, with labor trafficking-only cases representing 10-15% of the total. Not all callers provide demographic information so numbers may not add up to the total number of reported cases.

Source: Adapted from National Human Trafficking Hotline, Hotline Statistics (Jan. 8, 2021), https://humantraffickinghotline.org/states

[77] National Human Trafficking Hotline (NHTH) statistics "are based on aggregated information learned through signals – phone calls, texts, online chats, emails, and online tip reports – received by the Trafficking Hotline, but does not define the totality of human trafficking or of a trafficking network in any given area." *Hotline Statistics*, NAT'L HUM. TRAFFICKING HOTLINE, https://humantraffickinghotline.org/states.

Seattle/King County data provided by the King County Prosecuting Attorney's Office shows the breakdown by gender in charges for commercial sexual exploitation of minors (Table 2):[78]

Table 2. King County CSEC[79] Charges by Gender, 2018-2020

CSEC Charges	2018 (N=38)	2019 (N=42)	2020 (N=40)
Female Victim	100%	100%	82%
Male Victim	0%	0%	18%
Female Defendant	--	5%*	0%
Male Defendant	--	95%	100%

Footnotes for Table 2.

* Female defendant charged with promoting CSAM

Source: KING COUNTY SEXUAL EXPLOITATION CASES: THE DATA BEHIND THE CHARGES 2018 & 2019 UPDATE, and 2020 UPDATE. data and slides provided by Benjamin Gauen, Senior Deputy Prosecuting Attorney, King County Prosecutor Office, and available at https://www.kingcountycsec.org/data

Dr. Boyer's King County-area study of CSEC who had accessed legal and social services found that 85% of the study population were identified as female in their CSEC case file (Table 3). Five percent and three percent of the study population were identified as "transgender" and "intersex and other" respectively.[80] While there is a lack of data (or even reliable estimates) on the percent of the youth or adult populations who identify as transgender or intersex in King County or Washington State, Dr. Boyer's data suggest that these populations are also disproportionality represented among CSEC.

[78] BENJAMIN GAUEN, KING COUNTY PROSECUTING ATTY'S OFF., KING COUNTY SEXUAL EXPLOITATION CASES: THE DATA BEHIND THE CHARGES 2018 & 2019 UPDATE (2019), and 2020 UPDATE (2021), data and slides provided by Benjamin Gauen, Senior Deputy Prosecuting Attorney at King County Prosecuting Attorney's Office and available at KING COUNTY. CSEC TASK FORCE, https://www.kingcountycsec.org/data.

[79] Includes charges for CSAM and Promoting CSAM (including Attempted CSAM and Attempted Promoting CSAM), and, for 2020, Human Trafficking in the 2nd Degree (involving minors).

[80] BOYER, *supra* note 11at 26.

Table 3. Gender Distribution of CSEC within Seattle/King County Study Sample, 2018 Data (Boyer, 2020)

Gender (N=172)	Percent (N)
Female	85% (146)
Male	7% (12)
Transgender	5% (8)
Intersex and Other	3% (6)

Footnotes for Table 3.

Notes: The study author notes that this is likely an undercount of all CSEC, with particular undercounting for male, transgender, and intersex and other youth. It is not clear from the source if gender was self-identified.

Source: Adapted from information available from Debra Boyer, Commercially Sexually Exploited Children in Seattle/King County 2019 Update (2020).

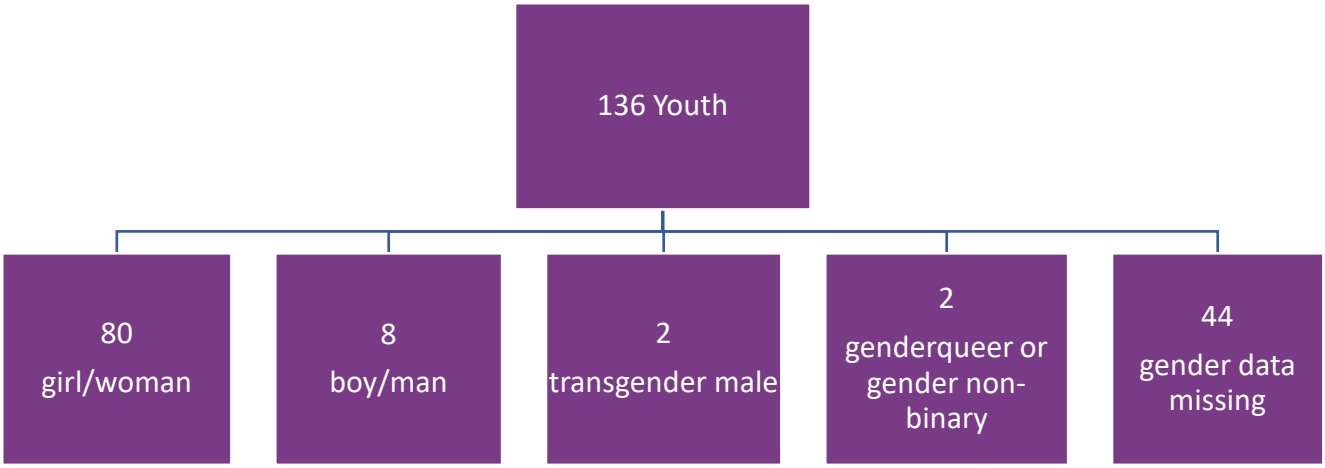
Dr. Boyer also found that of the 172 CSE in her study, 69% had been sexually abused prior to being sexually exploited, 55% had experienced addiction, 80% had mental health issues, and 90% had experienced trauma/PTSD. Most of the CSEC had run away, were experiencing homelessness, and/or were involved with foster care.[81]

2020 referral data from service providers in Skagit, Pierce and, Benton/Franklin Counties suggests patterns similar to the pattern in Seattle/King County: of 136 youth confirmed or highly suspected to be CSEC, 122 were assigned female sex at birth and 14 were assigned male sex at birth. The data on gender-identity shows a more nuanced picture (see Figure 1). In addition, of the 136

[81] *Id.* at 8. *See also* "Chapter 9: Juvenile Justice and Gendered and Racialized Disparities."

participants, 36 identified as straight, six as bisexual, one as gay or lesbian, and information for 91 participants was not collected.[82]

Figure 1. Self-Identified Gender of Youth Confirmed or Highly Suspected to be CSEC from Service Providers in Skagit, Pierce, and Benton/Franklin Counties, 2020 Referral Data



Source: CTR. FOR CHILDREN & YOUTH JUSTICE., 2020 CSEC REFERRAL DATA REPORT (2021) (on file with authors).

This data relies entirely on people who are accessing services and resources, so it is difficult to determine how accurately it reflects the population impacted by sexual exploitation. Dr. Michael Pullmann took a different approach, identifying CSEC within the child welfare system, as part of an outcomes evaluation pursuant to a five-year federal grant. Dr. Pullmann analyzed child welfare and juvenile justice records in the Department of Children, Youth & Families (DCYF) Regions 3 and 4, which includes King, Snohomish, Skagit, Whatcom, San Juan, and Island Counties. He concluded 89.2% of the 83 state-dependent youth who were confirmed or highly suspected of commercial sexual exploitation were female. These youth had many referrals to child welfare, frequent living situation changes, and frequent juvenile detention episodes. About 87% of the youth ran away from child welfare placement at least once; of those who ran away, the average

[82] CTR. FOR CHILDREN & YOUTH JUSTICE., 2020 CSEC REFERRAL DATA REPORT (2021) (on file with authors). It should be noted that these three counties encompass only 18% of the state's population.

number of runaway events was just under nine; and runaway episodes comprised nearly 19% of days CSE youth were in the care of child welfare.[83]

Washington data is similar to that from other states. Hawaii Child and Family Service (Hawaii's largest family-centered nonprofit) participated in a study with Arizona State University. Of 363 people who were getting services from the agency and completed the survey, 26.7% had sex trafficking experiences. Of the respondents who reported sex trafficking experiences, 75% were female, 23% male, one percent transgender, and one percent nonconforming; 64 % of those trafficked identified as all or some native Hawaiian, 23% were children when first trafficked, and 25% were first trafficked by a family member. Where trafficking began as a minor, the average age of first trafficking was 11.3 years of age.[84]

Increasing numbers of male victims of commercial sexual exploitation are being identified, but they are still mostly "invisible" in data, referrals, training, etc. For example, the King County CSEC Task Force shares data on referral numbers and sources provided by the Bridge Collaborative. In 2014, with the hiring of a new DCYF CSEC liaison, the Task Force began its "And boys, too" training and asked the Collaborative to break out its data by gender. The Task Force generally agrees with nationally representative studies suggesting that about half of trafficked youth are male identified, and lower numbers in King County are due to service providers and other systems not identifying boys.[85] It is notable that when "And Boys Too" training for service providers and others began in 2014, identification of boys increased significantly. In April of 2014, of youth referred to the Bridge Collaborative, four percent identified as males. By September 2015 the number of boys referred had doubled to eight percent, and by March 2016 it had tripled to 13% of youth referred.

[83] *See* Michael D. Pullmann et al., *Residential Instability, Running Away, and Juvenile Detention Characterizes Commercially Sexually Exploited Youth Involved in Washington State's Child Welfare System*, 102 CHILD ABUSE NEGLECT 1 (2020).
[84] DOMINQUE ROE-SEPOWITZ & KHARA JABOLA-CAROLUS, RESEARCH REPORT - SEX TRAFFICKING IN HAWAI'I: Part III 22 (2020), https://hoolanapua.org/wp-content/uploads/2020/06/Final-Report-Sex-Trafficking-in-Hawaii-Part-III-01092020.pdf.
[85] Information provided by Kelly Mangiaracina, Task Force Coordinator for the King County Task Force on Commercially Sexually Exploited Children (CSEC) (Apr. 7, 2017 & June 18, 2021).

2020 data from the King County Prosecuting Attorney's Office shows an increase in boy victims identified through law enforcement investigations. Even then, the number is three which is very low, yet a 300% increase compared to prior years.[86]

In an effort to improve data collection and better identify CSEC male victims, the National Center for Missing and Exploited Children studied 565 missing incident reports of males who were recovered endangered runaways and likely CSEC victims between 2013-2017.[87] Half (50%) of those recovered males were white, 24% were Black, and 14% were biracial.[88] Of these 11-17 year old endangered runaways, 37% ran away on at least two prior occasions between 2013-2017 and the majority (86%) ran away while in the care of Social Services.[89] Already high risk and in unsafe situations, almost all (98%) CSEC males suffered from drug and/or alcohol use, behavioral health diagnoses, and suicidal and self-harm tendencies.[90] Of the missing incident reports involving male child sex trafficking victims, NCMEC found that 21% identified as transgender girls.[91]

There is broad agreement that the number of male CSE victims is under-reported.[92] There are a myriad of reasons why this may be so. Many victims are never reported missing or are exploited at home, school, or other places that are part of their daily lives.[93] In 2013 ECPAT USA examined available research about CSE Boys (CSEB) and services available to them, and found the scope of CSEB is vastly under reported. Most researchers who have studied boys conclude that CSEB are not identified, screened, or served due to shame and stigma about being gay or perceived as gay, and are thus not likely to self-report. Boys are often unidentified because of a lack of awareness of male CSEC victimization by law enforcement and social services. There is limited outreach by social services to areas known for male sex work, and the belief that boys are not generally

[86] BENJAMIN GAUEN, KING COUNTY. PROSECUTING ATT'YS OFF., KING COUNTY SEXUAL EXPLOITATION CASES: THE DATA BEHIND THE CHARGES 2020 UPDATE (2021), available at KING COUNTY. CSEC TASK FORCE, https://www.kingcountycsec.org/data.
[87] MISSINGKIDS.ORG, MISSING MALE VICTIMS OF CHILD SEX TRAFFICKING 1 (2018), https://www.missingkids.org/content/dam/missingkids/pdfs/ncmec-analysis/Missing%20Male%20Victims%20of%20Child%20Sex%20Trafficking_EXTERNAL.PDF.
[88] *Id.* at 2.
[89] *Id.* at 2-3.
[90] *Id.* at 3.
[91] *Id.* at 4.
[92] *Id.* at 6.
[93] *Id.* at 6.

exploited by third parties obscures the need for outreach and supportive services.[94] In an Office of Juvenile Justice and Delinquency Prevention literature review, the authors indicate:

> The gender disparity in awareness and research could be due to the fact that boys are less likely to be identified as commercially sexually exploited or at risk for victimization. Currently, very few organizations provide services for boys and young men who are victims of sexual exploitation. Consequently, few resources provide valuable information about exploitation of boys and young men. It is known that many CSE boys are homeless or runaways and are significantly less likely than girls to have a pimp or other adult exploiting them. Boys and young males likely share many of the risk factors for involvement in CSE as girls, such as child maltreatment and family violence.[95]

The trauma sexually exploited boys and young men experience is magnified by shame and social stigma. Like exploited girls, impacts on boys include risk of suicide, depression, anxiety, self-harm like cutting, post-traumatic stress disorder, distrust, isolation, sexually transmitted infections, substance abuse, and physical injuries such as bruising, fractures, cuts, and forced tattooing. However, the literature disagrees on whether these impacts manifest differently in behaviors between boys and girls.[96] This is a meaningful area for future study as it could inform gender-responsive trauma treatment. There are few services for male survivors, but there is a national nonprofit committed to the prevention and treatment of sexual victimization of boys and men. The network connects males with therapists and support groups, among other things.[97] For the reasons mentioned, sexually exploited boys are less likely to self-identify, and are often not identified because those with whom they come in contact are inadequately trained.

[94] *See generally* Brian WILLIS ET AL., AND BOYS TOO: AN ECPAT-USA DISCUSSION PAPER ABOUT THE LACK OF RECOGNITION OF THE COMMERCIAL SEXUAL EXPLOITATION OF BOYS IN THE UNITED STATES (2013), https://d1qkyo3pi1c9bx.cloudfront.net/00028B1B-B0DB-4FCD-A991-219527535DAB/1b1293ef-1524-4f2c-b148-91db11379d11.pdf.

[95] OFF. OF JUV. JUST. & DELINQUENCY PREVENTION, *supra* note 71, at 3 (internal citations omitted).

[96] *See generally* Sprang & Cole, *supra* note 38.

[97] MALESURVIVOR (2020), https://malesurvivor.org.

LGBTQ+ people are overrepresented in the sex industry and among those sexually exploited. LGBTQ+ youth experience high rates of homelessness, which leaves them at higher risk for engaging in survival sex.[98] Children and youth who have run away or are experiencing homelessness are targeted for commercial sexual exploitation due to their vulnerability. Within this group, Black, Indigenous, and youth of color and especially LGBTQ+ youth of color are significantly overrepresented.[99] A disproportionate number of LGBTQ+ youth, and particularly LGBTQ+ youth of color, are forced to exchange sex for shelter and necessities due to parental rejection, foster care discrimination and abuse, and lack of acceptance in their communities.[100] "In studies in New York City and Chicago of youth and young adults who engaged in survival sex . . . many LGBTQ youth, particularly transgender youth, reported resorting to survival sex after being kicked out of their homes for their sexual orientation or gender identity and/or leaving other unsafe environments."[101] One study found that LGBTQ+ youth in New York City were seven to eight times more likely to trade sex than their cisgender, heterosexual peers.[102]

People experiencing discrimination, poverty and exclusion from formal economies often rely on informal economies such as the sex industry to survive. A study about HIV prevention and risk in transgender women sex workers said data from six countries showed restricted economic opportunities and lower access to the formal labor market for transgender sex workers due to stigma, discrimination, and exclusion from social and economic opportunities "were common and served as the impetus for many transgender women to sell sex."[103] The 2015 U.S.

[98] Bernadette Brown, *The Commercial Sexual Exploitation of LGBTQ Youth*, EVIDENT CHANGE (Nov. 26, 2012), https://www.nccdglobal.org/newsroom/nccd-blog/commercial-sexual-exploitation-lgbtq-youth.
[99] BOYER, *supra* note 11 (citing Michelle Page, *Forgotten Youth: Homeless LGBT Youth of Color and the Runaway and Homeless Youth Act*, 12 NW J. L. & SOC. POL'Y 17 (2017)).
[100] Jordan Dashow, *New Report on Youth Homeless Affirms that LGBTQ Youth Disproportionately Experience Homelessness,* HUM. RTS. CAMPAIGN (Nov. 15, 2017), https://www.hrc.org/news/new-report-on-youth-homeless-affirms-that-lgbtq-youth-disproportionately-ex; DANK ET AL., *supra* note 45.
[101] DANK ET AL., *supra* note 45. JAZEERA IMAN ET AL., YOUNG WOMEN'S EMPOWERMENT PROJECT, GIRLS DO WHAT THEY HAVE TO DO TO SURVIVE: ILLUMINATING METHODS USED BY GIRLS IN THE SEX TRADE AND STREET ECONOMY TO FIGHT BACK AND HEAL (2009), https://ywepchicago.files.wordpress.com/2011/06/girls-do-what-they-have-to-do-to-survive-a-study-of-resilience-and-resistance.pdf.
pdf.
[102] DANK ET AL., *supra* note 45.
[103] Tonia Poteat et al., *HIV Risk and Preventive Interventions in Transgender Women Sex Workers*, 385 LANCET 274 (2015).

Transgender Survey found that transgender people who had lost a job due to anti-transgender discrimination were three times more likely to engage in sex work. The same survey found that 40% of Black transgender people self-report having engaged in the sex industry.[104]

2. Disproportionate victimization of Black, Indigenous, and communities of color

"The U.S. Department of Health and Human Services (HHS) Administration for Native Americans (ANA) and the Office of Trafficking in Persons (OTIP) note that American Indian, Alaska Native, Native Hawaiian, and Pacific Islander women and girls are at higher risk for experiencing sex trafficking." [105] It is well documented nationally and locally that sexual exploitation has disproportionate impacts on Indigenous communities, both on tribal land and in rural and urban areas not on tribal lands. "Intergenerational trauma, lack of resources, lack of employment opportunities, prior abuse, substance use, and jurisdictional challenges" put Indigenous people at particularly high risk for trafficking.[106] "Chapter 8, Consequences of Gender-Based Violence: Domestic Violence and Sexual Assault," provides in-depth study of the violence inflicted on Indigenous communities and highlights the issue of missing and murdered Indigenous women and people (MMIWP) as an issue of colonized and racialized gender-based violence.

A study of 105 prostituted native women in Minnesota found that 79% of the women had been sexually abused as children by an average of four perpetrators; 92% had been raped; 47% had been used by more than 200 sex buyers during their lifetimes, 16% by at least 900 buyers; 72% suffered traumatic brain injuries in sex work; 98% were currently or previously homeless; and

[104] ERIN FITZGERALD ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY, MEANINGFUL WORK: TRANSGENDER EXPERIENCES IN THE SEX TRADE," THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2015), https://transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf.
[105] DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILDREN & FAMILIES, COMBATING HUMAN TRAFFICKING IN NATIVE COMMUNITIES - FY 2019 (2020), https://www.acf.hhs.gov/sites/default/files/documents/otip/otip_one_pager_native_communities_fy19.pdf.
[106] Jeri Moomaw, founder and executive director of Innovations Human Trafficking Collaborative in Olympia, WA, is a nationally recognized Tribal human trafficking and anti-violence expert and a trainer and advocate with the National Human Trafficking Training and Technical Assistance Center. https://www.acf.hhs.gov/otip/training/nhttac. *See also Native Empowerment Dialogue on Human Trafficking: There Is Hope*, THE ADMIN. FOR CHILDREN & FAMILIES, https://www.acf.hhs.gov/otip/success-story/native-empowerment-dialogue-human-trafficking-there-hope.

92% wanted to escape the sex industry.[107] A 2016 news article, said that, according to the South Dakota District U.S. Attorney's Office, in South Dakota, Native American women and girls represented 40% of sex trafficking victims,[108] despite comprising only about 8% of the population in that year.[109]

As the Minnesota study noted:

> Prostitution is a sexually exploitive, often violent economic option most often entered into by those with a lengthy history of sexual, racial and economic victimization. Prostitution is only now beginning to be understood as violence against women and children. It has rarely been included in discussions of sexual violence against Native women. It is crucial to understand the sexual exploitation of Native women in prostitution today in its historical context of colonial violence against nations. In order for a woman to have the real choice to exit prostitution, a range of services must be offered yet there are currently few or no available services especially designed for Native women in prostitution.[110]

As in communities of color, Native Women historically have been devalued and hypersexualized. Deep historical roots inform the exploitation of Indigenous communities. Of 105 Native women in the sex industry in Minnesota, 62% saw "the connection between colonization and prostitution of Native women." "The devaluation of women in prostitution was seen as identical to devaluation of colonized Native people." Two thirds had family members who had attended boarding schools, which were designed to "Americanize" Native Americans, eradicating their

[107] MELISSA FARLEY ET AL., GARDEN OF TRUTH: THE PROSTITUTION AND TRAFFICKING OF NATIVE WOMEN IN MINNESOTA 3 (2011), https://www.niwrc.org/sites/default/files/images/resource/Garden-of-Truth.pdf.
[108] Danielle Ferguson, *Law Enforcement, Native Communities Focus on Sex Trafficking Prevention Training*, ARGUSLEADER (Aug. 27, 2016), https://www.argusleader.com/story/news/crime/2016/08/27/law-enforcement-native-communities-focus-sex-trafficking-prevention-training/89273822/.
[109] CENSUS DATA CTR., SOUTH DAKOTA STATE UNIVERSITY, 2012-2016 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, COMPARATIVE DEMOGRAPHIC ESTIMATES: SOUTH DAKOTA 2 (2017), https://openprairie.sdstate.edu/cgi/viewcontent.cgi?article=1011&context=census_data_newsreleases.
[110] FARLEY ET AL., *supra* note 107, at 4.

culture, and felt they owed their survival to their cultural identity and Native spiritual practices.[111] In 2018 Congressional testimony, Judge Michelle Demmert, Chief Judge of the Tulalip Tribal Court, noted:

> Trafficking, in multiple forms, has been utilized as a tool of genocide and colonization of American Indians and Alaska Natives (AI/AN) within the United States since first contact with Europeans. Leading sex trafficking researcher and Native scholar, Dr. Sandi Pierce notes that it is no secret that "the selling of North America's Indigenous women and children for sexual purposes has been an ongoing practice since the colonial era. There is evidence that early British surveyors and settlers viewed Native women's sexual and reproductive freedom as proof of their 'innate' impurity, and that many assumed the right to kidnap, rape, and prostitute Native women and girls without consequence."[112]

Experts have found that traffickers are targeting Native Americans nationally.[113] Washington is no different. The targeting of and impact on rural and urban dwelling American Indians/Alaska Natives who are living away from tribal lands is staggering, though ignored in mainstream sources. For example, in a 2018 report, the Urban Indian Health Institute (UIHI) found that while 71% of

[111] *Id.* at 32-35, "The relatives who attended boarding schools were grandmothers (42%), mothers (35%), grandfathers (26%), sisters (17%), fathers (17%), cousins (17%), brothers (14%), great grandmothers (7%), great grandfathers (6%), aunts or uncles (6%), and a daughter (1%). Another 7% were unsure whether or not family members attended boarding schools. Boarding schools were located in South Dakota (Flandreau Industrial School, Marty Mission, St. Francis, Stephan), Minnesota (Mission School, Red Lake School, Shattuck), Oklahoma (Riverside, Oaks Mission School, Chilocco Indian School, River), North Dakota (Wahpeton), California (Sherman), Kansas (Haskell Indian Junior College), Arizona (GMA), Idaho, Wisconsin, and Canada."

[112] *Hidden in Plain Sight: Understanding Federal Efforts to Stop Human Trafficking: Hearing Before the H. Subcomm. on Border and Maritime Sec. of the Comm. on Homeland Sec. H.R.*, 115th Cong. (2018) (statement of the Honorable Michelle Demmert).

[113] Cecily Hilleary, *Sex Traffickers Targeting Native American Women*, VOA (Nov. 18, 2015), https://www.voanews.com/usa/sex-traffickers-targeting-native-american-women; *see also* Cecily Hilleary, *Sex Traffickers Target Native American Children in South Dakota,* VOA (March 20, 2021), https://www.voanews.com/usa/sex-traffickers-target-native-american-children-south-dakota; Alexandra Sandi Pierce, *American Indian Adolescent Girls: Vulnerability to Sex Trafficking, Intervention Strategies*, 19 AM. INDIAN ALASKA NATIVE MENTAL HEALTH RSCH. 37 (2012).

Indigenous women live in urban areas, only 506 cases of MMIWG (Missing and Murdered Indigenous Women and Girls) were identified in 71 cities from 1900-2018.[114]

Nearly every Native American woman in a Seattle survey (94%) said she was raped or coerced into sex. The survey was done in 2010, and has been updated.[115] The Seattle Times reported that it remained hidden in a drawer until discovered by a new director of the UIHI, six years later.[116] This was one of the first surveys to study Indigenous people living in urban communities. While not specific to sex trafficking, the report reveals a horrific level of sexual violence. Additionally, 53% of all respondents lacked permanent housing, and 86% reported being affected by historical trauma. Of these, 94% had been raped or coerced in their lifetime, 42% attempted suicide at some point, and 34% binge drank after they were initially attacked. Of the 70% of women whose first experience of sexual violence was rape, 82% were raped before age 18.[117] Significantly, the report was deliberately hidden for all those years because the Seattle Indian Health Board believed the information would reflect negatively on the Native community.[118] This reaction embodies the guilt, shame, and stigma suffered by survivors of sexual violence and exploitation.

A 2019 UIHI report found that participants in community meetings identified human trafficking as one of four key issues underlying the problem of murdered and missing Indigenous women in Washington.[119] During the COVID-19 pandemic, there has been an increase in murdered and

[114] URBAN INDIAN HEALTH INST., MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS: A SNAPSHOT OF DATA FROM 71 URBAN CITIES IN THE UNITED STATES 3, 6 (2018), http://www.uihi.org/wp-content/uploads/2018/11/Missing-and-Murdered-IndigenousWomen-and-Girls-Report.pdf.

[115] URB. INDIAN HEALTH INST., OUR BODIES, OUR STORIES: SEXUAL VIOLENCE AMONG NATIVE WOMEN IN SEATTLE, WASHINGTON 6 (2018), https://www.uihi.org/download/our-bodies-our-stories/?wpdmdl=12904&refresh=60b1370d169571622226701.

[116] Vianna Davila, *Nearly Every Native American Woman in Seattle Survey Said She Was Raped or Coerced Into Sex,* SEATTLE TIMES (June 10, 2019), https://www.seattletimes.com/seattle-news/homeless/survey-reveals-high-rates-of-sexual-assault-among-native-american-women-many-of-them-homeless; *see also* URB. INDIAN HEALTH INST., *supra* note 115.

[117] URB. INDIAN HEALTH INST., *supra* note 115, at 4.

[118] Davila, *supra* note 116.

[119] ABIGAIL ECHO-HAWK ET AL., URB. INDIAN HEALTH INST., MMIW: WE DEMAND MORE: A CORRECTED RESEARCH STUDY OF MISSING AND MURDERED INDIGENOUS WOMEN & GIRLS IN WASHINGTON STATE 18 (2019), https://www.doj.state.wi.us/sites/default/files/ocvs/UIHI-MMIWG-We-Demand-More.pdf.

missing Indigenous women and people (MMIWP).[120] The 2019 UIHI report emphasizes the "lack of reliable data on the rates of human trafficking of Native women and girls in Washington. However, just because the data has not been collected does not mean it is not happening. The lack of data contributes to the scope of the problem."[121] Efforts to shed light on these issues and to prioritize and improve data collection and research in Washington are described in "Chapter 8: Consequences of Gender-Based Violence: Domestic Violence and Sexual Assault." These efforts benefit from Washington's strong, outspoken, nationally involved Native American survivor community with survivor led, trauma- and culturally-responsive organizations.

Communities of color are also disproportionately represented in the sex industry and targeted for exploitation. They are disproportionately impoverished due to discriminatory laws, histories of state violence, family separation, redlining, labor exclusion, and community divestment. The combination of poverty and exclusion from formal labor markets force many into the sex industry to survive. Misogyny, racism and xenophobia cause traffickers and sex buyers to target individuals in the Black, Latinx and Asian, Native Hawaiian, and other Pacific Islander communities for sexual exploitation, to perpetuate disproportionality in the sex industry, and to feed social and legal narratives that see them as criminals.[122] During the COVID-19 pandemic, Black and African American CSEC youth have been experiencing more intense anti-black racism.[123] Young Black girls are particularly subject to "adultification" and hypersexualization, and therefore are more likely to be sexually exploited.[124] This also makes them less likely to be believed by police.

The history of sexual violence against Black women is well documented, going back centuries in this country beginning with the transatlantic voyages that brought slaves here. Commercial sexual exploitation in the 1800s included using enslaved Black women "to produce a perpetual

[120] CTR. FOR CHILDREN & YOUTH JUST., THE IMPACT OF COVID-19 ON COMMERCIALLY SEXUALLY EXPLOITED CHILDREN IN WASHINGTON (2021).
[121] ECHO-HAWK ET AL., *supra* note 119, at 18.
[122] Boyer, *supra* note 61, at 3.
[123] CTR. FOR CHILDREN & YOUTH JUST., THE IMPACT OF COVID-19 ON COMMERCIALLY SEXUALLY EXPLOITED CHILDREN IN WASHINGTON (2021).
[124] *Id.*

labor force."[125] The resulting historical, intergenerational trauma, together with risk factors that apply to other targeted populations, increases the risk of sexual exploitation of Black women. Child sexual abuse (CSA), which includes incest, rape, or sexual coercion before age 18, is a strong predictor of adult rape, and CSA survivors are at increased risk of being sexually victimized as adolescents or adults. Prevalence of sexual violence among various Black populations "translate[s] to an estimated 3.1 million Black rape victims and 5.9 million Black survivors of other forms of sexual violence.[126]

In a sample of Black rape survivors, 12% reported commercial sexual exploitation as a child. As with other targeted populations, the connection between poverty and sexual violence is complex. "Survivors often experience multiple, overlapping risk factors. . . Poverty and sexual revictimization can be viewed as both risk factors and consequences of sexual violence."[127] A prospective study of Black women who were first interviewed as child sexual assault victims, then reinterviewed as adults, compared those who were revictimized and those who were not. Black women who were revictimized were "3 times more likely than their nonrevictimized counterparts to report a history of prostitution."[128] Given previously cited documentation of the link between child sexual abuse and later commercial sexual exploitation, Dr. West's research indicates that the risk for revictimized women may be even higher.

Seattle based API Chaya, formerly the Asian Pacific Islander Women and Family Safety Center, serves diverse women who come from other countries or are American-born victims of domestic violence, sexual assault, or trafficking. The women they serve are often Asian American or Pacific Islander, frequently limited English speaking, physically or psychologically abused, with children,

[125] CAROLYN M. WEST, SEXUAL VIOLENCE IN THE LIVES OF AFRICAN AMERICAN WOMEN, RISK, RESPONSE, AND RESILIENCE 1 (2006), https://www.researchgate.net/profile/Carolyn-West-2/publication/228674995_Sexual_violence_in_the_lives_of_African_American_women_Risk_response_and_resilience/links/53ec00710cf24f241f1558f1/Sexual-violence-in-the-lives-of-African-American-women-Risk-response-and-resilience.pdf.
[126] CAROLYN M. WEST & KAMILAH JOHNSON, SEXUAL VIOLENCE IN THE LIVES OF AFRICAN AMERICAN WOMEN 3 (2013), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_SVAAWomenRevised.pdf.
[127] *Id.* at 4.
[128] Carolyn M. West, Linda M. Williams & Jane A. Seigel, *Adult Sexual Revictimization Among Black Women Sexually Abused in Childhood: A Prospective Examination of Serious Consequences of Abuse*, 5 CHILD MALTREATMENT 49, 55 (2000).

and vulnerable to threats of deportation and/or increased loss of freedom and power. API Chaya was established in 1995 in response to the murders of several foreign-born women who were brought to the United States as "mail order brides." Identifying the abuse and murders of foreign brides as an instance of human trafficking led to the passage of HB 1175 and to Washington becoming the first U.S. state to criminalize human trafficking.[129]

Asian women have been hypersexualized, exoticized, fetishized, and stigmatized in American society, just as they often are in the sex industry.[130] The March 2021 mass shooting in three massage parlors in the Atlanta area, which left eight people dead, six of them Asian women, is a horrific reminder of the interplay of misogyny, racism, colonialism, and xenophobia that feed the bias and harm inflicted on women and individuals in Asian, Native Hawaiian, and other Pacific Islander and migrant communities. In condemning the Atlanta mass shooting, API Chaya highlighted and honored the many immigrants and migrant Asian women who work at the intersections of care services and the sex industry, and whose work is devalued and stigmatized in our societies.[131] Emi Koyama, the Director of the Coalition for Rights and Safety for People in the Sex Trade, spoke at a vigil for the Atlanta victims, and said: "I want to make it clear that not all migrant Asian women working at massage parlor do sex work, so massage workers should not be equated with sex workers. But the way the society vilifies, criminalizes,

[129] Suzanna Remerata Blackwell, the fetus she carried, and her two friends, were murdered by Suzanna's estranged American husband at the King County courthouse. The murder of Suzanna, who was brought to the United States as a "mail-order bride" from the Philippines, and the murders four years later of two other "mail order brides," Helen Clemente from the Philippines and Anastasia King from Kyrgyzstan, catalyzed a coalition in Washington State, led by Velma Veloria, the only Filipina American Legislator in the state, Dr. Sutapa Basu, Director of the University of Washington Women's Center, and Emma Catague, Field Manager of the Asian Pacific Islander Women and Family Safety Center. They saw the abuse and murders of foreign brides as more than domestic violence: it was human trafficking. Their efforts resulted in HB 1175. *See* Velma Veloria, Washington State Representative 1993-2004, *The Road To H.B. 1175: Making Human Trafficking a Crime in the State of Washington, My Story*, 9 SEATTLE J. SOC. JUST. 549, 549 (2001).

[130] *A Sociologist's View On The Hyper-Sexualization Of Asian Women In American Society*, ALL THINGS CONSIDERED: NPR (Mar. 19, 2021), https://www.npr.org/2021/03/19/979340013/a-sociologists-view-on-the-hyper-sexualization-of-asian-women-in-american-societ.

[131] *Love to All Massage Parlor Workers & Those Harmed by White Supremacist Violence*, API CHAYA, https://www.apichaya.org/love-to-all-massage-parlor-workers-and-those-harmed-by-white-supremacist-violence. API Chaya has been providing survivor-assistance and advocacy support to survivors of sexual abuse/assault and human trafficking in Seattle and Washington for the last 25 years. API Chaya, https://www.apichaya.org/.

and targets sex workers for violence, as well as those that target women, Asians, immigrants, and poor people, affect all Asian massage workers regardless of whether or not they personally perform any sex work, as the recent violence in Georgia has shown, so we support and advocate for them all the same."[132]

Asian, Native Hawaiian, and other Pacific Islander individuals are among the largest groups trafficked into the United States.[133] Many migrant Asian, Native Hawaiian, and other Pacific Islander survivors of sexual exploitation in the United States were brought into the country under false pretenses of employment and are subject to severe exploitation in illicit massage parlors or high-end brothels. A broad anti-trafficking investigation in King County led, in 2016, to the shutdown of two prostitution websites, the shuttering of 12 brothels in Bellevue and the arrest and charging of over 30 people with promoting prostitution.[134] The prostitution enterprise was organized by a group of sex buyers who, in collaboration with the websites, promoted the prostitution of South Korean women with the goal of increasing the number of prostituted women in the market. "TheReviewboard.net, with an estimated 23,000 members, allowed men to post graphic descriptions of their sexual encounters with prostituted women and share tips to avoid police attention and suspicion from wives and girlfriends, according to charging papers."[135] The women were brought to the U.S. and trafficked between major cities. The investigation produced evidence that some of the victims became involved in sex work to "pay off debt."[136] A similar coordinated Seattle police raid in 2019 on 11 storefront spas and massage parlors in the Chinatown-International District led to the recovery of 26 Chinese women whom law enforcement suspected were

[132] COALITION FOR RIGHTS AND SAFETY, http://rightsandsafety.org.
[133] *See generally Trafficking*, ASIAN PAC. INST. ON GENDER-BASED VIOLENCE, https://www.api-gbv.org/about-gbv/types-of-gbv/trafficking/; *Awareness on Asian American Human Trafficking*, ASIAN AM. HUM. TRAFFICKING (Oct. 2014), https://asianamericanhumantrafficking.wordpress.com/2014/10/.
[134] Source: Benjamin Gauen, Senior Deputy Prosecuting Attorney at King County Prosecuting Attorney's Office. *See also* Sara Jean Green, *Large Prostitution Ring, Bellevue Brothels Shut Down*, SEATTLE TIMES (Jan. 9, 2016), https://www.seattletimes.com/seattle-news/crime/online-site-where-men-rated-prostitutes-is-shut-down-charges-to-be-filed/
[135] Green, *supra* note 134.
[136] Source: Benjamin Gauen, Senior Deputy Prosecuting Attorney at King County Prosecuting Attorney's Office. *See also* Green, *supra* note 134.

being forced to provide sexual services. Many of the women were newly arrived from China (through trafficking hubs in New York and California) and spoke little or no English.[137]

The 2019 raid, and similar police raids on massage parlors where owners and workers are primarily Asian immigrant women, have come under scrutiny from some. Local grassroots groups who have built deep relationships with Asian migrant women working in massage parlors in Seattle's Chinatown-International District, such as the Massage Parlor Outreach Project (MPOP) and Chinatown-International District (CID) Coalition, have called for an end to such large scale raids.[138] They argue that while there are certainly cases of human trafficking within massage parlors, it is inaccurate to suggest that most or many of the women are "trafficked," and the raids can cause further harm. API Chaya, which has participated in past raids on massage parlors, refused to participate in the 2019 raids or others since because, in their experience, individuals recovered in large scale raids (as opposed to interventions in specific cases) often end up worse off due to the lack of income, and fail to qualify for trafficking-specific victim services or for visa relief. In the 2019 raid, law enforcement collaborated closely with national resources, with some service providers, and with members of Seattle's Chinese community in order to prioritize the needs of the women, make them feel comfortable and safe, and be as trauma-responsive as possible.[139] The women were offered visa services, connections to housing, and case management. Local advocates report that, nevertheless, the women were simply displaced and re-traumatized.[140] When the massage parlors re-opened within weeks "under new

[137] Sara Jean Green, *Major Prostitution Bust: Seattle Police Raid 11 Massage Parlors, Freeing 26 Women*, SEATTLE TIMES (Mar. 8, 2019), https://www.seattletimes.com/seattle-news/crime/a-crazy-amount-of-money-seattle-police-raid-prostitution-network-in-massage-parlors/.

[138] *Rescue Hurts: Real-Life consequences of SPD's Raids on Massage Parlors & How to Actually Support Migrant Women Workers*, COALITION FOR RIGHTS AND SAFETY (July 23, 2019), http://rightsandsafety.org/rescue-hurts-real-life-consequences-of-spds-raids-on-massage-parlors-how-to-actually-support-migrant-women-workers. *See also* http://rightsandsafety.org/solidarity-with-massage-parlor-workers-means-ending-police-raids-and-patrols-in-the-cid.

[139] *Id.*

[140] Some advocates argue that such large-scale raids often lead to displacement, trauma, and abandonment, as well as loss of means of living, shelter, and personal belongings (including identity documents and meager savings) — meager and/or exploitive as they may have been.

management," some of the women simply got on WeChat and found another parlor to work, further impoverished and in a more difficult environment.[141] Those in law enforcement say this is complex and nuanced, because in order to get a T Visa or U Visa a person has to disclose the abuse, which requires time and relationship building. Some of the women in the 2019 raid took advantage of housing and services offered and others did not. While clearly not all massage parlor workers are sex trafficked, many are sex and/or labor trafficked. According to law enforcement and prosecutors, many massage parlors are part of large organized groups of exploiters taking advantage of the economic, cultural, and immigration status of these women.

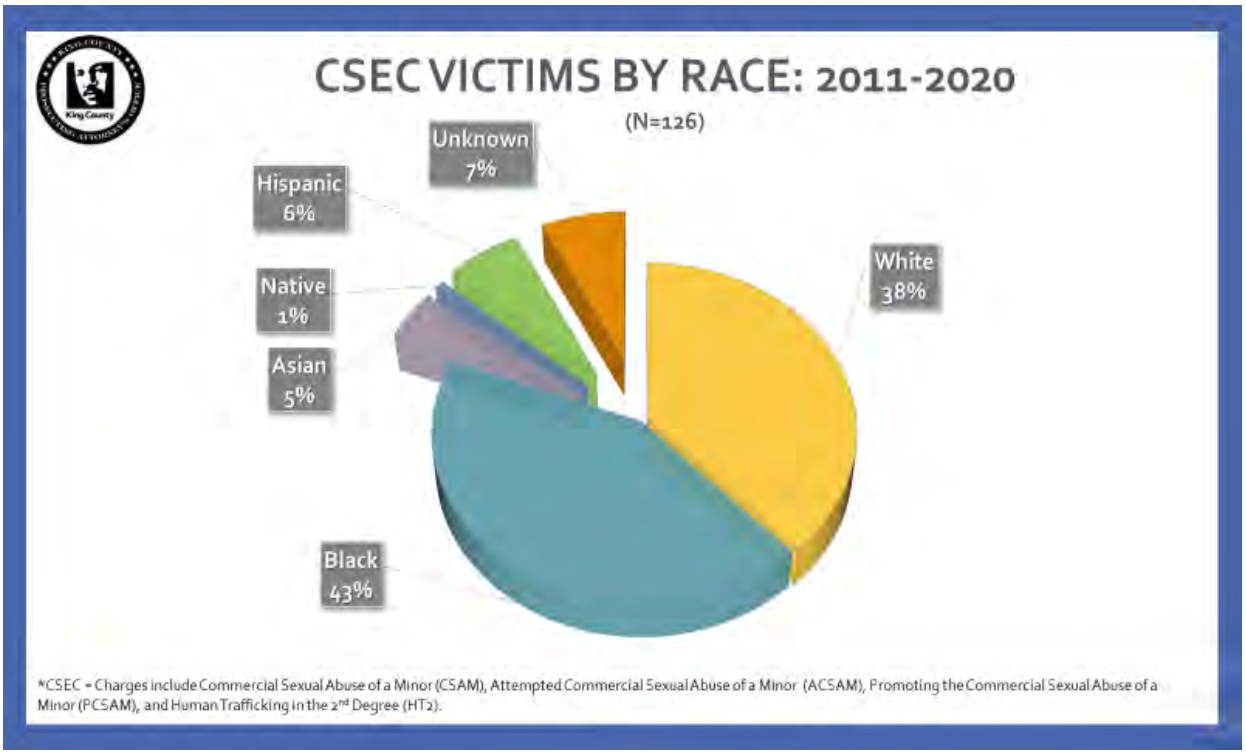
Washington data on the demographics of adult survivors of trafficking and CSE is hard to come by, but data in CSEC cases is demonstrative. King County has kept records of the demographics of victims and defendants in charged cases concerning CSEC. Between 2011 and 2020, of 126 cases, CSEC victims were 43% Black, six percent Hispanic, five percent Asian, one percent Native, and seven percent unknown. King County's general population is 6.2% Black (Figures 2 and 3).[142] It is important to note that Native Americans are often undercounted in datasets,[143] as are Hispanic/Latinx individuals.[144] In addition, disparities within populations are often masked when diverse populations are grouped together within a larger category such as "Asian."[145] This dataset does not include any information on Native Hawaiian and Other Pacific Islander populations. Moreover, as sources with the King County Prosecuting Attorney's Office noted, their data relies on data provided by law enforcement, which typically does not indicate more than one racial or ethnic identity. If a person is Latinx and Black, and there is only one box to

[141] *Rescue Hurts: Real-Life Consequences of SPD's Raids On Massage Parlors & How to Actually Support Migrant Women Workers*, Coalition for Rights and Safety, http://rightsandsafety.org/rescue-hurts-real-life-consequences-of-spds-raids-on-massage-parlors-how-to-actually-support-migrant-women-workers.
[142] BENJAMIN GAUEN, KING COUNTY. PROSECUTING ATT'YS OFF., KING COUNTY SEXUAL EXPLOITATION CASES: THE DATA BEHIND THE CHARGES 2020 UPDATE (2021), data and slides provided by Benjamin Gauen, Senior Deputy Prosecuting Attorney at King County Prosecuting Attorney's Office and available at KING COUNTY. CSEC TASK FORCE, https://www.kingcountycsec.org/data.
[143] ECHO-HAWK ET AL., *supra* note 119, at 18.
[144] TATIANA MASTERS ET AL., INCARCERATION OF WOMEN IN WASHINGTON STATE: MULTI-YEAR ANALYSIS OF FELONY DATA (2020).
[145] *AAPI Data Disaggregation*, WASH. STATE COMM'N ON ASIAN PAC. AM. AFFS. (2019), https://capaa.wa.gov/resources/.

check, how does the data reflect it? Many of those coded by the King County Prosecuting Attorney's Office as "unknowns" are victims of color but the office doesn't know how to account for that without passing its own judgment.[146] This is problematic and speaks to the need for coordinated, mandated, and consistent data entry.[147]

[146] Source: Benjamin Gauen, Senior Deputy Prosecuting Attorney at King County Prosecuting Attorney's Office
[147] *Id.*

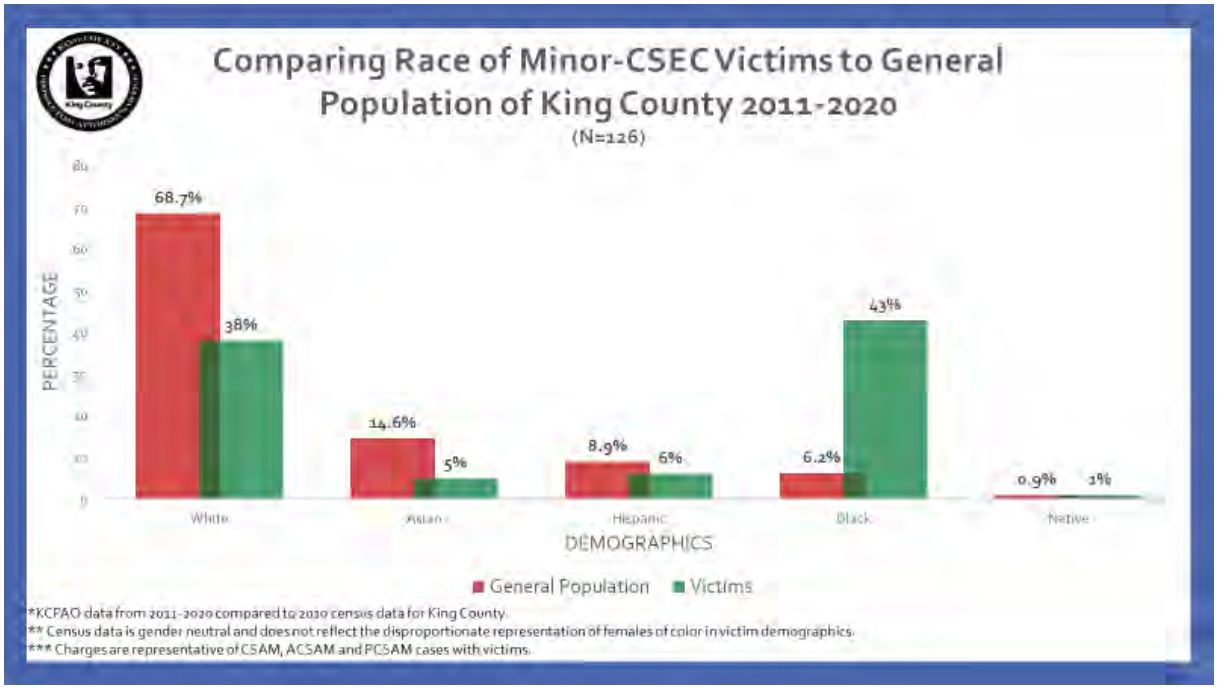
Figure 2. CSEC Victims in King County by Race and Ethnicity, 2011-2020



Footnotes for Figure 2.

Source: Benjamin Gauen. King County Sexual Exploitation Cases: The Data Behind the Charges. King County Prosecuting Attorney's Office. (2020) Available at https://www.kingcountycsec.org/data.

Figure 3. Comparing Race and Ethnicity of Minor-CSEC Victims to General Population of King County, 2011-2020



Footnotes for Figure 3.

Source**:** Benjamin Gauen. King County Sexual Exploitation Cases: The Data Behind the Charges. King County Prosecuting Attorney's Office. (2020) Available at https://www.kingcountycsec.org/data.

Dr. Boyer's Seattle area study, discussed above, also found that CSEC victims in King County were disproportionately Black, Indigenous, or youth of color.[148] While 7.7% of King County's general youth population (ages 0-24 years) was Black in 2018,[149] Black youth comprise 31% of CSEC in the study sample (Table 4).[150]

[148] BOYER, *supra* note 11.
[149] *2018 Population Estimates*, WASH. STATE OFF. OF FIN. MGMT. (Feb. 2, 2021), https://ofm.wa.gov/washington-data-research/population-demographics/population-estimates/estimates-april-1-population-age-sex-race-and-hispanic-origin.
[150] BOYER, *supra* note 11.

Table 4. Race and Ethnicity Distribution for Sample from Seattle-Area CSEC Study, 2017-2019

Race/Ethnicity	Study Population percent (N=154)	King County Non-Hispanic Youth Population Age 0-24 Years, 2018
Asian	< 1% (2)	17.8%
Black/African American	31% (47)	7.7%
Native Hawaiian/Pacific Islander	0% (0)*	1.2%
Caucasian/White	40% (61)	48.5%
American Indian/Alaskan Native	10% (15)	0.6%
Hispanic/Latinx	8% (13)	--
Other- Reported Two Or More Ethnicities	10% (16)	--

Footnotes for Table 4.

*Two youth reported as Native Hawaiian/Pacific Islander and African American.

Note: Dr. Boyer's study presented data on race and ethnicity together as one variable, suggesting that youth who were counted in any one racial group were identified as Non-Hispanic, youth counted as Hispanic/Latinx, were not identified as any other racial/ethnic group, and that youth identified as Hispanic and any racial group or more than one race were counted as "Two or more Ethnicities." This method for data collection is not directly comparable to Office of Financial Management population estimates for Hispanic/Latinx youth or youth who reported more than one race or ethnicity, so this table does not include population estimates for those two groups.

Source: Adapted from information available from Boyer, *Commercially Sexually Exploited Children in Seattle/King County 2019 Update* (2020) available at https://www.kingcountycsec.org/data; Washington State Office of Financial Management 2018 Population Estimates; available from https://ofm.wa.gov/washington-data-research/population-demographics/population-estimates/estimates-april-1-population-age-sex-race-and-hispanic-origin, accessed April 21, 2021.

Gender, racial, and ethnic disproportionality among exploited children is evident statewide as well. The Center for Children & Youth Justice (CCYJ) collects data from juvenile courts and youth-serving agencies in several counties in Washington State. Similar to the King County data, CCYJ's statewide data demonstrates that victims are disproportionately Black, Indigenous, and youth of color compared to their percentage in the general population. For 2019, the data shows that 55% of referrals were for Caucasian/white, 16% unknown race/ethnicity, 11% Hispanic/Latinx, nine percent African American/Black/African, seven percent multiracial, one percent Asian, one percent Native Hawaiian/Pacific Islander.[151] In 2020, 42% Caucasian/white, 18% Unknown, 14% Hispanic/Latinx, 13% multiracial, ten percent African American/Black/African, one percent Native American/Alaska Native, one percent Asian, one percent Native Hawaiian/Pacific Islander.[152] Dr. Pullmann's analysis of child welfare and juvenile justice records in Northwest Washington State, discussed above, concluded that, of the 89.2% of the 83 state-dependent youth who were confirmed or highly suspected of commercial sexual exploitation, 57.8% where white, 19.3% were Black, 13.3% were more than one race, 20.5% were Latinx, 7.2% were American Indian/Alaskan Native, and 2.4% were Asian/Native Hawaiian/Other Pacific Islander.[153] It is important to note that when diverse populations are combined into one category such as "Asian/Native Hawaiian/Other Pacific Islander," disparities are often masked.

3. Age

The data confirms that a high number of those trafficked and exploited in the commercial sex industry in Washington, and across the United States, are children and young adults (up to age 24). Of the more than 23,500 endangered youth reported as runaways in 2019 to the National Center for Missing and Exploited Children, one in six were likely victims of child sex trafficking.[154] As noted earlier, it was estimated in 2018 that the CSEC prevalence alone in

[151] CTR. FOR CHILDREN & YOUTH JUST., 2019 CSEC REFERRAL DATA REPORT (2020).
[152] CTR. FOR CHILDREN & YOUTH JUST., 2020 CSEC REFERRAL DATA REPORT (2021).
[153] Pullmann et al., *supra* note 83.
[154] *By the Numbers*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, https://www.missingkids.org/theissues/trafficking#bythenumbers.

Washington State ranges from 2,000 to 3,000 children and youth.[155] In Seattle/King County, there were 473 identified CSE youth in 2018 versus 238 (18 and under) in 2008. Of the 473 in 2018, 231 were 18 years old and under, and 242 were 19-24 years of age.[156]

The Seattle area study by Dr. Boyer discussed above found that the ages of the study population ranged from 12 to 24 years, of whom 73% were ages 12-17 years and 27% were ages 18-24 years. The mean age at first CSE was 14.4 years.[157] Of the 136 individual young people included in the 2020 CSEC referral data from service providers in Skagit, Pierce, and Benton/Franklin Counties, seven were ages 11 or younger, 87 were ages 12-17 (45 of whom were ages 14-15), and 40 were ages 18-24.[158]

4. Sex buyers

Trafficking and commercial sexual exploitation are a supply response to very high market demand. While there are adults who voluntarily and consensually engage in sex work, many more targeted and vulnerable minors and adults do not. Those who pay for sexual services cannot necessarily tell, and often do not care, whether they are dealing "at arm's length" with a consenting adult sex worker or receiving sexual services from an individual who is exploited or trafficked. To better understand disparities in the sex industry, to develop justice system responses to minimize these disparities, and to reduce the scope of trafficking and CSE, we need to understand who buys sex in the United States. In 2018, Tim Swarens wrote a series of ten articles in the Indy Star and USA Today following a year-long fellowship funded by the Society of Professional Journalists. The first, "Who buys a trafficked child for sex?," answered the question this way: "Many otherwise

[155] BOYER, *supra* note 11.

[156] In 2007, the City of Seattle commissioned Dr. Debra Boyer to assess the number of youth and young adults, aged 24 years and younger, who were victims of commercial sexual exploitation in the Seattle area. The final report, *Who Pays the Price? Assessment of Youth Involvement in Prostitution in Seattle*, was published in 2008. A decade later, StolenYouth commissioned Dr. Boyer to update the earlier study. In November 2019, Dr. Debra Boyer published *Commercially Sexually Exploited Children in Seattle/King County 2019 Update*. Dr. Boyer's data is drawn from CSE and prostitution involved minors and, in the updated report, young adults up to 24 years of age, who had engaged with social and legal services in 2006/7 and 2018 respectively.

[157] For those aged 12-17 years, 27% were ages 15 or younger, and 18% were ages 14 or younger. Only two cases reported first CSE as above age 18; one at age 19 and the other at age 21 (data were collected on Age at First CSE for 99 cases ages 12-24 years). BOYER, *supra* note 11.

[158] CTR. FOR CHILDREN & YOUTH JUST., 2020 CSEC REFERRAL DATA REPORT (2021). Two were categorized as age unknown.

ordinary men. They could be your co-worker, doctor, pastor or spouse." Swarens did the math to determine a conservative estimate of the scope of the problem: using the lower number of victims in a range identified in a 2016 study by the Center for Court Innovation, multiplied by a rate of daily exploitation per child of 5.4, assuming only one "work" day per week. The result: adults purchase children for sex at least 2.5 million times a year in the United States. Other articles in the series examined the issue in other countries, in devastating detail.[159]

Sex buyers are almost exclusively men.[160] In an effort to better understand the demand side of the illegal U.S. sex industry, Demand Abolition commissioned a survey that was completed by 8,201 adult males across the U.S. between December 2016 and January 2017.[161] While only 6.2% of respondents had bought sex within the past 12 months, "high-frequency" buyers purchased so often (weekly or monthly) that their activity accounted for nearly 75% of market transactions.[162] The survey indicated that buyers' race and sexual orientation have almost no profiling power, nor does income, with one important exception: "currently active high-frequency buyers are much more likely than other men to make $100,000 or more annually."[163] Sex buyer chat room members, surveyed in a different 2014 study, were older, more highly educated, and had higher incomes than men arrested for buying sex.[164]

Responses from buyers in the Demand Abolition survey confirm that those exploited in the sex industry in the U.S. are overwhelmingly young, disproportionately Black females. High-frequency buyers are more likely to have paid for sex with a Black person. While most paid sex transactions

[159] Tim Swarens, *Who Buys a Trafficked Child for Sex? Otherwise Ordinary Men,* USA TODAY (Jan. 30, 2018), https://www.usatoday.com/story/opinion/nation-now/2018/01/30/sex-trafficking-column/1073459001/.
[160] DEMAND ABOLITION, *supra* note 68. King County data is in accord.
[161] *Id.*
[162] *Id.* at 4, 9, 16.
[163] *Id.* at 4, 19.
[164] WORLD WITHOUT EXPLOITATION, GET THE FACTS: WHAT WE KNOW ABOUT SEX TRAFFICKING, SEXUAL EXPLOITATION AND PROSTITUTION IN THE UNITED STATES 21 (2020), https://global-uploads.webflow.com/5b7ed53e01bf9702b9df675b/5e1cd98f61c439d812b34ed3_Get_the_Facts_January_2020.pdf.

involve females, about one in five high-frequency buyers most recently purchased sex from a male.[165]

The survey results are striking. While buyers "care most about their own wellbeing" (personal safety, sexual health, and freedom from arrest), they were "much more concerned about the risk of arrest than finding a legal place to purchase sex." They "are clearly untroubled by breaking the law," but preoccupied by the need to avoid getting caught. While some also believe the prostituted person "should not be forced or trafficked," that could be due to the criminal justice implications of trafficking for the buyer.[166] In fact, active buyers often believe that prostitution is a mostly victimless crime where no one is harmed; that prostituted people enjoy the act of prostitution; and that they chose the "profession."[167] An Illinois survey of buyers in online chat rooms unveiled highly troubling, but not surprising, attitudes: buyers admitted to being violent or aggressive to women in prostitution; recognized the harm they and pimps/traffickers do to women but continue to buy sex despite the harm; they also recognized the extreme youth of some prostituted women but were not deterred from buying (raping) children.[168]

The Demand Abolition survey found that only about six percent of men who purchase sex illegally have ever been arrested for it. Active high-frequency buyers, however, were six times as likely to have been arrested for sex buying, with two-thirds of them reporting multiple arrests for the same offense. The survey did not provide insight into whether a subsequent arrest led to heightened penalties or was even recognized as a repeat offense by the law enforcement agency.[169]

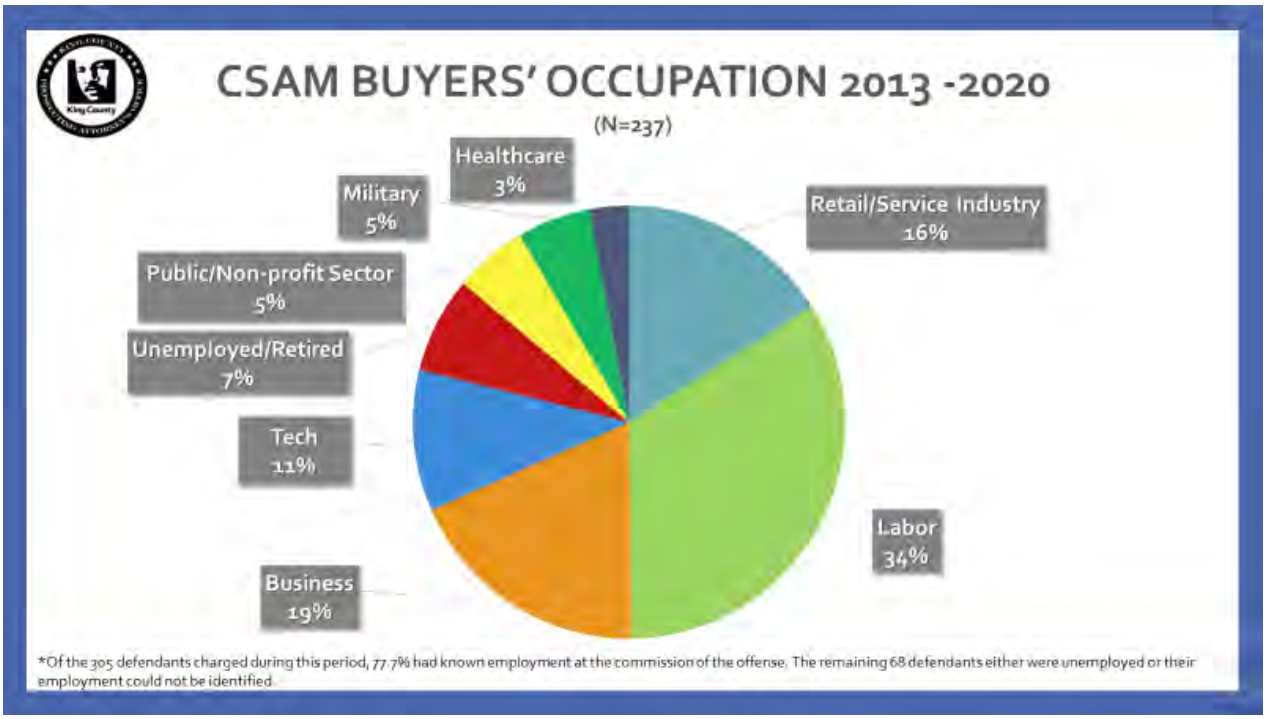
Consequently, the Demand Abolition report recommended shifting law enforcement from arresting and adjudicating prostituted persons towards arresting and adjudicating buyers; creating increasingly severe penalty structures for repeat buyers; and using mandatory minimum

[165] DEMAND ABOLITION *supra* note 68, at 15.
[166] *Id.* at 26.
[167] *Id.*
[168] WORLD WITHOUT EXPLOITATION, *supra* note 164, at 23-24.
[169] DEMAND ABOLITION, *supra* note 68, at 26-27.

fines from convicted buyers to support survivor exit services and law enforcement operations to stop demand.[170]

Disparities in the legal system's treatment of sex "sellers" and "buyers," and the shift in arrest and prosecution policies in some parts of Washington law, are explored in Part III.C. As part of that shift, law enforcement agencies in Washington have been engaging in proactive policing investigations, sometimes referred to as "net nanny" operations, to prevent commercial sexual abuse of minors. While not generalizable, data from the King County Prosecuting Attorney's Office provides some insights into the demographics of buyers charged with CSAM (Figures 4-6).[171]

Figure 4. Commercial Sexual Abuse of Minors, Buyers' Occupations, King County, 2013-2020



[170] *Id.* at 5, 32-34.
[171] GAUEN, *supra* note 142. The charged cases include both cases involving real victims and charges from "net nanny" operations.

Footnotes for Figure 4.

Notes:

Labor includes industries: General Labor (defined as work that is manual labor which requires no specific education), Manufacturing, Agriculture/fishing, Mechanic, and Construction.

Retail/Service includes industries: Entertainment, Food service, Retail, Tourism, and Transportation (i.e., cab or truck drivers).

Business includes industries: Business owner/self-employed, Business, Professional services.

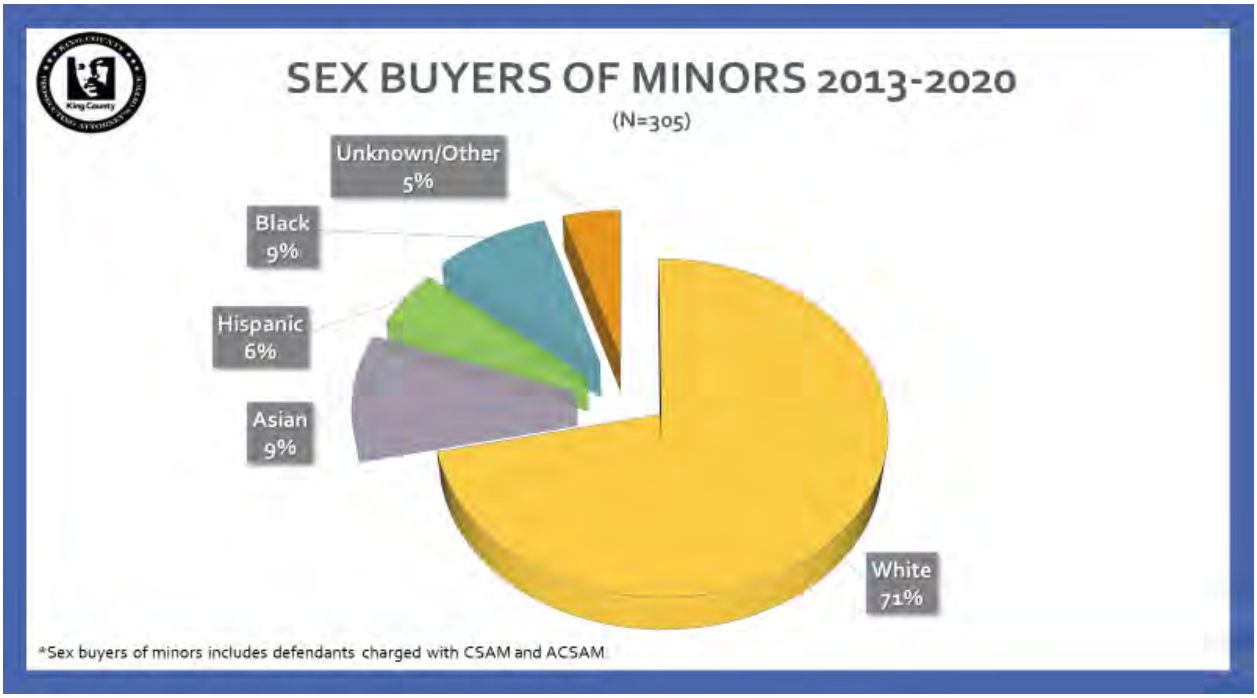
People in these industries include those working in a professional firm managing products, departments and/or people. This includes accountants, architects, people managers, product managers, etc.

Public Employee is defined as a person who works for a government organization, including teachers.

A Tech employee is classified as a person working in a technology-focused capacity, either building or facilitating use of, for a firm. This includes a Help-Desk manager, software engineer, IT administrator, etc.

Source: Benjamin Gauen. King County Sexual Exploitation Cases: The Data Behind the Charges, 2020 Update. (2021). Available at https://www.kingcountycsec.org/data.

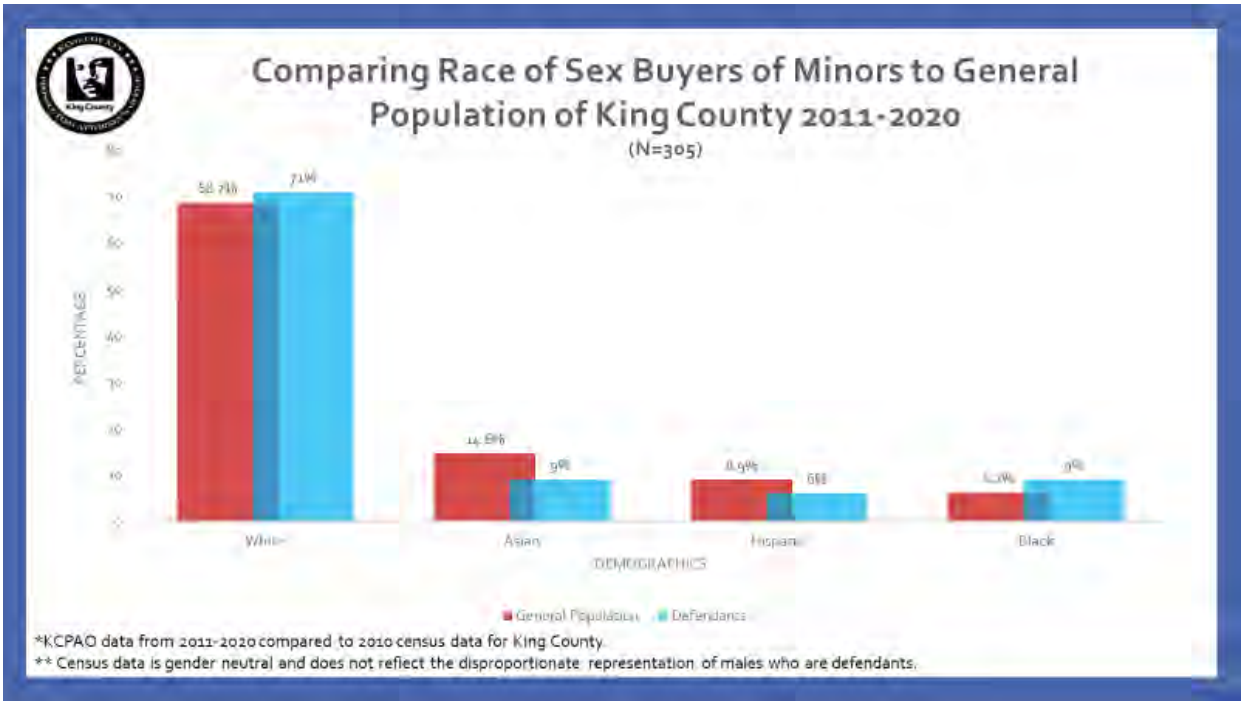
Figure 5. Sex Buyers of Minors in King County by Race and Ethnicity, 2013-2017



Footnotes for Figure 5.

Source: Benjamin Gauen. King County Sexual Exploitation Cases: The Data Behind the Charges, 2020 Update. King County Prosecuting Attorney's Office. (2021). Available at https://www.kingcountycsec.org/data.

Figure 6. Comparing Race and Ethnicity of Sex Buyers of Minors to General Population of King County, 2011-2020



Footnotes for Figure 6.

Source: Benjamin Gauen. King County Sexual Exploitation Cases: The Data Behind the Charges, 2020 Update. King County Prosecuting Attorney's Office. (2021). Available at https://www.kingcountycsec.org/data.

III. Bias in Washington Justice System Response

Inequities in the justice system amplify the disparities discussed so far, both for survivors of exploitation and for individuals in the sex industry generally. Broadly speaking, the criminal justice system addresses commercial sex through overlapping frameworks: sex trade offenses such as prostitution and patronizing; commercial sexual exploitation; and human trafficking. Those frameworks are often in tension with each other, as discussed below.

On the one hand, as new evidence has exposed wide-spread exploitation and abuse in the commercial sex environment, the last two decades have led to the recognition and criminalization of those responsible for sex trafficking and commercial sexual exploitation of both

minors and adults. Many of those involved in commercial sex are victims of commercial sexual exploitation and may experience trafficking, coercion, force, fraud, threats, and violence from buyers and third-party exploiters. Women, children, and marginalized people are most likely to be victims of CSE and sex trafficking.[172]

On the other hand, they are also most likely to have been criminalized historically for commercial sex offenses, and to be left unprotected by the legal system: Sex workers are often undocumented, Black, Indigenous, and women of color, and/or young LGBTQ+ people who have little to no access to justice.

The most targeted and marginalized populations are doubly harmed by their exploitation and by institutional bias within the legal system. As Andrea, a survivor and advocate, pointedly notes: "Society needs to shift its view of prostitution…We need to stop blaming victims or questioning 'how did you get yourself into that?'".[173]

Washington State data reflects these historical disparities in the legal system response – disparities that have heightened the impact on populations already marginalized due to gender, race, and age. Recent data illustrates progress made in Washington State towards alleviating disparities. This report explores efforts in Washington to correct course and recommends steps to reduce bias within the legal system.

A. Systemic bias in the legal system framing of sex industry offenses, commercial sexual exploitation, and human trafficking

In 2000, Congress enacted the Trafficking Victims Protection Act (TVPA).[174] The TVPA and its progeny make it illegal to recruit, entice, harbor, transport, provide, obtain, advertise, maintain, patronize, or solicit by any means a person or to benefit from such activities knowing that the person will be caused to engage in commercial sex acts, either when induced by force, fraud, or

[172] *See supra* Part II.
[173] THE LIFE STORY, https://www.thelifestory.org/.
[174] Trafficking Victims Protection Act of 2000, Division A of Pub. L. No. 106-386, 114 Stat. 464 (reauthorized regularly since) (mostly codified in 22 U.S.C. §§ 7101-7112).

coercion with regards to adults,[175]or where the person is under 18.[176] Coercion means threats of serious harm to or physical restraint against any persons; any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of law or the legal practice. Serious harm means physical harm or harm that includes "psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm."[177] In the case of minors, use of force, fraud or coercion is not required, and consent of the victim is not a defense. Federal law also prohibits using mail or computers to induce a minor to engage in prostitution,[178] and prohibits travel with intent to engage in illicit sexual conduct with a minor.[179]

In 2003, Washington was the first state to pass a law criminalizing human trafficking, using similar definitions and criteria.[180] Trafficking in the First Degree and Trafficking in the Second Degree were both defined as class A felonies, and the law added Trafficking to the crimes included in the Criminal Profiteering Act.[181]

In 2007, the Washington State Legislature created four new crimes relating to child sexual exploitation in order to prevent any benefit or profit from engaging minors in sexual conduct (defined broadly): Commercial Sexual Abuse of a Minor (CSAM) (replacing the crime of patronizing a juvenile prostitute),[182] Promoting Commercial Sexual Abuse of a Minor,[183] Promoting Travel for Commercial Sexual Abuse of a Minor,[184] and Permitting Commercial Sexual Abuse of a Minor.[185] A person is guilty of CSAM if they: provide anything of value to a minor or a

[175] 22 U.S.C. § 7102.
[176] 18 U.S.C. § 1591(a).
[177] 18 U.S.C. § 1591(e).
[178] 18 U.S.C. § 2422.
[179] 18 U.S.C. § 2424.
[180] RCW 9A.40.100.
[181] RCW 9A.82.010.
[182] RCW 9.68A.100.
[183] RCW 9.68A.101.
[184] RCW 9.68A.102.
[185] RCW 9.68A.103.

third person as compensation for a minor having engaged in sexual conduct (defined broadly) with them; provide or agree to provide anything of value to a minor or a third person pursuant to an understanding that in return such minor will engage in sexual conduct with them; or solicit, offer, or request to engage in sexual conduct with a minor in return for anything of value.[186] A person is guilty of promoting CSAM if they knowingly advance commercial sexual abuse or a sexually explicit act of a minor or profit from a minor engaged in sexual conduct or a sexually explicit act.[187] A person (not the minor or the buyer) "profits from commercial sexual abuse of a minor" if they accept or receive money or anything of value pursuant to an agreement or understanding with any person whereby they participate or will participate in the proceeds of CSAM.[188] Consent of the minor is not a defense to any CSAM offense,[189] and neither is not knowing the victim's age.[190] In 2010, the Washington State Legislature increased the seriousness level of CSAM offenses for sentencing purposes.[191]

Prostitution, the exchange of sex for money or other items of value, has long been outlawed in Washington State. Prostitution and patronizing a prostitute are misdemeanors, and penalties include a fine of up to $1,000, up to 90 days in jail, or both.[192] It is also a crime in Washington to

[186] RCW 9.68A.100.
[187] RCW 9.68A.101. A person, acting other than the prostituted person or the customer thereof, "advances commercial sexual abuse or sexually explicit act of a minor" when they cause or aid a person to commit or engage in CSAM, procure or solicit customers for CSAM, provide persons or premises for the purposes of CSAM, operate or assist in the operation of a house or enterprise for the purposes of engaging in CSAM, or engage in any other conduct designed to institute, aid, cause, assist, or facilitate an act or enterprise of commercial sexual abuse of a minor. RCW 9.68A.101(a), (c).
[188] RCW 9.68A.101(b).
[189] RCW 9.68A.100-.103.
[190] RCW 9.68A.110.
[191] ESSB 6467 (2010). The level of seriousness for promoting CSAM and CSAM were raised; CSAM was increased from a Level III seriousness to a Level VIII offense. Promoting CSAM was raised from a Level VIII seriousness to a Level XII offense. RCW 9.94A.515. In addition, CSAM was changed from a class C to class B felony; promoting CSAM was changed from a class B to a class A felony.

In 2013 the CSEC Statewide Coordinating Committee was established, and in 2015 the Washington State Legislature tasked the Committee with reviewing implementation and barriers to implementation of ESSB 6467. The CSEC Committee reported that insufficient dedicated law enforcement resources exist to properly investigate these complex crimes, particularly outside of large urban areas. *Commercially Sexually Exploited Children Statewide Coordinating Committee*, WASH. STATE OFF. OF THE ATT'Y GEN., https://www.atg.wa.gov/commercially-sexually-exploited-children-statewide-coordinating-committee.
[192] RCW 9A.88.030, .110.

promote prostitution,[193] to provide or sell travel services knowing they will be used to patronize prostitutes,[194] and to permit prostitution in a building that you rent, own, or reside in.[195]

With regard to minors, under Washington law, there is now a presumption that a youth arrested for prostitution or prostitution loitering meets the criteria for certification as a victim of a severe form of trafficking and is also a victim of commercial sexual abuse of a minor.[196] That recognition, in part, led to the recent Washington legislation decriminalizing prostitution for those under 18. The decriminalization part of the law will go into effect on January 1, 2024. The delayed implementation was intended to allow the state to establish the services needed for these youth as required by the legislation.[197]

In contrast, the treatment of young adults ages 18-24 who have experienced sexual exploitation (when not formally amounting to trafficking) still generates controversy and mixed legal system responses. Current research and data on sexually exploited young adults and many adults in commercial sex indicates that "prostitution" is part of the spectrum of gendered violence and sexual exploitation of both minors and adults. However, the legal system, for the most part, has not responded with adequate training and information or made necessary changes to policies in recognition of sexual exploitation being on the spectrum of gender-based violence.

[193] RCW 9A.88.070, .080. Promoting prostitution in the first degree, a class B felony, is when a person knowingly advance prostitution by compelling a person by threat or force to engage in prostitution, compelling a person with a mental incapacity or developmental disability that renders the person incapable of consent to engage in prostitution, or profiting from prostitution that results from either of the above. Penalties include a fine of up to $20,000, up to ten years in prison, or both. RCW 9A.88.070. Promoting prostitution in the second degree, a class C felony, is when a person knowingly advances (causes or aids) prostitution (not through the use of threat or force), or profits from prostitution. Penalties include a fine of up to $10,000, up to five years in prison, or both. RCW 9A.88.080.

[194] RCW 9A.88.085. Promoting travel for prostitution is a class C felony, when a person offers or sells travel services when the purpose of the travel is to engage in what would be patronizing a prostitute if the behavior took place within Washington State. penalties include a fine of up to $10,000, up to five years in prison, or both. RCW 9A.88.085.

[195] RCW 9A.88.090. It is a misdemeanor to permit prostitution in a building that you possess or control (including places that you rent, own, or reside in), if you know about the prostitution and do nothing to stop it. Penalties include a fine of up to $1,000, up to 90 days in jail, or both. RCW 9A.88.090.

[196] RCW 13.40.219. For further discussion see subsection III.E below. This law references the federal definition under the TVPA, which defines sex trafficking of any person younger than 18 as a severe form of trafficking.

[197] ENGROSSED THIRD SUBSTITUTE H.B. 1775, 66th Leg., Reg. Sess. (Wash. 2020) (amending RCW 9A.88.030).

As the following data shows, for too long the legal system viewed both minors and adults who engage in commercial sex as criminals. Those who are exploited were not recognized as victims due to criminalization and stigma, which keeps them trapped in the sex industry. Criminal convictions for prostitution are often used against survivors and those involved in the sex industry in family law hearings including custody, divorce, and dependency cases. Criminal convictions prevent survivors and sex workers from obtaining employment and housing to meet their basic needs.[198] "In the United States, people with criminal convictions are barred from jobs ranging from cutting hair to caring for toddlers…[v]irtually any potential employer can access this information, so prostitution convictions routinely lock us out of decent jobs let alone professional careers."[199]

The Washington Association of Sheriffs and Police Chiefs issues annual crime reports which include statewide data on human trafficking and prostitution offenses.[200] Relevant data for the last fifteen years (2004-2019, not all data was similarly collected every year) generally demonstrates the following:

[198] See "Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families" for an analysis of the collateral consequences of a criminal record.

[199] Marian Hatcher et al., *Exited Prostitution Survivor Policy Platform*, 3 DIGNITY 1, 2 (2018). See also "Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families."

[200] *CJIS Statistics and Reports*, WASH. ASS'N OF SHERIFFS AND POLICE CHIEFS, https://waspc.memberclicks.net/crime-statistics-reports (last visited May 28, 2021).

As defined by the reports, Human Trafficking offenses are defined as the inducement of a person to perform a commercial sex act, labor, or service, through force, fraud, or coercion. Human Trafficking can also occur if a person under 18 years of age has been induced or enticed, regardless of force, fraud, or coercion, to perform a commercial sex act. These offenses are categorized under two types of criminal activity: 1) Commercial Sex Acts, which are defined as inducing a person by force, fraud, or coercion to participate in commercial sex acts, or in which a person induced to perform such act(s) has not attained 18 years of age; 2) Involuntary Servitude, which is defined as the obtaining of a person(s) through recruitment, harboring, transportation, or provision, and subjecting such persons by force, fraud, or coercion into voluntary servitude, peonage, debt bondage, or slavery (not to include commercial sex acts).

Prostitution offenses are defined as unlawfully engaging in or promoting sexual activities for profit. These offenses are currently categorized under three types of criminal activity: 1) Prostitution, which is to unlawfully engage in sexual relations for profit; 2) Assisting/Promoting Prostitution, defined as soliciting customers or transporting persons for prostitution purposes; to own, manage, or operate a dwelling or other establishment for the purpose of providing a place where prostitution is performed; or to otherwise assist or promote prostitution; 3) Purchasing Prostitution, which is to purchase or trade anything of value for commercial sex acts. However, prior to 2013 Purchasing Prostitution was not included in either the offense or arrest data.

(1) Historically, law enforcement viewed only a small number of sexual exploitation cases as trafficking cases, compared to the high number of cases that they categorized as "prostitution" offenses. For example, reported sex trafficking offenses ranged from three in 2013 to 53 in 2019. Prostitution offenses went down from 555 in 2013 to 335 in 2019; Assisting/Promoting prostitution offenses hovered around 100 each year; and reported purchasing offenses increased from 20 to 192.[201]

(2) A closer look at prostitution offense arrests shows an overall decline of 75-80% in the total arrests between 2004 and 2019.[202] However, arrest data is not broken down by gender or the three categories: prostitution, assisting and promoting, and purchasing. Consequently, it is not possible to learn from this data either the gender or the percentage of arrestees who were selling sex as opposed to their customers or third-party exploiters.

(3) Over time, the number of prostitution offenses and arrests primarily of those targeted for exploitation has decreased. There has been a 90% decrease between 2004 and 2019 in the arrests of women for prostitution, and only five arrests of juveniles by 2019.[203] Law enforcement officers have begun to recognize that prostitution may mask exploitation and they are better equipped to identify those who are victims of sexual exploitation. The decrease in the number of prostitution offense arrests of women and of juveniles illustrates this shift in paradigm. Challenges remain, however, and racial disparities are significant.[204]

The data is problematic in several key respects and limits our ability to draw inferences about gender, race, and age disparities and systemic biases discussed further in this report. While the dataset provides insights into the number of arrests and the number of offenses reported, it does not include the number of resulting charges. It does not indicate if any given individual was subject to multiple arrests or repeat offenses. Except for the reported offense data, arrest data for prostitution offenses does not differentiate between those who are selling sex, including

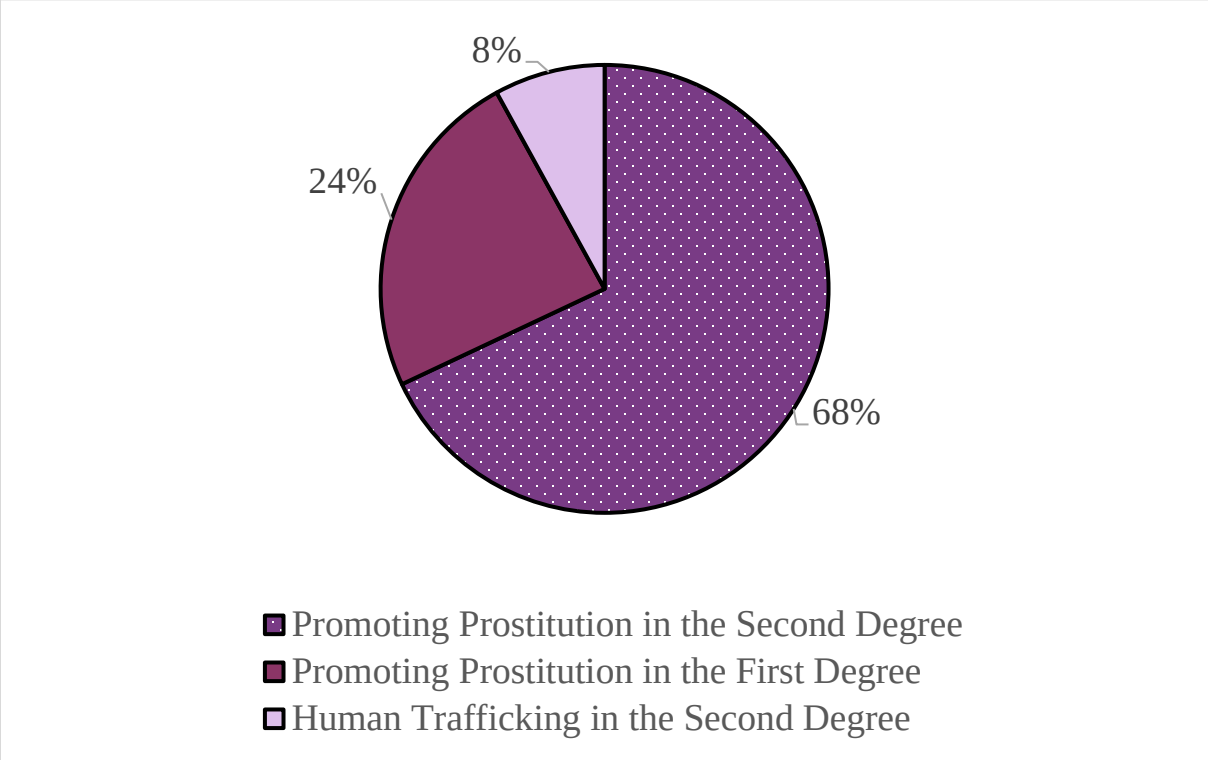
[201] *Crime in Washington Annual Reports 2012-2019*, WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, https://waspc.memberclicks.net/crime-statistics-reports (adapted from information available at WASPC.net).
[202] *Id.*
[203] *Id.*
[204] *See* Part III.B.

those who are exploited, and those purchasing, promoting as a third party, or forced into promoting prostitution. It is important to note that many third-party exploiters will force, coerce, and defraud people they are exploiting into promoting prostitution as a means to avoid prosecution themselves. Bias may also influence whether certain conduct is reported and charged under one category or another. For example, prostitution related offenses may be categorized differently than trafficking and sexual exploitation offenses, when they are often both on the sexual exploitation spectrum. The reports also categorize gender as a binary male/female. No data is provided for transgender individuals, or for the LGBTQ+ community in general. These gaps and limitations in the manner in which law enforcement collects data on CSE in Washington should be addressed moving forward.

Statewide data on resulting charges and prosecutions is similarly limited.[205] 2019 and 2020 data provided by the King County Prosecuting Attorney's Office show both the number of charges for commercial sexual exploitation of adults (data regarding CSEC follows later) and breakdown along gender, race, and age.[206] In 2019, there were a total of 37 charges for adult commercial sexual exploitation, the majority of which were for promoting prostitution in the second degree (see Figure 7). All victims were identified as female, with 75% of the defendants identified as male and 25% as female. The race breakdown of the 25 adult CSE victims is presented in Figure 8. Lastly, of those 25 victims, 32% were between the ages of 18-25, 52% between 26-35, 12% between 36-50, and four percent with unknown age.

[205] Note that trafficking cases may be charged and prosecuted in federal courts under TVPA as well as in Washington State courts under state law.
[206] GAUEN, *supra* note 142.

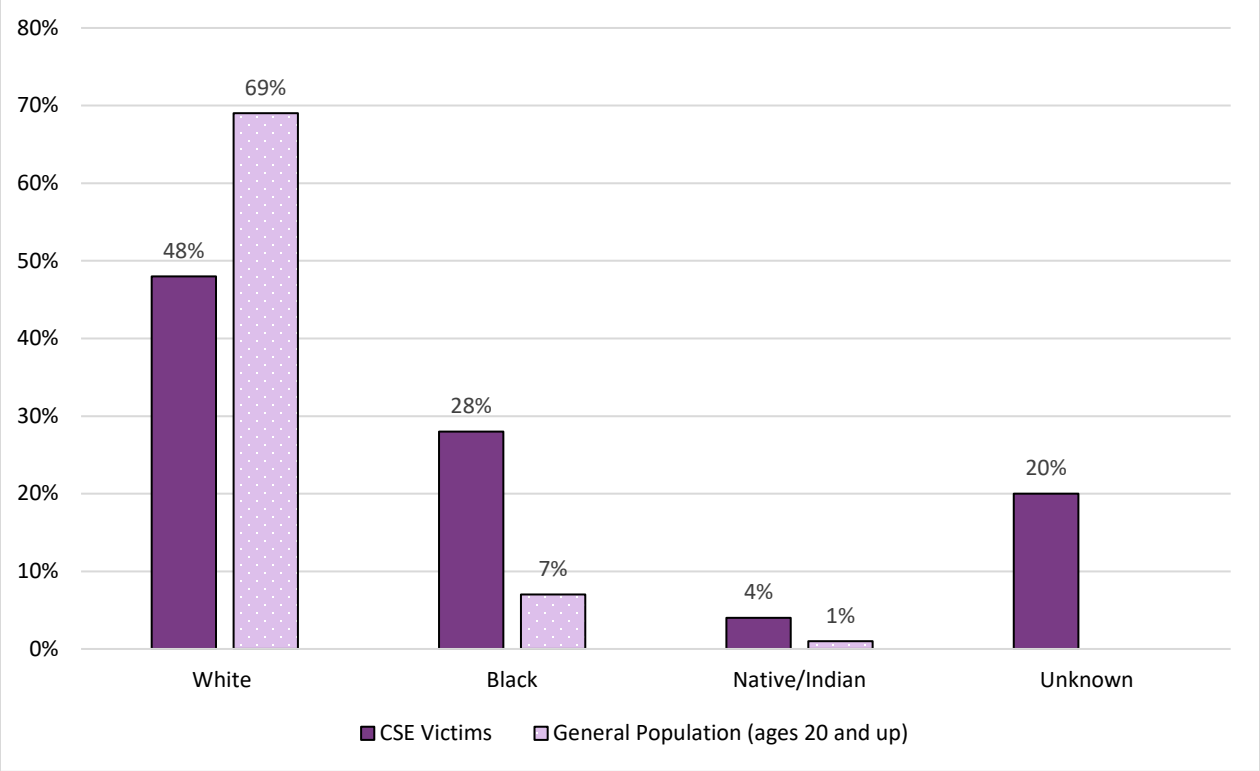
Figure 7. King County Prosecuting Attorney's Office Charging Data for Commercial Sexual Exploitation of Adults, 2019 (n=37)



Footnotes for Figure 7.

Source: Adapted from information available from Benjamin Gauen. King County Sexual Exploitation Cases: The Data Behind the Charges. King County Prosecuting Attorney's Office. (2019) Accessed February 19, 2021. Available at https://www.kingcountycsec.org/data.

Figure 8. King County Prosecuting Attorney's Office Charging Data, CSE Adult Victims by Race compared to King County General Population by Race, 2019 (n=25)



Footnotes for Figure 8.

Note: These data should be interpreted with caution due to the small number of CSE cases (n=25).

Source: Adapted from information available from Benjamin Gauen. King County Sexual Exploitation Cases: The Data Behind the Charges. King County Prosecuting Attorney's Office. (2019) Accessed February 19, 2021. Available at https://www.kingcountycsec.org/data; Office of Financial Management 2019 Population Estimates; available from https://ofm.wa.gov/washington-data-research/population-demographics/population-estimates/estimates-april-1-population-age-sex-race-and-hispanic-origin, accessed June 18, 2021.

In 2020, there were a total of 11 charges for adult commercial sexual exploitation in King County, the majority of which were for promoting prostitution in the second degree (77%). All victims

were identified as female, and all of the defendants identified as male. In 2020 for the first time no prostitution charges were filed anywhere in King County.[207]

The arrest and charging data provide only a partial picture of disparities and inequities in the criminal justice system. We do not know whether gender, race, or ethnicity, for example, impact the conviction or incarceration rate of prostitution involved and CSE adults. This research gap in Washington State should be addressed moving forward.

Moreover, despite progress and efforts to shift how law enforcement and the justice system perceive sex workers and the sex industry, concerns remain. The criminalization of the sex industry means increased contact with law enforcement. In the past, police primarily enforced prostitution laws against street level sex workers, often Black, Indigenous, and women of color, transgender people, immigrants, and people in difficult socioeconomic circumstances.[208] Some have described such over policing at this level as stop-and-frisk policing for women and transgender and gender-nonconforming communities in areas that have laws prohibiting loitering for prostitution.[209] Neither Washington State nor Seattle still have loitering laws. There is evidence not only of regular police contact, but also the extent to which those interactions may be abusive, violent, and lead to imprisonments. A study of street-based sex workers in Baltimore, Maryland found that 70% of sex workers in the sample had been incarcerated, with an average of 15 instances of imprisonment within their lives.[210] The Center for Court Innovation found that, of 316 adults in New York who traded sex for money, housing, food, drugs, or other things, "Thirty percent of participants reported that they were threatened with violence by a police officer, and 27% reported that they were harassed by an officer because of their gender presentation. Often, this

[207] BENJAMIN GAUEN, KING COUNTY PROSECUTING ATTY'S OFF., KING COUNTY SEXUAL EXPLOITATION CASES: 2020 UPDATE (2021), available at KING COUNTY. CSEC TASK FORCE, https://www.kingcountycsec.org/data.
[208] *See* Natlia Benitez et al., *Prostitution and Sexwork*, 19 GEO. J. GENDER & L. 331 (2018); *see also* Shelly A. Wiechelt & Corey S. Shdaimah, *Trauma and Substance Abuse Among Women in Prostitution: Implications for a Specialized Diversion* Program, 1 J. FORENSIC SOC. WORK 159 (2011).
[209] Emma Whitford, *Surge in Prostitution Related Loitering Charges Affects Undocumented Immigrants*, DOCUMENTED NY, https:// documentedny.com/2018/12/19/surge-in-loitering-charges-mayaffect-undocumented-immigrants; Ricardo Cortes, *An Arresting Gaze: How One New York Law Turns Women Into Suspects*, VANITY FAIR (Aug. 2017), https://www.vanityfair.com/ culture/2017/08/nypd-prostitution-laws.
[210] Anne E Fehrehbacher et al., *Exposure to Police and Client Violence Among Incarcerated Female Sex Workers in Baltimore City, Maryland*, S1 AM. J. PUB. HEALTH 110 (2020).

violence involved sexual contact during stops. Additionally, 15% of participants reported that an officer did not arrest them in exchange for sex."[211] The Coalition for Rights & Safety for People in the Sex Trade reported that sex workers in Seattle/King County have been stopped, questioned, or intimidated by the police while engaging in sex work.

In areas where loitering laws exist, stops can result in other charges such as drug possession or trespass. As noted above, criminal records from these charges prevent people from accessing housing and employment, preventing economic advancement.

As further explored in Part IV.B., many court systems now have diversion programs for victims of CSE. Diversion programs provide resource referrals for assistance with substance abuse, domestic violence, sexual assaults, housing, welfare, and vocational rehabilitation.

Although diversions can provide access to resources and essential services, they are tied to involvement with the criminal justice system and they require adherence to release conditions with potential criminal conviction(s) and suspended jail sentences. Some survivors and advocates report that diversion requirements can be inaccessible financially to people in the sex industry. Getting an assessment and going to treatment require health insurance. A survivor with a DUI, for example, may get fired from a job because of the DUI, and then has no health insurance with which to pay for treatment. Attending treatment, court, probation, and other required meetings may prevent survivors from getting or keeping jobs. If one defaults on payments or fails to comply with probation, they may end up in and out of jail, over and over again. A legal reform platform proposed by a coalition of prostitution survivors notes that although a court can facilitate access to services like substance abuse and mental health treatment as part of resolving charges, the mere fact of those services recognizes the inherent vulnerability in sexual exploitation. In addition, successful completion of those programs may simply reduce or prevent jail time or probation, leaving the person with a conviction nonetheless.[212]

[211] Elise White et al., *Navigating Force and Choice: Experiences in the New York City Sex Trade and the Criminal Justice System's Response*, CTR. FOR COURT INNOVATION (2017).

[212] Hatcher et al., *supra* note 199, at 2.

The criminal justice system frames sex work and commercial sexual exploitation in ways that misunderstand the pathways leading into the sex industry and the barriers to exit.[213] A national study in 2010 examined whether the police conceptualize juveniles involved in the sex industry as victims of CSEC or as delinquents. Studying case files of 126 youth allegedly involved in prostitution provided by police agencies in six major U.S. cities, the study found that 60% of youth in this sample were conceptualized as victims by the police and 40% as offenders. Police considered youth with greater levels of cooperation, greater presence of identified exploiters, and no prior record as more likely to be victims, and may have considered local youth more often as victims.[214] This study found that race was not a significant predictor of law enforcement perception of youth as victims; but all Black, Indigenous, and youth of color were combined into one race category so disparities within these populations would have been masked. Hispanic ethnicity was a significant predictor that youth would be viewed as victims rather than offenders. However, when other factors (such as cooperation with police, prior record, and age) were added to the model, Hispanic ethnicity was no longer a significant predictor. Youth with missing ethnicity were coded as non-Hispanic which could reduce the model's ability to identify significant relationships between ethnicity and police perception. Additionally the author notes that the sample size was small so additional research is needed before conclusions can be drawn about the impact of race and ethnicity on police perception.[215] The study used a predictive model to correctly predict 91% of a youth's culpability status.[216] It also appeared that the police at the time of the survey used criminal charges as a paternalistic protective response to detain some of the youth treated as offenders, even though they considered them victims.[217]

Social and economic factors such as lack of access to employment beyond menial jobs with poverty wages, lack of access to education, and unstable housing funnel youth into survival sex, including

[213] *See supra* II.B – vulnerabilities to exploitation and harm caused.
[214] Stephanie Halter, *Factors That Influence Police Conceptualizations of Girls Involved in Prostitution in Six U.S. Cities: Child Sexual Exploitation Victims or Delinquents?* 15 CHILD MALTREATMENT 152, 152-60 (2010).
[215] *Id.* at 156.
[216] *Id.*
[217] *Id.* This study was published in early 2010. Much has changed in terms of perception and training since then.

a disproportionate number of Black, Indigenous, and youth of color and LGBTQ+ youth.[218] Research and data on youth ages 18-24, and on older adults in commercial sex work suggest that a significant percentage of adults in the sex industry entered as minors, experience multiple traumas, and face significant barriers to exiting the sex industry.[219] Although 87.2% of youth wanted to leave sex work, the barriers to exiting were similar to the social and environmental factors that caused them to become sexually exploited.[220] The barriers of criminal charges, lack of employment history, lack of education, financial challenges, and psychological impacts may increase as these youth age into adulthood.

The criminal justice system framework does not account for complex narratives, especially when dealing with young adults ages 18-24 and adults over age 24 involved in the sex industry. Consequently, law enforcement, prosecutors, and legal systems historically saw people as "criminals" and prosecuted them, instead of seeing them as victims of circumstances and trauma. A Seattle-based person who identified as a sex worker said:

> What I do fear…is arrest. Because I'm an independent provider, with no pimp to speak of or trafficking excuse to get me out of legal trouble, I fall outside of the victim narrative. While they may offer services or diversion to someone with a good enough human trafficking angle, I have no such options or excuses. Since I'm not a victim, I'm a criminal. And since I sometimes work with a friend of mine, I could also be charged with felony promotion of prostitution. This is my biggest fear.[221]

[218] *See generally* Phillips, *supra* note 45; Conner, *supra* note 45.
[219] *See* section II.B above . *See also About Ending Exploitation Collaborative*, ENDING EXPLOITATION COLLABORATIVE, https://www.endingexploitation.com/about-ending-exploitation-collaborative.html. The *Ending Exploitation Collaborative* is a partnership including the Washington Attorney General's Office, King County Prosecuting Attorney's Office, the Seattle City Attorney's Office, the survivors-led Organization for Prostitution Survivors (OPS), Businesses Ending Slavery & Trafficking (BEST), and Seattle Against Slavery.
[220] Phillips, *supra* note 45, at 1665.
[221] *Original Work: A Full Contact Sex Worker Tells a Story*, SEX WORKERS OUTREACH PROJECT USA (Jan. 20, 2020), https://seattle.swopusa.org/2020/01/20/original-work-a-full-contact-sex-worker-tells-a-story/ (previously but no longer available).

In Part IV, this report will address Washington State's legal response to recognize the intersection of sex work, commercial sexual exploitation, and trafficking. Despite decriminalization for minors and safe harbor protections for young and adult trafficking victims, challenges remain. The state must develop better multi-system ways to address the exploitation and vulnerabilities of sexually exploited people.

B. Systemic bias is magnified by disparities based on victim demographics

The data provided in Part II suggests significant disparities in the commercial sex industry and commercial sexual exploitation nationally and at least in northwest Washington State.[222] The criminal justice system further perpetuates disparities in CSE and the commercial sex industry in Washington.

Disparities in the justice system in Washington are consistent with national data, much of which focuses on children and youth, and to a lesser extent on adults. In Washington and nationally, women and girls have been disproportionately criminalized. Washington data does not provide any information about the criminalization of LGBTQ+ populations who are involved in the sex industry, though national data suggests they are also disproportionately criminalized. The disparate impact on Black, Indigenous, and communities of color in Washington is significant.

Nationwide, CSE girls have historically been prosecuted at higher rates than those who exploit them,[223] particularly when their behaviors fell outside of prescribed narratives of what victimhood looks like.[224] Exploited youth frequently do not see themselves as victims, so do not identify themselves as victims to law enforcement and prosecutors. They see themselves as the survivors they are, who did what they had to do to eat, have a place to stay, get drugs, etc. Girls who end up in court may face more restrictive interventions with suspended jail sentences used as a tool for compliance. This is due to a lack of knowledge about trauma, lack of shelters or

[222] We don't have good statewide data on disparities based on demographics. While CCYJ data is statewide, it is limited in its focus on CSEC/CSE youth. The remaining data is limited to King County and a few other regions.
[223] *See* Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL'Y REV. 1 (2011).
[224] For example, CSEC individuals may not quickly cooperate with law enforcement or case workers.

placements capable of serving the needs of CSE victims, and to paternalistic views of judges. Some judges still believe that "jail is the safest of many bad options."[225]

This sometimes-well-intended instinct is not only counter-productive but it can be harmful. As a Washington service provider observed:

> I am noticing the criminal legal system does not know how to meet the needs of CSEC survivors. CSEC survivors are getting locked up in Juvenile Detention for CSEC related behavior (i.e. running away, violating probation because trafficker is making demands). The Juvenile Justice system has good intentions but doesn't seem to understand that it is not okay to lock up victims because you are fearful that something bad will happen to them. We lack the type of wrap around services that CSEC survivors need. They end up in a revolving door with juvie and/or foster care. We have resources for homeless youth who are 18-24 but not good resources for CSEC victims who are under the age of 17.[226]

Sexually exploited boys also see disparate interactions and outcomes. Increasing numbers of male victims are being identified but still are mostly "invisible" in data, referrals, training, etc. National statistics from the Department of Justice indicate that boys are charged with prostitution in fewer numbers.[227] Like girls, they may be charged with other offenses related to their victimization. While Safe Harbor Laws are intended to protect CSEC victims, CSE boys are less likely to be diverted and receive services and more likely to be incarcerated. At least one study found that male minors are

[225] Priscilla A. Ocen, *(E)racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 UCLA L. REV. 1586, 1636 (2015).
There has been a great deal of judicial training over the last 15-20 years on trauma, adolescent brain development, and how to respond to these youth. There is much more to be done, and Washington lags on judicial trauma training. The National Council of Juvenile and Family Court Judges (NCJFCJ) has weeklong trainings on Child Abuse and Neglect and a National Judicial Institute on Domestic Child Sex Trafficking, usually twice a year. In addition, NCJFCJ does trauma audits for courts (King County had one many years ago), works with the National Traumatic Stress Network (NCTSN), and co-branded a bench card on child trauma: NCTSN Bench Cards for the Trauma-Informed Judge |The National Child Traumatic Stress Network.
[226] CTR. FOR CHILDREN & YOUTH JUST., THE IMPACT OF COVID-19 ON COMMERCIALLY SEXUALLY EXPLOITED CHILDREN IN WASHINGTON (2021).
[227] TIMOTHY A. BASTEDO, LOVE 146, THE COMMERCIAL SEXUAL EXPLOITATION OF MALE MINORS IN THE UNITED STATES: A SNAPSHOT WITH STRATEGIC IMPLICATIONS FOR PREVENTION EDUCATION 31 (2013), https://love146.org/wp-content/uploads/2013/06/CSEMMFinalReport-1.pdf.

less likely than female minors to be referred to services by law enforcement agencies.[228] Additionally, CSE boys are more likely to face bias in the courts due to expectations of gender conformity and prejudice against non-heterosexual sexual orientations.[229] As noted earlier, many are less likely to disclose for fear that they will be perceived as gay when they are not.

LGBTQ+ youth are highly represented in populations detained by the police. A 2010 study found that lesbian, bisexual, and questioning girls were twice as likely as their heterosexual peers to be held for prostitution—11% compared with five percent.[230] The statistics are starker for gay, bisexual, and questioning boys: one percent of heterosexual boys are detained for prostitution compared with ten percent of their gay, bisexual, and questioning peers.[231] Six percent of gender non-conforming girls were detained for prostitution compared with seven percent of their gender conforming peers. Seven percent of gender non-conforming boys were detained for prostitution compared with one percent of their gender conforming peers.[232]

Because buyers are almost always men, homeless heterosexual boys are often forced by circumstances into exploitation with members of the same sex; this is survival behavior. In the criminal justice system, LGBTQ+ youth may not be perceived as victims of violence or trafficking, and Safe Harbor resources may be unsafe custodial or detention placements due to hostility, ignorance of a youth's sexual orientation, and placements that do not meet the needs of a survivor's gender identity (transgender youth being placed with their assigned at birth gender population).[233]

In fact, research suggests that LGBTQ+ people, particularly transgender women, are profiled by police for engaging in prostitution even when they are not. In a 2015 U.S. survey of transgender people, approximately three in ten Black transgender women and multiracial transgender

[228] *Id.*
[229] *See* Annitto, *supra* note 223.
[230] Angela Irvine, *We've Had Three of Them: Addressing the Invisibility of Lesbian, Gay, Bisexual, and Gender Nonconforming Youths in the Juvenile Justice System*, 19 COLUM. J. GENDER & L. 675, 694 (2010).
[231] *Id.*
[232] *Id.*
[233] *See generally* Conner, *supra* note 45.

women reported that a police officer had assumed they were sex workers.[234] Transgender respondents in a survey of 305 LGBTQ+ people in the Jackson Heights neighborhood of New York City similarly reported being profiled as sex workers though none were working as sex workers at the time.[235]

The criminalization of the sex industry disproportionately impacts Black, Latinx, Native American, immigrant communities, and other communities of color. People of color are disproportionately represented among police arrests, profiling, and incarceration, including in offenses related to sex work. Disproportionate criminalization reflects the disproportionate exploitation of marginalized people and groups. Black and Latinx individuals accounted for 91% of arrests for "loitering for the purposes of prostitution" in New York in 2018, while Asian immigrant women made up the majority of sex work-related massage parlor arrests.[236] In 2013 Black women were arrested for prostitution at a rate 14 times their percentage in the population in California.[237] A study examining data from three cities in North Carolina from 1993-2010 suggested that "in these cities, law enforcement's focus on outdoor prostitution appears to result in [B]lack females being arrested for prostitution at higher rates than their white counterparts and at rates disproportionate to their presence in online advertisements for indoor prostitution." [238]

Of sexually exploited youth, Black children are more likely to come into contact with the criminal justice system, are more likely to be prosecuted, and are more likely to be charged as adults.[239] Black youth make up approximately 62% of minors arrested for prostitution-related offenses in the U.S., even though they comprise only 13% of the population.[240] In a study of New York City youth and young adults engaging in survival sex, multiracial, Latinx, and Black young adults

[234] SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 158 (2016), https://transequality.org/sites/default/files/docs/usts/ USTS-Full-Report-Dec17.pdf.
[235] MAKE THE ROAD NEW YORK, TRANSGRESSIVE POLICING: POLICE ABUSE OF LGBTQ COMMUNITIES OF COLOR IN JACKSON HEIGHTS (2012), https://maketheroadny.org/pix_reports/MRNY_Transgressive_Policing_Full_Report_10.23.12B.pdf.
[236] New York State Division of Criminal Justice Services.
[237] AMIRA HASENBUSH ET AL., THE WILLIAMS INST. AT UCLA SCH. OF L., HIV CRIMINALIZATION AND SEX WORK IN CALIFORNIA (2017), https://williamsinstitute. law.ucla.edu/wp-content/uploads/HIV-Criminalization-Sex-WorkOct-2017.pdf.
[238] JUDGE SHANA & MARIAH WOOD, ASS'N FOR PUB. POL'Y ANALSIS & MGMT., PANEL PAPER: RACIAL DISPARITIES IN THE ENFORCEMENT OF PROSTITUTION LAWS (2014).
[239] Ocen, *supra* note 225, at 1592.
[240] Phillips, *supra* note 45, at 1645.

reported the highest experiences of trouble with police and their clients.[241] "Chapter 9, Juvenile Justice and Gendered and Racialized Disparities," details how gender and racial biases against Black girls often cast them as more mature, thus possessing more agency than their white counterparts. This can impact how they are perceived and treated in the legal system generally and in the context of commercial sexual exploitation specifically.[242]

A 2007 study in Hennepin County, Minnesota, found roughly 24% of the women arrested for prostitution identified as American Indian/Alaskan Native, over 12 times their representation in the county population. A study in Anchorage, Alaska using 2009-2010 data found about one third of the women arrested for prostitution were Alaska Native, but Alaska Natives make up only 16% of the population statewide.[243]

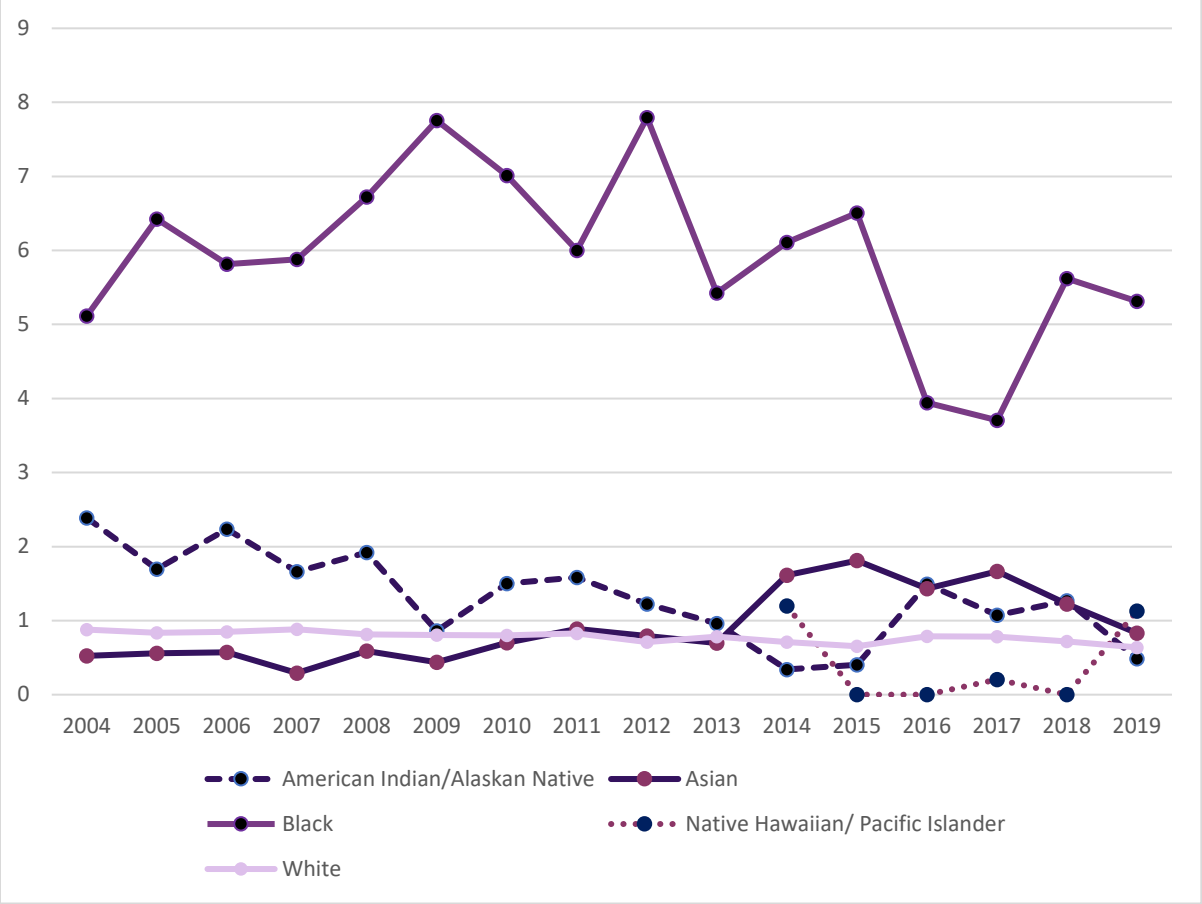
Even when Indigenous/Native American women and girls are identified as victims of sexual exploitation, complicated tribal and state jurisdictional issues on tribal land leave them with fewer protections afforded by anti-trafficking laws.[244] These jurisdictional issues have generally prevented tribes from arresting and prosecuting non-native exploiters and traffickers in tribal court.[245] Most sex traffickers of Indigenous women and girls are non-Native and target tribal lands, knowing that there are no clear avenues for prosecutorial consequences and/or that police in any jurisdiction are reluctant to get involved. This not only makes Indigenous women and girls

[241] DANK ET AL., *supra* note 45.
[242] *See generally supra* note 225, at 1636; Phillips, *supra* note 45, at 1646.
[243] Pierce, *supra* note 113, at 38.
[244] *See* Andrea Johnson, *A Perfect Storm: The U.S. Anti-Trafficking Regime's Failure to Stop the Sex Trafficking of American Indian Women and Girls*. 43 COLUM. HUM. RTS. L. REV. 617 (2012); Gabrielle Mandeville, *Sex Trafficking on Indian Reservations*, 51 TULSA L. REV. 181 (2015).
[245] *But see,* United States v. Cooley, 141 S. Ct. 1638, 1641 (2021) ("The question presented is whether an Indian tribe's police officer has authority to detain temporarily and to search a non-Indian on a public right-of-way that runs through an Indian reservation. The search and detention, we assume, took place based on a potential violation of state or federal law prior to the suspect's transport to the proper nontribal authorities for prosecution. We have previously noted that a tribe retains inherent sovereign authority to address 'conduct [that] threatens or has some direct effect on ... the health or welfare of the tribe.' *Montana v. United States*, 450 U.S. 544, 566, 101 S.Ct. 1245, 67 L. Ed. 2d 493 (1981); see also *Strate v. A–1 Contractors*, 520 U.S. 438, 456, n. 11, 117 S.Ct. 1404, 137 L. Ed. 2d 661 (1997). We believe this statement of law governs here. And we hold the tribal officer possesses the authority at issue.")

targets for commercial sexual exploitation, but also often prevents them from seeking justice and restitution during prosecution.[246]

Similar to the national data, Black, Indigenous, and people of color in the sex industry in Washington State have been disproportionately criminalized (Figure 9).

Figure 9. Washington Association of Sheriffs and Police Chiefs Data, Prostitution Offense Arrestees by Race Compared to Washington Population Data, Juveniles and Adults, Washington State, 2004-2019



[246] *See* Johnson, *supra* note 244; Mandeville, *supra* note 244.

Footnotes for Figure 9.

Notes:

Data not reported for Native Hawaiian and Other Pacific Islanders after 2013. In any given year, some police departments did not provide data. The population data is statewide, so may not be 100% comparable to the arrest data populations given the missing arrest data from various parts of the state. These calculations are based on small numbers and should be interpreted with caution. A ratio below one means that the population is underrepresented in the prostitution offense arrest data as compared to their representation in the general statewide population. A ratio above one means that the population is overrepresented in the prostitution offense arrest data as compared to their representation in the general statewide population.

Sources: *CJIS Statistics and Reports*, WASH. ASS'N OF SHERIFFS AND POLICE CHIEFS, https://waspc.memberclicks.net/crime-statistics-reports (last visited May 28, 2021).
Adapted from information available from Washington Association of Sheriffs & Police Chiefs, Crime in Washington Annual Reports 2012-2019, available at https://waspc.memberclicks.net/crime-statistics-reports.

What this figure tells us*:*

Between 2004 and 2019, the percentage of white individuals arrested for prostitution offenses was considerably lower than their representation in the general Washington State population. This population saw little change in their disproportionality index over time. On the other hand, Black individuals have been disproportionately overrepresented consistently in this time period, a trend that has fluctuated but shown no real progress. The Asian population has seen a trend of moving from being underrepresented in these arrest data to being overrepresented, though data in recent years indicates that this trend may be reversing with Asian individuals being underrepresented again according to the 2019 data. American Indian/Alaskan Native individuals were also overrepresented in 2004, with a slow trend toward more proportional representation over time. It is important to note that this data does not include arrests on Tribal land which could artificially deflate the impacts of prostitution offense arrests on Indigenous communities. All of the data should be interpreted with caution due to the small numbers (cell sizes range from n=0 to n=1,145). The cell sizes for Native Hawaiian and Other Pacific Islanders are very small and make it difficult to make inferences—particularly given that this population was only included in

Washington Association of Sheriffs and Police Chiefs Data Reports in recent years. This data does not have a Latinx category, which means Latinx people may be categorized as a racial group (e.g., Black or white). Since the dataset excludes Latinx individuals, it probably skews the data concerning white, Black, Indigenous, Asian, and Native Hawaiian and Other Pacific Islander representation. Lastly, it is always important to note that when datasets aggregate very diverse populations into high-level categories like the five included here, disparities are often masked. Overall, these data suggest that there are racial disparities in prostitution arrest rates in Washington and that over time, while changes to policies or practice may have reduced those disparities for some populations, it has not been true for all racial groups. Black people remain extremely overrepresented in the arrest data.

Commercial sexual exploitation is violence by men against women, LGBTQ+ people, and children of all genders. Exploited people suffer significant trauma that is often hidden and compounded by stigma and widely shared views that people who are sexually exploited chose freely to engage in the sex industry.[247] Often exploited adults are not identified as victims until they are already in the court process.[248] Even if identified as victims or survivors of CSE, criminal justice system involvement, from the initial arrest to court proceedings including diversion when available, can perpetuate the harm to survivors. "Diversion and exit services mean little to nothing when you are branded a felon."[249]

> The impact of the criminalization of women within the sex trade reduces us to an object in pejorative "humor"; we are the whores, hookers, and sluts at the butt of jokes; and, the scapegoat for men's bad behavior. Not coincidentally, we are also subjected to oppression, hardship, and mistreatment beyond measure. We are exploited by sex buyers and pimps, harassed by the public, abused by insensitive

[247] *About Us*, OPS, http://seattleops.org/about-us.
[248] *See* Serita, *supra* note 70.
[249] Hatcher et al., *supra* note 199, at 3; see "Chapter 9: Juvenile Justice and Gender and Race Disparities" and "Chapter 13: Prosecutorial Discretion and Gendered Impacts" for more information on the impacts of policy contact and "Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families" for more information on the impacts of involvement in the criminal legal system.

police and uninformed judges. The situation we find ourselves in is unjust, and we are condemned to suffer because we are seen as perpetrators instead of survivors. Our suffering is not negligible or diminutive in nature; we bear the consequences of policymakers' negligence in acknowledging our status as victims. The burdens we carry due to criminalization include poverty, homelessness, economic inequity, racial inequity, and myriad additional forms of trauma and oppression. Systemic violence and institutionalized oppression in our social, legal, and economic institutions have pushed us to the margins and seared our exploitation into our souls, branding us just as surely as many of us were branded—through coerced tattoos declaring ownership—by our exploiters.[250]

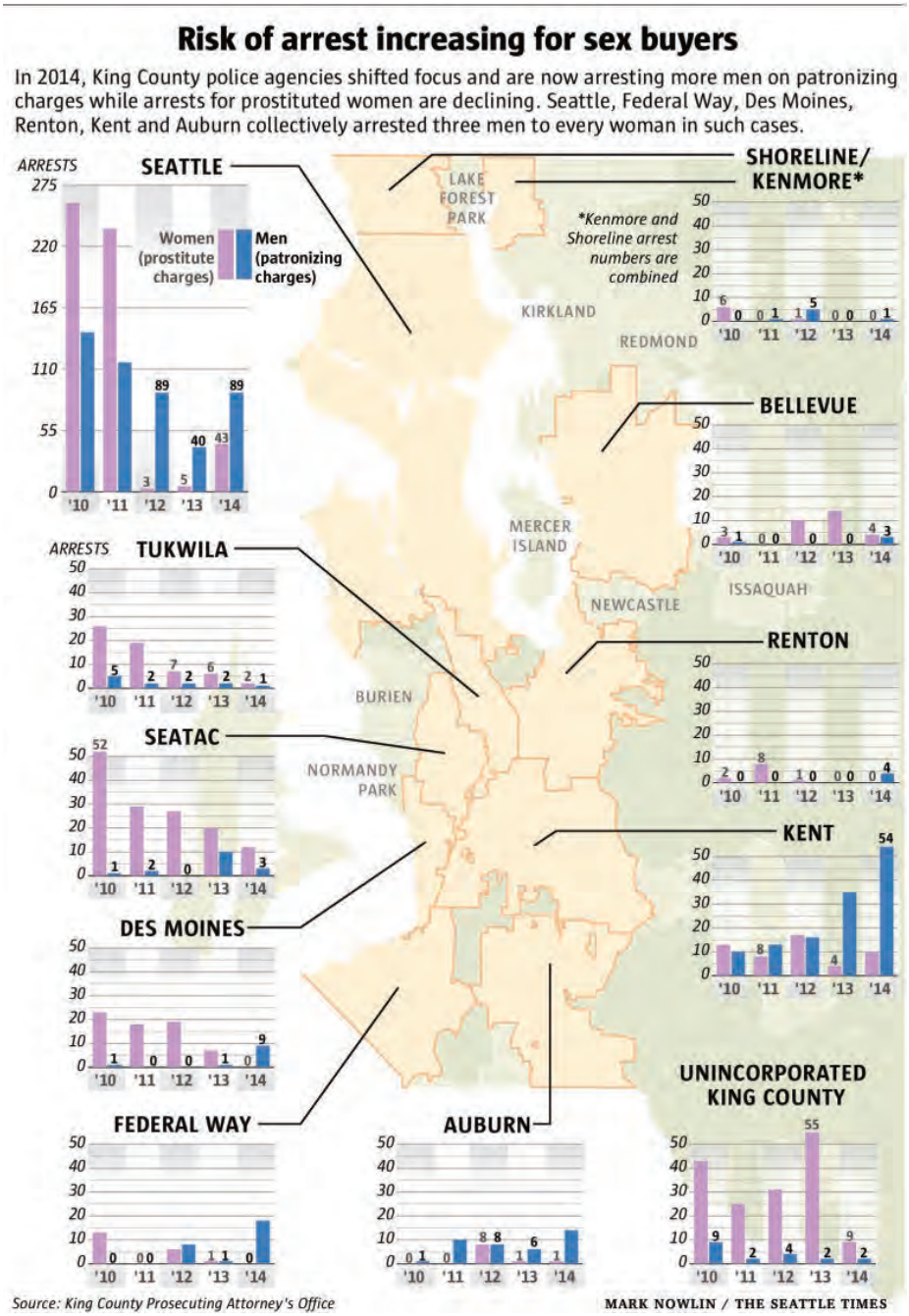
C. Disparities in response to exploitation when framed as prostitution offenses: biased treatment of "sellers" and "buyers"

Historically, people in the sex industry, including victims of exploitation, have been criminalized and sanctioned disproportionately to their third-party exploiters (promoters and traffickers) and buyers. While statewide prostitution offense arrest data is not broken down by the three categories of prostitution related offenses, we can infer from the male/female arrest breakdown that until 2010, those selling sex were being arrested two to three times more than those exploiting them.[251]

King County data illustrates prior biases and shows the dramatic changes resulting from the recognition and identification of many sellers as victims of exploitation. A 2010 to 2014 snapshot of prostitution and patronizing arrests from King County illustrates the trend, at least in some parts of Washington, to redirect arrest and prosecution from the individuals selling sex to their buyers and third-party exploiters. This trend is corroborated by 2008-2020 King County prostitution versus patronizing charging data (see Figures 10 through 13).[252]

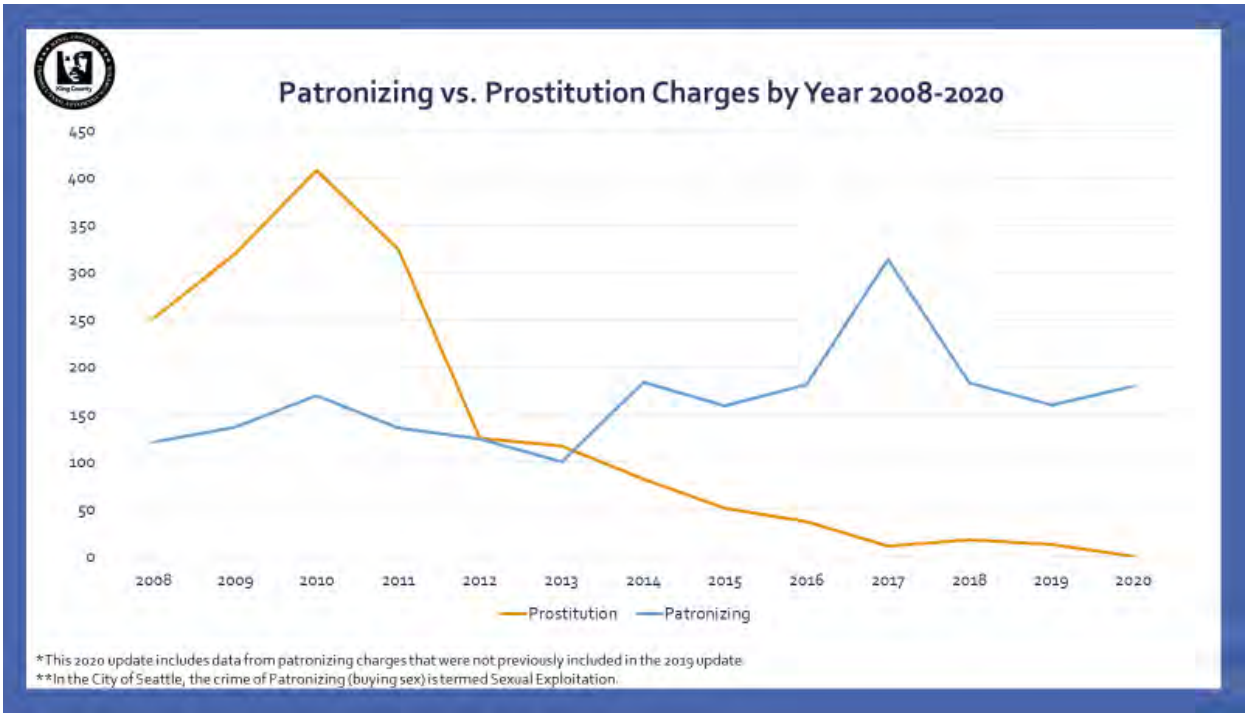
[250] *Id.*
[251] *Crime in Washington Annual Reports 2012-2019*, WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, https://waspc.memberclicks.net/crime-statistics-reports (adapted from information available at WASPC.net).
[252] BENJAMIN GAUEN, KING COUNTY PROSECUTING ATTY'S OFF., KING COUNTY SEXUAL EXPLOITATION CASES: THE DATA BEHIND THE CHARGES 2020 UPDATE (2021), data and slides provided by Benjamin Gauen, Senior Deputy Prosecuting Attorney at

Figure 10. Risk of Arrest Increasing for Sex Buyers, King County 2010-2014



King County Prosecuting Attorney's Office and available at KING COUNTY CSEC TASK FORCE, https://www.kingcountycsec.org/data. King County police agencies are responsible for 91 % of the arrests for "patronizing" or sex buying in the state. *See* WASH. STATE DEP'T OF COMM., CRIMINAL PENALTY FEES RELATED TO SEXUAL EXPLOITATION CRIMES: RCW 43.280.100 (2019).

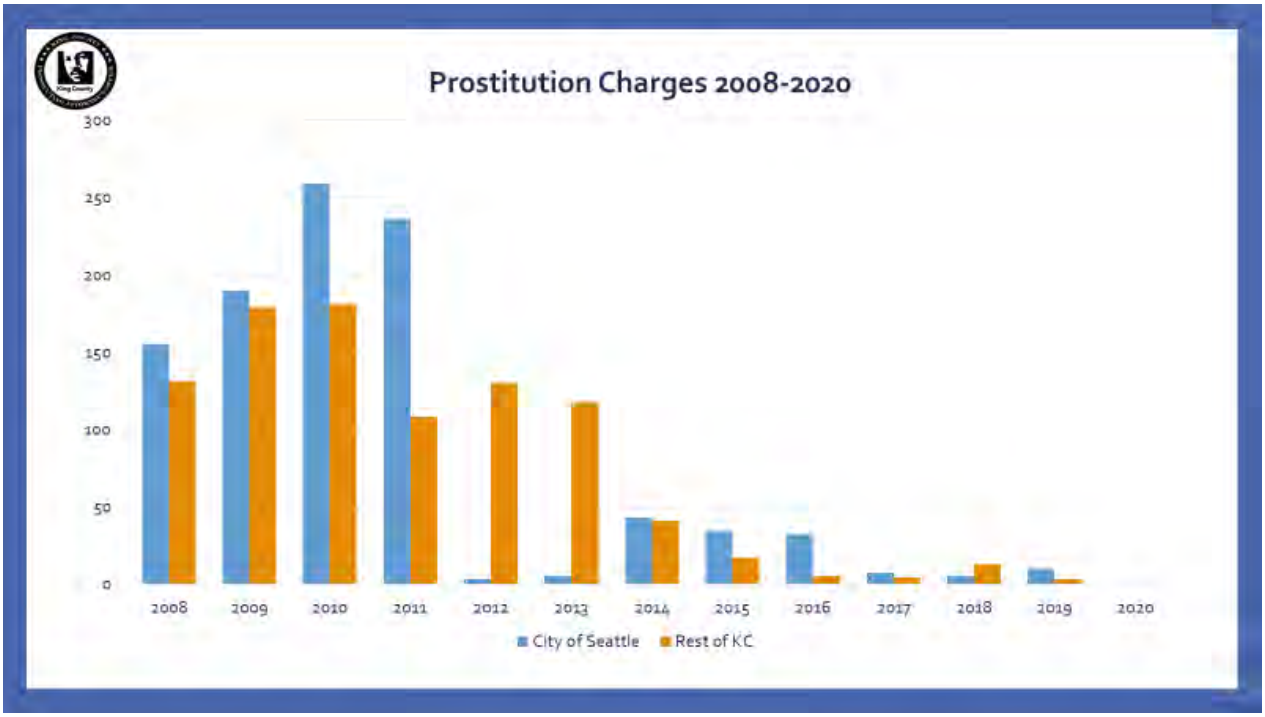
Figure 11. Patronizing vs. Prostitution Charges by Year, King County, 2008-2020



Footnotes for Figure 11.

Source: BENJAMIN GAUEN, KING COUNTY PROSECUTING ATTY'S OFF., KING COUNTY SEXUAL EXPLOITATION CASES: THE DATA BEHIND THE CHARGES 2020 UPDATE (2021), data and slides provided by Benjamin Gauen, Senior Deputy Prosecuting Attorney at King County Prosecuting Attorney's Office and available at KING COUNTY CSEC TASK FORCE, https://www.kingcountycsec.org/data.

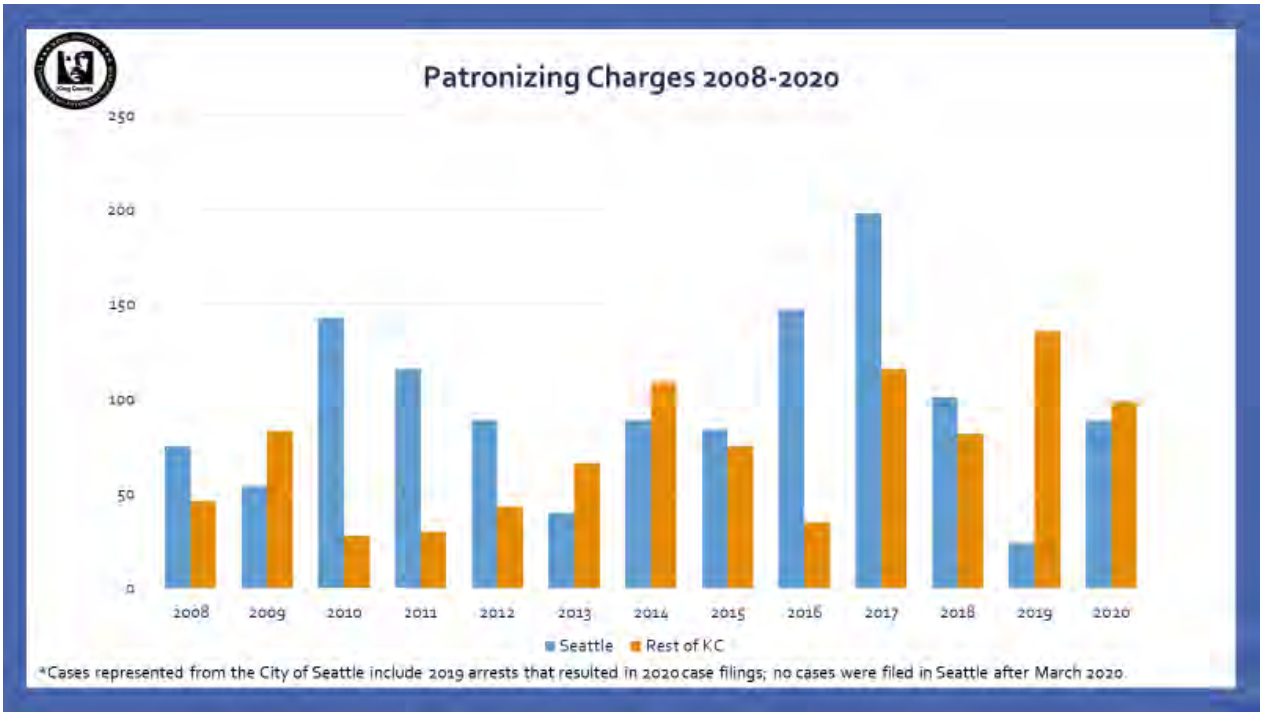
Figure 12. Prostitution Charges, King County, 2008-2020



Footnotes for Figure 12.

Source: BENJAMIN GAUEN, KING COUNTY PROSECUTING ATTY'S OFF., KING COUNTY SEXUAL EXPLOITATION CASES: THE DATA BEHIND THE CHARGES 2020 UPDATE (2021), data and slides provided by Benjamin Gauen, Senior Deputy Prosecuting Attorney at King County Prosecuting Attorney's Office and available at KING COUNTY CSEC TASK FORCE, https://www.kingcountycsec.org/data.

Figure 13. Patronizing Charges, King County, 2008-2020



Footnotes for Figure 13.

Source: BENJAMIN GAUEN, KING COUNTY PROSECUTING ATTY'S OFF., KING COUNTY SEXUAL EXPLOITATION CASES: THE DATA BEHIND THE CHARGES 2020 UPDATE (2021), data and slides provided by Benjamin Gauen, Senior Deputy Prosecuting Attorney at King County Prosecuting Attorney's Office and available at KING COUNTY CSEC TASK FORCE, https://www.kingcountycsec.org/data.

Some law enforcement jurisdictions have shifted from arresting and charging those selling sex to arresting and charging sex buyers. That shift has worked in tandem with prosecutorial policies in Seattle and King County since 2011. King County partners have collaborated on a strong cross-sector approach - the "Ending Exploitation Collaborative" – a partnership including the Washington Attorney General's Office, The King County Prosecuting Attorney's Office, the Seattle City Attorney's Office, the survivor-led Organization for Prostitution Survivors (OPS), Businesses Ending Slavery & Trafficking (BEST), the Center for Children and Youth Justice, and Seattle Against

Slavery.[253] Addressing demand is also on the forefront of national anti-exploitation organizations and the federal government, as well as international organizations.[254] On the other hand, other advocates and sex workers, including members of the Seattle/King County based Coalition for Rights & Safety for People in the Sex Trade, Legal Voice, and the ACLU, question the demand abolition model and advocate for full decriminalization of commercial sexual exchanges between consenting adults when no force, fraud, coercion, violence, or intimidation are present. Both approaches are briefly described below.

Demand focused approaches view the demand for commercial sex as the driver of sex trafficking and exploitation. Trafficking and CSE are a supply response to high demand. Consequently, efforts by the Ending Exploitation Collaborative, the National Center on Sexual Exploitation, and many exited survivors, advance a comprehensive strategy to end commercial sexual exploitation by reducing demand for commercial sex, ending the cycle of prostitution-related crime, and facilitating exit from the sex industry by providing survivor services.[255] The approach of the collaborative is informed by the understanding that:

> The misconception that prostitution is a free choice and a victimless crime affects the ability of individuals, social services, and systems to help victims of CSE. Survivors experience stigma and judgment because of a pervasive belief they have chosen prostitution and are responsible for the harm and violence they suffer. In fact, most people become involved in prostitution as adolescents and have histories of child abuse. Prostitution represents a continuum of violence; the molested 4-year-old becomes the raped 11-year-old, and then the prostituted 14-year-old. The trauma from child abuse, continued abuse and

[253] ENDING EXPLOITATION COLLABORATIVE, https://www.endingexploitation.com.
[254] *See e.g.*, DEMAND ABOLITION, *supra* note 68; NAT'L CTR. ON SEXUAL EXPLOITATION, https://endsexualexploitation.org; *Discouraging the Demand That Fosters Trafficking for the Purpose of Sexual Exploitation*, OSCE (June 10, 2021), https://www.osce.org/cthb/489388; MY LIFE MY CHOICE, mylifemychoice.org. There is also a federal Interagency Working Group on Demand Reduction.
[255] ENDING EXPLOITATION COLLABORATIVE, *supra* note 253; NAT'L CTR. ON SEXUAL EXPLOITATION, *supra* note 254; Marian Hatcher et al., *Exited Prostitution Survivor Policy Platform*, 3 DIGNITY: J. ON SEXUAL EXPLOITATION & VIOLENCE 1, 4 (2018); OSCE, *supra* note 254.

violence in the life, and the subculture of the life are significant barriers to exiting and building more stable lives.[256]

The approach is also based on an international understanding of human rights. Prostitution in all its forms is an abuse of power and is defined as such in the Palermo Protocol under Article 3.[257] The Palermo Protocol is one of three protocols supplementing the UN Convention against Transnational Organized Crime. It was adopted by the General Assembly. Under Article 3, as Dempsey says, "adults who are prostituted by means of an "abuse of power" or "abuse of a position of vulnerability" are victims of sex trafficking, but continue to be treated as criminals throughout the United States, even though their experience constitutes sex trafficking under international law. The approach being implemented in Seattle/King County tries to balance increased accountability for buyers, and increased services rather than prosecution for those engaged in the sex industry.

The Organization for Security and Cooperation in Europe (OSCE), with 57 member nations including the United States, recently released a report "DISCOURAGING THE DEMAND that fosters trafficking for the purpose of sexual exploitation." The 96-page paper cites King County's EEC as "one of the few holistic, multi-sectoral approaches in the OSCE region. . ." It notes that "the activities of the EEC are coordinated through a multi-sector working group that includes survivors, prosecutors, law enforcement, direct service providers, academics, and non-profit organizations and other anti-trafficking stakeholders. . . Actions within sectors focus on policy development, capacity building and concrete initiatives." Those initiatives include education in

[256] *Barriers to Service*, ENDING EXPLOITATION COLLABORATIVE, https://www.endingexploitation.com/barriers-to-services.html.

[257] Michelle Madden Dempsey, *Decriminalizing Victims of Sex Trafficking*, 52 AM. CRIM. L. REV. 207, 214 (2015) ("Despite its ratification of the Palermo Protocol, the United States continues to domestically define trafficking according to the narrower criteria requiring proof of 'force, fraud, or coercion.' Likewise, law enforcement training in the United States regarding the identification of sex trafficking victims continues to rely on the narrower criteria of 'force, fraud, or coercion.' As such, adults who are prostituted by means of an 'abuse of power' or 'abuse of a position of vulnerability' continue to be treated as criminals throughout the United States, despite the fact that their experience constitutes sex trafficking under international law.") (internal citations omitted).

schools and for buyers, education of employers and employees, partnerships to develop technology-based interventions to demand, holding sex buyers accountable.[258]

The EEC moves toward the Nordic Model (often called the Equality Model in the U.S.), which criminalizes and holds accountable sex buyers and third-party profiteers, decriminalizes and offers services to people in the sex industry, and provides for prevention education and awareness.

The Equality/Nordic Model is a systemic approach to reducing disparities by shrinking the demand for commercial sex and providing viable off ramps for those who want to leave the sex industry. The approach was developed in Sweden in 1999 and has been adopted by eight countries.[259] While many U.S. states, including Washington, have moved to decriminalize minors, prostitution is still a crime for adults in all states except for ten counties in Nevada.[260] Many survivors who have exited the sex industry, including Seattle based Organization for Prostitution Survivors, support the Equality/Nordic model as a pillar of criminal justice and policy reform to address inequities and support recovery from exploitation and trauma:

> The Nordic Model offers the social justice framework we need to lift women out of their position of inequality, poverty, and social disparities, through non-

[258] Technology-based prevention interventions include Seattle Against Slavery's Freedom Signal Program, "Freedom Signal is an online app for service providers and advocates that specialize in reaching victims of online sex trafficking or sexual exploitation. When a potential victim replies to a direct outreach message, it enables advocates to develop relationships and build trust with vulnerable populations in acute crisis." FREEDOM SIGNAL, https://freedomsignal.org; *Online Deterrence*, ENDING EXPLOITATION COLLABORATIVE, http://www.endingexploitation.com/online-deterrence.html (online deterrence through digital disruption, providing messages on the consequences, harm, and alternatives to sex buying).

[259] Boyer, *supra* note 61, at 7. *See also* SHARING SWEDEN, PROSTITUTION POLICY IN SWEDEN – TARGETING DEMAND (2019), https://sharingsweden.se/app/uploads/2019/02/si_prostitution-in-sweden_a5_final_digi_.pdf; *Does Legalized Prostitution Increase Human Trafficking?*, HARV. L. & INT'L DEV. SOC'Y (June 12, 2014), https://orgs.law.harvard.edu/lids/2014/06/12/does-legalized-prostitution-increase-human-trafficking/; *Human Trafficking Persists Despite Legality of Prostitution in Germany*, DER SPIEGEL (May 30, 2013), https://www.spiegel.de/international/germany/human-trafficking-persists-despite-legality-of-prostitution-in-germany-a-902533.html; Wim Huisman & E.R. Kleemans, *The Challenges of Fighting Sex Trafficking in the Legalized Prostitution Market of the Netherlands*, 61 CRIME L. & SOC. CHANGE 215 (2014); Geneva Abdul, *It's Legal to Sell Sex in Amsterdam, But Don't Expect the Same Rights As Other Workers*, FOREIGN POL'Y (Feb. 19, 2019), https://foreignpolicy.com/2019/02/19/its-legal-to-sell-sex-in-amsterdam-but-dont-expect-the-same-rights-as-other-self-employed-workers-netherlands-legal-prostitution-sex-workers.

[260] Boyer, *supra* note 61, at 7.

> criminalization and services. As these arguments are made, it is important to underscore that none of this works unless basic needs, including income, are met.[261]

Common sense dictates that removing the threat of arrest and conviction should make sex workers feel more confident and safer reporting violent crime to the police. That should apply under both the Equality/Nordic model and decriminalization.

Seattle has informally followed the Equality/Nordic model for a decade. The Seattle City Attorney's Office (SCAO) reversed arrest policies and flipped prosecution priorities in 2009/2010, recognizing that individuals engaged in the sex industry may have been victimized by the pimps/traffickers and buyers, and then re-victimized by the police arresting them and the prosecutors punishing them. SCAO may charge the individuals engaged in the sex industry under some circumstances with the goal of providing services towards exit in every case.[262] A charged adult will be in community court with an order for continuance of disposition. Prosecutors say their goal is not to convict but rather to dismiss in six weeks after connecting the person with service providers. SCAO has been coordinating with the courts to have services in place, but the services through the Court Resource Center (drug treatment, mental health, job training) are not specifically tailored to exploited individuals, many of whom suffered severe trauma. SCAO also tries to connect individuals with LEAD, the Organization of Prostitution Survivors, and other agencies tailored to their specific needs [263]

[261] *Id.* (Building on the Exited Prostitution Survivor Policy Platform put forth by Marian Hatcher and her colleagues). *See generally supra* note 199.

[262] The process of recovery and overcoming complex trauma is long and difficult. The Stages of Change model used in treating those with substance abuse disorder also applies to survivors of sexual exploitation. "This model has been used extensively for understanding behavior change and for guiding the recovery from various types of addictions and the exit and recovery process for sexually exploited youth and individuals in the sex trades. Stages of Change can be applied to different domains of a person's life (for example: a youth may be pre-contemplative about leaving a trafficking situation, in preparation stage for returning to school and in maintenance stage regarding sobriety." LESLIE BRINER, RESPONDING TO THE SEXUAL EXPLOITATION AND TRAFFICKING OF YOUTH TOOLKIT (2017), Toolkit+2.pdf (squarespace.com), available at www.kingcountycsec.org (internal citation omitted). As with recovery from addiction, this process has steps forward and back, and relapse is often part of the recovery process.

[263] Interview by Jennifer Ritchie and Dana Raigrodski Meeting with Kelly Harris, Chief of the Criminal Division at Seattle City Attorney's Office, and Heidi Sargeant, Assistant City Prosecutor Vice/High-Risk Victims & Narcotics, Seattle City Attorney's Office (Mar. 27, 2017 and updated July 26. 2021) (notes on file with author).

Police are generally not arresting individuals engaged in the sex industry, but on rare occasions they may do so due to complaints from businesses and residents in a particular area.[264] SCAO declines to charge them, but the arrests themselves perpetuate criminalization and continue to inflict disproportionate harm. Sex workers, including some in Washington, have identified regular encounters with law enforcement, even those not leading to arrest and charge, as a source of harm.

In keeping with the shift, and to reduce the disparate impact of prostitution loitering statutes on women, and especially transgender women of color, Seattle recently repealed its prostitution loitering ordinance.[265] The repeal may unintentionally impact the ability of law enforcement to reach CSE minors and transport them to an appropriate place, such as receiving centers as required under the Safe Harbor Act.

The focus on arrest and conviction of sex buyers is part of a broad effort to decrease the demand for exploitive commercial sex, minimize harm and violence towards those in the sex industry, and reduce disparate impacts on targeted vulnerable populations. Perpetrator fees and fines and post-conviction education requirements are also designed to reduce demand and serve a broader goal of restorative justice in providing services for survivors and sex workers.

Some efforts to minimize the harm and violence towards those in the sex industry and the demand for exploitive commercial sex focus on implementing intervention programs to foster behavioral change for buyers and exploiters. Beginning in 2012, the King County Prosecuting Attorney's Office and the Organization for Prostitution Survivors offered a sex buyer's intervention program for all convicted sex buyers. The Stopping Sexual Exploitation (SSE) Program for Men, now operated by Seattle Against Slavery, is a ten-week data-driven men's

For further discussion of the LEAD Program, see notes 332-336 and accompanying text.

[264] *Id.* 2019 saw a troubling, though brief reemergence of Seattle police arresting street-based sex workers, a marked departure from Seattle's approach since 2012. This seems to have been an egregious anomaly in one precinct, in response to complaints of local business and neighbors. COVID-19-related return to the streets has apparently not resulted in increased arrests.

[265] *Seattle City Council Repeals 'Problematic' Prostitution Loitering Law Affecting Minorities*, KOMO NEWS (June 22, 2020), https://komonews.com/news/local/seattle-city-council-repeals-problematic-prostitution-loitering-law-affecting-minorities.

accountability class that changes ideas, behaviors, and beliefs around buying sex, and is currently implemented in ten jurisdictions in King County.

The program is based on principles of social justice and personal transformation and is designed to help men understand their behavior and decisions to buy sex, and to promote men's accountability to stop the harm in the sex industry.[266] Throughout 2020, 97% of participants said they would not buy sex again after participating in the SSE program. Further:

- 92% of responding participants acknowledged that women are harmed by prostitution: "Before [participating in the SSE Program], I ignored the damage and impact that buying sex has." "After [participating in the SSE Program], I better understand the lack of choices and options [people in the sex trade] have. I understand that I may be adding trauma and abuse to their lives."[267]
- 89% of responding participants disagreed that men have a right to pay for sex: "People involved in prostitution usually don't have many options, or feel like they have a choice. As a man, the choice [to participate in prostitution by buying sex] is mine.[268] Another participant similarly noted that "[m]en make up most if not all the reasons why prostitution exists. If men simply stop buying sex, so many of the harms in prostitution will go away."[269]
- 90% of responding participants disagreed that women freely choose to be in prostitution: "I've come to understand how there are many underlying factors that can lead women into prostitution who may not have otherwise been involved in it."[270]
- 96% of responding participants said that their thinking about prostitution has changed after participating in the SSE program.

[266] Stopping Sexual Exploitation: 2021 Program Evaluation (on file with authors).
[267] *Id.* at 6.
[268] *Id.* at 7.
[269] *Id.*
[270] *Id.* at 6.

At this time, Seattle Municipal Court has not yet extended its contract for sex buyer education programs to the Stopping Sexual Exploitation Program.

The Equality/Nordic model and the focus on accountability and education of buyers of sex seek to reduce disparities and harm to individuals in the sex industry. Some advocates and sex workers question the demand abolition model and argue that the Equality model does not go far enough in reducing harm and may perpetuate it. They advocate for full decriminalization of commercial sexual exchanges between consenting adults. Supporters of decriminalization say there is a growing consensus among civil rights, LGBTQ+ justice, labor, immigrant justice, and women's groups that the decriminalization of sex work best protects people in the sex industry, and that it promotes racial justice, LGBTQ+ justice, gender equity, immigrant rights, public health, and labor rights.[271]

They believe that, short of full decriminalization (as opposed to the Equality/Nordic model which only decriminalizes sellers), buyers will continue to fear arrest and conviction, will refuse safety screens, will be forced to meet at clients' homes rather than in places sex workers designate, giving sex workers less bargaining power and less control over their working conditions.[272] Advocates for decriminalization and sex workers argue that full decriminalization might allow all sex workers access to more stable, legal income, and autonomy.

Although people disagree about whether decriminalization of the sex industry will remove the drivers of trafficking and exploitation, or normalize and increase the size of the sex industry, trafficking, and sexual exploitation, there are areas of agreement:

- We must end violence and exploitation in the sex industry and ensure that individuals in the sex industry are protected and treated with respect.
- Minors should never be trafficked or sexually exploited.

[271] DATA FOR PROGRESS, DECRIMINALIZING SURVIVAL: POLICY PLATFORM AND POLLING ON THE DECRIMINALIZATION OF SEX WORK, https://www.filesforprogress.org/memos/decriminalizing-sex-work.pdf.
[272] *Id.* at 18. *See also* ACLU RESEARCH BRIEF, IS SEX WORK DECRIMINALIZATION THE ANSWER? WHAT THE RESEARCH TELLS US (2020), https://www.aclu.org/report/sex-work-decriminalization-answer-what-research-tells-us.

- We should reduce over-policing, arrest, and incarceration of individuals in the sex industry and improve their access to help and ability to report violence and exploitation without fear of arrest or incarceration.
- We must address root causes of exploitation by reducing the vulnerabilities of people targeted for or already in the sex industry. People with few economic choices are susceptible to being exploited. Children and youth are especially susceptible to being exploited. To that end we must:
    - Fund shelters that house all exploited youth, and house and affirm LGBTQ+ youth experiencing homelessness.
    - Expand and fund services for people in the sex industry whether or not they are connected to the criminal justice system, including services that meet health care, substance abuse, and mental health needs.
    - Ensure jobs and job training are available that do not discriminate against people who have been involved in the sex industry.
    - Ensure legal support including assistance with vacating prior convictions related to exploitation and immigration.

D. Mandatory statutory fees for sexual exploitation offenders are not being imposed

Under Washington law, courts are required to assess mandatory fees following convictions for trafficking, CSAM, and patronizing a prostitute. The fees are in addition to other criminal penalties, including statutory fines and jail time. They may be reduced but not waived as discussed below, and they are applied to prevention of sexual exploitation, providing victim services, and supporting police investigation of exploitation cases.

If a person is convicted of a trafficking crime, given a deferred prosecution, or enters into a statutory or non-statutory diversion agreement for Trafficking, the court must assess a fee of

$10,000.[273] The court "shall not" reduce, waive, or suspend payment of the fee unless it finds, on the record, that the offender does not have the ability to pay the fee in which case it may reduce the fee by up to two thirds.[274] The fees are remitted to the jurisdiction where the offense occurred and are split between law enforcement (for the purpose of increasing investigation efforts) and local prevention efforts such as education programs for offenders, and rehabilitative services for victims, such as mental health and substance abuse counseling, parenting skills, training, housing relief, education, vocational training, drop-in centers, and employment counseling.[275]

In 2010 the Washington State Legislature added a mandatory fee of $5,000 to CSAM/CSEC crimes,[276] and provided that the arresting officer must impound the suspect's vehicle if it was used in the commission of these offenses.[277] The court may waive up to two thirds of the $5000 fee if the offender is unable to pay; but the vehicle may be impounded, and a substantial fee paid for its release, without regard to ability to pay. Ninety-eight percent of the fees go back to the jurisdictions,[278] and are split between law enforcement (to increase related investigations) and prevention efforts and victim services (similar to those for trafficking fees). The Washington State Legislature also imposed additional fees for those convicted, deferred, or diverted for promoting or patronizing prostitution.[279]

These mandatory fees recognize the economic aspect of crimes of exploitation; they work on the assumption that if a person has money to pay for commercial sex or has earned money exploiting another person, they should have money to help reduce the harm that their actions have caused

[273] RCW 9A.40.100.
[274] *Id.*
[275] *Id.*
[276] A person convicted of CSAM, promoting CSAM, promoting travel for CSAM, or who has been given a deferred prosecution or entered into a statutory or non-statutory diversion agreement for the aforementioned offenses must be assessed a fee of $5,000. RCW 9.68A.105.
[277] RCW 9A.88.140(2). Suspects must pay a fine of $2,500 to redeem the impounded vehicle. RCW 9A.88.140(4)(a).
[278] Unlike trafficking offenses, for CSAM offenses, two percent of the fee revenue is remitted to the Department of Commerce for the Prostitution Prevention and Intervention Account (PPIA).
[279] RCW 9A.88.120.

to people in their communities. The data, though, shows that this assumption is not necessarily true for every offender.

Proceeds and property may be seized and forfeited for promoting prostitution in the first degree.[280] Ninety-eight percent of the fees go back to the jurisdictions[281] and are split as described above. Law enforcement agencies are also authorized to seize any proceeds or property that facilitate prostitution crimes.[282] Of those seized proceeds or property, 90% shall be used by the seizing law enforcement agency for the expenses of the investigation and seizure and to enforce the related crimes, and 10% shall be deposited in the Prostitution Prevention and Intervention Account, managed by the Department of Commerce.

Various statutes authorize law enforcement agencies to seize and forfeit proceeds or property that facilitate or are proceeds of the sexual exploitation of children.[283] The disposition of the proceeds of forfeiture varies depending on the statute.

Data on King County charges for commercial sexual exploitation of adults shows that between 2013 and 2018, CSE related fees totaled $715,692.67, with the average fees ordered per case ranging from $2,500 to $4,500.[284] A 2016 CSEC Statewide Coordinating Committee Report noted the following issues related to CSAM-specific fees:[285] 1) Attorneys and judges must know the fees exist to assess them; 2) Judges must impose at least a portion of the fees and should understand they can only be reduced by up to two-thirds if the court finds the defendant "does not have the ability to pay the fee;" and 3) The current standardized version of the Felony Judgment and

[280] RCW 9A.88.150.
[281] Two percent of the fee revenue is remitted to Department of Commerce for the Prostitution Prevention and Intervention Account (PPIA).
[282] RCW 9A.88.150.
[283] RCW 9.68A.120 authorizes civil forfeiture of property or proceeds from child-pornography related crimes. The money laundering act (RCW 9A.83.030), the Criminal Profiteering Act (RCW 9A.82.100), Promoting Prostitution (9A.88.150), and the Felony Forfeiture statute (RCW 10.105.010) apply to forfeiture of CSAM related crimes.
[284] BENJAMIN GAUEN, KING CNTY. PROSECUTING ATT'YS OFF., KING COUNTY SEXUAL EXPLOITATION CASES: THE DATA BEHIND THE CHARGES 2019 UPDATE (2019), https://static1.squarespace.com/static/5b71c32bec4eb7c684a77ff4/t/5f21d3f3ff89035c1cd5ca00/1596052475191/KCPAO+2019.pdf https://www.kingcountycsec.org/data.
[285] *Commercially Sexually Exploited Children Statewide Coordinating Committee*, WASH. STATE OFF. OF THE ATT'Y GEN., https://www.atg.wa.gov/commercially-sexually-exploited-children-statewide-coordinating-committee.

Sentence Form does not separate the CSAM, Promoting CSAM, and promoting travel for CSAM fee of $5,000 from the Trafficking and Promoting Prostitution offenses. Updating the standardized Felony Judgment and Sentence form by creating a separate section for CSAM, promoting CSAM, and promoting travel for CSAM would make the fee, along with when and if it is required, clear to prosecutors, defendants, and the courts. King County has started the process of implementing these changes.[286]

Currently many courts in Washington don't impose any portion of these mandatory fees, potentially leaving substantial funds uncollected. In fiscal year 2019, "68 courts in Washington handed down convictions for crimes that bear the additional fee. Of these courts, 23 levied statutorily required fees. Twenty-one courts collected revenue toward payment of the fees."[287] (Note that the fees collected in a particular year are not necessarily related to fees imposed during that year.) "If judges ordered persons convicted of crimes to pay the full fee amount for all crimes, potential revenue would total $474,350. Instead, judges in superior, district, and municipal courts ordered $257,496. Out of the amount levied, courts collected a total of $174,891."[288] (Again, note that the fees collected in a particular year are not necessarily related to fees imposed during that same year, and some of the difference may be due to partial waivers for those unable to pay the full amount). In fiscal year 2020, "just over half (51%) of courts that handed down convictions for sexual exploitation crimes levied the required fees." Excluding courts in King County, Washington courts imposed only 5% of the total amount of penalty fees that could have been imposed if inability to pay were not considered.[289] Fees not collected from those able to pay remain in the pockets of traffickers and exploiters, rather than aiding local efforts to end exploitation.

[286] There is now a one-page handout breaking down the statutorily authorized penalty fines and revenue from seized property due to trafficking, prostitution, and commercial sexual exploitation crimes, and how they are to be dispersed. There is an effort to circulate the handout to courts and prosecutors around the state. Source: Benjamin Gauen, Senior Deputy Prosecuting Attorney, King County Prosecutor Office.
[287] WASH. STATE DEP'T OF COMM., REPORT TO THE LEGISLATURE: CRIMINAL PENALTY FEES RELATED TO SEXUAL EXPLOITATION CRIMES 2 (2020).
[288] *Id.*
[289] *Id.*

Additional mechanisms to encourage courts to impose these fees might include publishing an annual list of the rate at which such fees have been imposed by local courts in Washington. We could also survey the courts and prosecutors' offices to determine whether courts are not imposing these fees for other reasons.

Other sections in the 2021 Gender Justice Study note that enforcement of certain fines, fees, and other penalties against defendants and potential defendants may be unnecessarily punitive and lead to disproportionate impacts on marginalized communities. The fees discussed here are distinguishable from those other types of fees in important ways. 1) In the context of trafficking, CSAM, and even patronizing, the fees are a form of restorative justice - reparative and equitable accountability. In most cases 50% of the funds go to victim/survivor services and education for buyers, about 50% go to fund investigations of sexual exploitation. Often there is no restitution in these cases, especially where the charge is patronizing. As noted so often in this report, commercial sexual exploitation is a form of economic colonialism. These fees help correct that by providing money for sorely needed services. 2) If sex buyers can afford to pay for sex, they should be able to afford to pay fees. A survey of 8,210 adult men between December 2016 and January 2017 concluded that "In general, sex buying is only weakly related to income, education level, or political ideology." [290] Buyers are found across the income distribution. Notably, 29.1% of active high-frequency buyers made $100,000 or more annually and 21.7% made between $60,000-99,000 annually. At the same time, 27.9% of active high frequency buyers only made between $20,000-29,000 annually.[291] The survey also found that high frequency buyers (those who buy sex monthly or weekly) account for nearly 75% of market transactions. King County's records (see Figures 4 and 5 above) demonstrate that sex buyers of minors (CSAM) are mostly gainfully employed white men. Many, such as those in the tech industries, business, or professional services, represent the most privileged in our community exploiting the most marginalized. Certainly, those who are the highest earners can afford to pay fees which enable survivors to exit a life of exploitation. Recovery from this kind of trauma often takes years of

[290] DEMAND ABOLITION, *supra* note 68, at 19.
[291] *Id*.

substance abuse treatment, behavioral health treatment, and other social services. It is an equitable policy for the perpetrators of the harm to pay for those services if they are able. 3) Although these fees are mandatory, courts have the discretion to reduce them by up to two thirds if they find the defendant unable to pay.

E. Challenges where there are co-occurring crimes

Since the early 2000s, Washington State has made significant progress on issues of human trafficking and commercial sexual exploitation and reduced the involvement of youth in the criminal justice system. Recognizing the need for a victim-centered approach, the Washington State Legislature has enacted legislation that provides for affirmative defenses for minor and adult trafficking victims, pathways to vacate prostitution convictions for minors and adults, decriminalization of prostitution by minors, and receiving centers for exploited youth who would have been detained for prostitution in the past. Challenges remain for sexually exploited youth who are arrested and adjudicated for other charges.[292] The criminalization of prostituted adults (including young adults ages 18-24) exists even after the enactment of human trafficking and CSEC/CSAM laws. Where no force or coercion is known to be involved, adults have limited defenses to the charge or pathways to vacate convictions. Despite the progress, vacatur is still inaccessible to many adults who have prostitution-related convictions. Those convictions may have collateral consequences (See "Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families") that undermine their ability to exit the sex industry. The lack of protective legislation and policies for the 18-24-year age group and others is a systems failure. It fails to recognize that most people who are sexually exploited, are forced or coerced either by third parties, or by poverty, substance abuse, or homelessness to engage in sex work.[293]

[292] DEBRA BOYER, CITY OF SEATTLE, HUM. SERVS. DEP'T DOMESTIC VIOLENCE & SEXUAL ASSAULT PREVENTION DIV., WHO PAYS THE PRICE? ASSESSMENT OF YOUTH INVOLVEMENT IN PROSTITUTION IN SEATTLE 5 (2008), http://www.prostitutionresearch.com/Boyer%20Who%20Pays%20the%20Price.pdf.
[293] *See* Melissa Farley et al., *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, 2 J. TRAUMA PRAC. 33 (2008). "89 percent of 785 people in prostitution in 9 countries

Since 2010, the Washington State Legislature has enacted several laws recognizing that minors exploited in the sex industry are victims of a crime. Those laws establish a presumption that such minors are victims of a severe form of trafficking under the TVPA; provide immunity from prosecution for those seeking emergency assistance; and mandate diversion into services from juvenile offender proceedings.[294] In addition, in April 2020, the governor signed into law E3SHB 1775: it amended RCW 9A.88.030 by decriminalizing prostitution for anyone under the age of 18 beginning January 1, 2024.[295] This new law requires DCYF to fund and establish receiving centers in both Western and Eastern Washington for youth ages 12-17 who are, or have been, at risk of suffering commercial sexual exploitation. While the bill envisions youth being referred to the centers by law enforcement, DCYF, juvenile courts, community service providers, a parent or guardian, and even the youth themselves, law enforcement may still take the youth into protective custody in certain circumstances.[296]

Barriers remain even as prostitution arrests and charges of minors have steadily declined. There is an egregious shortage of comprehensive resources for commercially sexually exploited children involved in the juvenile justice and child welfare systems. The new legislation provides for law enforcement to detain a juvenile whom they reasonably believe "may be the victim of sexual exploitation," and directs law enforcement to transport that juvenile to an evaluation and treatment center.[297] At the time of this report, though requests for applications for receiving centers on the east and west sides of the state were published twice, and it appears that the east side will be opening a receiving center, none were submitted for the west side. No organization felt it could do what

wanted to escape from prostitution." *Id.* at 56. More than 75% of those (78% in the U.S. cohort) said they needed a home or a safe place; 67% of those in the U.S. said they needed drug/alcohol treatment. *Id.* at 51.

[294] In 2010, ESSB 6467 established partial protections for minors alleged to have committed prostitution. In 2012, the Washington State Legislature went a step further and created an affirmative defense to the charge of prostitution for minors and adults if the offense was committed as the result of being a victim of trafficking or of promoting prostitution in the first degree. RCW 9A.88.040. In 2019, HB 1382 was passed to provide immunity from prosecution for CSE victims of any age if the victim is seeking emergency assistance.

[295] ENGROSSED THIRD SUBSTITUTE H.B. 1775, 66th Leg., Reg. Sess. (Wash. 2020) (amending RCW 9A.88.030).

[296] *Id. See also* FINAL B. REP. ON ENGROSSED THIRD SUBSTITUTE H.B. 1775, 66th Leg., Reg. Sess. (Wash. 2020). For a detailed analysis of balancing decriminalization with protective and law enforcement considerations see, for example, BOYER, *supra* note 11.

[297] RCW 43.185C.260(7).

the law requires with the funding available. Sufficient funding must be provided to implement the new law and provide the necessary services for sexually exploited youth. In addition to funds for receiving centers, the state must also fund residential treatment beds for sexually exploited youth who suffer from co-occurring disorders, including PTSD, substance use disorder, and other mental health issues. Washington is an outlier among states in having so few treatment beds available for these youth. Mental Health America recently released its 2020 statistical survey of state mental health rankings. Washington ranked 43 out of 51 indicating a higher prevalence of mental illness and lower rates of access to care for youth.[298] In King County, there are NO detox beds for minors. This is important because most residential treatment programs won't admit a person until they have detoxed.

Adults in the sex industry have even more limited options. Adult victims of trafficking or promoting prostitution in the first degree have an affirmative defense to the charge of prostitution.[299] The Washington State Legislature should consider an affirmative defense to any offense committed as a result of exploitation (including Trafficking, any CSAM offense, promoting prostitution, dealing in depictions of a minor engaged in sexually explicit conduct). In addition, 2019 legislation now provides immunity from prosecution for prostitution for those seeking emergency assistance on behalf of themselves or others from violent crimes and assaults including rape.[300]

CSEC and CSE adults may face multiple charges including drug possession, trespass, burglary, shoplifting and other theft, forgery, etc. related to their exploitation. Survivors paint a grim picture:

> Even when we are classified as victims of trafficking we are too often charged with non-violent co-occurring crimes, further aggravating our negative circumstances, increasing the barriers to exit, and increasing the likelihood of re-entering into prostitution. Often it is not until after the exploitation has occurred, and the

[298] *Ranking the States: Youth Ranking 2020*, Mental Health Am., Inc. (2021), https://www.mhanational.org/issues/ranking-states#youth_data.
[299] RCW 9A.88.040.
[300] RCW 9A.88.200.

> violence inflicted is finally deemed "bad enough" that law enforcement will bother to classify the exploited person as a victim. This does little to prevent us from being forced back into prostitution, and it does nothing to abate the stigma and associated depression that becomes a very real part of our day-to-day lives.[301]

These individuals often reoffend, come in and out of the justice system, and may or may not be identified as victims or survivors of CSE. Of the group of Seattle/King County CSE minors studied by Dr. Boyer in 2006/2007, many were arrested on multiple offenses multiple times (Table 5).[302]

[301] Hatcher et al., *supra* note 199, at 3.
[302] BOYER, supra note 292, at 20.

Table 5. Arresting Offenses Among Youth, King County, 2004-2006

Study Group (N=31) Arresting Offense	# of Charges Within Study Group*
Prostitution/Prostitution Loitering	102
Theft	31
Obstruction / Resisting / Escape / False Statement	27
Assault	23
VUCSA** Controlled Substance Violation	21
Firearms/Weapon	8
Criminal Trespass	7
Kidnapping/Intimidating Witness	3
Robbery	2
Domestic Violence Call	2
Motor Vehicle Violations/Possession/Taking a Motor Vehicle / Stolen Property	21

Footnotes for Table 5.

*A filing may have multiple charges.

**VUSCA: Violation of the Uniform Controlled Substances Act

Source: DEBRA BOYER, CITY OF SEATTLE, HUM. SERVS. DEP'T DOMESTIC VIOLENCE & SEXUAL ASSAULT PREVENTION DIV., WHO PAYS THE PRICE? ASSESSMENT OF YOUTH INVOLVEMENT IN PROSTITUTION IN SEATTLE (2008), http://www.prostitutionresearch.com/Boyer%20Who%20Pays%20the%20Price.pdf. Also available at https://www.kingcountycsec.org/data.

As of 2019, Seattle/King County prosecutors usually offer diversion for minors charged with other kinds of crimes when sex trafficking and CSE are known.[303]

Arrests and prosecution of minors have declined statewide, but adults remain subject to arrest, prosecution, and incarceration. The Seattle and King County de facto Equality/Nordic Model is implemented via internal law enforcement and prosecutorial policy directives, so could be subject to change. It is also not uniformly applied throughout the state. People engaged in the sex industry, particularly those from marginalized communities, report that over-policing and targeted discrimination and harassment by law enforcement continues in some places even absent formal arrests.

The Washington State Legislature has expanded options for vacating convictions. House Bill 1041, known as the New Hope Act, went into effect in July 2019 (it was further amended by SB 5180 in 2021).[304] It eliminated many former inequities and broadened eligibility requirements, including streamlining the process for vacating a criminal conviction, shortening the wait time, and removing the complete bar on eligibility for vacatur due to subsequent convictions.[305] Survivors of trafficking or CSAM, or who were compelled by threat or force to engage in prostitution, are also able to seek vacatur of a prostitution conviction as a result of being a victim by applying to the sentencing court. Effective July 2021, SB 5180 allows survivors of abuse to clear more types of criminal convictions related to their abuse. Survivors would be able to show past sexual abuse and won't necessarily have to prove that prostitution was forced or coerced.[306] The vacatur law also allows the prosecutor to petition for vacatur.[307] Nonetheless, vacating a criminal conviction remains a difficult process for survivors to do without the aid of an attorney.

[303] BOYER, *supra* note 11.
[304] The New Hope Act, SENTENCE AND PUNISHMENT—DISCHARGE—CERTIFICATES AND CERTIFICATION, 2019 Wash. Legis. Serv. Ch. 331 (S.H.B. 1041) (WEST).
[305] *Id.*
[306] ENGROSSED SUBSTITUTE S.B. 5180, ch. 237, 67th Leg., Reg. Sess. (Wash. 2021) (specific relevant provisions codified in RCW 9.94A.0002).
[307] *Id.* RCW 9.94A.0002(1)(b).

IV. Addressing Gender, Race, and Age Disparities: Emerging Approaches and Next Steps

Washington has made significant progress on issues of human trafficking and CSE, with parallel progress on reducing disproportionate gender and racial impact of the justice system response. The state has increased the accountability of traffickers and exploiters, who are primarily men, and has legislated a survivor-centered approach to sexually exploited minors and, to some extent, adults. It has made significant progress in reducing the involvement of all CSE minors, many of whom are at-risk girls, LGBTQ+ individuals, boys, and Black, Indigenous, and youth of color, in the justice system. These actions will continue to alleviate the gender, racial, and socioeconomic inequities that the justice system in Washington has perpetuated. However, many of these protections do not apply to young adults ages 18-24 whose exploitation almost always began when they were minors. Moreover, the criminalization of adults in in the sex industry, including those who are survivors of sexual exploitation, remains.

This section examines how Washington can further reduce sexual exploitation and its harms, which include exacerbating gender and racial disparities. Reducing those harms will require multidisciplinary systems-wide responses, "upstream" prevention focused on reducing economic and social marginalization, and a public health approach. These responses call for further reduction of justice system involvement for minors and adults, for data collection, and for comprehensive systems-wide training and education. We begin by discussing the public health approach and the need for upstream interventions. While some of the proposed steps may be outside the technical scope of this study, Washington cannot address CSE and the disparities we identify comprehensively without them. They should inform and shape the justice system response, as discussed in the subsections below.

A. The need for multidisciplinary systems-wide responses: focusing on "upstream" prevention and a public health approach

In September 2020, the National Advisory Committee on the Sex Trafficking of Children and Youth in the United States (NAC) issued best practices and recommendations for states, guided by its vision for a "comprehensive response to human trafficking in which federal, state, tribal, and local efforts converge to identify and care for victims, hold perpetrators accountable, and

eradicate the conditions that perpetuate human trafficking."[308] Such efforts should be victim-survivor centered and informed; trauma-informed; culturally and linguistically appropriate; build on evidence-based practices and evaluation; and use cross jurisdictional and public-private collaboration.[309] While NAC's scope of work focuses on children (up to age 18) and youth/young adults (18-24), its best practices and recommendations should inform our responses to all CSE people.

Both NAC and the CDC consider sex trafficking to be a serious public health problem that negatively affects the well-being of individuals, families, and communities. [310] The U.S. Department of Health & Human Services (HHS) has emphasized the need to use a public health approach in addressing trafficking,[311] and the National Human Trafficking Training and Technical Assistance Center at HHS also recommends a public health approach.[312] "The public health approach emphasizes multidisciplinary collaboration and the use of rigorous scientific research to develop an evidence base that drives the development of policies, procedures, and programs." [313] Through ongoing observation of child and youth trafficking, a public health approach can help the state define and monitor the problem, determine vulnerability and resilience factors related to victimization, and develop and implement proven prevention strategies and programs.[314]

As the NAC report notes, "[m]any states have taken significant steps to adopt a public health approach by viewing children and youth as victims and providing them with protection and support. A national effort is underway to create a social safety net that treats children and youth

[308] NAT'L ADVISORY COMM. ON THE SEX TRAFFICKING OF CHILDREN & YOUTH IN THE U.S., BEST PRACTICES AND RECOMMENDATIONS FOR STATES 7 (2020), https://www.acf.hhs.gov/sites/default/files/documents/otip/nac_report_2020.pdf [hereinafter NAC BEST PRACTICES REPORT].
[309] *Id.* at 9.
[310] *Id.* at 8; CTRS. FOR DISEASE CONTROL & PREVENTION, VIOLENCE PREVENTION: SEX TRAFFICKING (2021), https://www.cdc.gov/violenceprevention/sexualviolence/trafficking.html.
[311] *Public Health* Approach, U.S. DEP'T OF HEALTH AND HUM. SERVS., NAT'L HUM. TRAFFICKING TRAINING & TECHN. ASSISTANCE (Jan. 8, 2021), https://nhttac.acf.hhs.gov/soar/eguide/guiding-principles/applying-public-health-approach-to-human-trafficking.
[312] *Id.*
[313] NAC BEST PRACTICES REPORT, *supra* note 308, at 8.
[314] *Id.*

as victims, not perpetrators."[315] Washington should adopt a statewide policy recognizing human trafficking and sexual exploitation in all its forms as a public health issue. In doing so, Washington can look to the *Best Practices and Recommendations for States*, issued by The National Advisory Committee on the Sex Trafficking of Children and Youth in the United States, as a model.[316]

B. Efforts to reduce justice system involvement through problem-solving courts, task forces for CSE survivors, and interventions pre-arrest

Problem solving and therapeutic courts are a public health proactive intervention with a history of success. Washington, like other states, has seen increased use of drug courts, family dependency or family drug courts, mental health courts, DUI, and domestic violence courts.[317] In most problem-solving courts, such as a drug court or domestic violence court, an interdisciplinary team, led by a judge (or probation authority), works collaboratively to reduce criminal offending through therapeutic and interdisciplinary approaches that address issues underlying criminal behavior such as addiction, mental health, trauma, and repeat offending.[318]

The model often used in drug courts may involve: offender screening and assessment of risks, needs, and responsivity; judicial interaction, monitoring, and supervision; graduated sanctions and incentives; and treatment and rehabilitation services. Cases are usually managed by a multidisciplinary team including judges, prosecutors, defense attorneys, community corrections officers, social workers, treatment service professionals, and sometimes other community

[315] *Id.*

[316] THE NAT'L ADVISORY COMM. ON THE SEX TRAFFICKING OF CHILDREN & YOUTH IN THE U.S., BEST PRACTICES AND RECOMMENDATIONS FOR STATES (2020), https://www.acf.hhs.gov/sites/default/files/documents/otip/nac_report_2020.pdf. Given the importance of cross-system understanding and collaboration in addressing these issues, NAC structured its 127 recommendations in the following areas: Multidisciplinary Response; Screening and Identification; Child Welfare; Service Provision; Housing; Law Enforcement and Prosecution; Judiciary; Demand Reduction; Prevention; Legislation and Regulation; Research and Data; and Funding and Sustainability. *See generally National Advisory Committee on the Sex Trafficking of Children and Youth in the United States: Best Practices and Recommendations for States*, OFF. ON TRAFFICKING IN PERSONS: AN OFF. OF THE ADMIN. FOR CHILDREN & FAMILIES (Sept. 15, 2020), https://www.acf.hhs.gov/otip/report/resource/national-advisory-committee-report-best-practices-recommendations.

[317] RCW 2.30.010. We could add a section to this for trafficking survivor courts.

[318] *Problem-Solving Courts*, NAT'L INST. OF JUSTICE (Feb. 20, 2020), https://nij.ojp.gov/topics/articles/problem-solving-courts.

services like housing. Support from stakeholders representing law enforcement, the family, and the community is encouraged.[319] Peer mentoring by prior court graduates is often a successful tool.

CSE-specific problem-solving courts have not yet been broadly adopted in Washington State. CSE minors are less at risk of criminalization due to the legislative changes described above. But criminal charges remain an issue for minors and adults charged with exploitation-related crimes. CSE survivors are often charged with crimes that are a direct or indirect result of their exploitation, including drug possession, trespass, shoplifting, forgery, burglary, robbery, and others. Criminal history and incarceration are barriers to exiting from CSE. Survivors shared that for many of them, substance use disorders were inextricably linked to their sexual exploitation through coerced use as a form of control or the exchange of sex for drugs. Yet, some noted, those dynamics may have gone underreported and under-addressed in drug courts, especially where multi-disciplinary participants and judges were not well trained to identify and respond to CSE. CSE victimization on related crimes perpetuates gender, race, and poverty-related injustice.

In 2016, the CSEC Statewide Coordinating Committee recommended considering amending state law to exempt victims of CSAM from criminal liability for crimes related to their exploitation.

There are several possible approaches, some of which will generate debate as to which crimes and what age groups. Washington could expand diversion and therapeutic options for minors and adult CSE survivors for co-occurring crimes, as some courts already do. Since 2013 Kitsap County has had a human trafficking pre-adjudication diversion program (THRIVE Court)[320] for adult victims/survivors of human trafficking charged with low level misdemeanors and felonies, which need not be prostitution charges (for example, forgery, possession of methamphetamines).[321]

[319] *Id.*

[320] Jennifer Witt, *THRIVE Court in Kitsap County*, WITT L. GRP. (Apr. 2, 2020), https://wittlegal.com/blog/thrive-court-in-kitsap-county. https://wittlegal.com/blog/thrive-court-in-kitsap-county

[321] Interview by Dana Raigrodski Meeting with Coreen Schnepf, Former Senior Deputy Prosecuting Attorney at Kitsap County Prosecutor's Office (Mar. 27, 2017) (notes on file with author).

The program is in district court and prosecutorial diversion is the same model as most drug courts in Washington.

To be eligible to participate, the defendant must have personally engaged in exchanging sexual services for anything of value within the last two years and that experience must have contributed to the current offense. Current charges or past convictions for violent or serious violent crimes preclude eligibility; an exception for a violent offense may be made if the crime was committed while the defendant was actively victimized to the extent of Human Trafficking in the second degree.[322] The diversion program is 18 months long, and many participants end up in long term treatment programs for behavioral health and/or substance abuse, and in life skills programs. Most of the participants in the program have children; most don't have custody at the time they enter the program; and many get their children back while in the program. There are housing programs that allow for children.[323]

In June 2019, Kitsap County Superior Court, in partnership with CCYJ, began piloting a Girls' Court—the first gender specific therapeutic court program in Washington for female identifying youth. The three-year pilot program is being evaluated by the Washington State Center for Court Research (WSCCR). A Girls' Court such as this has the potential to better address the needs of girls who are confirmed or at-risk for exploitation.[324] See "Chapter 9: Juvenile Justice and Gender and Race Disparities" for more information on the Kitsap County Girls' Court.

[322] *Human Trafficking Diversion Eligibility* Criteria, KITSAP CNTY., https://www.kitsapgov.com/pros/Pages/Human_Trafficking_Diversion_Eligibility_Criteria.aspx.
[323] Interview by Dana Raigrodski Meeting with Coreen Schnepf, Former Senior Deputy Prosecuting Attorney at Kitsap County Prosecutor's Office (Mar. 27, 2017) (notes on file with author).
[324] There are several states that have comprehensive trafficking courts for girls. *See, e.g.*, CONN. DEP'T OF CHILDREN & FAMILIES, HUMAN ANTI-TRAFFICKING RESPONSE TEAM (HART) IN CONNECTICUT (2019), https://portal.ct.gov/-/media/DCF/HumanTrafficking/pdf/90CA1828-01-00-DCF_HART_Final-Report-January-2020.pdf?la=en; *Program for Empowerment of Girls*, N.M. CTS., https://seconddistrictcourt.nmcourts.gov/home/courts/childrens-court/program-for-empowerment-of-girls; JUD. COUNCIL OF CA., CTR. FOR FAMILIES, CHILDREN & THE CTS., AN OVERVIEW OF CALIFORNIA'S GIRLS' AND CSEC COURTS: PROCESS EVALUATION REPORT (2021), https://www.courts.ca.gov/documents/Girls-Court-Process-Evaluation-Report-FINAL2.pdf. New York has Human Trafficking Intervention Courts in 12 locations; In 2015 the 11th District of Florida established the Miami-Dade GRACE (Growth Renewed through Acceptance, Change, and Empowerment) Court, for children who have been identified as victims of CSE and labor trafficking; Nashville, TN has a human trafficking intervention court.

We do not know whether male victims of CSE in Washington have similar access to problem solving and therapeutic courts for crimes related to their exploitation. Considering what we know about the (often unidentified) number of boys and young men in the sex industry, this is a data and resource gap that needs to be addressed.

The state could also consider enacting an affirmative defense for victims of sexual exploitation for other crimes committed as a result of their exploitation (CSAM, promoting CSAM, trafficking in the first or second degree, dealing in depictions of a minor engaged in sexually explicit conduct).

The NAC recommends that "juvenile courts that serve children and youth who have experienced or are at risk of experiencing sex trafficking should establish policies and procedures to meet the complex needs and safety concerns that often lead children and youth to cycles of revictimization and recidivism." [325] Court proceedings should be trauma-informed.[326] For example, "[w]hen a child or youth engages in criminal activities as a result of their victimization…judges should assess the child's involvement in criminal activities from a victim-centered and trauma-informed perspective." [327] In addition, "juvenile detention facilities and community-based programs operated by the juvenile justice system must have policies and procedures in place to adequately care for and respond to this population."[328]

The NAC notes that judges and courts are in a unique position "because of [their] contact with many stakeholders and [their] authority in criminal, civil, tribal, juvenile, and family matters."[329] Consequently, "[j]udges in state and tribal courts have the ability to convene multidisciplinary collaborations and work across jurisdictions to respond and deliver services to children and youth who have experienced sex trafficking and hold offenders accountable."[330]

This is how King County Superior Court convened the King County CSEC Task Force. It established a mission ". . . to ensure the safety and support of commercially sexually exploited children (CSEC)

[325] NAC BEST PRACTICES REPORT, *supra* note 308, at 55.
[326] *Id.* at 58.
[327] *Id.*
[328] *Id.* at 55.
[329] *Id.* at 53.
[330] *Id.*

and to prevent further exploitation," and intentionally developed a collaboration that included anyone who might come into contact with exploited children. Those initially included the court, probation, law enforcement, defense attorneys, prosecutors, school systems, Washington Office of Superintendent of Public Instruction, service providers, tribes, Public Health – Seattle & King County, child welfare, survivors and survivor organizations, business organizations and others. More than 120 governmental and nongovernmental organizations have attended Task Force meetings since 2013. It is funded by King County Superior Court and has had support from the County Council and County Executive over the years. The Task Force immediately began training on identifying and responding to CSEC.[331] The Task Force applied for and got a five-year federal grant to examine CSEC and at-risk-for-CSEC youth in the child welfare system. Those outcomes have been published. The Task Force relies on community advocates who are case managers specializing in working with sexually exploited youth and youth adults. They work with multidisciplinary teams to provide services, they reach out to youth and work with their families and support systems, and they work with youth as long as necessary. Advocates do not report to the court. The Task Force partners with DCYF, YouthCare, Accelerator YMCA, and the Organization for Prostitution Survivors on ConnectUp, a pilot program for CSEC-specific foster care.

Interventions prior to arrest and charging also have the potential for broad systemic change. The Seattle/King County Let Everyone Advance with Dignity (LEAD) program,[332] was piloted in 2011 in an attempt to reduce gross racial disparities in police enforcement. Its goal is to reduce frequent engagement with the criminal justice system and its cycles of arrest, prosecution, and incarceration. The program diverts people who would otherwise be arrested for low-level drug and prostitution crimes directly into a harm-reduction case management program that provides support and connection to community resources. Though the LEAD program is often thought of as a "pre-arrest" diversion program, the police can still make arrests as part of LEAD and still send

[331] The King County CSEC Task Force offers key trainings on a regular basis. *See infra*, note 343 and accompanying text.
[332] Formerly known as Law Enforcement Assisted Diversion. The program was renamed in an effort to de-center the role of law enforcement in diversion. LEAD NAT'L SUPPORT BUREAU, https://www.leadbureau.org.

arrest records to prosecutor offices. Though the presumption is that as long as the individual complies with the intake process or diversion program they will not be charged, prosecutors maintain discretion over whether to file charges. Police do not always make an arrest. They have substantial discretion to make a "social contact" referral when an officer encounters someone they know is engaged in substance abuse or prostitution.[333]

Such diversion programs have great potential to reduce contact with the criminal justice system for women and other individuals targeted for exploitation. From October 2011 to January 2014, for example, 39% of LEAD participants (program participants were primarily diverted for drug offenses) were female, and the majority of participants were Black, Indigenous, and other people of color.[334] An evaluation found that participants are "significantly more likely to obtain housing, employment, and legitimate income in any given month subsequent to their LEAD referral" compared to before participating in the program.[335] An evaluation of the effects of LEAD on recidivism found that "[c]ompared to controls, LEAD participants had 60% lower odds of arrest during the six months subsequent to evaluation entry; and both a 58% lower odds of arrest and 39% lower odds of being charged with a felony over the longer term. These statistically significant differences in arrests and felony charges for LEAD versus control participants indicated positive effects of the LEAD program on recidivism."[336] For people subject to being charged with prostitution, programs like these have the potential of offering a way out of exploitation and the criminal justice system.

[333] KATHERINE BECKETT, SEATTLE'S LAW ENFORCEMENT ASSISTED DIVERSION PROGRAM: LESSONS LEARNED FROM THE FIRST TWO YEARS (2014), https://www.fordfoundation.org/media/2543/2014-lead-process-evaluation.pdf.

[334] SEEMA L. CLIFASEFI, HEATHER S. LONCZAK & SUSAN E. COLLINS, LEAD PROGRAM EVALUATION: THE IMPACT OF LEAD ON HOUSING, EMPLOYMENT AND INCOME/BENEFITS (2016), https://depts.washington.edu/harrtlab/wordpress/wp-content/uploads/2017/10/housing_employment_evaluation_final.pdf. Participant gender, race, and ethnicity were reported by the referring officer, as follows: "57 percent participants were African American, 26 percent were European American, 6 percent were American Indian/Alaska Native or Pacific Islander, 4 percent were Multiracial, 4 percent were Hispanic/Latino/a, 1 percent were Asian American, and 2 percent were 'Other.'" *Id.* at 4. Intersectional demographic data were not provided.

[335] *Id.*

[336] SUSAN E. COLLINS, HEATHER S. LONCZAK & SEEMA L. CLIFASEFI, SEATTLE'S LAW ENFORCEMENT ASSISTED DIVERSION (LEAD): PROGRAM EFFECTS ON RECIDIVISM OUTCOMES (2017), https://www.researchgate.net/publication/316863460_Seattle's_Law_Enforcement_Assisted_Diversion_LEAD_Program_Effects_on_Recidivism_Outcomes.

The LEAD program is a unique collaboration among police, prosecutors, civil rights advocates, public defenders, political leaders, mental health and drug treatment providers, housing providers and other service agencies, and business and neighborhood leaders. Like the Task Force Model, it exemplifies the success of multidisciplinary collaboration to help those most vulnerable.

C. Providing and broadening education on the scope, dynamics and disparities related to commercial sexual exploitation

In order to develop a system that addresses the dynamics and remedies the disparities of sexual exploitation, everyone in the system must be trained, and training should be updated regularly.

In 2014, the Statewide Coordinating Committee on Sex Trafficking recommended multidisciplinary collaborative training for law enforcement and prosecutors. It also recommended judicial training to ensure appropriate treatment of sex trafficking and CSE cases, including during pre-trial release, sentencing, and provision of victim protections in all jurisdictions within the state by establishing funding to bring trainers to areas of the state where training is needed. [337]

In 2015, the Washington State Legislature responded, requiring the Department of Commerce Office of Crime Victims Advocacy (OCVA) to establish a statewide training program on Washington's human trafficking laws for criminal justice personnel.[338] The new law requires training of law enforcement, prosecutors, and court personnel on Washington's anti-trafficking laws, and the investigation and adjudication of sex trafficking cases. The training must encourage "interdisciplinary coordination among criminal justice personnel, build cultural competency, and develop understanding of diverse victim populations, including children, youth, and adults."

[337] WASH. STATE DEP'T OF COM., STATEWIDE COORDINATING COMMITTEE ON SEX TRAFFICKING: REPORT ON COMMITTEE ACTIVITIES AND PLAN TO ADDRESS SEX TRAFFICKING 45-50 (2014), http://www.commerce.wa.gov/wp-content/uploads/2016/03/Commerce-Sex-Trafficking-Final-2014.pdf.
[338] RCW 43.280.095.

OCVA has issued required biennial reports to the Washington State Legislature in 2017 and in 2019 on the statewide training program. In the first biennial report in 2017, OCVA reported completing six trainings for a total of 161 individuals.[339] Court clerks and law enforcement and prosecutor trainee groups demonstrated increased knowledge from pre- to post-test in the trafficking of girls and women, lesbian, gay, bisexual, transgender, queer, questioning, two-spirit (LGBTQ2) individuals, boys, men, and people of color.

From July 2017 - June 2019, OCVA provided four day-long trainings (in Yakima, Mt. Vernon, Vancouver, and Bellingham) and two four-hour trainings (for the Tulalip Indian Tribe Police) on sex trafficking for 168 individuals. The trainings included law enforcement from city and state jurisdictions, as well as Tribal law enforcement. State and tribal prosecutors attended, as well as professionals from the Attorney General's Office. Seventy-five percent of the trainees were law enforcement personnel, 10% were prosecutors (no prosecutors attended specific training for the Tulalip Indian Tribe Police) and 15% were other criminal justice personnel.[340] Again, participants, especially those without previous trafficking training, demonstrated significant increases in understanding human trafficking of LGBTQ+ individuals, of men, and of people of color.[341]

Upon the request of the Tulalip Indian Tribal police, in 2018 the U.S. Attorney's Office and OCVA developed a training program to meet the unique needs and challenges posed by human trafficking in Indian Country in Washington. The training for tribal law enforcement similarly demonstrated significant increase in knowledge of the human trafficking of LGBTQ+ individuals, boys, and men.[342]

[339] WASH. STATE DEP'T OF COM., OFF. OF CRIME VICTIMS ADVOC. & PUB. SAFETY, HUMAN TRAFFICKING LAWS AND INVESTIGATIONS (2017), http://www.commerce.wa.gov/wp-content/uploads/2018/06/Commerce-Human-Trafficking-Training-2017.pdf.
[340] WASH. STATE DEP'T OF COM., OFF. OF CRIME VICTIMS ADVOC. & PUB. SAFETY, HUMAN TRAFFICKING LAWS AND INVESTIGATIONS (2019), https://www.commerce.wa.gov/wp-content/uploads/2020/04/FINAL-Human-Trafficking-Laws-and-Investigations.pdf.
[341] *Id.*
[342] *Id.*

Over the last five years, the King County CSEC Task Force has consistently offered multiple free trainings to participants across the community.[343] The trainings represent best practices and are evidence-based, with a focus on trauma-informed and trauma-responsive services and on the intersectionality of poverty, racism, and gender issues affecting CSEC. Regularly offered trainings include:

- CSEC 101: Responding to the Sexual Exploitation and Trafficking of Youth
- CSEC 102: And Boys Too
- CSEC 103: At the Margins: The Sex Trafficking of LGBTQ+ Youth
- CSEC 201: Engaging Men to End Commercial Sexual Exploitation
- CSEC 202: Understanding and Responding to Running Away Behavior in CSEC
- CSEC 401: Survivor Centered Programming
- CSEC 402: Walk with Me

The King County CSEC Task Force trainings are available statewide, and more trainers are now available statewide through its train-the-trainer program.[344] Nonetheless, training opportunities and emphasis are not consistent across the state. [345] In addition, most of the trainings so far have focused on law enforcement, prosecutors, service providers, child welfare, and some court clerks. State training for judges, particularly training focused on intersectional disparities and inequities, remains insufficient and should be significantly improved. In both 2017 and 2019, OCVA recommended more narrowly defining court personnel as judges and court clerks in RCW

[343] In 2018, there were 52 trainings with 974 attendees. In 2019, at the time of Dr. Boyer's report, there have been 40 trainings with 628 attendees. *See* BOYER, *supra* note 11. Trainings have been offered to service providers, school personnel, law enforcement (when the Task Force began), health-related facilities (children's hospital), foster families, and many others.

[344] Because of the COVID-19 pandemic and remote trainings and programs, people have participated from across the country and the world. According to May 2021 report from the King County CSEC Task Force to the Statewide Coordinating Meeting, there were 57 trainings, for 600 people who attended from across the country and the globe.

[345] *See* OCVA 2019 Report for examples of OCVA proposals to offer training to judges and prosecutors that have been declined.

43.280.095, in order to help identify, develop, and implement trainings specific to the duties and responsibilities of these positions. National trainings on these subjects are also available. The National Council of Juvenile and Family Court Judges (NCJFJC) has twice yearly National Institutes on Domestic Child Sex Trafficking, an intense, interactive 2½ day training designed for adult learning styles. The Court should consider expanding funding for state judges to attend these trainings, or to arrange with the NCJFCJ to provide in-state trainings for Washington judicial officers and/or multi-disciplinary teams.

Training for all court personnel, prosecutors, and law enforcement should be expanded and sustained to provide ongoing, current evidence-based information about the dynamics and complexities of human trafficking and its impacts. In a 2018 Kentucky study, many judges said that knowing the underlying reasons why youth act in destructive or high-risk ways was an important aspect of providing them context in decision-making.[346] Training should be repeated at regular intervals. Training must include information about fees associated with trafficking/CSAM/prostitution so that they are imposed consistently. Prosecutors and judges should also be trained about the expanded vacatur options.

Judges in the 2018 study expressed a preference for in-person, interactive, experiential trainings that are ongoing and repetitive. Incorporation of case studies, lived experiences of survivors, practical skills training, group work, and demonstrations were noted as effective training methods. In addition, a toolkit of online resources and training materials would provide greater access to training content and useful resources for referencing later and for being kept current on changes in laws, research, and best practices.[347]

Judicial officers and court staff absorb the trauma they see and hear from survivors and victims of trauma. Secondary or vicarious trauma affects relationships within the courtroom and at home, can cause or exacerbate depression and anxiety, and can affect physical health.

[346] JENNIFER COLE & GINNY SPRANG, SEX TRAFFICKING OF MINORS: THE IMPACT OF LEGISLATIVE REFORM AND JUDICIAL DECISION MAKING IN METROPOLITAN AND NON-METROPOLITAN COMMUNITIES, A FINAL SUMMARY OVERVIEW (2018), https://www.ojp.gov/pdffiles1/nij/grants/254003.pdf.
[347] *Id.*

Judges and court staff need more training about these affects and to be given tools to deal with them.[348]

D. Data collection

Lastly, everyone involved in issues related to trafficking and CSE decries the lack of data. Here is the problem: there is law enforcement data, court data, child welfare data, public health data, school-related data, etc. on youth. The data is inconsistent because there are no uniform trauma or CSE screening tools, and because the data is only as good as the information entered. The databases are on different systems, and those systems don't, won't, or can't communicate with each other. This is a national problem, which some institutions are working on. The result is that a Washington child might be trafficked to Nevada, run away to California, get picked up for an offense there, and none of the state systems know about each other. Here is a real example – a Washington resident moved to another state, had a baby, and then the child was taken away and placed with the maternal grandfather who trafficked his children. The state doesn't know and doesn't have the records that would show this. Washington should fund and develop a reliable, comprehensive and centralized data collection and information sharing system that protects the rights of survivors.

V. Recommendations

As to Commercially Sexually Exploited Children and Youth

- Washington State should institute demand-reduction efforts specific to the exploitation of children, including:
    - Stakeholder trainings should address the demand for sex from children and identify upstream strategies to prevent Commercial Sexual Exploitation of Children (CSEC).
    - All criminal statutes that address demand for sex from children should be enforced.

[348] LAURA VAN DERNOOT LIPSKY & CONNIE BURK, TRAUMA STEWARDSHIP: AN EVERYDAY GUIDE TO CARING FOR SELF WHILE CARING FOR OTHERS (2009).

- Broader prevention efforts should include public awareness and education about the harms of sex buying and the role of buyers as exploiters of children.
- Technology-based interventions should address the demand for children on a broad scale.

- Continue to develop multidisciplinary systems-wide responses, with a focus on upstream prevention and a public health approach. Judges in state and tribal courts should be encouraged to convene and work with broad multidisciplinary collaborations of those who come in contact with sexually exploited minors and young adults. Those collaborative groups should develop locally appropriate policies and procedures for multidisciplinary responses designed to keep youth out of the system, and to respond in a trauma-responsive manner when system involvement is necessary. To the extent possible, the group should include systems and service providers (e.g., courts, law enforcement, defense attorneys, service providers, survivors, school systems, child welfare, health care providers).
- The Washington State Legislature should adequately fund both the receiving centers authorized under the Safe Harbor Bill HB 1775 and residential treatment beds for sexually exploited youth who suffer from co-occurring disorders, including Post-Traumatic Stress Disorder (PTSD), substance abuse disorder, and other mental health issues.
- Juvenile courts, including those in rural areas, should have designated probation counselors who are trained to identify and respond to sexually exploited children. Where a youth is on probation, their probation counselor should be part of any multidisciplinary team convened to help and to provide services to an exploited minor.
- Follow the recommendation in "Chapter 9: Juvenile Justice and Gender and Race Disparities" to assess and further develop gender-responsive and culturally competent programs and services for justice system involved youth, including Kitsap County girls' court and other gender- and LBGTQ+-specific programs and services offered through Washington's juvenile courts.

As to all Impacted Populations, Adults as Well as Children

- Washington State should expand therapeutic courts for victims/survivors of exploitation. Defendants charged with crimes related to exploitation should be admitted into those courts. Those therapeutic courts should place an emphasis on connecting these individuals with robust local services, including housing, substance abuse and mental health treatment, and training/employment opportunities, to facilitate exit from the sex industry.
- Courts and the Washington State Legislature should study and consider expanding education, accountability and therapeutic options for those benefiting from Commercial Sexual Exploitation (CSE), and should determine how to fund those programs.
- Drugs are often used to coerce people as a means of control. The Washington State Legislature should consider amending the definition of coercion in trafficking and CSE laws to include supplying, furnishing, or providing any drug or illegal substance to a person, including to exploit the addiction of the person or cause the person to become addicted to the drug or illegal substance.
- The Washington State Legislature should consider enacting an affirmative defense for victims of sexual exploitation to other crimes committed as a direct result of their exploitation (exploitation as victims of crimes includes but is not limited to commercial sexual abuse of minors [CSAM], promoting CSAM, trafficking in the first or second degree, dealing in depictions of a minor engaged in sexually explicit conduct).
- Current efforts in Washington State to reduce justice system involvement and its harms for adults in the sex industry vary by jurisdiction and are implemented through discretionary and locally implemented policies. The Governor, Legislature, or Attorney General should create a bipartisan collaborative group to work with appropriate state, county, local, and tribal law enforcement, prosecutors, and stakeholder groups to recommend best practices and guidelines.
- All courts and courtrooms should be trauma-informed and trauma-responsive.
- To better understand the demographics of sexual exploitation, particularly of children and youth, Washington State should establish and fund a cross-sector database and develop

criteria for safely sharing that data while protecting the identity and privacy of survivors. The following steps could be taken to implement this:

  - Develop and implement data sharing agreements to track cases of sex trafficking of children and youth, including information related to victim identification and service provision, across all state agencies. Such agreements should include standardized identifiers and definitions and established protocols to share information, protect the confidentiality of children and youth, and be limited in scope.
  - Develop and implement data sharing agreements among all public agencies and publicly funded private agencies that provide services to children and youth who have experienced sex trafficking. Such agreements should include standardized identifiers and definitions and established protocols to share information, protect the confidentiality of children and youth, and be limited in scope.
  - Require state agencies and private agencies that receive public funding to collect and report aggregate data about the sex trafficking of children and youth and their agency's response to the Washington State Legislature or the Governor for public dissemination.

- Data that is collected is inconsistent. Washington State should consider funding development, validation, and adoption of a short trauma and sexual exploitation screening tool for all youth who enter detention, child welfare, health care, or any other state system, and make the tool available to others who come in contact with at-risk or trafficked children (e.g., school counselors). That tool should contain demographic information and the data should be entered into the statewide database.
- Washington State should require regular evidence-based education and training for all court personnel (including judges, court staff, prosecutors, defense attorneys, and law enforcement) about the dynamics and complexities of trauma and human trafficking. It should address the impact of systemic racial, cultural, and gender-based bias on those affected by CSE.

- Training for judges and court staff should acknowledge and provide tools to reduce the effects of secondary or vicarious trauma on judges, staff, and the people they serve.

Part IV

The Gendered Impact of the Increase in Convictions and Incarceration

Chapter 11

Incarcerated Women in Washington

Marla Zink, JD
Judge Joseph Campagna; Sierra Rotakhina, MPH

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I. Summary

The number of women who are incarcerated in Washington State grew exponentially and largely in the shadows between 1980 and 2000, a trend mirrored in much of the nation. However, while the female population in prison has declined in many other states in the 2000s, Washington's numbers have continued to increase or have declined at a lower rate during this same time period. It is well past time to shine light into the shadows and address the growing incarceration of women in Washington.

Unfortunately, the data and research in this area is thin. Voluminous research shows American Indian/Alaska Natives and Black individuals are disproportionately represented in our prison and jail populations. However, for the most part, data analyses do not account for the intersection of sex, race, and ethnicity—even when the data would allow for such exploration. To start addressing this gap in the literature, the Gender and Justice Commission commissioned an analysis of Washington State felony judgment and sentencing data. The pilot project found that Black, Indigenous, and women of color are convicted and sentenced at rates two to eight times higher than white women. In addition, the types of crimes for which women and men are convicted, vary greatly. Women were convicted and sentenced in relatively higher proportions in drug, property, and fraud categories, compared to violent and sex offenses.

Complicating the problem, data on race and ethnicity suffers from problems in how groups are identified, classified, and reported. Moreover, Washington-specific gender identity and sexual orientation data largely does not exist. Therefore, we lack a complete picture. We extrapolate from national and other research where possible, but more work should be conducted to parse out Washington's data and to identify and address the root causes of over-incarceration.

Based on the research and data in which we do have confidence, the forces driving the growing incarceration of women in Washington center around criminalization rather than treatment of complex and other traumas; increasingly harsh penalties, particularly for drug offenses, which have disparately harsh impacts on Black, Indigenous, and communities of color; policing and prosecuting practices that zero-in on certain offenses in certain communities, particularly Black, Indigenous, and communities of color; a rise in pretrial incarceration and its relation to socioeconomic status but also its impact on

socioeconomic status; and persistent growth in sentencing laws that result in lengthier sentences, keeping more women locked up for longer. We also recognize that racism and marginalization underlie criminalization and incarceration in this country, and in Washington. Throughout this chapter, we recommend changes to end these practices and substantially reverse the trend.

II. Washington State's Increase in Female Convictions and Incarceration

Generally, data shows an increase in female convictions and incarceration in Washington State as compared to males in the 2010s.[1] This chapter examines the data, the policies and the laws that have been shown to be driving the data, and the effect of this trend on women and subpopulations of women.[2]

There are data limitations in this report, particularly for demographic data such as data on sex, race, and ethnicity. The datasets and research often use only binary female/male gender options, do not clarify how transgender individuals are being coded, or fail to differentiate between gender identity and sex.[3] With regard to data related to incarceration specifically, Washington State anecdotes and research indicate that individuals are often housed based on their sex assigned at birth rather than their gender identity,[4] therefore these individuals ~~are likely often misclassified~~ in data included in this chapter. Therefore, throughout this chapter

[1] E. Ann Carson, *National Prisoner Statistics Program*, BUREAU OF JUST. STAT. (2018), https://bjs.ojp.gov/data-collection/national-prison-statistics-nps-program (generated using the online Corrections Analysis Tool)

[2] We use the terms "women" or "female" to refer to the population of persons incarcerated in female facilities. We recognize, however, that some people in those facilities do not self-identify as women.

[3] The Centers for Disease Control and Prevention defines "gender identity" as "an individual's sense of their self as man, woman, transgender, or something else" and defines "sex" as "an individual's biological status as male, female, or something else. Sex is assigned at birth and associated with physical attributes, such as anatomy and chromosomes." *Terminology: Adolescent and School Health*, CTRS. FOR DISEASE CONTROL & PREVENTION (2020), https://www.cdc.gov/healthyyouth/terminology/sexual-and-gender-identity-terms.htm.

[4] Disability Rights Washington has collected extensive data through interviews with transgender prisoners in Washington. The Gender and Justice Commission received a presentation of preliminary data in 2019. The final report from Disability Rights Washington is forthcoming. GENDER & JUST. COMM'N, FRIDAY, NOVEMBER 1, 2019 MEETING NOTES 6 (2019), https://www.courts.wa.gov/content/publicUpload/Gender%20and%20Justice%20Commission%20Meeting%20Materials/20191101_m.pdf; DISABILITY RTS. WASH.: TRANS IN PRISON JUST. PROJECT, TRANS JUSTICE WORK IN WASHINGTON STATE PRISONS (2019), https://www.courts.wa.gov/content/publicUpload/Gender%20and%20Justice%20Commission%20Meeting%20Materials/20191101_d.pdf; Nick Garber, *She Protested in Seattle, Then Spent 2 "Terrifying" Days in Jail*, PATCH (June 8, 2020), https://patch.com/washington/seattle/she-protested-seattle-then-spent-2-terrifying-days-jail.

when we discuss female and male incarcerated individuals we are most likely actually discussing "individuals incarcerated in female facilities" and "individuals incarcerated in male facilities" regardless of their true gender identity. Race and ethnicity data is also limited by several factors. It is often unclear if individuals' race and ethnicity was self-identified, the race categories generally lack granularity or have other limitations that can mask disparities. This happens frequently for Native Hawaiian and other Pacific Islander Populations. See Section V of the full report ("2021 Gender Justice Study Terminology, Methods, and Limitations") for a more detailed explanation of the data limitations.

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

Generally, data shows an increase in female convictions and incarceration in Washington State as compared to males in the 2010s.[5] This section examines available data that show recent trends. Both nationwide and Washington State data are analyzed. Moreover, within each category, various subgroups are addressed: state and federal jurisdictions, local city and county jails, and American Indian and Alaskan Native (AIAN)[6] populations. The next section analyzes the social and legal environments that may explain the data trends. Although women are still incarcerated at a lower rate than men, in recent years, male imprisonment rates decreased faster than female rates, or even decreased in years that female rates increased both nationally and in Washington.[7] The reasons for the disparity are somewhat unclear. However, recent studies suggest that an increase in pretrial detention, an increase in incarceration for probation

[5] Carson, *supra* note 1.

[6] The Urban Indian Health Institute, in its report titled *MMIWG: WE DEMAND MORE*, indicates that they "use the terms Native, Native American, and American Indian/Alaska Native interchangeably in [their] report to acknowledge the varying ways that North American Indigenous peoples are forced to identify within the American racial structure and English language." ABIGAIL ECHO-HAWK, ADRIAN DOMINGUEZ & LAEL ECHO-HAWK, MMIWG: WE DEMAND MORE 4 (2019), https://www.uihi.org/resources/mmiwg-we-demand-more/. This Study is also based on the acknowledgement that race is a social construct and recognizes the limitations of both the terminology coded into datasets and used in research and the race/ethnicity data that our report relies upon. Often reports, research articles, and datasets cited here do not describe if race or other demographic information was self-reported and, if so, what options individuals were given to inform the terminology used. For this purpose, we generally use the terminology throughout this section that was used by the source authors to avoid the risk of inadvertently misrepresenting their findings. See Section V of the full report for a more detailed explanation of terminology used throughout the report.

[7] Carson, *supra* note 1.

violations, an increase in mandatory sentences for drug offenses, fewer opportunities for post-sentence review and early release, and the impact of trauma on involvement in the justice system have all contributed to the increase in female incarceration rates. These contributors are examined in Section III of this chapter.

1. Types of confinement facilities in Washington

Research regarding incarceration rates in Washington includes information on incarcerated individuals in different confinement facilities.

Jails:[8] In Washington, jails are facilities managed locally by municipalities, counties, or American Indian and Alaska Native Tribes. Jail facilities are intended to hold individuals for less than a year on a temporary or short-term basis.[9] Jail populations include adult[10] pretrial individuals who are unable to pay bail/were not granted bail while awaiting a trial date, some convicted adults waiting for sentencing, and adults serving misdemeanor sentences of less than a year.[11] Individuals incarcerated in jails may also be held temporarily as they wait to be transferred to a prison.[12]

Prisons:[13] Prisons are facilities used to house adults following entry of a conviction in court. In other jurisdictions and generally in Washington, prisons house people with felony sentences

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[8] "Facilities include jails, detention centers, city and county correctional centers, special jail facilities (such as medical or treatment centers and pre-release centers) and temporary holding or lockup facilities that are part of the jail's combined function." DANIELLE KAEBLE & MARY COWHIG, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016 (2018), https://www.bjs.gov/content/pub/pdf/cpus16.pdf.

[9] Ellen Belcher, *Lloyd Sealy LIbrary LibGuides: New York Prisons and Jails: Historical Research: Definitions: Jail & Prison*, JOHN JAY COLL. OF CRIM. JUST., CUNY(2020), https://guides.lib.jjay.cuny.edu/c.php?g=288375&p=1922709; BERK IN PARTNERSHIP WITH ANNE PFLUG, CAMPBELL CONSULTING AND JOPLIN CONSULTING, FINAL REPORT: ANALYSIS OF STATEWIDE ADULT CORRECTIONAL NEEDS AND COSTS (2014); *What Is the Difference Between Jails and Prisons?*, FREQUENTLY ASKED QUESTIONS, BUREAU OF JUST. STAT., https://bjs.ojp.gov/frequently-asked-questions?iid=322&ty=qa&combine=&sort_by=changed&sort_order=DESC&page=1#faq-what-is-the-difference-between-jails-and-prisons.

[10] "…may hold juveniles before or after they are adjudicated." KAEBLE & COWHIG, *supra* note 8. In Washington, counties are required to maintain "juvenile detention facilities . . . separate and apart from" adult detention facilities. RCW 13.16.030. There are very limited circumstances and periods of time, outlined in RCW 13.04.116, in which a juvenile may be held in an adult facility. Juvenile Justice in Washington is examined in depth in "Chapter 9: Juvenile Justice and Gender and Race Disparities."

[11] BERK IN PARTNERSHIP WITH ANNE PFLUG, CAMPBELL CONSULTING AND JOPLIN CONSULTING, *supra* note 9; Belcher, *supra* note 9.

[12] BERK IN PARTNERSHIP WITH ANNE PFLUG, CAMPBELL CONSULTING AND JOPLIN CONSULTING, *supra* note 9.

[13] Prison facilities include: "public or private prisons, penitentiaries, correctional facilities, halfway houses, boot camps, farms training or treatment centers and hospitals." KAEBLE & COWHIG, *supra* note 8.

greater than one year. In Washington, prison sentences can include some sentences of less than one year, such as a prison-based Drug Offender Sentencing Alternative (DOSA) sentence. Prisons can be operated by the state or federal government.[14] In Washington, state prisons are managed by the statewide Department of Corrections.[15]

2. Community supervision

In national research, the community supervision population generally includes individuals on probation and parole.[16] Washington has a system of probation, but it abolished parole for all crimes occurring after June 30, 1984 as part of the Sentencing Reform Act. See "Chapter 14: Sentencing Changes and Their Direct and Indirect Impact on Women" for more information.

Probation**:** Individuals are often given probation as an alternative to being incarcerated and have a "court-ordered period of supervision in the community while under the control, supervision, or care of a correctional agency."[17] Probation may or may not require reporting to a correctional agency and the amount of active supervision can vary widely.[18]

Parole or, in Washington, Community Custody: In Washington, the Sentencing Reform Act requires most felony sentences to include a term of community custody following incarceration where the individual is supervised according to certain conditions in the community.[19] This includes individuals who committed sex offenses and are subject to the Indeterminate Sentence Review Board and are released from incarceration to supervision for the remainder of the statutory maximum for the crime(s).[20] Parole in Washington only applies to persons convicted of

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[14] BUREAU OF JUST. STAT., *supra* note 9.

[15] Individuals held in immigration detention are not included in this study, although Washington State is home to one of the largest immigration detention centers, the Northwest ICE Processing Center (recently renamed from the Northwest Detention Center). Civil immigrant detainees are also held at the Federal Detention Center in SeaTac and in local jails, including the Cowlitz County Youth Services Center in Longview. ICE reports 23,429 individuals currently detained nationwide, as of 6/20/2020. This statistic is not broken out by location, sex, or other demographic. *Detention Management*, U.S. IMMIGR. & CUSTOMS ENF'T (July 8, 2021), https://www.ice.gov/detention-management. Also not included in this study are persons detained due to mental health under the state's civil commitment laws. *See generally* Chapter 71.05 RCW.

[16] DANIELLE KAEBLE, PROBATION AND PAROLE IN THE UNITED STATES, 2016 (2018).

[17] BUREAU OF JUST. STAT., *supra* note 9; KAEBLE, *supra* note 16.

[18] KAEBLE & COWHIG, *supra* note 8.

[19] RCW 9.94A.701-711.

[20] RCW 9.94A.507. Indeterminate sentences are discussed further in "Chapter 14: Sentencing Changes and Their Direct and Indirect Impact on Women."

crimes occurring on or before June 30, 1984. Nationally, individuals are released on parole often either by a parole board or according to provisions of a statute.[21] Individuals on parole are released early from their prison term and serve the remainder of their sentence in the community under the supervision of a correctional agency.[22]

3. Net increase in incarceration rates across the United States

Female incarceration in state prisons, federal prisons, and jails nationwide increased more than 750% between the years 1980 and 2017. Rising from a total of 26,378 women incarcerated in 1980 to 225,060 in 2017.[23] While population increases since 1980 at least partially account for this steep increase, as shown below, the rates per 100,000 people have also increased in this time period. This shows that increases in incarceration have outpaced increases in the population. In evaluating these data, readers should keep in mind that, in the world, the United States (U.S.) has the highest jail and prison population, the highest female jail and prison population, the highest incarceration rate, and the highest female incarceration rate.[24]

a. State and federal prisons in Washington State and nationwide

i. Summary - Washington State's female prison population has been on the rise

The incarceration rate in Washington State in 2016 was over three times higher than the average rate for the Organization for Economic Cooperation and Development (OECD) countries. Washington is one of only eight states nationwide that saw the prison population grow throughout most of the 2010s. Even as crime rates were falling, Washington's prison population

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[21] BUREAU OF JUST. STAT., *supra* note 9.
[22] *Id.*; KAEBLE & COWHIG, *supra* note 8; KAEBLE, *supra* note 16.
[23] THE SENT'G PROJECT, FACT SHEET: INCARCERATED WOMEN AND GIRLS (2019), https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf. When studying national data from 1980 to 2019, female incarceration increased by more than 700%. THE SENT'G PROJECT, INCARCERATED WOMEN AND GIRLS (2020), https://www.sentencingproject.org/publications/incarcerated-women-and-girls/.
[24] ROY WALMSLEY, WORLD FEMALE IMPRISONMENT LIST: FOURTH EDITION (2017), https://www.prisonstudies.org/sites/default/files/resources/downloads/world_female_prison_4th_edn_v4_web.pdf; ROY WALMSLEY, WORLD PRISON POPULATION LIST: TWELFTH EDITION (2018), https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf.

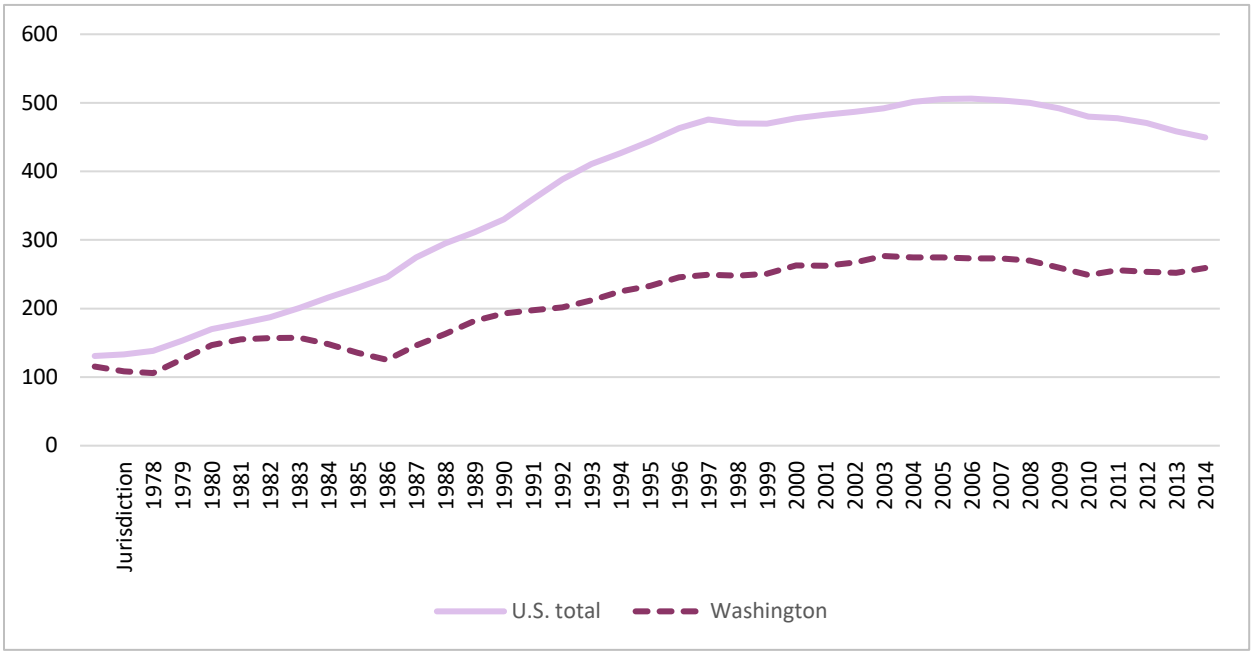
grew.[25] While growth in the prison population may be expected over time as the population grows, the fact that Washington saw an increase in the prison-population rate per 100,000 people while many other states reduced their prison populations is of interest. Within this context, we examine the rise in Washington State's female prison population.

In Washington, and in the U.S., imprisonment rates for all genders combined increased during the 1980s and 1990s before leveling off in the 2000s. However, Washington diverges from U.S. trends more recently. From 2006-2016, the U.S. imprisonment rate decreased by ten percent, whereas Washington's rate decreased only six percent in the same period, and even increased between 2015-2016 (Figure 1 and Table 1). Unfortunately, the analyses in Figures 1-4 and Table 1 are limited by the underlying dataset, which does not allow for the differentiation of individuals held under state versus federal jurisdiction in Washington State. This limitation means it is challenging to draw conclusions about changes that could be made to the state versus the federal system in order to address this dramatic increase in female incarceration.[26]

[25] KATHERINE BECKETT & HEATHER EVANS, ACLU, ABOUT TIME: HOW LONG AND LIFE SENTENCES FUEL MASS INCARCERATION IN WASHINGTON STATE (2020), https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state.

[26] In 2017 federal prisons nationwide only accounted for 12% of the total U.S. prison population—indicating that the trends in incarceration rates may be largely driven by populations in state prisons. JENNIFER BRONSON & E. ANN CARSON, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., PRISONERS IN 2017 (2019), https://www.bjs.gov/content/pub/pdf/p17.pdf.

Figure 1. Imprisonment Rates (per 100,000) for State and Federal Prisons (All Genders Combined), U.S. and Washington State, 1978-2016



Footnotes for Figure 1.

Imprisonment rates include individuals serving prison sentences under the jurisdiction of state or federal corrections authorities. In some states, this may include individuals sentenced to one year or less. These data include youth sentenced as adults.

Source: E. Ann. Carson, Bureau of Just. Stat., National Prisoner Statistics Program (2018), www.bjs.gov (generated using the Corrections Statistics Analysis Tool).

Table 1. Imprisonment Rates (per 100,000) for State and Federal Prisons (All Genders Combined), U.S. and Washington State, 2006-2016*

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	% Change
U.S.	501	506	506	504	500	492	480	477	471	459	450	-10%
WA State	274	275	273	273	270	260	249	256	254	252	259	-6%

Footnotes for Table 1.

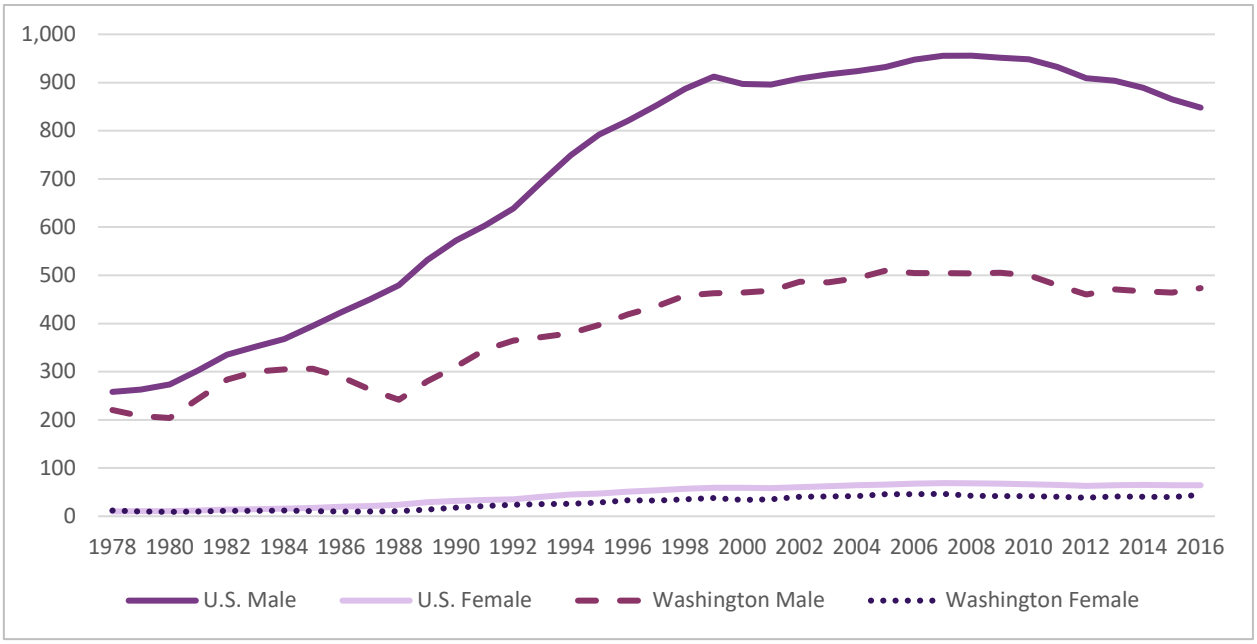
*Cells emphasized and shaded light purple indicate an increase in the rate compared to the previous year. Cells shaded maroon indicate a decrease in the rate compared to the previous year or no rate change compared to the previous year. Imprisonment rates include individuals serving prison sentences under the jurisdiction of state or federal corrections authorities. In some states, this may include individuals sentenced to one year or less. These data include youth sentenced as adults.

Source: E. Ann. Carson, Bureau of Just. Stat., National Prisoner Statistics Program (2018), www.bjs.gov (generated using the Corrections Statistics Analysis Tool).

In the U.S. and in Washington State, male imprisonment rates are far higher and have historically increased faster than female imprisonment rates. However, in recent years, male imprisonment rates decreased faster than female rates, or even decreased during time periods in which female rates increased (Figure 2). For example, the male imprisonment rate in Washington State decreased five percent between 2010 and 2016. In this same time period, the Washington female imprisonment rate increased seven percent (Table 2).[27] Nationally, increases in female incarceration rates and arrest rates began exceeding those of men in 1981. For example, between 1994 and 2004 arrest rates for men declined 6.7% while arrest rates for women increased 12.3%.[28]

[27] Carson, *supra* note 1.
[28] Angela Moe & Kathleen Ferraro, *Criminalized Mothers: The Value and Devaluation of Parenthood from Behind Bars*, 29 WOMEN & THERAPY 135 (2006).

Figure 2. U.S. and Washington State Male and Female Imprisonment Rates (per 100,000), 1978-2016



Footnotes for Figure 2.

Imprisonment rates include individuals serving prison sentences under the jurisdiction of state or federal corrections authorities. In some states, this may include individuals sentenced to one year or less. These data include youth sentenced as adults.

Source: E. Ann. Carson, Bureau of Just. Stat., National Prisoner Statistics Program (2018), www.bjs.gov (generated using the Corrections Statistics Analysis Tool).

Table 2. Male and Female Imprisonment Rates (per 100,000) in Washington State, 2006-2016

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	% Change from 2006-2016	% Change from 2010-2016
Male	504	505	504	505	500	480	460	471	467	464	473	-6%	-5%
Female	46	46	43	42	42	40	38	41	40	40	45	-3%	+7%

Footnotes for Table 2.

*Cells emphasized and shaded light purple indicate an increase in the rate compared to the previous year. Cells shaded maroon indicate a decrease in the rate compared to the previous year or no rate change compared to the previous year. Imprisonment rates include individuals serving a prison sentence under the jurisdiction of state or federal corrections authorities. In some states, this may include individuals sentenced to one year or less. These data include youth sentenced as adults.

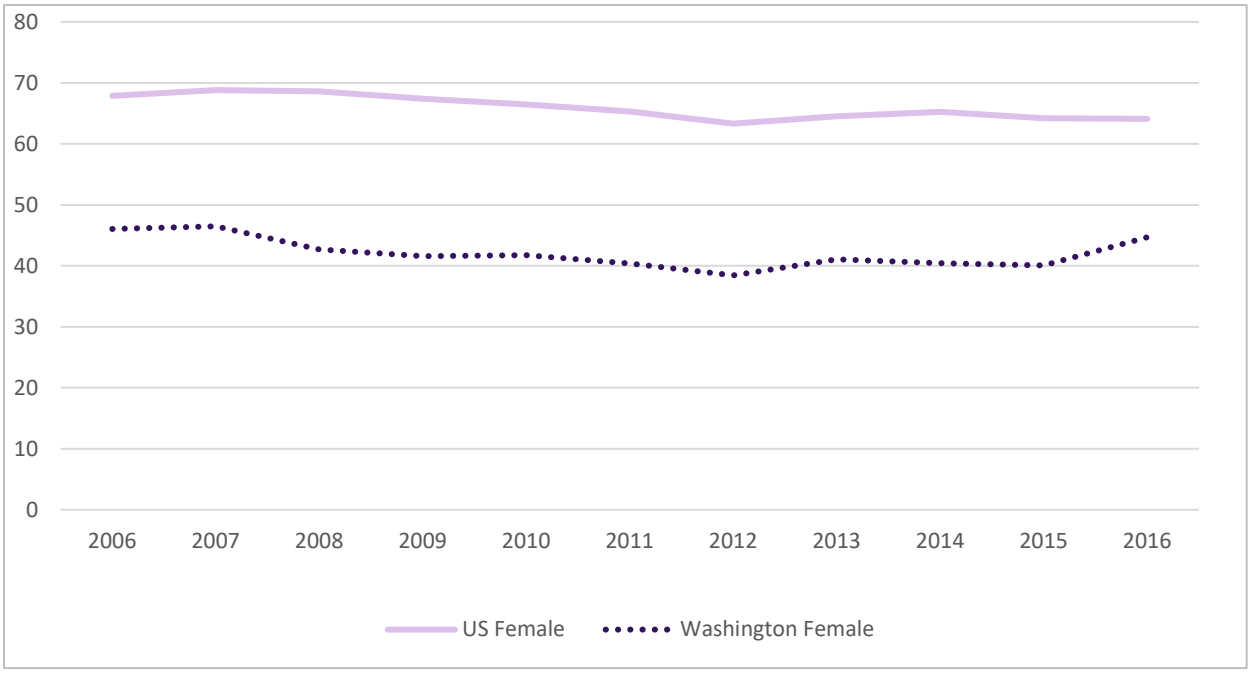
Source: E. Ann. Carson, Bureau of Just. Stat., National Prisoner Statistics Program (2018), www.bjs.gov (generated using the Corrections Statistics Analysis Tool).

While in recent years Washington State female-imprisonment rates were slightly lower than the average for all states, female-imprisonment rates across the U.S. are declining faster than in Washington State, with a six percent decrease in the U.S. between 2006 and 2016, but only a three percent decrease in Washington over that decade. In fact, female imprisonment rates in Washington dipped to a low of 38 per 100,000 in 2012 (the lowest rate since 2001) but have steadily risen since (Figure 3 and Table 3).[29] Twenty-five states, the Federal Bureau of Prisons, and combined nationwide rates showed decreases in female prison populations from year-end 2016 to year-end 2017. The number actually increased in the other 25 states, including

[29] Carson, *supra* note 1.

Washington State.[30] This data suggests that the root causes of increasing female incarceration rates still needs to be addressed, and that Washington may have opportunities to learn from other states that are seeing a decline in contrast to Washington's increase in female incarceration.

Figure 3. Female Imprisonment Rates (per 100,000) in the U.S. and Washington State, 2006-2016



Footnotes for Figure 3.

Imprisonment rates include individuals serving prison sentences under the jurisdiction of state or federal corrections authorities. In some states, this may include individuals sentenced to one year or less. These data include youth sentenced as adults.

Source: E. Ann. Carson, Bureau of Just. Stat., National Prisoner Statistics Program (2018), www.bjs.gov (generated using the Corrections Statistics Analysis Tool).

[30] For the purposes of the cited report by Bronson and Carson, prison is defined as "a long-term confinement facility that is run by a state or the federal government." BRONSON & CARSON, *supra* note 26.

Table 3. Female Imprisonment Rates (per 100,000) in the U.S. and Washington State, 2006-2016*

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	% Change
U.S.	68	69	69	67	66	65	63	65	65	64	64	-6%
WA State	46	46	43	42	42	40	38	41	40	40	45	-3%

Footnotes for Table 3.

*Cells emphasized and shaded light purple indicate an increase in the rate compared to the previous year. Cells shaded maroon indicate a decrease in the rate compared to the previous year or no rate change compared to the previous year. Imprisonment rates include individuals serving prison sentences under the jurisdiction of state or federal corrections authorities. In some states, this may include individuals sentenced to one year or less. These data include youth sentenced as adults.

Source: E. Ann. Carson, Bureau of Just. Stat., National Prisoner Statistics Program (2018), www.bjs.gov (generated using the Corrections Statistics Analysis Tool).

The experience of women and non-cisgendered persons during incarceration in Washington is explored in more detail in "Chapter 8: Consequences of Gender-Based Violence: Domestic Violence and Sexual Assault" (see subsection IV.B on sexual assault in prisons and jails) and Chapter 12: Availability of Gender Responsive Programming and Use of Trauma Informed Care in Washington State Department of Corrections." Research still needs to be conducted on other aspects of gender bias during incarceration. For example, is money spent at the same per capita rate for men and women.

ii. Washington data showing racial and ethnic disparities in incarceration rates

At the inception of this study, there was a gap in the Washington State literature and publicly available data that would allow us to determine if Black, Indigenous, and women of color; LGBTQ+ populations; or other marginalized communities are disproportionally imprisoned.

Consequently, this study funded a limited review of females incarcerated for felonies in Washington, based upon data from six counties for fiscal years 2000, 2010 and 2019, as the first step in understanding and responding to factors contributing to the growth of this population. The goals of this pilot study were to take a first look at who we are incarcerating and for what crimes. It was important to us to conduct intersectional analysis to understand the demographic breakdown of women in Washington State prisons and to identify any racial or ethnic disparities in crimes for which women are convicted and how they are sentenced. [See Chapter 14: Sentencing Changes and Their Direct and Indirect Impact on Women]. In all counties examined and across all points in time, the pilot found statistically significant differences indicating racial disproportionality in Washington's conviction and sentencing of women. The disproportionality for Black and Native American women are the most severe (Tables 4 and 5).[31] This should be unsurprising as Washington data also shows that people of color and AIAN populations are disproportionally represented in the justice system.[32] Unfortunately, most publicly available data are not disaggregated by sex or gender, now with the exception of the pilot study. Additionally, national level research widely highlights racial disparities in female incarceration as well as disparities by sexual orientation. These disparities are reflected in higher incarceration rates for Black, Indigenous, and communities of color than white populations (see Section III for more on the intersection of incarceration rates, gender and race).[33] These Washington State findings of racial and ethnic disparities in our carceral system for all genders combined, the new pilot study

[31] The pilot study, like most Washington data, was constrained by the same limitations on race and ethnicity identified previously. [See section V of the full report: "2021 Gender Justice Study Terminology, Methods, and Limitations".] The data sets available for the study made it particularly likely Hispanic/Latinx people are undercounted and made it impossible to include Hispanic/Latinx people in chi-square testing comparing racial and ethnic groups. For a more detailed explanation of these limitations and the work that is being undertaken to resolve them, see Pilot Study at 5-8. TATIANA MASTERS ET AL., INCARCERATION OF WOMEN IN WASHINGTON STATE: MULTI-YEAR ANALYSIS OF FELONY DATA (2020).

[32] Thomas Bonczar & Joseph Mulako-Wangota, *Corrections Statistical Analysis Tool (CSAT) – Probation*, BUREAU OF JUST. STAT. (June 29, 2020), https://www.bjs.gov/probation/ (count of year-end probation population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool); Thomas Bonczar & Joseph Mulako-Wangota, *Corrections Statistical Analysis Tool (CSAT) – Parole*, BUREAU OF JUST. STAT. (June 23, 2020), https://www.bjs.gov/parole/ (count of year-end parole population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool); E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2016 (2018), https://www.bjs.gov/content/pub/pdf/p16_old.pdf; KAEBLE, *supra* note 16; U.S. Census Bureau American Communities Survey (2016) (for the U.S. and Washington population counts for rates calculations).

[33] BRONSON & CARSON, *supra* note 26; THE SENT'G PROJECT, *supra* note 23.

findings that Black, Indigenous, and women of color are disproportionally represented, and the national data finding racial and ethnic disparities among the female justice-involved population specifically, leave no doubt that Washington's female justice-involved population has similar unacceptable disproportionality.

The pilot study found, "statistically significant differences indicating racial disproportionality in Washington's conviction and sentencing of women in all of the six counties examined, across all three time points."[34] Black women were typically convicted and sentenced at two or three times the rate of their proportion of each county's population.[35] In some counties, in some fiscal years, they were convicted and sentenced at rates up to eight times higher.[36] Native American women, across counties, often made up two to four times as large a proportion of the convicted and sentenced population as they did of the general population of each county.[37] White women were generally represented at or below their level in the general population.[38] Asian American women typically were convicted and sentenced at a lower rate than their representation in the general population.[39] It is important to acknowledge that disparities are often masked for Asian communities when many diverse populations are combined into one broad Asian category in a dataset. Other data shows that much higher rates of AIAN individuals and non-Hispanic Black individuals in Washington are present in prison, parole, and probation populations compared to other subpopulations (Figure 4).[40]

While women's representation in the incarcerated population increased from 19 to 21% from 2000 to 2019, men still make up the majority of persons incarcerated in Washington.[41] The types of crimes for which women and men are convicted, however, vary greatly. Women were convicted and sentenced in relatively higher proportions in drug, property, and particularly fraud

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[34] MASTERS ET AL., *supra* note 31, at 19.
[35] MASTERS ET AL., *supra* note 31, at 2,19.
[36] *Id.*
[37] MASTERS ET AL., *supra* note 31, at 2.
[38] MASTERS ET AL., *supra* note 31, at 19.
[39] MASTERS ET AL., *supra* note 31.
[40] It is important to note there is a high rate of "unknown" reports of race/ethnicity for both probation and parole in Washington and the U.S.—64% of the probation population in Washington is listed with race/ethnicity unknown, so these data should be interpreted with caution. Bonczar & Mulako-Wangota, *supra* note 32; Bonczar & Mulako-Wangota, *supra* note 32; CARSON, *supra* note 34; KAEBLE, *supra* note 16.
[41] MASTERS ET AL., *supra* note 31, at 30.

categories, but were convicted and sentenced much less for violent offenses (12 to 14%) and sex offenses (never more than three percent).[42]

Unfortunately, the only Washington-specific data that has been published analyzing by both race/ethnicity and gender identity or sex is the pilot study. We recommend that the pilot study be expanded to canvas the entire state, that better data be collected and reviewed for the Hispanic/Latinx population in particular, and that the intersectional research on women of different identities be studied throughout the different stages of the criminal justice system from community support to policing, charging, incarceration, and reentry. We further recommend additional qualitative research, using facts and circumstances if appropriate, to further examine the disproportionality for Black women charged with violent crimes, causes of disproportionality in drug conviction and sentencing, and the nature and antecedents of the relatively high levels of fraud felony convictions among women. More research is also needed specifically on Indigenous women, given the racial disproportionality and the almost complete lack of national research. This research should be led by Indigenous researchers.

[42] *Id.* at 9, 25.

Table 4: Distribution of Racial and Ethnic Groups (Within Gender and County) Among Convicted and Sentenced Men and Women in Caseload Forecast Counsel Data for Selected Washington State Counties, Fiscal Year 2019

	King		Pierce		Snohomish		Spokane		Yakima		Benton-Franklin*	
	Men	Women	Men	Women	Men	Women	Men	Women	Men	Women	Men	Women
White	56%	57%	56%	65%	83%	88%	81%	84%	41%	55%	69%	80%
African American	34%	29%	28%	19%	9%	9%	11%	6%	6%	4%	7%	3%
Asian American	7%	8%	7%	7%	3%	2%	2%	1.5%	>1%	2%	1%	1%
Native American	1%	4%	2%	4%	2%	1%	5%	7%	4%	8%	1%	1%
Hispanic/Latinx**	2%	2%	7%	4%	3%	<1%	1%	1%	49%	31%	21%	10%
Unknown	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	1%	5%
Total count by gender	2,526	385	2,554	573	1,610	438	2,231	529	990	245	940	233
Total convicted and sentenced individuals by county	2,884		3,127		2,048		2,760		1,235		1,173	
Proportion of total convicted and sentenced individuals	87%	13%	82%	18%	79%	21%	81%	19%	80%	20%	80%	20%

Footnotes for Table 4.

* In combining proportions across Benton and Franklin counties, the authors used weighted averages to account for the difference between the two counties' populations.

** Hispanic/Latinx figures are likely an undercount due to Caseload Forecast Council coding methodology and should be interpreted with caution.

Source: Data adapted from information available at TATIANA MASTERS ET AL., INCARCERATION OF WOMEN IN WASHINGTON STATE: MULTI-YEAR ANALYSIS OF FELONY DATA (2020).

Table 5: Distribution of Racial Groups Among Convicted and Sentenced Women in Caseload Forecast Counsel (CFC) Data, Compared to Washington State Census Data, for Selected Offense Categories, Fiscal Year 2019

	White		African American		Asian American		Native American	
	Census	CFC	Census	CFC	Census	CFC	Census	CFC
Violent (n = 433)	79%	70%	4%	15%	9%	3%	2%	6%
Drug (n = 1607)	79%	85%	4%	5%	9%	2%	2%	4%
Property (n = 1484)	79%	78%	4%	9%	9%	3%	2%	5%
Fraud (n = 677)	79%	81%	4%	7%	9%	4%	2%	3%
Public Order (n = 498)	79%	76%	4%	11%	9%	4%	2%	5%

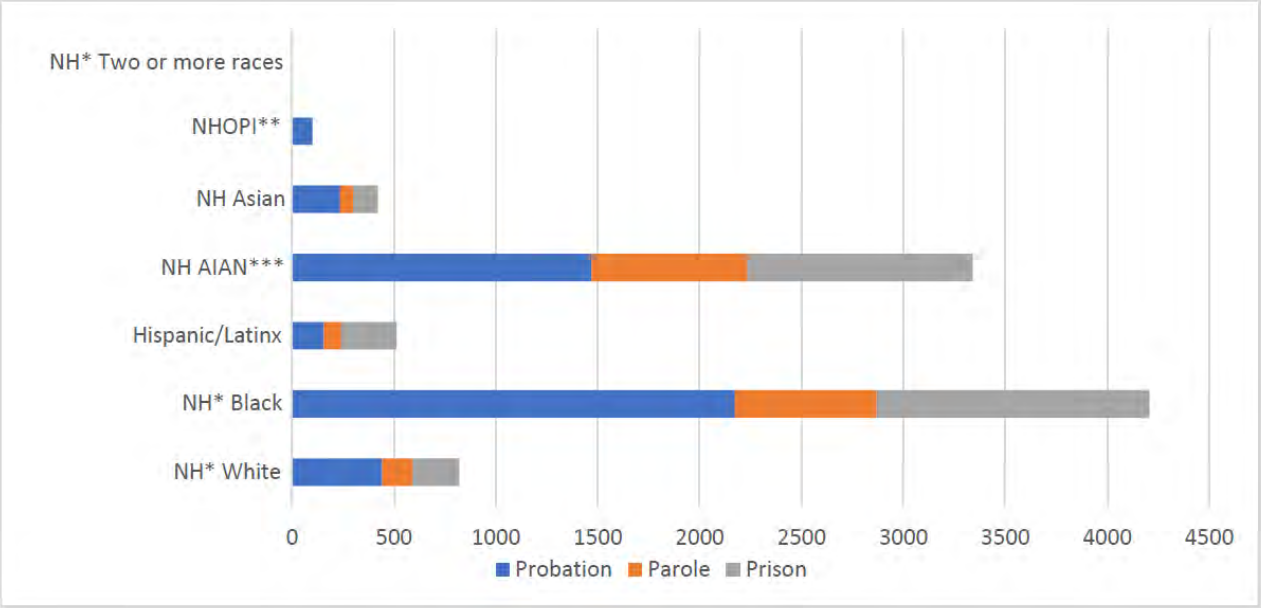
Footnotes for Table 5.

Statistical significance of differences:

Proportions of women across racial categories were significantly different in CFC data than in Washington State Census data in all offense categories. Violent $\chi^2 = 190$, df 3, $p < 0.001$; Drug $\chi^2 = 136$, df 3, $p < 0.001$; Property $\chi^2 = 226$, df 3, $p < 0.001$; Fraud $\chi^2 = 45$, df 3, $p < 0.001$; and Public Order $\chi^2 = 106$, df 3, $p < 0.001$.

Source: Data adapted from information available at TATIANA MASTERS ET AL., INCARCERATION OF WOMEN IN WASHINGTON STATE: MULTI-YEAR ANALYSIS OF FELONY DATA (2020).

Figure 4. Washington Rates (per 100,000) of Probation, Parole, and Prison by Race/Ethnicity, All Genders Combined, 2016



Footnotes for Figure 4.

*NH means Non-Hispanic

**NHOPI means Native Hawaiian or Other Pacific Islander

***AIAN means American Indian or Alaska Native

Prison refers to State and Federal prison, and includes juveniles sentenced as adults, and in some states may include individuals with sentences of less than one year.

The Washington State Department of Corrections places offenders on "community supervision," not on probation or parole in most circumstances. They only allocate them to either probation or parole for Bureau of Justice Statistics (BJS) according to the "cause" that put them on probation or parole.

Probation and parole counts for Washington could deviate from the actual numbers because several agencies in Washington did not provide data in 2016 and BJS estimated the 2016 populations based on 2015 reports for these agencies.

Probation and parole counts in the U.S. and Washington have high rates of "unknown" race (60% of Washington probation population reported in BJS has "unknown" listed as race).

The very low number of individuals of two or more races indicates that multi-racial individuals are likely not being captured or are being counted under another racial category.

Sources: Data adapted from:

Thomas Bonczar & Joseph Mulako-Wangota, Corrections Statistical Analysis Tool (CSAT) – Probation, BUREAU OF JUST. STAT. (June 29, 2020), https://www.bjs.gov/probation/ (count of year-end probation population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool).

Thomas Bonczar & Joseph Mulako-Wangota, Corrections Statistical Analysis Tool (CSAT) – Parole, BUREAU OF JUST. STAT. (June 23, 2020), https://www.bjs.gov/parole/ (count of year-end parole population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool).

E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2016 (2018), https://www.bjs.gov/content/pub/pdf/p16_old.pdf. DANIELLE KAEBLE, BUREAU OF JUST. STAT., PROBATION AND PAROLE IN THE UNITED STATES, 2016 (2018), https://www.bjs.gov/content/pub/pdf/ppus16.pdf.

U.S. Census Bureau American Communities Survey (2016) (for the U.S. and Washington population counts for rates calculations).

iii. National data showing racial and ethnic disparities in female incarceration rates

Because limited Washington-specific research exists, it is helpful to look at national research as well. As with the Washington pilot study, national research shows that the rate of increased incarceration is not borne evenly across women of different racial, ethnic, and socioeconomic groups and by persons of any sexual orientation. Black, Indigenous, and communities of color and other marginalized communities tend to be increasingly impacted by the increase in convictions and incarceration. This national research suggests the likelihood of similar disproportionate impacts in Washington and the need for Washington-specific research and data collection.

Similar to male incarceration, race impacts the rate at which women are incarcerated nationally. In 2017, according to the Bureau of Justice Statistics, the imprisonment rates in federal and state prisons for Black and Hispanic women were substantially higher than the rate for white women. It is important to discuss the racial shifts in incarceration nationally since 2000 for Black, Hispanic, and white women. Between 2000 and 2017, the rate of imprisonment in federal and state prisons decreased 55% for Black women, increased ten percent for Hispanic women, and increased 44%

for white women.[43] The impact of the swelling-shadow of incarceration on Indigenous women is set forth separately below.

While there is robust research to support the racial inequality facing women (and men) in incarceration rates, there are several deficits that deserve attention. Often low-socioeconomic position is conflated with race and ethnicity in the research (for example when assumptions are made that race or ethnicity serves in some way as a proxy for income rather than gathering income data independently), so further research should be conducted to parse out how income interacts with other demographic variables to impact outcomes. Furthermore, the available datasets and research on incarcerated populations often do not indicate how race and ethnicity data were collected (e.g., self-report or based on the assumption of others) or analyzed. There is a notable lack of research focusing on Indigenous, Asian, and Native Hawaiian or Other Pacific Islander populations and substantial missing race and ethnicity data for some datasets. Our report has been limited by these deficiencies and we recommend Washington State collect more accurate and complete demographic information throughout the criminal justice system. See Section V of the full report ("2021 Gender Justice Study Terminology, Methods, and Limitations") for more information on data limitations.

iv. Data showing disparities in incarceration rates based on gender and sexual orientation

Incarceration rates based on gender and sexual identity need to be parsed out in Washington. Nationally, according to 2011-2012 National Inmate Survey data, sexual minorities are disproportionality incarcerated in prisons and jails in the U.S. The incarceration rate for self-identified sexual minorities of all genders was over three times higher than the rate in the total U.S. adult population. The weighted results showed a disproportionate number of incarcerated women self-identifying as sexual minorities as compared to incarcerated men (42.1% of women in prison compared to 9.3% of men in prison and 35.7% of women in jail compared to 6.2% of men in jail).[44] Additionally, this research and Bureau of Justice Statistics data indicates that sexual

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[43] THE SENT'G PROJECT, *supra* note 23. Between 2000 and 2017, the national imprisonment rate for Black women decreased from 205 to 92 per 100,000; the rate for Hispanic women increased from 60 to 66 per 100,000, the rate for white women increased from 34 to and 49 per 100,000. BRONSON & CARSON, *supra* note 26.

[44] Meyer et al. analyzed data (n=80,601) from interviews conducted in the 2011-2012 National Inmate Survey. The survey used a random sample of people incarcerated in state and federal prisons, local jails, and special facilities

minorities are more likely than their counterparts to report being sexually victimized and experiencing solitary confinement and other sanctions while incarcerated (see "Chapter 8: Consequences of Gender-Based Violence: Domestic Violence and Sexual Assault" for further discussion of the disparities and consequences of sexual assault in jails and prisons).[45] These results highlight the need to address the root causes contributing to the disproportionate incarceration rates and harsher treatment while incarcerated of sexual minorities, and women in particular. Additional analysis of the root causes of incarceration can be found in "Chapter 9: Juvenile Justice and Gender and Race Disparities."

b. City and county jails in Washington State

While the Washington Association of Sheriffs and Police Chiefs collects and publicly posts city and county jail population data annually, almost every annual dataset from 1997 to 2020 is missing data from several jails. The missing data each year is not consistently from the same facilities. This makes it very challenging to look at trends over time at the state, county, or facility level. In addition, gender data is not included every year, further decreasing the ability to look at trends by gender. Table 6 shows data from 1997-2001, 2015, and 2018—the only years which include complete gender data for all jails in Washington. This table should be interpreted with caution as so many years were excluded due to missing data and to ensure the years presented were comparable. More consistent and complete data reporting by facilities would vastly improve Washington's ability to track trends in jail incarceration by gender, race, and ethnicity. Despite the limitations of these data, more meaningful findings could be derived from these datasets with more advanced modeling. The simple data provided in Table 6 does indicate that jail incarceration rates for women increased dramatically between 1997 and 2018 while the rates

(e.g., military, Indian country, and Immigration and Customs Enforcement facilities) and asked questions regarding sexual orientation, race/ethnicity, incarceration-related factors, health outcomes, sexual victimization, and consensual sex. The incarceration rate for sexual minorities of all genders was 1,882 per 100,000 for U.S. residents over the age of 18, over three times higher than the rate in the U.S. adult population. This article defined "sexual minorities" to include, "those who self-identify as lesbian, gay, or bisexual or report a same-sex sexual experience before arrival at the facility." Ilan Meyer et al., *Incarceration Rates and Traits of Sexual Minorities in the United State: National Inmate Survey. 2011-2012*, 107 AM. J. PUB. HEALTH 234 (2017).

[45] *Id.*

for men declined in the same time period.[46] This suggests that analyzing these data more completely could reveal important trends. This is an area that needs to be studied, particularly because we know a large portion of the incarcerated population in Washington State is being held locally in pretrial detention.[47] See Section III for further discussion of pretrial detention.

Table 6: Statewide City and County Jails, Average Daily Population Rates (per 100,000), Washington State, By Gender, 1997-2001, 2015, 2018*

	1997	1998	1999	2000	2001	2015	2018	% change from 1997 to 2018
Male	312	327	324	330	346	283	276	-11%
Female	41	45	47	48	53	56	72	+75%
% Total Jail Population that was Female	12%	12%	13%	13%	13%	17%	21%	

Footnotes for Table 6.

*Cells emphasized and shaded light purple indicate an increase in the rate compared to the previous year. Cells shaded maroon indicate a decrease in the rate compared to the previous year or no rate change compared to the previous year.

This table should be interpreted with caution as several years of data are excluded for several reasons. This prevents any true analysis of the trends over time and prohibits the ability to see if the years included are anomalies. In addition, this table does not show trends between 2001 and 2015 which means a significant piece of the picture is missing. The years 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2016, 2017, 2019, and 2020 are excluded due to missing data from several counties that did not report any data, or that did not report gender data, and/or because gender data was not included in the publicly available dataset for that year.

Sources: Washington Association of Sheriffs and Police Chiefs, Annual Jail Statistics, 1997-2020, (2020), https://www.waspc.org/cjis-statistics---reports (last visited June 22, 2021); Office of Financial Management 1997-2018 Population Estimates; available from https://ofm.wa.gov/washington-data-research/population-demographics/population-estimates/estimates-april-1-population-age-sex-race-and-hispanic-origin, accessed June 22, 2021.

[46] *Annual Jail Statistics: 2019*, WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, ANNUAL JAIL STATISTICS (2020), https://www.waspc.org/cjis-statistics---reports.
[47] INTISAR SURUR & ANDREA VALDEZ, PRETRIAL REFORM TASK FORCE: FINAL RECOMMENDATIONS REPORT 39.

c. City and county jails nationwide

Among incarcerated women nationwide, the largest population was being held in city and county jails across the U.S. with numbers reaching 113,700 in 2017.[48] Nationwide data shows a steady increase between 1990 and 2007 in jail populations. This trend exists for incarcerated men, women, and the combined jail population.[49,50]

Beginning in 2009 the U.S. saw the beginning of an overall downward trend in jail incarceration rates. However, while the male population continued this general downward trend through 2018 (with some oscillation from year-to-year), the female jail incarceration rate began climbing again in 2012, reaching the highest historical rate in 2017 and 2018 (data is only available through 2018). Between 2005 and 2018 the jail incarceration rate for males fell 14%. During this same time period, the rate grew ten percent for women (Table 7 and Figure 5).[51]

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[48] THE SENT'G PROJECT, *supra* note 25.

[49] On average, the adult female jail population grew 6.6% annually between 1990 and 2000, while the adult male inmate population grew 4% annually in that time period. ALLEN BECK & JENNIFER KARBERG, PRISON AND JAIL INMATES AT MIDYEAR 2000 (2001), https://www.bjs.gov/content/pub/pdf/pjim00.pdf.

[50] Between 1999 and year-end 2013, the female jail inmate population increased by 48%. In this same time period, the male jail inmate population increased by 17%. TODD MINTON ET AL., CENSUS OF JAILS: POPULATION CHANGES, 1999–2013 (2015), https://www.bjs.gov/content/pub/pdf/cjpc9913.pdf.

[51] ZHEN ZENG, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT, JAIL INMATES IN 2018 (2020), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6826.

Table 7: Male and Female Jail Incarceration Rates (per 100,000), City and County Jails Nationwide, 2005-2018*

	2005	2010	2011	2012	2013	2014	2015	2016	2017	2018	% change
Male	448	431	419	418	404	405	394	398	394	387	-14%
Female	63	59	59	62	64	67	64	66	69	69	+10%

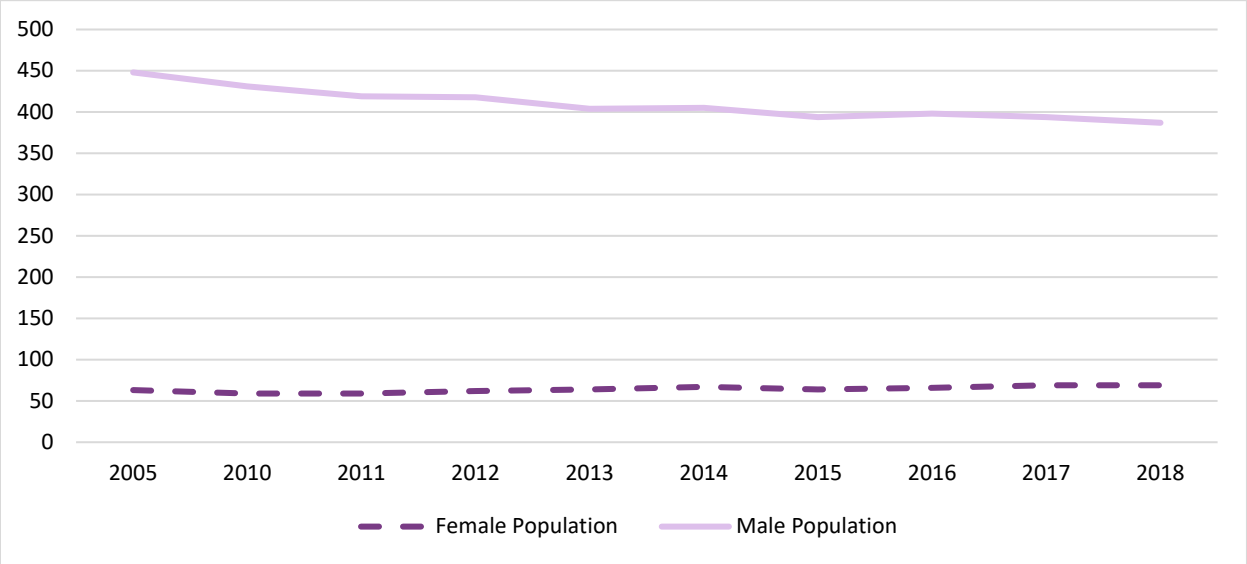
Footnotes for Table 7.

*Cells emphasized and shaded light purple indicate an increase in the rate compared to the previous year. Cells shaded maroon indicate a decrease in the rate compared to the previous year or no rate change compared to the previous year.

Rates are based on the number of individuals confined in local jails at midyear per 100,000 U.S. residents of a given demographic group. In 2015 and 2016, the Annual Survey of Jails (the source for the underlying data) collected demographic data on inmate populations at year-end instead of midyear. Jails typically hold fewer individuals at year-end than at midyear, so the 2015 and 2016 inmate populations were adjusted for seasonal variation in the source document.

Source: This table is adapted from information available from:
ZHEN ZENG, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., JAIL INMATES IN 2018 (2020), https://www.bjs.gov/content/pub/pdf/ji18.pdf.

Figure 5. Male and Female Jail Incarceration Rates (per 100,000), City and County Jails Nationwide, 2005-2018



Footnotes for Figure 5.

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Source: This figure is adapted from information available from:
ZHEN ZENG, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., JAIL INMATES IN 2018 (2020), https://www.bjs.gov/content/pub/pdf/ji18.pdf.

A national report published in 2019 by the Prison Policy Initiative shows that 60% of incarcerated women who are under local control in jail facilities "have not been convicted of a crime and are awaiting trial."[52] Women are often detained for long periods of time as they await their trial because of the financial strain of bail and other fines imposed by the correctional system.[53] This

[52] ALEKS KAJSTURA, WOMEN'S MASS INCARCERATION: THE WHOLE PIE 2019 (2019), https://www.prisonpolicy.org/reports/pie2019women.html#fnref:6.
[53] *Id.*

report highlights that jail conditions create adverse consequences for women as unique barriers exist for individuals incarcerated in jail facilities such as more expensive phone calls and sometimes more restricted mail entry requirements, as opposed to prisons which still have many of these barriers but generally to a lesser degree than the jails. These constraints make it difficult for women in jail to maintain contact with family members.[54] While these hardships effect both men and women in jail, they are more acutely born by women due to the gender-wage gap and systemic sexism that normalizes women bearing a greater share of childcare obligations (see "Chapter 1: Gender and Financial Barriers to Accessing the Courts" and "Chapter 4: The Impact of Gender on Courtroom Participation and Legal Community Acceptance" for more in-depth discussions of the gender-wage gap and a lack of gender-parity in childrearing responsibilities). Incarcerated women in jail facilities nationally also reported high rates of mental health illness and trauma: "86 percent report having experienced sexual violence in their lifetime. . . and one in five has experienced [Serious Mental Illness] SMI, [Post Traumatic Stress Disorder] PTSD, and substance use disorder in her lifetime…"[55] These complex medical conditions call for critical mental health treatment that jail facilities have difficulty providing. Moreover, research shows that medical and mental health symptoms worsen when incarcerated individuals cannot access treatment and remain in jail for longer periods of time.[56] See "Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families" for more information on the impacts of incarceration on parents and families.

d. Probation and community custody in Washington State

In Washington State, female probation numbers are more than five times female imprisonment and parole (i.e., community custody) numbers combined (Figure 6), but note that the number may have significant inaccuracies, as 40% of individuals on probation were listed with sex unknown.[57] The requirements of any particular term of probation also varies widely among jurisdictions, offenses, and other factors. Thus, while a large proportion of criminal-justice-

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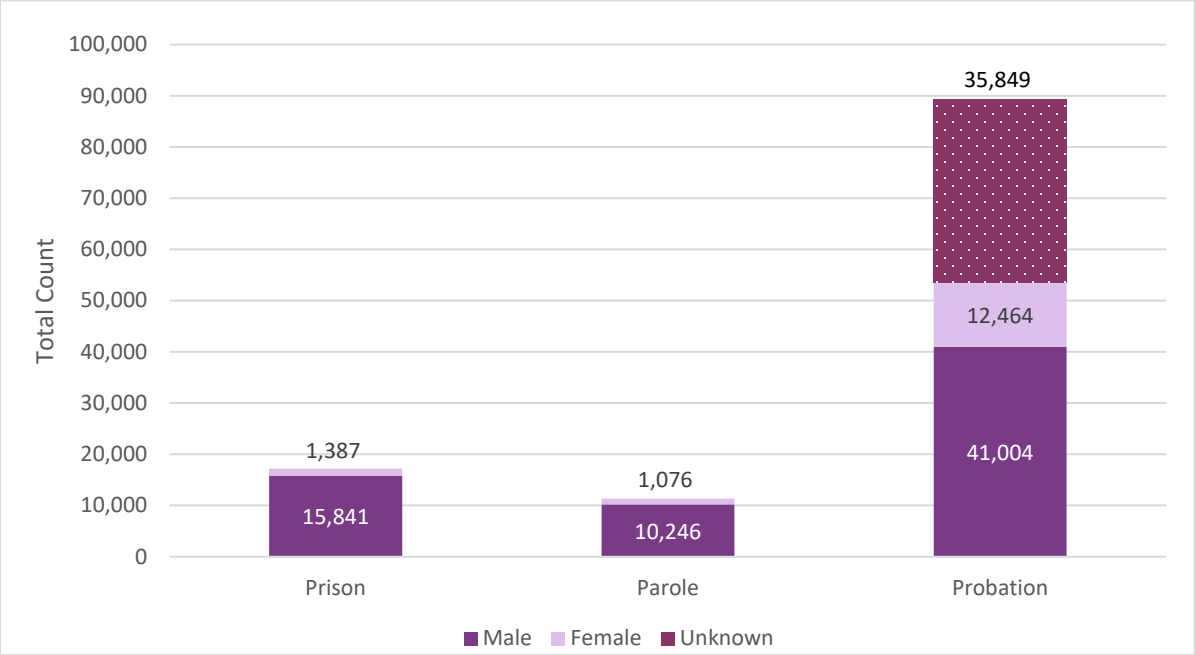
[54] *Id.*
[55] ELIZABETH SWAVOLA, KRISTINE RILEY & RAM SUBRAMANIAN, OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM (2016).
[56] *Id.*
[57] For further explanation of allocation of probation and parole see the note at Figure 4; Bonczar & Mulako-Wangota, *supra* note 32.

involved women are subject to probation, the actual impact of probation is not easily captured or comprehensively available for study.

Figure 6. Female and Male Counts in Prison, Parole, and Probation in Washington State, 2016



Footnotes for Figure 6.

Prison refers to state and federal prison, and includes juveniles sentences as adults. The Washington Department of Corrections places offenders on "community supervision," not on probation or parole. They only allocate them to either probation or parole for Bureau of Justice Statistics according to the "cause" that put them on probation or parole.

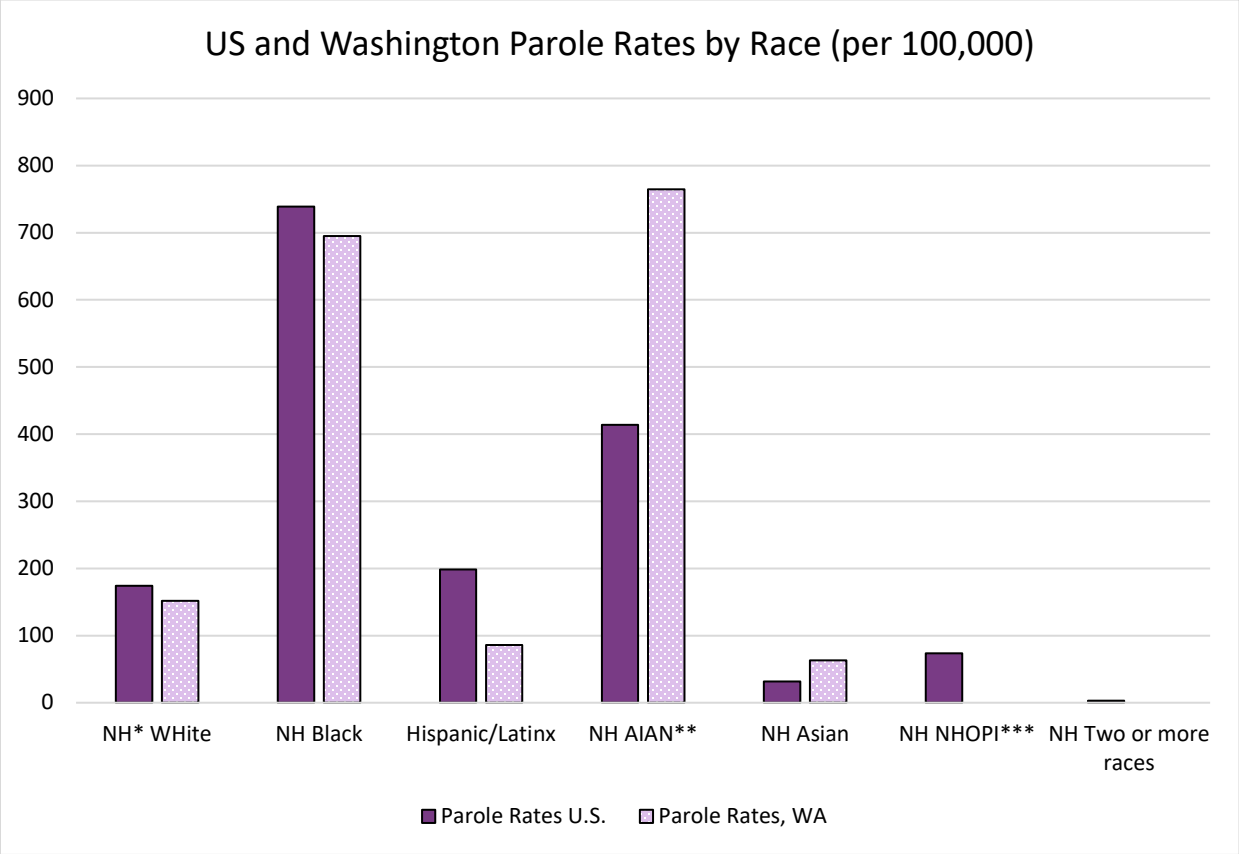
Sources:
Thomas Bonczar & Joseph Mulako-Wangota, Corrections Statistical Analysis Tool (CSAT) – Probation, BUREAU OF JUST. STAT. (June 29, 2020), https://www.bjs.gov/probation/ (count of year-end probation population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool).

Thomas Bonczar & Joseph Mulako-Wangota, Corrections Statistical Analysis Tool (CSAT) – Parole, BUREAU OF JUST. STAT. (June 23, 2020), https://www.bjs.gov/parole/ (count of year-end parole population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool).

E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2016 (2018), https://www.bjs.gov/content/pub/pdf/p16_old.pdf.
DANIELLE KAEBLE, BUREAU OF JUST. STAT., PROBATION AND PAROLE IN THE UNITED STATES, 2016 (2018), https://www.bjs.gov/content/pub/pdf/ppus16.pdf.

While Washington's racial disparities in corrections overall appear to be similar to U.S. racial disparities, Washington State has higher rates of AIAN individuals on parole compared to national totals (Figure 7). However, it is important to note that 13% of parolees nationally and two percent of Washington State parolees had race/ethnicity reported as "unknown" in 2016.[58]

Figure 7. U.S. and Washington State Parole Rates (per 100,000) by Race/Ethnicity, 2016



[58] Bonczar & Mulako-Wangota, *supra* note 32.

Footnotes for Figure 7.

*NH means Non-Hispanic

**AIAN means American Indian or Alaska Native

***NHOPI means Native Hawaiian or Other Pacific Islander

The Washington Department of Corrections places offenders on "community supervision," not on probation or parole in most circumstance. They only allocate individuals to either probation or parole for the Bureau of Justice Statistics (BJS) according to the "cause" that put them on probation or parole. Probation and parole counts in the U.S. and Washington have high rates of "unknown" race (60% of Washington probation population reported in BJS has "unknown" listed as race). Individuals listed as "unknown" are not presented here. Parole counts for Washington could deviate from the actual numbers because several agencies in Washington did not provide data in 2016 and BJS estimated the 2016 populations based on 2015 reports for these agencies. The very low number of individuals of two or more races indicates that multi-racial individuals are likely not being captured or are being counted under another racial category.

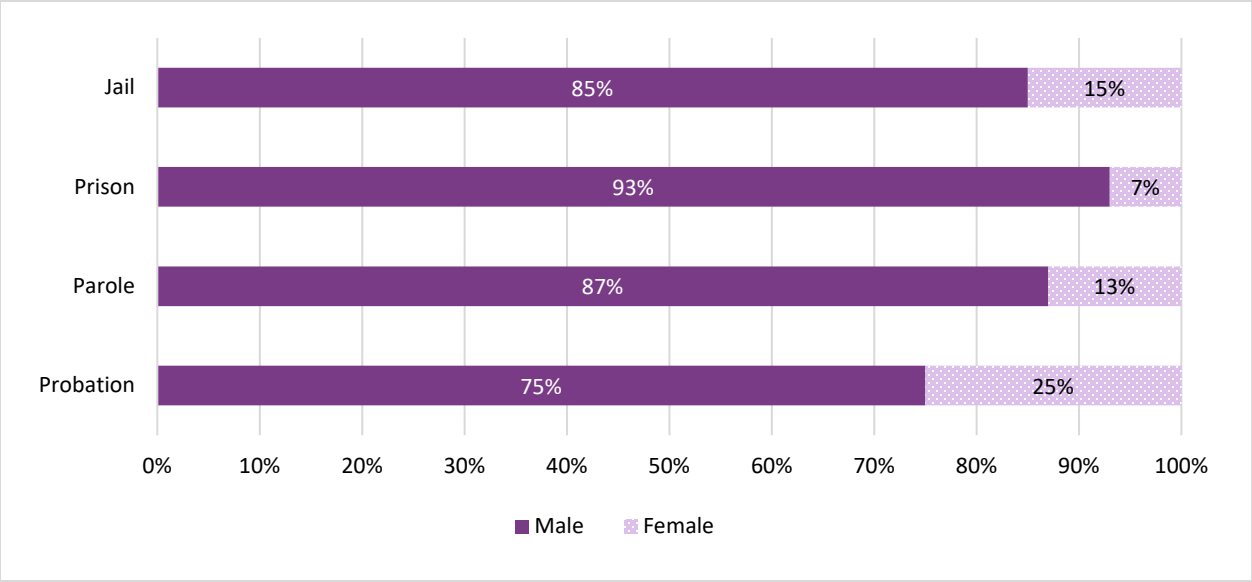
Sources: Data adapted from:
Thomas Bonczar & Joseph Mulako-Wangota, Corrections Statistical Analysis Tool (CSAT) – Parole, BUREAU OF JUST. STAT. (June 23, 2020), https://www.bjs.gov/parole/ (count of year-end parole population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool).
U.S. Census Bureau American Communities Survey (2016) (for the U.S. and Washington population counts for rates calculations).

e. Probation and parole nationally

It also bears noting that the vast majority of the female population interacting with the criminal justice system is doing so through probation. Nationwide only a small portion (19%) of the female population involved in the correctional system are actually in correctional facilities. The remaining 81% of the population are either on probation or parole with the majority on probation. Nationally, women make up a higher proportion of individuals on probation (25%) compared to parole, prison, and jail (Figure 8).[59]

[59] *Id.*; Carson, *supra* note 1; KAEBLE, *supra* note 16; ZENG, *supra* note 51.

Figure 8. Percent Men and Women Under Control of the Correctional Systems In The U.S., 2016



Footnotes for Figure 8.

Prison refers to state and federal prison, and includes juveniles sentenced as adults, and in some states may include individuals with sentences of less than one year. Jail refers to local city and county jails.

Sources: Data adapted from:
Thomas Bonczar & Joseph Mulako-Wangota, Corrections Statistical Analysis Tool (CSAT) – Probation, BUREAU OF JUST. STAT. (June 29, 2020), https://www.bjs.gov/probation/ (count of year-end probation population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool).

Thomas Bonczar & Joseph Mulako-Wangota, Corrections Statistical Analysis Tool (CSAT) – Parole, BUREAU OF JUST. STAT. (June 23, 2020), https://www.bjs.gov/parole/ (count of year-end parole population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool).

E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2016 (2018), https://www.bjs.gov/content/pub/pdf/p16_old.pdf.

DANIELLE KAEBLE, BUREAU OF JUST. STAT., PROBATION AND PAROLE IN THE UNITED STATES, 2016 (2018), https://www.bjs.gov/content/pub/pdf/ppus16.pdf.

ZHEN ZENG, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., JAIL INMATES IN 2018 (2020), https://www.bjs.gov/content/pub/pdf/ji18.pdf.

As discussed in "Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families," many barriers exist for women who are on probation that create significant hardship. As noted above, these hardships are more acutely born by women due to the gender-wage gap and systemic sexism that normalizes women bearing a greater share of childcare obligations (see "Chapter 1: Gender and Financial Barriers to Accessing the Courts" and "Chapter 4: The Impact of Gender on Courtroom Participation and Legal Community Acceptance" for more in-depth discussions of the gender-wage gap and a lack of gender-parity in childrearing responsibilities). A report by the Prison Policy Initiative highlights, "probation often comes with steep fees, which like bail, women are in the worst position to afford. Failing to pay these probation fees is often a violation of probation." Additional barriers include finding and affording childcare and transportation to and from required meetings with a probation officer.[60] See "Chapter 15: The Gendered Impact of Legal Financial Obligations" for more information on gendered impacts of the costs of incarceration.

f. Juvenile detention nationwide

Juvenile detention and other youth interactions with the justice system are discussed in "Chapter 9: Juvenile Justice and Gender and Race Disparities," which covers gender impact for juveniles as they relate to shifts in juvenile law focus, such as limiting judicial discretion and effects of treatment, and "Chapter 10: Commercial Sex and Exploitation."

g. American Indian and Alaska Natives in Washington prisons

In Washington, AIANs are over-represented in our prisons and in community custody. The rate of AIANs in community custody in Washington is over 3.5 times higher than the rate for whites. The rate of imprisonment for AIANs is almost five times the white rate in Washington (Figure 4).[61] This disparity is also evident when looking only at life and long sentences, where AIANs are also over represented.[62] Although unfortunately these data are not disaggregated and presented by

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[60] KAJSTURA, *supra* note 52.

[61] Bonczar & Mulako-Wangota, *supra* note 32; CARSON, *supra* note 32; KAEBLE, *supra* note 16; U.S. Census Bureau American Communities Survey (2016) (for the U.S. and Washington population counts for rates calculations).

[62] While only 1.2% of the state population identified as Native American in 2016, 2.4% of those receiving long sentences, 2.5% of those receiving very long sentences, and 1.9% of those receiving life sentences are identified in the sentencing data as Native American that year. BECKETT & EVANS, *supra* note 25.

gender, the Pilot Study mentioned above takes a first look at intersectionality within the Native American population. This study found Native American women, across counties, often made up two to four times as large a proportion of the convicted and sentenced population as they did of the general population of each county.[63] Taking 2019 as an example, Benton-Franklin and Snohomish Counties had no significant disproportionality among Native American women. In King County, Native American women were convicted and sentenced at four times the rate of their representation in the general population. Spokane County convicted and sentenced Native American women at over three times the rate of their representation in the population. In Pierce County, Native American women were more than twice as likely to be sentenced and incarcerated as their presence in the population would suggest. In Yakima, Native American women were overrepresented in the convicted and sentenced population but to a somewhat lesser extent.[64]

h. American Indian and Alaska Natives in local jails in Washington and across the United States

Washington numbers and national statistics look similar as to the alarmingly high rates at which AIANs are incarcerated in local facilities. The jail incarceration rate for this population increased by 17% in Washington between 1999 and 2013, and by 60% nationally in this same time period. Relative to other racial and ethnic groups, AIANs are disproportionately represented in jails nationwide.[65] It is important to note that the Bureau of Justice Statistics analyses providing these figures only include AIANs of a single race (i.e., excludes multiracial AIANs) and excludes persons of Hispanic or Latinx origin. While the adult AIAN jail population nationally was 12,100 in 2011 when using this narrow definition, the population count was 68,500 when including both Hispanic

[63] MASTERS ET AL., *supra* note 31, at 19–26.
[64] *Id*.
[65] According to Bureau of Justice Statistics data, at year-end 2013, jails in Washington State held 620 AIANs. Between 1999 and 2013, the national AIAN jail incarceration rate increased from 288 to 398 incarcerated AIANs per 100,000 AIAN U.S. residents. The jail incarceration rate for AIANs nationally is 398 per 100,00 U.S. residents. The jail incarceration rate for all other racial/ethnic groups combined is 236 per 100,000 U.S. residents. TODD MINTON, SUSAN BRUMBAUGH & HARLEY ROHLOFF, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST STAT., AMERICAN INDIAN AND ALASKA NATIVES IN LOCAL JAILS, 1999-2014 (2017), https://www.bjs.gov/content/pub/pdf/aianlj9914.pdf.

and Non-Hispanic AIANs and AIANs of single or multiple races.[66] Any Bureau of Justice Statistics data and reports on AIANs should be interpreted with caution given this methodology paired with the already pervasive undercounting of AIANs in many datasets.[67]

Although Washington data on the gender breakdown of incarcerated AIANs is lacking, national data shows AIAN women constitute a larger percentage of the jailed AIAN population than for all other racial and ethnic groups combined. In 2011, the AIAN population held in local jails across the U.S. was 80% men and 20% women. For all other racial and ethnic groups combined, the breakdown was 87% men and 13% women.[68]

i. Jails in Indian Country across the United States and in Washington

Males continued to account for the largest proportion of the population in Indian Country jails nationally in 2016. However, the proportion of women incarcerated in jails in Indian Country nationally increased from 20% of the incarcerated population in 2000 to 27% in 2016. In midyear 2016, 381 individuals were being held in Indian Country jails in Washington State (77% male and 23% female).[69] Similarly, the proportion of individuals in Indian Country jails in Washington State who were female increased from 11% in 2000 to 23% in 2016.[70] So, while Indian Country jails in Washington State had a lower proportion of incarcerated women (23%) than the average for all Indian Country jails nationally (27%), Washington saw an increase of 12 percentage points between 2000 and 2016 compared to an increase of seven percentage points nationally.

4. The Impact of COVID-19 on incarceration rates

The COVID-19 pandemic has been ravaging the world while this report was being researched and published, and the U.S. has been particularly hard hit. Prisons and jails are congregate environments where incarcerated individuals sleep, eat, and live together and staff travel

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[66] *Id.*
[67] URB. INDIAN HEALTH INST., MISSING AND MURDERED INDIGENOUS WOMEN & GIRLS, http://www.uihi.org/wp-content/uploads/2018/11/Missing-and-Murdered-Indigenous-Women-and-Girls-Report.pdf.
[68] MINTON, BRUMBAUGH & ROHLOFF, *supra* note 65.
[69] TODD MINTON & MARY COWHIG, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST STAT., JAILS IN INDIAN COUNTRY, 2016 (2017), https://www.bjs.gov/content/pub/pdf/jic16.pdf.
[70] *Id.*; TODD MINTON, BUREAU OF JUST. STAT. BULL., JAILS IN INDIAN COUNTRY, 2000 (2001), https://www.bjs.gov/content/pub/pdf/jic00.pdf.

between the facility and the community. Like nursing homes, cruises, bus terminals, or meatpacking plants, effective preventative measures including physical distancing and avoiding contact with shared surfaces are nearly impossible to enact.[71] A massive reduction in prison and jail populations was widely discussed as the only way to reduce the risk of outbreaks and large-scale illness and death.[72] Some jails and prisons took such calls seriously and significantly reduced their populations.[73] But many took much more limited measures, including the federal prison system and Washington State.[74] Overall, the tragic result has been that individuals in prisons

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[71] *E.g.*, *Correctional and Detention Facilities: COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 30, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/index.html; *Infection Control for Nursing Homes: COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 29, 2021), https://www.cdc.gov/coronavirus/2019-ncov/hcp/long-term-care.html; *Traveler's Health: COVID-19 and Cruise Ship Travel*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 16, 2021), https://wwwnc.cdc.gov/travel/notices/covid-4/coronavirus-cruise-ship; *Martinez-Brooks v. Easter*, No. 3:20-CV-00569 (MPS), 2020 WL 2405350, at *5, 23 (D. Conn. May 12, 2020); Order Granting Motion for Temporary Restraining Order, *Pimentel-Estrada v. Barr*, 2:20-cv-00495, Dkt. 51, pp. 6-9 (Apr. 28, 2020) (describing conditions at immigration detention center); Written Statement of Dr. Scott Allen, Examining Best Practices for Incarceration and Detention During COVID-19 Before the Senate Committee on the Judiciary, pp. 2-4 (Jun. 2, 2020), https://www.judiciary.senate.gov/imo/media/doc/Scott%20Allen%20Testimony.pdf.

[72] *E.g.*, Kelsey Kauffman, *Why Jails are Key to 'Flattening the Curve' of Coronavirus*, THE APPEAL (Mar. 13, 2020), https://theappeal.org/jails-coronavirus-covid-19-pandemic-flattening-curve/?fbclid=IwAR1K9cf0ardpNwIfxtzjLlegqusQ4l_ZpY1MEuagMfcnqsttzMi5aGlKnCQ; *U.S. Jails Begin Releasing Prisoners to Stem COVID-19 Infections*, BBC NEWS (Mar. 19, 2020), https://www.bbc.com/news/world-us-canada-51947802; Weihua Li & Nicole Lewis, *This Chart Shows Why The Prison Population Is So Vulnerable to COVID-19*, THE MARSHALL PROJECT (Mar. 19, 2020), https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19; *Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic*, OFF. OF THE ATT'Y GEN. (Mar. 26, 2020), https://www.justice.gov/file/1262731/download; Katie Benner, *Barr Expands Early Release of Inmates at Prisons Seeing More Coronavirus Cases*, N.Y. TIMES (Apr. 3, 2020), https://www.nytimes.com/2020/04/03/us/politics/barr-coronavirus-prisons-release.html.

[73] *E.g.*, Chad Sokol, *Dozens Released from Spokane County Custody Following Municipal Court Emergency Order*, SPOKESMAN REV. (Mar. 17, 2020), http://www.courts.wa.gov/content/publicupload/eclips/2020%2003%2018%20Dozens%20released%20from%20Spokane%20County%20custody%20following%20Municipal%20Court%20emergency%20order.pdf; *164 "Low Level, Nonviolent" Offenders Being Released from Hillsborough County Jails*, ABC ACTION NEWS (Mar. 19, 2020), https://www.abcactionnews.com/news/region-hillsborough/164-low-level-nonviolent-offenders-being-released-from-hillsborough-county-jails; Julia Marsh & Ben Feuerherd, *NYC Jail Population Lowest Since World War II After Coronavirus Releases*, N.Y POST (Mar. 26, 2020), https://nypost.com/2020/03/26/nyc-jail-population-lowest-since-world-war-ii-after-coronavirus-releases; Kathleen Hopkins, *Coronavirus in NJ: Up to 1,000 Inmates to Be Released from Jails*, ASBURY PARK PRESS (Mar. 23, 2020), https://www.app.com/story/news/2020/03/23/nj-coronavirus-up-1-000-inmates-released-jails/2897439001/.

[74] *E.g.*, Damini Sharma et al., *Prison Populations Drop by 100,000 During Pandemic – But not Because of COVID-19 Releases*, THE MARSHALL PROJECT (July 16, 2020), https://www.themarshallproject.org/2020/07/16/prison-populations-drop-by-100-000-during-pandemic (finding average prison populations reduced by eight percent due mostly to halt in transfers from jails to prisons; Washington's prison population reduced by seven percent in 2020); Keri Blakinger & Joseph Neff, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied*, THE MARSHALL PROJECT (Oct. 7, 2020), https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied.

nationwide have contracted COVID-19 at rates far greater than the general population.[75] In Washington's prison system, for example, one in three incarcerated individuals has tested positive, 6.4 times the rate in Washington overall, although death rates have been consistent across the two populations. Among individuals incarcerated in federal facilities, two in seven have tested positive.[76] In addition, while adult release data or changes to admission data resulting from COVID-19 have not been analyzed to date, there are some early indications in the Washington State juvenile admissions data showing that reductions in admissions following the start of the COVID-19 outbreak are not being distributed equally across all genders and racial or ethnic groups, with female youth and Black, Indigenous, and youth of color seeing smaller reductions in admissions than their counterparts (see "Chapter 9: Juvenile Justice and Gender and Race Disparities").[77]

In Washington State, Governor Inslee directed the release of approximately 1,100 prisoners, approximately a six percent reduction, in April 2020.[78] However, individuals also continued to be returned to prison for violating conditions of release, limiting the effect of the meager releases and resulting in additional possible exposures.[79] By May 2021, nine of 12 prisons reported coronavirus cases among incarcerated individuals (ranging from 11 to 1,675 confirmed cases), many other facilities and work release facilities were also affected, and all but one prison had several to hundreds of reported staff cases.[80] By May of 2021, 14 incarcerated individuals and

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[75] *E.g.*, Associated Press, *One in Every Five Prisoners in US Has Tested Positive for Covid-19*, GUARDIAN (Dec. 18, 2020), https://www.theguardian.com/us-news/2020/dec/18/us-prisoners-coronavirus-stats-data; Brendan Saloner et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 J. AM. MED. ASS'N 602 (2020); *see also A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT, https://perma.cc/6M22-KL8V (updated May 31, 2021).

[76] THE MARSHALL PROJECT, *supra* note 74.

[77] Personal Communication with Dr. Amanda Gilman, Washington State Center for Court Research (Nov. 4, 2020) (based on analysis of statewide juvenile admissions data).

[78] Joseph O'Sullivan & David Gutman, *As Coronavirus Spreads in Washington's Prisons, Here's What a State Watchdog Says Needs to Change*, SEATTLE TIMES (Aug. 10, 2020), https://www.seattletimes.com/seattle-news/politics/fresh-air-outside-visitors-and-more-testing-watchdog-recommends-changes-in-washingtons-prisons-amid-coronavirus-pandemic/.

[79] *Id.*

[80] *COVID-19 Data*, WASH. STATE DEP'T OF CORR. (2020), https://perma.cc/7TS4-2DHQ (numbers reported as of May 21, 2021).

two staff had died of COVID-19.[81] Conditions within the state facilities have been shocking and dangerous.[82]

Many local jails in Washington took reductions in populations more seriously.[83] The ACLU found Washington's overall statewide jail population was reduced initially by approximately 50%. The Prison Policy Initiative reports Snohomish, Yakima, and Kitsap counties as among the leaders nationwide among large local jails in percentage of population reduction, at 50, 50, and 49% reductions respectively.[84] King County reported an approximately 35% reduction in population between March 2020 and May 2021.[85] These reductions were accomplished by a combination of some of the following: releasing elderly and medically vulnerable persons, adopting booking criteria and restrictions to limit the influx of persons entering jails, and/or delaying prosecutions.[86] However, a Washington Courts study found "most courts also continued to issue warrants for failure to appear which is possibly contrary to the Supreme Court Order (No. 25700-B-646, October 13, 2020)," which set forth criteria courts should consider before issuing warrants for failing to appear including the risk of COVID-19 transmission.[87]

Intersectional data on COVID-19 in Washington's prisons, jails, and population reductions have not been reported. The Department of Corrections reports race data for confirmed COVID-19 cases. At present, the data roughly tracks each race's percentage within the total incarcerated

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[81] *Id.*

[82] *E.g.*, Lilly Fowler, *WA Inmates Say They're Retaliated Against for Getting COVID-19*, CROSSCUT (Dec. 15, 2020), https://crosscut.com/news/2020/12/wa-inmates-say-theyre-retaliated-against-getting-covid-19 (Department of Corrections uses solitary confinement to isolate sick prisoners; two prisoners who died had waited days to report difficulty breathing); Maggie Quinlan, *70 Percent of Airway Heights Prison Is COVID-19-Positive*, SPOKESMAN REV. (Dec. 24, 2020), https://www.spokesman.com/stories/2020/dec/24/70-of-airway-heights-prison-is-covid-positive.

[83] Jaime Hawk, *Don't Go Back - Washington Jails Should Permanently Adopt Practices That Led to Reductions in Populations Due to COVID-19*, ACLU (Aug. 31, 2020), https://www.aclu-wa.org/story/don%E2%80%99t-go-back-washington-jails-should-permanently-adopt-practices-led-reductions-populations.

[84] Emma Widra & Peter Wagner, *Jails and Prisons Have Reduced Their Populations in the Face of the Pandemic, but not Enough to Save Lives*, PRISON POL'Y INITIATIVE (Aug. 5, 2020) https://www.prisonpolicy.org/blog/2020/08/05/jails-vs-prisons-update-2/.

[85] *Emergency COVID-19 Actions to Ensure Everyone's Safety at Correctional Facilities*, KING CNTY. (2020), https://perma.cc/8RZW-U3Q4 (data visited May 21, 2021).

[86] Hawk, *supra* note 83.

[87] BJA COURT RECOVERY TASK FORCE & LESSONS LEARNED COMMITTEE, CHANGING COURT PRACTICES AMIDST COVID AND BEYOND 1 (2020), http://www.courts.wa.gov/programs_orgs/pos_bja/Final%20Changing%20Court%20Practices%20Admist%20COVID%20Survey%20summary.pdf.

population. Just as Black individuals are overrepresented in the prison population, they are overrepresented in confirmed COVID-19 cases, accounting for 16.8% of cases among the Washington prison population in May of 2021. Incarcerated AIANs are experiencing COVID-19 at an even higher rate than their incarceration rate, accounting for 6.2% of COVID-19 cases and 5.9% of the incarcerated population.[88] Black, AIAN, Native Hawaiian or other Pacific Islanders, Latinx and other people of color have been disproportionately affected by COVID-19 writ large.[89] The two women's prison facilities have, as of May 2021, incurred 35 reported inmate cases and 41 staff cases of COVID-19, with no deaths.[90] It is important to note that disparities are often masked when we group many diverse populations into one racial or ethnic category—such as combining all Asian populations into one group as the datasets cited here do.

Widespread recidivism due to the larger reductions in jail populations and more modest reduction in the prison population have not been reported. In fact, as to pretrial releases, the ACLU concludes "These past several months have shown that people facing charges can remain safely in the community while their case is pending in court."[91] Thus, Washington and its counties should consider making these reductions permanent. We recommend the response of the state and localities to COVID-19 in our prisons and jails be studied, including why so many outbreaks occurred, what various stakeholders could have done to prevent suffering and death, and the effect of the releases that occurred on recidivism, public and inmate safety, and health.

III. The Environments Causing Increased Female Convictions and Incarceration Generally and Across Subpopulations

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[88] WASH. STATE DEP'T OF CORR., *supra* note 80.
[89] *COVID-19 Data Dashboard*, WASH. STATE DEP'T OF HEALTH, https://perma.cc/F7FT-CS2Y, (last accessed May 28, 2021); *The COVID Racial Data Tracker*, ATLANTIC, https://perma.cc/4MFG-CV6W (last accessed May 31, 2021); *Coronavirus Disease 2019 (COVID-19), Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://perma.cc/Q6M9-75TT (last accessed May 31, 2021); *COVID-19 Hospitalization and Death by Race/Ethnicity*, CTRS. FOR DISEASE CONTROL & PREVENTION https://perma.cc/9TNQ-TS9E (updated May 26, 2021*); see also* Gina Kolata, *Social Inequities Explain Racial Gaps in Pandemic, Studies Find*, N.Y. TIMES (Dec. 9, 2020), https://www.nytimes.com/2020/12/09/health/coronavirus-black-hispanic.html.
[90] WASH. STATE DEP'T OF CORR., *supra* note 80.
[91] Hawk, *supra* note 83.

As the previous section demonstrates, there has been a historical increase in the convictions and incarceration of women, a trend that seems to be continuing in Washington State. National research points to several factors contributing to these gender disparities. The national data reviewed below demonstrates specific impacts along gender lines, and particularly on subpopulations of women. More work needs to be done to study the drivers of increasing incarceration of women in Washington and, in particular, to study the reasons for the racial and ethnic disparities identified in the Pilot Study, as discussed previously. This section describes several, largely unquantified, drivers of the growing incarceration of women in Washington: untreated trauma, legislative changes, policing and prosecution practices, pretrial detention, socioeconomic factors, and sentencing laws. It is also important to recognize systemic racism as its far-reaching impacts undergird many, if not all, of these drivers.

A. The trauma-to-prison pipeline

Trauma is well established as a driver of female incarceration. A 2018 national study found that incarcerated women arrive at prison with higher rates of PTSD than incarcerated men, and that when women had experienced adult psychological trauma, they tended to commit more severe offenses and receive longer prison sentences.[92] Childhood adversity and trauma serve as significant risk factors for women's perpetration of intimate partner violence. Childhood adversity and trauma are also linked to adult risk factors, such as substance abuse disorder. Incarcerated women are often simultaneously victims and perpetrators. Although women do not commit a high proportion of violent offenses, over three fourths of violent women offenders commit their offenses with co-offenders, generally male partners, and fewer than 14% of women

[92] Thanos Karatzias et al., *Multiple Traumatic Experiences, Post-Traumatic Stress Disorder and Offending Behaviour in Female Prisoners*, 28 CRIM. BEHAV. MENTAL HEALTH 72 (2018); *see also* Christy K. Scott et al., *Trauma and Morbidities Among Female Detainees in a Large Urban Jail*, 96 PRISON J. 102 (2016) (reviewing research showing that "the experience of trauma is a likely determinant in women's involvement in criminal activities," and noting that incarcerated women are more likely than men to experience trauma-related addictions and psychological disorders); Bonnie Green et al., *Trauma Experiences and Mental Health Among Incarcerated Women*, 8 PSYCH. TRAUMA 455 (2016), (finding high rates of trauma exposure and psychiatric disorders among incarcerated women, reinforcing the conclusion that trauma is a significant pathway to criminal activity for women); Andrea James, *Ending the Incarceration of Women and Girls*, 128 YALE L.J. F. 772 (2019).

have a primary role in the offense.[93] Thus, traumas, adversity, and relationships form key bases for female offending.

To address these issues, it is important to recognize the complexities and the breadth of traumatic experiences befalling women in our state (and throughout the nation). Some women experience complex trauma and PTSD as a result of chronic exposure to traumatic events such as human trafficking situations, long-term domestic violence, long-term child physical abuse or child sexual abuse, organized child exploitation rings,[94] or intergenerational drug use.[95] In these situations, generally, the victim is held in a state of physical or emotional captivity, is under the control of the perpetrator, and is unable to escape.[96] For example, a survivor of childhood abuse who also witnessed the long-term psychological and physical abuse of her mother and siblings became the victim of relationship domestic violence perpetrated by her husband.[97] Despite attempts to seek help from her doctor, law enforcement, and the courts, she was unable to find adequate protection and never received mental health counseling or adequate support in the community. One night she took the knife she had in her purse for her own protection to the throats of herself and her young children, who all survived. She has been incarcerated for the last 25 years, serving a 40-year sentence for two counts of attempted murder despite the non-life-threatening nature of everyone's wounds and her complex trauma history. At trial in 1995, the defense focused on diminished capacity due to dissociative amnesia and the court at sentencing

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[93] Gina Fedock & Stephanie Covington, *Female Violent Offending, Theoretical Models of*, THE SAGE ENCYCLOPEDIA OF CRIM. PSYCH. 516–18 (2019).

[94] Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923 (2007).

[95] Chris Taplin et al., *Family History of Alcohol and Drug Abuse, Childhood Trauma, and Age of First Drug Injection*, 49 SUBSTANCE USE & MISUSE 1311 (2014); Elizabeth A. Swedo et al., *Adolescent Opioid Misuse Attributable to Adverse Childhood Experiences*, 224 J. PEDIATRICS 102 (2020); Kevin P. Haggerty & Beatriz H. Carlini, *Understanding the Intergenerational Transmission of Substance Use and Problem Behavior: Implications for Future Research and Preventive Interventions*, 34 PSYCH. ADDICTIVE BEHAVS. 894 (2020). Anecdotally, this author and other defense attorneys she has spoken with have heard from multiple clients that they were introduced to drug use at young ages by adult family members.

[96] Wayland, *supra* note 94; *PTSD: National Center for PTSD, Complex PTSD*, U.S. DEP'T OF VETERANS AFFS. (Jan. 31, 2020), https://www.ptsd.va.gov/professional/treat/essentials/complex_ptsd.asp.

[97] This example is provided with the permission of the woman described. Support for these facts are available in her clemency petition, which is on file with her attorney, Marla Zink.

had only a limited awareness of childhood abuse, depression, and stress as well as peripartum symptoms.

Complex trauma and PTSD is often experienced by racially marginalized individuals, particularly the intergenerational trauma to Black and AIAN women in the U.S., and those marginalized due to their gender or sexual identity.[98] The impact arises from the cumulative effect of hegemonic norms and systemic racism as well as more-commonly recognized, interpersonal acts of psychological and physical abuse.

Other women experience unique and relatively-unstudied traumas related, for instance, to separation, bereavement, or attachment. Trauma in young girls, moreover, may alter development and interfere with school performance, which in Washington, as discussed under legislative changes below, often leads to young women's first interaction with the criminal justice system and detention.[99] Washington criminalizes both women's attempts to escape abuse and trauma (including drug addiction, economic crimes, runaway girls, and prostitution) and their entrapment in violent relationships that coerce them into crime (including economic crimes, and violent crimes of self-defense or protection of others).[100] In short, the effects of trauma are myriad and unresolved through incarceration. Work remains to prevent abuse and trauma and to recognize and treat its various sources and manifestations in the community. See "Chapter 10: Commercial Sex and Exploitation" for a detailed analysis of the pathways leading to and the criminalization of sex work.

It is also important to consider that individuals' traumas may intersect with the criminal justice system in very particular ways that can exacerbate the trauma. For example, women who have suffered trauma through domestic violence may have situational responses to living in a controlling carceral environment. Those who have experienced systemic racism and/or

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[98] Kate Richmond & Theodore Burnes, *Lost in Trans-Lation Interpreting Systems of Trauma for Transgender Clients*, 18 TRAUMATOLOGY 45 (2012).

[99] MARY GILFUS, VAWNET.ORG, WOMEN'S EXPERIENCES OF ABUSE AS A RISK FACTOR FOR INCARCERATION (2002), https://vawnet.org/sites/default/files/assets/files/2017-08/AR_Incarceration.pdf.

[100] *Id.* at 3-6; MELISSA DICHTER & SUE OSTHOFF, VAWNET.ORG, WOMEN'S EXPERIENCES OF ABUSE AS A RISK FACTOR FOR INCARCERATION: A RESEARCH UPDATE (2015), https://vawnet.org/material/womens-experiences-abuse-risk-factor-incarceration-research-update; Melissa S. Jones et al., *Childhood Adversity and Intimate Partner Violence in Adulthood: The Mediating Influence of PTSD in a Sample of Women Prisoners*, 36 J. INTERPERSONAL VIOLENCE 8590 (2021).

marginalization may be triggered by biases exposed during their involvement with the criminal justice system.

Implementing and maintaining trauma-informed care throughout civil society and government agencies is key to helping to heal women in Washington.[101] Highlighting the impact of trauma on our female prison population, the Washington State Office of the Corrections Ombuds published a 2019 report describing seven areas of recommended changes based on complaints they have received from incarcerated individuals in the last year. The report highlights a recommendation specifically focusing on applying a "trauma-informed and gender-responsive lens to programs...particularly for women and [Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), and Intersex] LGBTQI individuals across facilities."[102] Further, the report asserts the following regarding the root causes of gender disparities in correctional facilities:[103]

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

Several programs in Washington target reducing female recidivism by, in part, working to heal trauma. For example, the Kitsap County Girls' Court responds to women (self-identified) presenting in juvenile court with greater negative childhood experiences and greater trauma histories by providing holistic post-disposition treatment that includes mental health, behavioral health, medical care, education and job training, independent living skills, and mentorship.[104] For details see "Chapter 9: Juvenile Justice and Gender and Race Disparities." The IF Project, a

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[101] *E.g.*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, SAMHSA'S CONCEPT OF TRAUMA AND GUIDANCE FOR A TRAUMA-INFORMED APPROACH (2014), https://ncsacw.samhsa.gov/userfiles/files/SAMHSA_Trauma.pdf; SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES (2014), https://store.samhsa.gov/sites/default/files/d7/priv/sma15-4912.pdf.
[102] JOANNA CARNS, WASHINGTON STATE OFFICE OF THE CORRECTIONS OMBUDS. ANNUAL REPORT 2019 (2019), https://oco.wa.gov/sites/default/files/public/Annual%20Report%202019%20Final.pdf.
[103] *Id.*
[104] *Kitsap County Girls Court*, CTR. FOR CHILDREN & YOUTH JUST. (2020), https://ccyj.org/our-work/girls-court/girls-court-kitsap-county.

collaboration of law enforcement, current and previously incarcerated adults, and community partners, meets women where they are after they are incarcerated and provides:[105]

- a one-day writing intensive workshop that asks the question "If there was something someone could have said or done to change the path that led you here what would it have been?";
- a creative writing course;
- a 10-week health and wellness program that focuses on life-planning for physical, emotional, and mental health needs; and
- a 10-week reentry program for women within 6 months of their release date, which covers topics including transportation, access to services/resources, healthy relationships, family reunification, stigma, personal responsibility, financial literacy, employment readiness, access to education/union membership, and technology.

Community Passageways is a further example. Among its many programs aimed at zero youth incarceration and felony diversion in King County, Community Passageways hosts women's-only healing circles to better support the unique needs of young women. The healing circles address trauma and build the skills necessary for youth to thrive while creating shared experiences within a supportive peer network. Community Passageways also hosts mixed-gender circles and their Ambassadors are trained to draw from evidence-based interventions: Multisystemic Therapy (MST), Dialectical Behavior Therapy (DBT), and Motivational Interviewing (MI). Their new reentry program, Not Forgotten, is directed by Andrea Altheimer, who spent more than 20 years incarcerated after in-home, childhood trauma. Andrea and her team work with incarcerated participants to build a comprehensive release plan that addresses factors that her lived experience and research suggest are most influential for reentry success: health, employment, housing, skills development (education and interpersonal), mentorship, and social connection. After collaborating to build a specific and realistic release plan, the reentry team walks alongside individuals upon release to decrease anxiety, build confidence, and grow their community. According to Community Passageways, this has proven to be the exact support individuals need

[105] THE IF PROJECT, https://www.theifproject.org.

to move forward on a positive path. Their program is built on the premise that connection to the community is critical to a positive path forward, and the work is accomplished by individuals who are a part of the communities they serve.[106] For more information about gender-responsive programming in the Department of Corrections see "Chapter 12: Availability of Gender Responsive Programming and Use of Trauma Informed Care in Washington State Department of Corrections."

B. Legislative changes as drivers of incarceration rates and their disproportionate impact on Black, Indigenous, and women of color

In Washington's largest counties, the Pilot Study discussed above shows that although men make up a greater percentage of the convicted and sentenced population, women are being convicted in relatively higher proportions of drug, property, and fraud offenses. Black women are typically convicted and sentenced at two or three times the rate we would expect based on their proportion of the state's population in each offense category. However, their representation for drug crimes was less pronounced in 2019, as compared with 2010 and 2000. Native American women are also disproportionately represented across these offense categories at only a slightly lower rate than Black women.[107]

National-level research widely cites the "war on drugs" as a root cause for the increase in convictions and incarceration of women. The so-called war on drugs has affected Washington women (and men) similarly to their national counterparts. The "war on drugs" includes the introduction of mandatory minimum sentences for federal drug offenses, specifically the Anti-Drug Abuse Act of 1986 and the Omnibus Anti-Drug Abuse Act of 1988, that have exacerbated the impact of the so-called war.[108] The legislation and its effect is further described and examined in "Chapter 14: Sentencing Changes and Their Direct and Indirect Impact on Women."

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[106] This discussion of Community Passageways is based on conversations between the author and staff members of Community Passageways as well as the publicly-available information here: Our Programs, Community Passageways , available at https://www.communitypassageways.org/programs-impact (last visited May 2, 2021).
[107] MASTERS ET AL., *supra* note 31, at 10, 16–18, 27–30.
[108] Stephanie Bush-Baskette, *The War on Drugs and the Incarceration of Mothers*, 30 J. DRUG ISSUES 919 (2000).

The "war on drugs" has been the most frequently studied reason for the increase in convictions and incarceration of women in the last forty years.[109] Between 1990 and 1997 the number of women sentenced to more than a year in state and federal prisons nationwide for drug offenses rose 99%, compared to a 48% increase among males. Drug offenses were the largest source of total population growth among women sentenced to more than a year in this time period, accounting for 38% of the increase. Furthermore, when examining the entire female population sentenced to over one year in state or federal prisons nationwide, in 1997 approximately 35% of women were incarcerated with a drug-related offense.[110] Female arrests for drug crimes have continued an overall increasing trend, whereas male drug arrests have declined. The effect is that women's drug arrests have increased 216% from 1985 to 2019 while men's drug arrests have risen a-still-alarming but comparatively more modest 48%.[111]

In Washington, the Pilot Study suggests women's conviction and incarceration for drug offenses has been volatile. The data from the selected counties are similar for fiscal years 2000 and 2019, but there was a small dip for 2010.[112] More should be done to study the trends and root causes among types of offenses statewide.

The "war on drugs" effort outwardly claimed to focus criminal justice efforts toward reducing the sale, distribution, and consumption of illegal drugs.[113] In implementation, it grossly disproportionately affects Black individuals. The resulting mass incarceration has been suggested

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[109] Barbara Bloom, Barbara Owen & Stephanie Covington, *Women Offenders and the Gendered Effects of Public Policy1*, 21 REV. POL'Y RSCH. 31 (2004); Stephanie S Covington & Barbara E Bloom, *Gendered Justice: Women in the Criminal Justice System*, GENDERED JUSTICE: ADDRESSING FEMALE OFFENDERS 3 (2003); Susan D. Phillips & Nancy J. Harm, *Women Prisoners: A Contextual Framework*, 20 WOMEN & THERAPY 1 (1998).

[110] Women experienced sharper growth in incarceration rates than males for each of the four offense categories analyzed (violent, property, drug, and public-order) between 1990 and 1997. Public-order offenses (i.e., "weapons, drunk driving, court offenses, commercialized vice, morals and decency charges, liquor law violations, and other public-order offenses") increased 274% for women compared to a 131% increase for men. Despite this sharp increase, public-order offenses only accounted for 17% of the growth among incarcerated women compared the 38% accounted for by drug offenses. It is not clear from the report if individuals were classified by their most serious offense only, but all categories add up to the total population count which implies that this is the methodology used. ALLEN BECK & CHRISTOPHER MUMOLA, BUREAU OF JUST. STAT. BULL., PRISONERS IN 1998 (1999), https://www.bjs.gov/content/pub/pdf/p98.pdf.

[111] Tiana Herring, *Since You Asked: What Role Does Drug Enforcement Play in the Rising Incarceration of Women?*, PRISON POL'Y INITIATIVE (Nov. 10, 2020), https://www.prisonpolicy.org/blog/2020/11/10/women-drug-enforcement/.

[112] MASTERS ET AL., *supra* note 31, at Tables 5-7.

[113] Lisa D. Moore & Amy Elkavich, *Who's Using and Who's Doing Time: Incarceration, the War on Drugs, and Public Health*, 98 AM. J. PUB. HEALTH S176 (2008).

to create the new "racial caste system," which Michelle Alexander argues is driven by politics and not crime.[114] History shows that anti-immigrant and anti-Black racism have underpinned selective drug criminalization since the early 1900s.[115] President Theodore Roosevelt's Opium Commissioner, Hamilton Wright, "used disturbing racial claims to advance his cause [of international drug controls and domestic regulation], blaming opium for illicit sexual relations between white women and Chinese men and linking cocaine to violence in African American men." In the 1930s, the first commissioner of the Federal Bureau of Narcotics, Harry Anslinger, "reframe[ed] drug use from a medical issue to a public menace responsive only to tough criminal controls. His vehicle was fearmongering that used racism as a tool to amplify the dangers of drugs." For example, he campaigned against marijuana by "deploying the mass media and antipathy toward Mexicans and Mexican Americans to demonize 'loco weed.'" The anti-drug movement has long relied on "emotional drivers, principally racialized fears and nostalgia for an imagined peaceful and innocent past." Prohibition laws restricting alcohol consumption were even used to justify the disenfranchisement of Black "wet" voters who were holding back the South from becoming "'dry' and progress[ing] to a brighter future."

There now should be no doubt criminalizing Black communities was the precise intent of the war on drugs, as President Nixon's head of domestic affairs admitted the administration's strategy in a 1994 interview:

> The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin. And then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify

[114] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012).
[115] Doris Marie Provine, *Race and Inequality in the War on Drugs*, 7 ANN. REV. L & SOC. SCI. 41 (2011). For another comprehensive review of selective drug laws and policy and a lengthy analysis of its historical roots, see LEGAL FRAMEWORKS GRP., KING CNTY. BAR ASS'N DRUG POL'Y PROJECT, DRUGS AND THE DRUG LAWS: HISTORICAL AND CULTURAL CONTEXTS (2005), https://www.kcba.org/kcba/druglaw/pdf/report_hc.pdf.

> them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.[116]

Drug use was actually in decline when President Reagan declared the war on drugs in the 1982.[117] In the 1980s, Lee Atwater, a Republican operative then working in the White House, acknowledged a strategy to mask the racial animus underlying policies:

> You start out in 1954 by saying, "N*****, n*****, n*****."[118] By 1968 you can't say "n*****"—that hurts you, backfires. So you say stuff like, uh, forced busing, states' rights, and all that stuff, and you're getting so abstract. Now, you're talking about cutting taxes, and all these things you're talking about are totally economic things and a byproduct of them is, blacks get hurt worse than whites.[119]

In 2017, drug offenses still accounted for one of the largest proportions of the female population sentenced to more than one year in state and federal prisons. Just over 25% of the incarcerated female population was incarcerated for a drug offense as their most serious offense. However, nearly 38% of sentenced women were incarcerated for a violent crime as their most serious offense in 2017, compared to less than 28% in 1997.[120] This indicates that, while drug offenses still have a substantial impact on women, violent offenses also have a significant (and growing) impact on women nationwide.

This year has seen significant changes in Washington's drug laws. First, in February 2021, the Washington Supreme Court held Washington's drug possession statute unconstitutional.[121] The case involved a woman charged of possessing methamphetamine after a small baggy containing the substance was found in the coin pocket of her jeans. Ms. Blake defended against the charge

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[116] Dan Baum, *Legalize It All,* HARPER'S MAG. (Apr. 2016), https://harpers.org/archive/2016/04/legalize-it-all.
[117] Kenneth Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks"*, 6 J. GENDER RACE & JUST. 381 (2002).
[118] We have redacted the racial epithet used to avoid repeating harmful language, although we find it relevant the speaker used and repeated this particularly abhorrent language during his explanation.
[119] Rick Perlstein, *Exclusive: Lee Atwater's Infamous 1981 Interview on the Southern Strategy*, THE NATION (Nov. 13, 2012), https://www.thenation.com/article/archive/exclusive-lee-atwaters-infamous-1981-interview-southern-strategy.
[120] BECK & MUMOLA, *supra* note 110; ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2018 (2020), https://www.bjs.gov/content/pub/pdf/p18.pdf.
[121] *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

by asserting her possession was unwitting, a friend had bought the jeans secondhand and then given them to her. Ms. Blake said she did not know the drugs were in the pocket. The Supreme Court held the statute unconstitutional because it did not require the prosecution to prove Ms. Blake, and other defendants, knew of the drugs in their possession. Under federal and state due process protections, and following decisions of the U.S. Supreme Court, the Washington Supreme Court held the strict liability drug possession statute with substantial felony penalties for potentially innocent, passive conduct exceeds the Legislature's police power. The result of the holding not only vacated Ms. Blake's conviction but all charges and convictions for possession of drugs under the same statute, RCW 69.50.4013. Individuals who had such convictions included in the calculation of their offender score and sentence for other crimes also became entitled to resentencing. Data presented by the American Equity and Justice Group show between 1999 and 2019 Black people were convicted of simple drug possession at "disproportionally high rates in every county except for Pacific, Pend Oreille, San Juan (which recorded zero Black residents in 2019), Grays Harbor, and Ferry (also zero Black people). Racial disparities were widest in King County, which saw 13,941 simple possession convictions during that twenty-year period. Of those cases, 40.2% involved Black people, 5% involved Asians, 1.5% involved Native Americans, and 50.5% involved white people. In 2019, King County's racial breakdown was seven percent Black, 19.9% Asian, one percent Native, and 67.1% white."[122] Unfortunately, the data has not yet been broken out by gender. Furthermore, the data derives originally from the Caseload Forecast Council and therefore suffers from the same shortcomings and concerns discussed above and in the Pilot Study (see Appendix C for the full Pilot Study).

In response, the Washington State Legislature passed a new drug possession law.[123] The new law requires the prosecution to prove the defendant's knowledge of the drugs in their possession and it also reduces the penalties from those imposed under the invalidated statute by making the offense a misdemeanor instead of a felony. The legislation also provides funding to

[122] Rich Smith, *New Data Analysis Shows the Astonishing Breadth of the Racial Disparity in Washington's Drug Possession Convictions*, THE STRANGER (Mar. 17, 2021), https://www.thestranger.com/slog/2021/03/17/55910514/new-data-analysis-exposes-wide-racial-disparities-in-drug-possession-convictions-across-washington.
[123] ENGROSSED S.B. 5476, 67th Leg., Reg. Sess. (Wash. 2021).

community services and requires law enforcement to divert suspected offenders to assessment, treatment, or other services. The bill encourages prosecutors also to divert individuals to services in the community rather than prosecute them. Most of the changes will sunset in 2023 unless the Legislature takes further action. The effect of this legislation cannot be stated yet, but it should be studied. It would be useful to compare it to a new law that took effect in Oregon this year, which reduces possession of small quantities of drugs to a civil infraction and invests in drug treatment programs and community services.[124]

Drug laws and policy are not the only factors increasing incarceration rates. Other legislation and practices in the "get tough on crime movement," including the Violent Crime Control and Law Enforcement Act of 1994, three-strikes legislation in Washington[125] and other states, and pretrial detention have further increased the incarceration of women.[126] These laws have a particular impact on women, for whom the combined factors of child care needs, poverty, and domestic violence have forced them into pathways involving crime and drug dealing to support themselves and their families to avoid homelessness. A small qualitative study with women incarcerated in a jail in Arizona found that conflicts between work, childcare, and probation requirements inevitably led to their incarceration. Those with dependent children in their custody talked about crime as an alternative to hunger and homelessness or as a means to protect their children from domestic violence. The interviews also highlighted the interactions of race, gender, and poverty with women noting experiences of racism and childhood trauma.[127] Moreover, Washington data reported in the Pilot Study also shows the number of women convicted and sentenced for public order offenses to be on the rise from 2000 to 2019.[128]

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[124] *Drug Addiction Treatment and Recovery Act*, OREGON HEALTH AUTH. (May 18, 2021) https://www.oregon.gov/oha/HSD/AMH/Pages/Measure110.aspx; Melissa Santos, *Washington Could Become the Second State to Decriminalize Drugs*, CROSSCUT (Feb. 4, 2021), https://crosscut.com/news/2021/02/washington-could-become-second-state-decriminalize-drugs.

[125] Initiative 593 (codified at RCW 9.94A.570). This legislation is discussed further in "Chapter 14: Sentencing Changes and Their Direct and Indirect Impact on Women."

[126] Bloom, Owen & Covington, *supra* note 109; Covington & Bloom, *supra* note 109; Kathleen J. Ferraro & Angela M. Moe, *Mothering, Crime, And Incarceration*, 32 J. CONTEMP. ETHNOGRAPHY 9 (2003).

[127] Ferraro & Moe, *supra* note 126.

[128] MASTERS ET AL., *supra* note 31, at Tables 5-7.

The criminalization and incarceration of female youth, and its disproportionate impact on Black, Indigenous, and youth of color, is studied in depth in "Chapter 9: Juvenile Justice and Gender and Race Disparities." Nonetheless, it deserves mention here because youth who interact with the criminal justice system are more likely to remain involved as adults and are likely to experience long-term social, psychological, health, educational, political, and economic outcomes post-release.[129] Within the U.S., Washington State detains the highest rate of girls for status offenses (i.e., noncriminal activity) including truancy (absence from school), running away from home, and violating curfew or rules of probation.[130] This makes Washington particularly susceptible to losing girls and women in the school-to-prison pipeline.[131] Also, female youth in Washington are more commonly detained for lower-level misdemeanor offenses than for more serious felony offenses.[132] Perhaps most troubling, a recent Washington-based study shows girls of particular races and ethnicities disproportionately receive the harshest sentences:

> Native girls made up 2.4% of the female youth population but 7.0% of female detention admissions in 2019; Latinx girls made up 18.5% of the female youth population but 24.6% of female detention admissions; and Black girls made up 4.9% of the female youth population but 14.6% of female detention admissions.[133]

The effect this increasing detention of girls, and especially the disproportionate effect on Indigenous, Latinx, and Black girls, has on this state's large incarcerated adult female population should be studied further.

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[129] *E.g.*, Gabrielle Prisco, *When the Cure Makes You Ill: Seven Core Principles to Change the Course of Youth Justice*, 56 N.Y. L. SCH. L. REV. 1433 (2011); Yael Cannon & Andrew Hsi, *Disrupting the Path from Childhood Trauma to Juvenile Justice: An Upstream Health and Justice Approach*, 43 FORDHAM URB. L.J. 425 (2016). The impact is felt exponentially by Black, Indigenous, and people of color. A recent Seattle-based study found Black youth who have contact with police by eighth grade are eleven times more likely to report arrest by age 20 than their Black peers without police contact, but the same is not true for white youth, even though more white than Black youth reported engaging in some criminal behavior. Anne McGlynn-Wright et al., *Usual, Racialized, Suspects: The Consequence of Police Contacts with Black and White Youth on Adult Arrest*, SOC. PROBS. (2020); ALIYAH ABU-HAZEEM ET AL., GIRLS OF COLOR IN JUVENILE DETENTION IN WASHINGTON STATE (2020), https://www.courts.wa.gov/subsite/mjc/docs/MJC%20Special%20Detention%20Report%202020.pdf.

[130] *See, e.g.*, RCW 13.32A.030; ch. 28A.225 RCW; RCW 28A.320.124.

[131] Prisco, *supra* note 129; Jonathon Arellano-Jackson, *But What Can We Do? How Juvenile Defenders Can Disrupt The School-to-Prison Pipeline*, 13 SEATTLE J. SOC. JUST. 751 (2015); Wendy S. Heipt, *Girl's Court: A Gender Responsive Juvenile Court Alternative*, 13 SEATTLE J. SOC. JUST. 803 (2014).

[132] ABU-HAZEEM ET AL., *supra* note 129.

[133] *Id.* at 1.

In 2019, the Washington State Legislature passed legislation authorizing the Juvenile Rehabilitation Administration to house and rehabilitate youth up to the age of 25, rather than transfer those with lengthy sentences to adult prisons.[134] The effect of this new legislation is not yet known but should be studied.

C. Policing and prosecution practices as drivers of incarceration rates and its disparate impact on Black, Indigenous, and women of color

Criminalization and incarceration are not just driven by laws but also by enforcement of those cases. Police and prosecutors play a significant role in who is arrested, who is charged, what they are charged with, whether they are offered a plea deal and what plea deal, and what sentence is sought. Police and prosecutorial discretion and bias is discussed in depth in "Chapter 13: Prosecutorial Discretion and Gendered Impacts." Briefly, while no statewide Washington-specific research on gender disparities in policing and prosecution exist, several projects by Dr. Katherine Beckett have found policing disparities in Seattle.[135] The policing of drug activity was by far the most common reason cited for why disproportionate numbers of Black, Indigenous, and people of color are convicted of felony drug charges. These are areas that should be examined through future research studies. In addition to researching drug-policing (and other) disparities in Washington, intersectional and gender-focused research should be conducted to study whether the use of traffic laws have a disparate impact across genders. There is reason to believe there is a widespread police practice of using the traffic laws to routinely stop and detain Black, Hispanic,

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[134] LAWS OF 2019, ch. 322.

[135] KATHERINE BECKETT, RACE AND DRUG LAW ENFORCEMENT IN SEATTLE (2004), https://static.prisonpolicy.org/scans/Beckett-20040503.pdf; Katherine Beckett, Kris Nyrop & Lori Pfingst, *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105 (2006); Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419 (2005); Barbara Ferrer & John M. Connolly, *Racial Inequities in Drug Arrests: Treatment in Lieu of and After Incarceration*, 108 AM. J. PUB. HEALTH 968 (2018); Ojmarrh Mitchell & Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, 32 JUST. Q. 288 (2015); Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257 (2009); THE SENT'G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities; SAMUEL R GROSS, MAURICE POSSLEY & KLARA STEPHENS, *RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES* 37 (2017); HUM. RTS. WATCH & ACLU, EVERY 25 SECONDS THE HUMAN TOLL OF CRIMINALIZING DRUG USE IN THE UNITED STATES (2016), https://www.hrw.org/sites/default/files/report_pdf/usdrug1016_web.pdf.

and other motorists of color for the investigation of crime in the absence of probable cause or reasonable suspicion for the stop.[136] The disproportionate impact is commonly referred to as "driving while Black." Data from the Washington State Patrol confirms that Black, Latino, Native American, and Native Hawaiian and other Pacific Islander drivers are searched at a higher rate than white motorists. Native Americans, in particular, are searched at a rate five times higher than white motorists—and these searches appear to be focused along the I-5 corridor and near the Yakima and Colville reservations.[137] National data indicates Black women are 17% more likely than white women to be in a police-initiated traffic stop, and are arrested three times as often as white women during police-initiated street and traffic stops.[138]

With national data showing the incarceration rate for LGBTQ+ individuals of all genders is over three times higher than the rate of LGBTQ+ individuals in the U.S. adult population,[139] it is fitting to study the extent to which policing or prosecutorial practices contribute to this disparity as well.

Moreover, while mandatory sentencing changes, such as increased minimum sentencing terms and three-strikes legislation, constrain courts, they provide more leverage to prosecutors who control the crimes and enhancements that are charged and also control plea deal offers. Thus, Washington would be well-served if it studied the composition of prosecutors' offices by gender, race, and ethnicity as well as disparities in prosecution throughout the state. It would be particularly interesting to study whether policing and/or prosecuting practices impact the disproportionate conviction and sentencing rates for Black and Indigenous women and across offense categories found in the six-county Pilot Study. We also recommend finding a way, if possible, to cover disparities affecting the Latinx and Native Hawaiian and other Pacific Islander populations and other intersectional data that has been limited to date.

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[136] THE STANFORD OPEN POLICING PROJECT (2021), https://openpolicing.stanford.edu; Joy Borkholder & Jason Buch, *Driving While Indian: How InvestigateWest Conducted the Analysis*, INVESTIGATEWEST (DEC. 19, 2019), https://www.invw.org/2019/12/19/driving-while-indian-how-investigatewest-conducted-the-analysis.
[137] THE STANFORD OPEN POLICING PROJECT, *supra* note 136; Borkholder & Buch, *supra* note 136.
[138] *Policing Women: Race and Gender Disparities in Police Stops, Searches, and Use of Force*, PRISON POL'Y INITIATIVE (May 14, 2019), https://www.prisonpolicy.org/blog/2019/05/14/policingwomen.
[139] Meyer et al., *supra* note 48; WALLACE SWAN, THE ROUTLEDGE HANDBOOK OF LGBTQIA ADMINISTRATION AND POLICY (2018).

D. Pretrial detention as a driver of incarceration rates and the racial disparity of pretrial detention

Individuals arrested and charged with a crime can be released or detained while they await trial, depending on recommendations made by the prosecuting attorney, arguments presented by defense counsel, and the final decision made by a judge. Because of the presumption of innocence, state and federal law generally hold that defendants not detained on a capital offense should only be detained before trial if they pose a danger to the public or if they are likely to interfere with the exercise of justice.[140] If a judge feels the defendant is unlikely to return for their court date, the judge may choose to place conditions on the defendant's release to incentivize them to return to court. Judges often have very little time in which to make these decisions—the Washington State Auditor found that it was not uncommon for judges to have only three to five minutes per defendant—and in this time, the judge must make complex calculations such as the likelihood that the defendant will commit a crime while released, or the amount of bail needed to incentivize their return.[141]

Over the past decade, the female jail population has increased while the male jail population has decreased (see Table 6 and Table 7).[142] The vast majority of the overall increase in jail confinement nationally since 2000 is due to increases in the unconvicted population.[143] A 2018 law review, provides an overview of bail policy and practice across the U.S., and traces this increase to changes in bail and release policy made during the Nixon era when concerns about public safety dominated the discourse on criminal justice.[144] According to the most recent national data from 2018, 66% of people in local jails have not been convicted of a crime.[145] In Washington State, the Administrative Office of the Courts estimated pretrial jail populations to

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[140] OFF. OF THE WASH. STATE AUDITOR, REFORMING BAIL PRACTICES IN WASHINGTON (2019), https://sao.wa.gov/wp-content/uploads/Tabs/PerformanceAudit/PA_Reforming_Bail_Practices_ar1023411.pdf.
[141] *Id.*
[142] ZENG, *supra* note 51.
[143] The authors estimate that 95% of the increase in jail inmate confinement nationally is due to increases in the unconvicted population; this estimate uses data from 2014. TODD MINTON & ZHEN ZENG, BUREAU OF JUST. STAT., JAIL INMATES AT MIDYEAR, 2014 18 (2014), https://bjs.ojp.gov/content/pub/pdf/jim14.pdf.
[144] John Logan Koepke & David G Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725 (2018).
[145] ZENG, *supra* note 51.

range from 57.3% in Thurston County to 77.7% in King County.[146] However, it is unknown at the state level how long that population is held, or what percentage are held during the entire period before their trial. The most comprehensive national data regarding pretrial detention and release show that in 2009, 62% of felony defendants were released at some point before their trial, while 38% were held for the entire period before their trial.[147] The median time between arrest and trial for detained defendants was 68 days, or over two months. Of those released, the majority were released on financial conditions. Of those held for the entire period pretrial, the vast majority (nine out of ten) had bail set for their release but were unable to make bail.[148] In other words, their personal lack of financial resources was the reason for their continued incarceration. Unsurprisingly, defendants with lower bail amounts were more likely to make bail and be released from jail. The median bail amount was $10,000.[149] Sixteen percent of defendants released prior to their trial were rearrested during pretrial release, nearly half of those on a misdemeanor charge. Seventeen percent of defendants released prior to trial missed a court date during pretrial release, though the majority ultimately returned to court—only three percent of defendants released pretrial never returned to court.[150] Unfortunately, there is a lack of data from Washington regarding the gender and racial or ethnic composition of populations held pretrial across the state.

Overall, the severity of the alleged offense and a defendant's prior record are the strongest predictors of pretrial detention. However, when controlling for these factors, significant disparities by gender, race, ethnicity, and socioeconomic status emerge—meaning that two people with the same criminal record and accused of the same offense will likely be treated differently at bail hearings based on their demographics. Research indicates that women, when compared to men, were more likely to be released on recognizance,[151] less likely be denied release, and have lower bail amounts set.[152] However, the financial impacts of being detained

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[146] These data are not disaggregated by gender or race. SURUR & VALDEZ, *supra* note 47.
[147] A review of the data of felony defendants from large urban counties in the U.S. Brian A Reaves, *Felony Defendants in Large Urban Counties, 2009 - Statistical Tables*, STAT. TABLES 40 (2009).
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] Released without bail.
[152] LINDSEY DEVERS, BAIL DECISIONMAKING: RESEARCH SUMMARY (2011).

and unable to work or of paying the non-refundable fee to a commercial bond bailsman in order to secure her release can have serious financial repercussions for those who can least afford it. For a discussion of how women disproportionately pay the costs of bail and other financial fees, even when it is men close to them who are incarcerated, see "Chapter 15: The Gendered Impact of Legal Financial Obligations." As the table below shows, most incarcerated women of color detained pretrial for failure to make bail were living in poverty before their arrest.[153]

[153] DATA FROM BJS, COLLECTED IN 2002. THIS IS THE MOST RECENT PUBLISHED DATA ON THE TOPIC. BERNADETTE RABUY & DANIEL KOPF, PRISON POL'Y INITIATIVE, DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME (2016), https://www.prisonpolicy.org/reports/DetainingThePoor.pdf.

Figure 9. Median Annual Income (Pre-Incarceration), 2015

	People in jail unable to meet bail (prior to incarceration)		Non-incarcerated people	
	Men	Women	Men	Women
All	$15,598	**$11,071**	$39,600	$22,704
Black	**$11,275**	**$9,083**	$31,284	$23,760
Hispanic	$17,449	**$12,178**	$27,720	$14,520
White	$18,283	$12,954	$43,560	$26,136

Footnotes for Figure 9.

"Median annual pre-incarceration incomes for people in local jails unable to post a bail bond, ages 23-39, in 2015 dollars, by race/ethnicity and gender. The incomes in [bold] fall below the Census Bureau poverty threshold. The median bail bond amount nationally is almost a full year's income for the typical person unable to post a bail bond."

Source: BERNADETTE RABUY & DANIEL KOPF, Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time, https://www.prisonpolicy.org/reports/incomejails.html (last visited Oct 1, 2020).

National studies assessing the impact of race on pretrial detention have found varied levels of effect. The Prison Policy Initiative conducted a review of the literature in 2019 and concluded that broadly, Black defendants and Hispanic/Latinx defendants are more likely to be held pretrial and have bail amounts set higher than their white peers. They looked at studies published on national datasets (limited to felony defendants) and smaller, local studies, and note that the

strength of the effect varies by location.[154] There is a lack of recent studies from Washington State on this topic, and these studies very rarely look at the intersection of race and gender.

Despite the fact that defendants held pretrial are presumed innocent, detention has numerous negative impacts on the lives of detainees. Being held in jail puts defendants at risk for losing their employment and resulting financial instability.[155] Additionally, there is strong evidence to show that pretrial detention is associated with later negative outcomes in the criminal justice system. Researchers note that when a defendant is held in jail, they are more likely to be convicted later, at least partly due to an increase in guilty pleas, and on average receive harsher sentences.[156] The coercive effect may be higher among women than men. In New York City, female misdemeanor defendants were found to be more likely to plead guilty than their male counterparts when they expected to be released upon pleading. The authors speculate that childcare concerns may contribute to this difference.[157] Women incarcerated in state prisons who are parents are more likely to report having been the main caregivers for their children prior to incarceration;[158] there are no comparable data on those incarcerated in jails, but it seems reasonable to assume a similar pattern of female parental caretaking exists within that population as well. See "Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families" for a discussion of the interactions of incarceration and parenting including termination of parental rights resulting from

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[154] WENDY SAWYER, *How Race Impacts Who is Detained Pretrial* (2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race. See an overview of the studies reviewed here: https://www.prisonpolicy.org/reports/pretrial_racial_disparities_sources.html.

[155] In a survey of groups of pretrial defendants in three states (not including Washington), 84% of those who were employed before their arrest indicated they might lose their job. CATHERINE S KIMBRELL & DAVID B WILSON, MONEY BOND PROCESS EXPERIENCES AND PERCEPTIONS 37 (2016).

[156] Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201 (2018); Paul Heaton & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017). Dobbie et al. note that defendants released from jail are in a better position to bargain regarding plea deals, while those detained may take the first deal offered in order to obtain release.

[157] Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J. L. & ECON. 529 (2017).

[158] In a 2007 survey of the U.S. prison population, women incarcerated in state prisons were more likely than males to report being the parents of minor children (61% vs 51.2%), and were much more likely to report having lived with their minor children in the month before arrest or just prior to incarceration (64.3% vs 46.5%). More than three quarters of women in state prisons reported being primary caregivers for their children prior to incarceration, compared to one quarter of their male counterparts. LAUREN GLAZE & LAURA MARUSCHAK, BUREAU OF JUST. STAT., PARENTS IN PRISON AND THEIR MINOR CHILDREN (2008), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=823.

incarceration. Additionally, in some locations pretrial detention has been found to be associated with increased odds of recidivism, potentially because defendants who experience detention may lose their jobs, housing, and social support.[159]

Numerous studies have developed strong evidence that experiences of parental incarceration have a negative impact on a dependent child's mental health and emotional wellbeing, and to some extent on their physical health as well. The evidence regarding the impact of maternal incarceration specifically is less well developed; but given that mothers are more likely to be primary caregivers of their children than are fathers, maternal incarceration is thought to have a more disruptive emotional and financial impact on children.[160] The majority of unconvicted women held in jail are mothers to children under 18, and women in jail are more likely than their male counterparts to be parents of minor children and to have lived with their children before incarceration.[161] See "Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families" for a more detailed analysis of these points, including the impact of onerous dependency court obligations, which can be nearly impossible to meet for incarcerated women, where the state has intervened into the parenting relationship.

Disability Rights Washington (DRW) notes that jails across the state have varying abilities to meet health and disability needs of incarcerated individuals: for example, they may not provide timely access to prescribed medications.[162] This could be dangerous for any medical condition, but the barriers appear to be higher for those receiving treatment for opioid use disorder. A state-sponsored survey of Washington State jails in 2018 found that fewer than half (14 of 33) of surveyed jails were actively providing treatment medication for opioid use disorder, and that

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[159] Heaton & Stevenson, *supra* note 156; CHRISTOPHER T LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, THE HIDDEN COSTS OF PRETRIAL DETENTION 32 (2013), https://nicic.gov/hidden-costs-pretrial-detention. Heaton et al. use data from over 380,000 misdemeanor cases in Harris County, Texas; Lowenkamp et al. use data from over 150,000 defendants in Kentucky.

[160] Julie Smyth, *Dual Punishment: Incarcerated Mothers and Their Children*, 10 COLUM. SOC. WORK REV., VOLUME III 13 (2019).

[161] Wendy Sawyer, *How Does Unaffordable Money Bail Affect Families?*, PRISON POL'Y INITIATIVE (Aug. 15, 2018), https://www.prisonpolicy.org/blog/2018/08/15/pretrial/ (from an analysis of a national survey of individuals incarcerated in jails conducted by the BJS in 2002).

[162] AVID PRISON PROJECT, COUNTY JAILS, STATEWIDE PROBLEMS: A LOOK AT HOW OUR FRIENDS, FAMILY AND NEIGHBORS WITH DISABILITIES ARE TREATED IN WASHINGTON'S JAILS (2016).

barriers remain to wider implementation, including a lack of knowledge within institutions and a lack of resources to provide adequate treatment.[163] Additionally, in their 2016 survey of jail facilities across the state, DRW noted that those with cognitive disabilities and mental illness were often held in solitary confinement because of a lack of appropriate facilities. Several jails were found to be using solitary confinement to house women due to a lack of female-specific space.[164] These are reported as anecdotal observations, and there is a lack of data regarding the use of this practice. Given the high prevalence of trauma and mental health issues in the incarcerated female population, as noted above, the use of solitary confinement is deeply concerning.

While deaths from all causes in jail, including suicide, have been declining in recent years, suicide remains the single leading cause of death in jail, and is substantially higher among the jail population than in the general population. The suicide rate for unconvicted women in jails nationally is 29 per 100,000 jail inmates—almost five times higher than the rate in the general population. While jailed and non-jailed male populations experience suicide rates higher than their female counterparts, the difference between jailed and non-jailed populations is much starker for women.[165]

Finally, pretrial detention has a financial cost to society. Increases in jail population and lengthier jail stays contribute to jail overcrowding. In Washington State in 2019, 11 jails reported average daily counts over 100% design capacity, with Spokane County jail at 121%, Clark County jail at 165%, and Stevens County jail at over 221%.[166] An audit of Washington's bail processes found that, when looking at variable costs, each additional person jailed increases the cost of running a

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[163] LUCINDA GRANDE & MARC STERN, PROVIDING MEDICATION TO TREAT OPIOID USE DISORDER IN WASHINGTON STATE JAILS 20 (2018).
[164] AVID PRISON PROJECT, *supra* note 162.
[165] The suicide rate for men in jail is just over twice as high as in the general population. E ANN CARSON & MARY P COWHIG, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., MORTALITY IN LOCAL JAILS, 2000-2016 - STATISTICAL TABLES (2020), https://bjs.ojp.gov/content/pub/pdf/mlj0016st.pdf; HOLLY HEDEGAARD, INCREASE IN SUICIDE MORTALITY IN THE UNITED STATES, 1999–2018 8 (2020), https://www.cdc.gov/nchs/data/databriefs/db362-h.pdf.
[166] Data from 58 county, city and tribal jails and multi-jurisdiction facilities. WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, ANNUAL JAIL STATISTICS, *supra* note 46.

jail by just over $10 per person, per day; and the average length of stay in Washington State jails is 15 days.[167]

Concerns about the negative impacts of pretrial detention are leading states and jurisdictions across the U.S. to make changes to policies regarding pretrial detention, release conditions, services, and bail. As the Washington State Pretrial Reform Task Force noted, "Accused individuals should not be detained pretrial solely because of their inability to post a bond or pay for their release."[168] In Washington State, a performance audit of current bail practices found that an average of 4,700 people per day, who could qualify for release but cannot afford their bail, are being held in jail unconvicted. Providing pretrial services instead of imposing bail that cannot be paid would save taxpayers $6 and $12 billion every year.[169] As discussed previously, COVID-19 led to a reduction in jail populations of, on average, 50% seemingly without a corresponding increase in crime.[170] These results should be studied and applied more broadly to pretrial detention practices.

The Seattle Municipal Court recently initiated a community court with a "release-first model" that aims to greatly reduce the number of individuals held in jail at all and for any length of time.[171] Instead of waiting for sentencing to offer community services, the Seattle Community Court provides services to participants at the time of charging, and participants are released from jail upon entering into the program. Participants give up no trial rights to enroll. The city prosecutors have agreed to not delay charging for eligible offenses so participants can be released from jail and into community services right away. Seattle Community Court works with 10 to 15 community partners to provide services such as housing, substance abuse disorder treatment, and assistance obtaining food, cash, and medical benefits.[172] The level of services

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[167] OFF. OF THE WASH. STATE AUDITOR, *supra* note 140; WASH. ASS'N OF SHERIFFS AND POLICE CHIEFS, ANNUAL JAIL STATISTICS, *supra* note 46.
[168] SURUR & VALDEZ, *supra* note 47, at 39.
[169] OFF. OF THE WASH. STATE AUDITOR, *supra* note 140.
[170] Hawk, *supra* note 83.
[171] This paragraph is based on an October 23, 2020 conversation between the author and Judge Damon Shadid as well as the publicly-available information here: SEATTLE CMTY. CT. (2020), http://www.seattle.gov/courts/programs-and-services/community-resource-center/crc-services#S1.
[172] *Community Resource Center*, SEATTLE MUN. CT. (2020), http://www.seattle.gov/courts/programs-and-services/community-resource-center.

participants are required to participate in varies depending on the seriousness of the charges—from information on how to connect with identified social service recommendations to actual appointments for such services to sustained engagement in a program or service. Seattle Community Court is keeping data, including police and self-identification data on race and ethnicity. Preliminary data studying eligibility from between 2019 and 2021 and for referrals made between August 2020 and March 2021 show women and men are referred into the program in proportions roughly equal to their share in overall eligibility, but that Black and AIAN referrals are made at a reduced level to their eligibility.[173] Because the program is new and has been occurring while COVID-19 has impacted the criminal legal system, the data should be analyzed when more becomes available with a particular review of its equity impact.

Washington's Pretrial Reform Task Force recommends the use of various forms of pretrial services including court date reminders, voluntary service referrals (though not as a condition of release), and transportation support for defendants released pretrial.[174] They note that defendants should not be expected to pay for any of these services; and that any pretrial reform efforts should be made as part of a transparent and inclusive process of decision-making. Moreover, researchers note that to be effective, services must address the specific needs of defendants and particular reasons influencing failed court appearances or rearrest, some of which may be gendered.[175] The Pretrial Reform Workgroup notes that current pretrial services are unevenly distributed across the state, with most clustered around Puget Sound and the Central Washington area, while areas like Eastern Washington and the Olympic Coast have fewer or no options available.[176]

Pretrial risk assessment (PTRA) tools weigh different factors for an individual defendant and give a score, which is interpreted to assess risk, such as the risk that the defendant will commit a crime

[173] Seattle Community Court Outcomes Q1 2021. On file with authors.
[174] SURUR & VALDEZ, *supra* note 47.
[175] Krista S. Gehring & Patricia van Voorhis, *Needs and Pretrial Failure: Additional Risk Factors for Female and Male Pretrial Defendants*, 41 CRIM. JUST. & BEHAV. 943 (2014). This small study in Ohio interviewed defendants and found correlations between failure to appear and substance abuse, mental health, and homelessness; these effects were particularly strong for female defendants.
[176] SURUR & VALDEZ, *supra* note 47.

while on release, or the risk that they will fail to appear for trial.[177] In 2019, the Pretrial Reform Task Force found that ten courts in Washington were currently using PTRA tools.[178] However, rather than removing bias from the system, some PTRA tools may serve to reproduce or even enhance existing biases in pretrial detention practices. The 2018 law review referenced above, which provides an overview of bail policy and practice across the U.S., notes that these tools are built using existing data about defendant practices. If a jurisdiction previously had no pretrial services and, as a result, had high court appearance failure rates, the tool is likely to over-estimate the court appearance failure rate for many defendants even after reforms are enacted. The authors argue that tools should be adapted and tested in the location where they are to be used, to account for local demographics and criminological patterns. Moreover, there is currently a lack of evidence regarding the reasons why defendants fail to appear for court dates, or what motivates activity that could lead to re-arrest. Without this information, PTRA tools are unlikely to lead to improvements in pretrial detention practices.[179] While the Pretrial Reform Task Force refrained from recommending (or not) the use of PTRA tools, they similarly noted that if jurisdictions should choose to adopt one, they should follow best practices such as clearly defined goals and terms, local development and validation, and data collection and evaluation, especially with an eye to racial disparities in outcomes. They note that PTRA development should be part of a transparent and inclusive process, involving the voices of Black, Indigenous, and communities of color and others impacted by pretrial detention practices.[180]

Yakima County is an example of a jurisdiction embarking on pretrial reform. Their intervention included the use of a PTRA tool in pretrial judicial decision-making; providing an attorney to all defendants for their first court appearance (regarding pretrial release); and an expansion of pretrial services.[181] An initial evaluation found that after the implementation of these reforms, more defendants were released pretrial, and there was no increase in re-arrest rates or failures

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[177] Koepke and Robinson, *supra* note 144.
[178] SURUR & VALDEZ, *supra* note 47.
[179] Koepke and Robinson, *supra* note 144.
[180] SURUR & VALDEZ, *supra* note 47.
[181] CLAIRE M B BROOKER, YAKIMA COUNTY, WASHINGTON PRETRIAL JUSTICE SYSTEM IMPROVEMENTS: PRE- AND POST-IMPLEMENTATION ANALYSIS 25 (2017).

to appear in court.[182] The positive impacts were particularly strong for defendants of color, leading to an increase in racial parity in pretrial release. However, areas of concern remain, including the number defendants eligible for release who are detained for failure to make bail.[183]

It would be useful to obtain sufficient bail data from the counties to study the impact of pretrial reform, including bail reform and more widespread pretrial services such as those enacted by Yakima, on wellbeing, recidivism, and incarceration. It is our recommendation throughout that data be examined at the race, ethnicity, and gender level and that best practices be followed with regard to determining and reporting racial, ethnic, gender, and other categories.

E. Socioeconomics, as both cause and effect, and the disparate impact on Black, Indigenous, and people of color

In light of the overuse of pretrial detention for women, it should be unsurprising that socioeconomics play a role in the increased incarceration rates.[184] National research indicates that female offenders are low-income, undereducated, and sporadically employed. They are likely to be mothers of children under 18, are disproportionately Black, Indigenous, and women of color, and are marginalized by race, class, and gender.[185]

The effects are particularly acute for Black, Indigenous, and women of color. Several national studies have examined the impact of race and drug use, among both male and female offenders, and found that Black, Indigenous, and people of color have increased risk of felony drug conviction, which in turn limits their resources; and when returning from prison without resources (education, jobs, insurance, healthcare, housing) they face an increased risk of

[182] *Id.*
[183] *Id.*
[184] *See* James, *supra* note 92.
[185] Bloom, Owen & Covington, *supra* note 109; Barbara Bloom, *Gender-Responsive Programming for Women Offenders: Guiding Principles and Practices*, INTERVENTIONS 22; Barbara E Bloom, Triple Jeopardy: Race, Class, and Gender as Factors in Women's Imprisonment (June 1996) (Ph.D. dissertation, University of California Riverside) (ProQuest); CARSON, *supra* note 120; THE SENT'G PROJECT, *supra* note 25.

recidivism.[186] According to a 1995 report from The Sentencing Project, between the years of 1986 and 1991, nationally, the state female prison populations for drug offenses increased by 828% for Black non-Hispanic women, 328% for Latinx women, and 241% for white non-Hispanic women.[187] Therefore, the "war on drugs" that is specifically cracking down on some drug users has a disproportionate impact on Black, Indigenous, and women of color compared to white women. National literature indicates that compared to white women, Black, Indigenous, and women of color are far more likely to be arrested, convicted, and incarcerated at rates that exceed their representation in the free world.[188]

As discussed, our recent Pilot Study found statistically significant differences indicating racial disproportionality leading to higher rates of conviction and incarceration for Black and Native American women in Washington in all of the six counties examined, across all three time points.[189] The Pilot Study did not include socioeconomic data. However, it found women's convictions and sentencing for drug offenses remained fairly consistent over the points studied in the last 20 years.[190] The study should be expanded to cover all counties and more years as well as to look into socioeconomic status.

Like our Pilot Study, other research focuses more on comparing gender disparities than examining the racial, ethnic, and socioeconomic differences within the increased conviction and incarceration of women. The research is very robust with regard to racial inequality facing both men and women in incarceration rates and increased convictions. Typically, however, low-socioeconomic status is often conflated with race in the research or is not studied as frequently as racial disparities. Furthermore, as discussed above there are many limitations in the current research with regard to how race and ethnicity are analyzed. The evidence suggests that Black,

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[186] Martin Y. Iguchi et al., *Elements of Well-Being Affected by Criminalizing the Drug User*, 117 PUB. HEALTH REP S146 (2002); Beth M. Huebner, Christina DeJong & Jennifer Cobbina, *Women Coming Home: Long-Term Patterns of Recidivism*, 27 JUST. Q. 225 (2010).
[187] MARC MAUER & TRACY HULING, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER (1995), https://www.sentencingproject.org/publications/young-black-americans-and-the-criminal-justice-system-five-years-later/.
[188] MARC MAUER, CATHY POTLER & RICHARD WOLF, GENDER AND JUSTICE: WOMEN, DRUGS AND SENTENCING POLICY (1999), https://www.sentencingproject.org/wp-content/uploads/2016/01/Gender-and-Justice-Women-Drugs-and-Sentencing-Policy.pdf; CARSON, *supra* note 120; THE SENT'G PROJECT, *supra* note 25.
[189] MASTERS ET AL., *supra* note 31.
[190] *Id.*

Indigenous, and women of color are punished more harshly and at increasing rates compared to their white counterparts. There remains a paucity of research examining these areas. We recommend increased attention be paid to intersectional research and analysis of race and ethnicity data for the incarcerated female population in Washington.

F. Sentencing laws and practices as drivers of incarceration rates

Sentencing laws have been completely restructured since the 1989 Gender & Justice in the Courts study. They are the most robustly studied driver of increased incarceration across genders. Sentencing laws, policies, and practices have also been found to have a profoundly disparate impact on Black, Indigenous, and people of color (with some notable deficiencies in the available research). To give this topic fair treatment, we cover it in depth in "Chapter 14: Sentencing Changes and Their Direct and Indirect Impact on Women."

IV. Conclusion

Washington can undertake policy changes to reduce the swelling of female incarceration by investing in societal programming and education, providing programming known to reduce recidivism, reforming sentencing laws, and enacting a second-look process where all individuals serving lengthy sentences are evaluated for parole after 15 or 20 years.[191]

In addition, more research should be undertaken to better understand female incarceration in Washington and nationally. Criminal justice research has been focused more on men than women, in large part because there are far more men incarcerated in the U.S. than women. In 2018 in Washington State, there were 17,702 men incarcerated in state prisons compared to 1,706 women, and this is a trend we see nationally.[192] Furthermore, gendered role stereotypes create the belief that men should be more violent and susceptible to violating laws compared to women. There has been a recent influx in the different pathways to crime that impact men and women, however, further research must be conducted. While the impact of the "war on drugs"

[191] BECKETT & EVANS, *supra* note 25.
[192] *State-by-State Data*, THE SENT'G PROJECT (2020), https://www.sentencingproject.org/the-facts.

on women has been studied rather robustly, further research needs to be conducted on the social-environmental impacts and the role of gender on pretrial release. Some of the analysis provided can only be collaborated by one or two citations or relies on research conducted 15 to 20 years ago, therefore these are the areas that need further examination.

V. Recommendations

- Adopt the recommendation described in "Chapter 13: Prosecutorial Discretion and Gendered Impacts" to institute a centralized database and standardized reporting criteria for jail bookings.
- Adopt the recommendation described in "Chapter 13: Prosecutorial Discretion and Gendered Impacts" to collect and analyze data on the prosecutors' diversionary practices.
- Government data collection should follow the best practices recommended by the 2020 *Incarceration of Women in Washington State* pilot study commissioned by the Gender and Justice Commission. The pilot study sets forth comprehensive recommendations for improvements in data collection as well as additional analyses and research to be implemented by the Caseload Forecast Council, the Washington State Legislature, and the Department of Corrections (see pages 31-32 of the *Incarceration of Women in Washington State* pilot study).
- When sufficient bail data can be obtained from the counties, WSCCR should study the impact of pretrial reform (including bail reform and more widespread pretrial services, such as those enacted by Yakima County) on wellbeing, recidivism, incarceration, community safety, and failure to appear rates.
- WSCCR and/or other stakeholders should undertake a study of (1) the impacts of incarcerating women for violating conditions of release, and (2) whether other sanctions could be equally or more effective.
- In the short term (next two years), criminal justice stakeholders, including the Department of Corrections and Juvenile Rehabilitation Administration, should study the effect that the increasing detention of girls - especially Indigenous, Latinx, and Black girls

- has on this state's large incarcerated-adult female population. We also recommend finding a way to measure disparities impacting other populations not currently represented in the data, such as Native Hawaiian and other Pacific Islander populations.

- The Washington State Legislature recently enacted SB 5476 (2021), which codifies simple drug possession as a misdemeanor; requires law enforcement to divert certain suspects to assessment, treatment, or other services and encourages prosecutors to do the same; and invests in programs and oversight. The Gender and Justice Commission should partner with stakeholders to evaluate that new law's impact on women and girls, including Black, Indigenous, and other women and girls of color, in terms of incarceration rates, legal financial obligations (both of their own and of their family members and partners), treatment impact, and public safety.
- During the 2022 legislative session, the Washington State Legislature should again consider legislation to retroactively account for trauma-based criminalization and incarceration, similar to the way that the Survivors Justice Act, HB 1293 (proposed during the 2021 Regular Session) and N.Y. Penal Law § 60.12 address this problem in the area of domestic violence trauma. The Legislature should consider whether other sources of trauma, such as adverse childhood experiences, surviving through war, etc., should be included in any such legislation.
- In the short term (next two years), criminal justice stakeholders should convene to consider whether to amend CrR 2.2, CrRLJ 2.2, CrR 3.2, and/or CrRLJ 3.2 to limit trial court power to issue bench warrants for failures to appear and to consider alternative methods of addressing non-appearances.

Chapter 12

Department of Corrections Gender-Responsive and Trauma-Informed Policies, Practices, and Programs

Judge Joseph Campagna

Laurie Dawson; Sharese Jones, MA; Sierra Rotakhina, MPH

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I. Summary

Historically, prisons and jails have confined mainly men. As a result, prisons and jails use approaches that are based on research conducted with men. The Washington State Department of Corrections (DOC) is no exception. Its programs, policies, and even its commissary items and clothing tend to serve the needs of the typical male population.

But not all incarcerated individuals are men. Women, transgender, and gender-nonconforming individuals often have different backgrounds, experiences, traumas, physical needs and social interactions than men; so approaches designed for cisgender men don't necessarily work for these other individuals. But there is evidence that certain correctional programs, when administered with fidelity, generally reduce recidivism for women, and that gender-responsive programs may be more effective than gender neutral programs in achieving this goal. In order to achieve positive outcomes, more gender-responsive and trauma-informed policies, procedures, and programs are needed within DOC.

DOC has taken intermittent strides in recent years toward becoming more gender-responsive. For example, in 2014, DOC instituted its first gender-responsive policy (DOC Policy 590.370), and in 2020, DOC implemented a Transgender, Intersex, and/or Gender Non-Conforming Housing and Supervision Policy (DOC Policy 490.700). In addition, DOC provides (or collaborates to provide) three gender-responsive and trauma-informed programs to incarcerated and formerly incarcerated women: Moving On, Beyond Violence, and the Seattle Women's Reentry initiative. The research shows that these programs are effective when implemented as designed—so it is important to monitor and evaluate existing DOC programs to ensure they are implemented with fidelity.

In addition, there are women who are incarcerated in Washington who have been very active in starting and running programs and in building communities that are relevant and responsive to the needs of incarcerated women. For example, the Women's Village at Washington State Corrections Center for Women (WCCW), was founded and is led by incarcerated women who develop programs, activities, and events that are responsive to their needs.

While DOC has made some progress in implementing gender-responsive policies and programs, a 2019 survey by the Washington State Office of Corrections Ombuds, and anecdotal evidence from incarcerated and formerly incarcerated people, highlights that many areas still need improvement. There is a pressing need for more research in Washington to determine if policies and programs are meeting the needs of, and improving outcomes for, women, transgender, and gender-nonconforming individuals—particularly for Black, Indigenous, and people of color who are disproportionally incarcerated and doubly harmed by sexism and racism.

II. Introduction

Gender-responsiveness within the justice system is a complex topic that spans many areas such as: Programming, dedicated court calendars, risk classification systems, policies on how to house and meet the needs of transgender and gender-nonconforming individuals, availability of clothing and hygiene items, the daily interactions and treatment of individuals who are incarcerated, and more. Applying an equity lens to each aspect of the justice system is the comprehensive and systematic work that is needed to make significant progress. This chapter provides a high-level overview of some aspects of the system, and highlights progress in DOC policies and programs and areas where continued improvements are needed. A more expansive analysis was outside the scope of this chapter, and we recommend future research to provide a better understanding of the effectiveness of existing gender-responsive programs and policies, and of the gender-responsiveness of jails and court ordered programs.[1]

III. Gendered Pathways to Prison Require Gender-Responsive Interventions

Since the 1990s, a growing body of research in the United States and abroad has highlighted the need for gender-responsive and trauma-informed policies, procedures, and programs to address the needs of justice-involved women in both custodial and non-custodial settings. Women often

[1] See *Chapter 9: Juvenile Justice and Race Disparities* for an analysis of gender-responsiveness of the juvenile justice system in Washington.

take different pathways to prison than men. Women's pathways may include the impact of abusive intimate relationships, gendered vulnerabilities, and sexual trauma.[2]

It is well established that many incarcerated women experience higher than average physical and sexual trauma in early life.[3] Although early trauma is common to prisoners generally, research shows that female prisoners are more likely to have histories of multiple types of victimization, co-occurring mental health disorders, and substance abuse issues, and are likely to be incarcerated for different types of offenses than male prisoners.[4] This research supports the inference that many incarcerated women take a gendered pathway to prison, based on the early life trauma they have experienced.[5]

The same is true of the pathways to incarceration for transgender, gender non-binary, and gender-nonconforming individuals who also experience disproportionate rates of sexual and physical abuse.[6] Research shows that these pathways are further complicated for Black, Indigenous, and people of color as well as gay, lesbian, and bisexual individuals who often experience compounding traumas, as well as discrimination that creates barriers to gainful employment and other resources.[7] The justice system needs policies, procedures, and programs that respond to these unique pathways.

[2] Angela Browne, Brenda Miller & Eugene Maguin, *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*, 22 INT'L J. L. & PSYCHIATRY 301 (1999); ANGELA BROWN ET AL., KEEPING VULNERABLE POPULATIONS SAFE UNDER PREA: ALTERNATIVE STRATEGIES TO THE USE OF SEGREGATION IN PRISONS AND JAILS (2015); Thanos Karatzias et al., *Multiple Traumatic Experiences, Post-Traumatic Stress Disorder and Offending Behaviour in Female Prisoners*, 28 CRIM. BEHAV. MENTAL HEALTH 72 (2018); Christy K. Scott et al., *Trauma and Morbidities Among Female Detainees in a Large Urban Jail*, 96 Prison J. 102 (2016); Bonnie Green et al., TRAUMA EXPERIENCES AND MENTAL HEALTH AMONG INCARCERATED WOMEN (2016); ANDREA JAMES, ENDING THE INCARCERATION OF WOMEN AND GIRLS 19 (2019). *See also Chapter 11: Incarcerated Women in Washington*, for more information on the trauma-to-prison pipeline, *Chapter 8: Consequences of Gender-Based Violence: Domestic Violence and Sexual Assault* for information on gender-based violence in prisons, and *Chapter 9: Juvenile Justice and Race Disparities* for information on pathways into the juvenile justice system based on gender, sexual orientation, and disability status.
[3] Browne, Miller & Maguin, *supra* note 2; BROWNE ET AL., *supra* note 2.
[4] JOANNE BELKNAP, THE INVISIBLE WOMAN: GENDER, CRIME, AND JUSTICE (2007); *see also* TATIANA MASTERS ET AL., INCARCERATION OF WOMEN IN WASHINGTON STATE: MULTI-YEAR ANALYSIS OF FELONY DATA (2020) for more information on types of offense types by gender among people incarcerated for felonies in Washington State.
[5] Renée Gobeil et al., *A Meta-Analytic Review of Correctional Interventions for Women Offenders*, 43 CRIM. JUST. & BEHAV. 301 (2016).
[6] Jinhee Yun et al., *Examining Trauma and Crime by Gender and Sexual Orientation among Youth: Findings from the Add Health National Longitudinal Study*, CRIME & DELINQUENCY (2021).
[7] *Id.*

Gendered pathways to prison require a gendered response. For policies and procedures, prisons and jails should make every effort to account for the traumatic pathways that led to incarceration for many women, transgender, and gender-nonconforming individuals. For programs, there is evidence that correctional interventions, when administered with fidelity, generally reduce recidivism for women, and that gender-responsive programs may be more effective than gender neutral programs.[8] A 2016 meta-analysis which analyzed the existing body or research on the effectiveness of gender-neutral programs for women compared to gender-informed programs did not find a significant difference in effectiveness when looking at the entire body of research combined.[9] However, when the authors only included the highest quality research, they found the "…effect size for gender-informed interventions was significantly and considerably greater than that for gender-neutral programs."[10] Gender-responsive programs appear to be particularly effective for women who have experienced prior abuse.[11]

IV. The Washington State Department of Corrections has Implemented Several Gender-Responsive Policies, Procedures and Programs.

DOC began its commitment to gender-responsiveness in 2008 with the draft Master Plan for Women Offenders.[12] The 2008 Master Plan assessed the gender-responsive organizational needs of DOC, with a goal of improving outcomes for women incarcerated in both the WCCW and the Mission Creek Corrections Center for Women (MCCCW). The Master Plan focused on three key areas: (1) Assessment, Classification, and Case Management, (2) Evidence Based Programs, and (3) Capacity and Facility Development.[13] The draft plan has not yet been finalized.

In 2013 DOC, working with the National Resource Center on Justice Involved Women, created a "Gender Responsiveness Action Plan" to address rising female incarceration rates and the lack of

[8] Gobeil et al., *supra* note 5, at 313.
[9] *Id.*
[10] *Id.*
[11] Preeta Saxena et al., *Who Benefits from Gender-Responsive Treatment? Accounting for Abuse History on Longitudinal Outcomes for Women in Prison*, 41 CRIM. JUST. & BEHAV. 417 (2014).
[12] PATRICIA VAN VOORHIS ET AL., WASH. STATE DEP'T OF CORR., MASTER PLAN FOR FEMALE OFFENDERS: FINAL REVIEW DRAFT (2008) (draft on file with the Gender and Justice Commission).
[13] *Id*. at 2-3.

an organized response.[14] In 2014, DOC instituted its first gender-responsive policy.[15] Policy 590.370 "recognizes the impact of gender differences on offender pathways into the criminal justice system and will allow gender-responsive principles to direct classification, supervision, and programming for all offenders."[16] The policy further states that "[t]he Department [of Corrections] will align and prioritize its resources to provide evidence based, gender-responsive interventions" to incarcerated females.[17]

Policy 590.370 was a substantial step towards a gender-responsive incarceration framework, encompassing many aspects of DOC's operations and treatment of incarcerated women. The policy includes employee training in trauma and gender-responsiveness, programming for incarcerated people, health services, reentry, and future building projects. The policy reinforced some existing provisions. For instance, for years prior to this policy, DOC had required staff, contractors, and volunteers to take gender-responsive training before facilitating programming.[18] The "Gender Responsiveness" policy expanded this, now requiring gender-responsive training for all staff, contractors, and volunteers.[19] It also requires all staff, contractors, and volunteers who interact with incarcerated people to take trauma-informed training.[20]

Finally, in 2019, DOC contracted with CORE Associates to conduct a Gender-Informed Practice Assessment (GIPA). The GIPA is an "assessment protocol to help women's prisons better understand the degree to which their policies and practices align with trauma-informed, gender-responsive, and evidence-based practices that, according to research, lead to improved outcomes for women in custody."[21] The assessment in Washington will conclude with a comprehensive report including areas in compliance with best practices and suggested areas for

[14] Jennifer Sullivan, *Women Behind Bars: State Takes a New Approach*, SEATTLE TIMES (Nov. 4, 2013), https://www.seattletimes.com/seattle-news/women-behind-bars-state-takes-a-new-approach.
[15] WASH. DEP'T OF CORR., DOC 590.370, GENDER RESPONSIVENESS (2014), https://www.doc.wa.gov/information/policies/files/590370.pdf.
[16] *Id*.
[17] *Id.*
[18] WASH. DEP'T OF CORR., DOC 590.350 (IV)(B), Offender Change Programs (Jan. 13, 2009).
[19] WASH. DEP'T OF CORR., DOC 590.370(VII)(A).
[20] WASH. DEP'T OF CORR., DOC 590.370(VII)(B).
[21] THE CTR. FOR EFFECTIVE PUB. POLICY, JUSTICE INVOLVED WOMEN PROJECTS (2020), https://cepp.com/expertise/women-offenders/projects/#1489606028683-e37068df-aead.

improvement, resulting in recommendations for how to best move forward in terms of increasing gender-responsiveness within DOC. Like many other plans that have been impacted by COVID-19, the GIPA was put on hold until it is safe for in-person interactions.[22]

V. Programs Started and Led by Women Who are Incarcerated

In addition, women who are incarcerated in Washington have been very active in starting and running programs and building communities that are relevant and responsive to the needs of incarcerated women. For example, a group of women incarcerated at WCCW, along with Psychology Associate Robert Walker and then-Associate Superintendent Margaret Gilbert, started the Women's Village at WCCW in 2009.[23] The Women's Village Handbook states, "We are a collection of women who support a set of common values and are committed to change ourselves and our environment."[24]

In 2011 members of the Women's Village invited professors to WCCW to talk about building a higher education program. Since this invitation, the Freedom Education Project Puget Sound (FEPPS) has offered "129 classes taught by over 102 professors to 252 women."[25] The Women's Village members provide mentoring, facilitate programs, and work to bring programming into WCCW:

> The Women's Village will strive to bring in services and programs to address the present and experienced needs of women housed at WCCW. These services include, but are not limited to: education, self-empowerment, life skills, health and wellness, self-care and disease prevention and interest groups.[26]

[22] Personal communication with DOC staff, July 28, 2021.
[23] Rowland Cawthon, *The Women's Village: A Source of Change for Incarcerated Women*, THE EVERGREEN STATE COLLEGE AND WASHINGTON STATE DEPARTMENT OF CORRECTIONS SUSTAINABILITY IN PRISONS PROJECT (2011), http://sustainabilityinprisons.org/blog/2011/09/01/the-womens-village-a-source-of-change-for-incarcerated-women; *History & Women's Village*, FREEDOM EDUCATION PROJECT PUGET SOUND, http://fepps.org/about-us/history-womens-village.; personal communication with DOC staff August 4, 2021.
[24] WCCW, THE WOMEN'S VILLAGE HANDBOOK 16 (2014) (on file with the Gender and Justice Commission).
[25] FREEDOM EDUCATION PROJECT PUGET SOUND, *supra* note 23.
[26] WCCW, *supra* note 24, at 16.

The programs, activities, and events listed in the Women's Village Handbook are extensive and include education courses (including GED classes, AutoCAD, Cosmetology, Business Math, AA College Courses, and more); financial planning; toastmasters; exercise classes; support groups such as alcoholics anonymous and "Grief & Loss;" parenting programs such as "Inside Out Moms/Moms Involving Dads;" self-help programming such as "Peace Talks," the "IF Project," "Mindfulness Meditation;" and mental health programming such as "Stress & Anger Management," and "Life After Trauma."[27]

The extent to which the Women's Village has flourished, growing from five members at its start to over 200 members,[28] is a strong indicator of how incarcerated women can inform and lead programming that is responsive to their needs. "Responsive" programming, by definition, addresses the needs of individuals who are incarcerated. The large variety of programs shaped by the Women's Village shows that this may mean programs specific to trauma, but it can also mean education, parenting, wellness, and many other types of programming.

Other examples of community-based programs include the Prison Pet Partnership Program,[29] and the Rotary Women's Prison Program.[30]

VI. Implementation of Gender-Responsive Programs in Washington State

DOC currently offers three gender-responsive programs to incarcerated women (Moving On, Beyond Violence, and Beyond Trauma), and participates in a gender-responsive reentry program for women transitioning out of custody (The Seattle Women's Reentry Initiative).[31] Each of these programs is an evidence-based and gender-responsive intervention with documented success at reducing recidivism.[32] The challenges moving forward, described in more detail below, are to

[27] *Id.* at 12-14.
[28] FREEDOM EDUCATION PROJECT PUGET SOUND, *supra* note 23.
[29] PRISON PET PARTNERSHIP, http://www.prisonpetpartnership.org/.
[30] ROTARY WOMEN'S PRISON PROGRAM, https://rotarywomensprison.com/.
[31] Personal communication with DOC staff on May 4, 2021 and August 4, 2021.
[32] Krista Gehring et al., *What Works for Female Probationers?: An Evaluation of the Moving On Program*, 11 WOMEN, GIRLS, & CRIM. JUST. 6 (2010); DUWE ET AL., MINNESOTA DEP'T OF CORRECTIONS, MOVING ON: AN OUTCOME EVALUATION OF A GENDER-RESPONSIVE, COGNITIVE-BEHAVIORAL PROGRAM FOR FEMALE OFFENDERS (2015); Sheryl Kubiak et al.,

ensure that the programs are being implemented with fidelity, that the impact on recidivism is studied in Washington, and that the types and locations of the programs are expanded to all justice-involved women.

A. Moving On

1. Description

Moving On is a gender-responsive, cognitive-behavioral therapy-based program that "focuses on improving communication skills, building healthy relationships, and expressing emotions in a healthy and constructive manner."[33] The program is designed for women and "delivered in 26 sessions via group and one-on-one discussions, self-assessments, writing exercises, and role-playing and modeling activities."[34] Participating women are encouraged to set goals and assess their strengths and weaknesses. Each session lasts one and a half to two hours.[35]

2. Implementation in Washington

According to DOC's internal data, 1,146 incarcerated women have enrolled in the Moving On program since April of 2014, with 967 graduating. This data includes those currently enrolled who have yet to graduate.[36] In Washington, DOC offers Moving On at both WCCW and MCCCW.[37] The course includes six modules—the first consisting of individual sessions, the remainder consisting of group sessions. According to the program overview developed by DOC, sessions should be held twice a week, with each session scheduled for two hours, spread across 13 weeks.[38] Once a participant is enrolled, participation is mandatory, and an unexcused absence is "the equivalent

Assessing Short-Term Outcomes Of An Intervention For Women Convicted Of Violent Crimes, J. SOC'Y SOC. WORK & RSCH. 197 (2012); Nena P. Messina et al., *Examination of a Violence Prevention Program for Female Offenders*, 3 VIOLENCE & GENDER 143 (2016); Jacqueline B. Helfgott & Elaine Gunnison, *Gender-Responsive Reentry Services for Women Leaving Prison: The IF Project's Seattle Women's Reentry Initiative*, Corrections (2020). The findings by Helfgott and Gunnison on recidivism for the Seattle Women's Reentry initiative are nuanced; see the subsection below titled "Seattle Women's Reentry Initiative" for more details on the evaluation findings.

[33] DUWE ET AL., *supra* note 32.

[34] *Id*. at 6.

[35] *Id*. at 6.

[36] Personal communication with DOC staff on May 4, 2021.

[37] Personal communication with DOC staff on July 28, 2021.

[38] WASH. STATE DEP'T OF CORR., COGNITIVE BEHAV. INTERVENTIONS UNIT, REENTRY DIV., MOVING ON PROGRAM OVERVIEW 1 (2018) (on file with the Gender and Justice Commission).

of missing a mandatory callout."[39] Only incarcerated individuals who meet certain criteria, including more than a year but less than five years to release, can participate. Of note, the enrollment criteria also include having at least a 6th grade reading level (or having a plan in place for assistance), and being able to communicate in English (or have a plan in place for translation).[40] DOC also uses a risk assessment tool as part of the program eligibility screening process.[41] Program lead facilitators can be either male or female,[42] and must be full-time Correctional Specialists or Program Specialists.[43] Cognitive Behavioral Intervention Quality Assurance specialists (these are Program Specialist 4 positions) attend the class on at least a monthly basis to witness the class facilitation, observe interactions, identify strengths and deficiencies, and provide feedback to the facilitator(s). Those providing the quality assurance assessment have been trained in the specific program delivery.[44]

3. Effectiveness

Multiple studies have found that Moving On is effective at reducing recidivism in justice-involved women. One study found that Moving On participants had significantly lower rates of rearrest and new convictions than the comparison group of probationers at both the 12-month and 30-month post-release markers.[45]

Other studies have found that the program is effective, but only when implemented with fidelity. For instance, in 2015, the Minnesota Department of Corrections examined the impact of Moving On in two distinct periods.[46] In the first period, the program was offered to participants on a voluntary basis, towards the end of an inmate's sentence, and for the full course as then designed, consisting of 48 hours spread across twelve weeks. Class sizes were small, between five

[39] WASH. STATE DEP'T OF CORR., CBI FACILITATOR GUIDE: MOVING ON FACILITATOR HANDBOOK WCCW AND MCCCW 8 (2018) (on file with the Gender and Justice Commission).
[40] MOVING ON PROGRAM OVERVIEW , *supra* note 38, at 2.
[41] *Id.*; WAONE is the risk/needs assessment tool currently being used per personal communication with DOC staff on August 4, 2021.
[42] CBI FACILITATOR GUIDE: MOVING ON FACILITATOR HANDBOOK WCCW AND MCCCW, *supra* note 39.
[43] MOVING ON PROGRAM OVERVIEW , *supra* note 38, at 1.
[44] Personal communication with DOC staff, August 4, 2021.
[45] Gehring et al., *supra* note 32, at 8.
[46] DUWE ET AL., *supra* note 32.

and ten people.[47] In the second period, the program was offered at intake, and due to scheduling constraints, was cut to three weeks and 30 hours, eliminating certain types of exercises and homework. Class sizes ballooned to between 40 and 50 people.[48] Minnesota found that when the operation of Moving On was largely consistent with how it was designed, the program significantly lowered the risk of rearrest and reconviction. Perhaps unsurprisingly, when the program was shorted, with fewer interpersonal exercises and larger class sizes, it stopped having any significant impact on recidivism.[49]

None of the identified evaluations included analyses that looked at the efficacy of these programs for subpopulations of women such as Black, Indigenous, and women of color.

4. Need for further study

To date, Washington has not undertaken a systematic evaluation of the way in which Moving On is implemented, or its effectiveness as administered generally or for subpopulations of women. This is a critical need. The data gathered to date in other jurisdictions indicates that the program works—but only when administered with fidelity.

B. Beyond Violence

1. Description

Beyond Violence: A Prevention Program for Women is a gender-responsive, cognitive-behavioral therapy program intended for incarcerated women convicted of a violent offense.[50] The intervention incorporates attention to "women's victimization history, the likelihood of substance use and/or mental health disorders and gender socialization."[51] Similar to Moving On, the program uses a variety of therapeutic strategies with participants (including psycho-education, role playing, mindfulness activities, cognitive behavioral restructuring and grounding

[47] *Id.* at 6.
[48] *Id.* at 7.
[49] *Id.* at 31.
[50] STEPHANIE COVINGTON, BEYOND VIOLENCE: A PREVENTION PROGRAM FOR CRIMINAL JUSTICE-INVOLVED WOMEN (2013).
[51] Sheryl P. Kubiak et al., *Assessing the Feasibility and Fidelity of an Intervention for Women with Violent offenses*, 42 EVALUATION & PROGRAM PLANNING 1, 2 (2014).

skills for trauma triggers) to address factors commonly present in the lives of women involved in the criminal justice system.[52]

2. Implementation in Washington

According to DOC's internal data, 263 incarcerated women have enrolled in the Beyond Violence program since December of 2017, with 223 graduating. This data is inclusive of those currently enrolled who have yet to graduate.[53] The program is administered in groups of ten participants, meeting twice weekly, for two hours each session, for a period of ten weeks.[54] As with Moving On, participation is considered mandatory for enrolled individuals.[55] Only those who meet certain criteria, including more than a year but less than five years to release, can participate.[56] The same reading and English language skills as outlined above for Moving On are also required for participation in Beyond Violence.[57] DOC also uses a risk assessment tool as part of the program eligibility screening process.[58] Program facilitators are full-time female, Correctional Specialists or Program Specialists.[59] DOC's internal Cognitive Behavioral Interventions Unit applies a fidelity instrument to "ensure that sessions are delivered as designed, and when they are not, [the fidelity instrument] can be used to guide training activities."[60]

3. Effectiveness

Beyond Violence, when administered properly, has been shown to be effective at reducing recidivism and increasing treatment follow-through among incarcerated women.[61] One study

[52] *Id.*
[53] Personal communication with DOC staff on May 4, 2021.
[54] WASH. STATE DEP'T OF CORR., COGNITIVE BEHAV. INTERVENTIONS UNIT, REENTRY DIV., BEYOND VIOLENCE PROGRAM OVERVIEW 1 (2018).
[55] WASH. STATE DEP'T OF CORR., PARTICIPANT HANDBOOK: BEYOND VIOLENCE, WCCW AND MCCCW 3 (on file with the Gender and Justice Commission).
[56] WASH. STATE DEP'T OF CORR., CBI FACILITATOR GUIDE, BEYOND VIOLENCE FACILITATOR HANDBOOK: WCCW AND MCCCW 3 (on file with the Gender and Justice Commission).
[57] *Id.* at 4.
[58] BEYOND VIOLENCE PROGRAM OVERVIEW, *supra* note 54, at 2; WAONE is the risk/needs assessment tool currently being used per personal communication with DOC staff on August 4, 2021.
[59] BEYOND VIOLENCE FACILITATOR HANDBOOK: WCCW AND MCCCW, *supra* note 56, at 2.
[60] BEYOND VIOLENCE: A PREVENTION PROGRAM FOR CRIMINAL JUSTICE-INVOLVED WOMEN: FIDELITY INSTRUMENT 1 (on file with the Gender and Justice Commission).
[61] Sheryl Kubiak, Gina Fedock, Woo Jong Kim, and Deborah Bybee, *Long-Term Outcomes of a RCT Intervention Study for Women with Violent Crimes* , Journal of the Society for Social Work and Research 2016 7:4, 661-679

found that women involved in Beyond Violence were more likely to participate in community-based substance-abuse treatment after release and to complete treatment, compared to women who had committed violent offenses who did not attend Beyond Violence.[62] Two studies of women with long or life sentences found that Beyond Violence produced significantly positive outcomes, with moderate to large effect sizes, on reductions in PTSD, anxiety, depression, anger and aggression, and symptoms of serious mental illness.[63] In addition, this study demonstrated the feasibility of using incarcerated peer educators to facilitate programs delivered to other incarcerated women.[64] However, as noted above, multiple studies have also shown that the effectiveness of any cognitive-behavioral therapy can vary widely, likely due in part to the implementation fidelity of the programs.[65] None of the identified evaluations included analyses that looked at the efficacy of these programs for different subpopulations of women, such as Black, Indigenous, and women of color.

4. Need for further study

To date, Washington has not undertaken a systematic evaluation of the way in which Beyond Violence is implemented or its effectiveness as administered generally and for subpopulations of women. As with Moving On, this is a critical need. The program works, but only when administered with fidelity.

C. Seattle Women's Reentry Initiative

1. Description

The Seattle Women's Reentry (SWR) Initiative is a collaboration between the Seattle Police Department's IF Project, DOC, and community social service agencies to support women leaving the WCCW.[66] This program is designed to address the needs of formerly incarcerated women who are reentering communities after serving jail or prison sentences, who are faced with

[62] *Id.*
[63] Kubiak et al., *supra* note 32, at 202; Messina et al., *supra* note 32.
[64] Messina et al., *supra* note 32.
[65] *See, e.g.*, Mark W. Lipsey et al., *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 ANN. REV. L. & SOC. SCI. 297 (2007).
[66] Jacqueline B. Helfgott & Elaine Gunnison, *Gender-Responsive Reentry Services for Women Leaving Prison: The IF Project's Seattle Women's Reentry Initiative*, CORRECTIONS POL'Y, PRAC. & RSCH. 1 (2020).

challenges in obtaining housing and employment, mental health and substance abuse treatment, legal help, lack of social support, and stigmatization.[67] The SWR is itself an outgrowth of the IF Project, which was established in 2008 as a partnership between the Seattle Police Department, the DOC, and "other local government agencies and nonprofits to assist women, men, and youth in prisons, youth detention facilities, and in the community [to] succeed upon release."[68]

2. Implementation

SWR services are offered to women incarcerated at the WCCW in Gig Harbor who are going to be released to King County. Reentry programming begins 12 weeks before release. The prerelease program consists of classes in ten content areas, includes personal participant goal-setting and planning, and culminates in individual presentations. SWR services continue for twelve weeks after release, with a one-year post-release follow-up.[69]

3. Effectiveness

Dr. Helfgott and Dr. Gunnison studied the outcomes for 85 women who were released from the WCCW during 2017 and 2018. Sixty of the women were released to King County, and were thus eligible for SWR services. The comparison group consisted of 25 women who were released to Skagit, Whatcom, and Snohomish counties, and thus were not eligible for SWR services.[70] Participants were an average of 40 years old, had served an average of ten years in prison.[71] Researchers interviewed and assessed each of the women before release and conducted monthly interviews for a year post-release.[72] The study tracked new arrests, new citations and violations, and readmissions to DOC custody for three years after release.[73] The study found that SWR participants had much lower rates of arrests and citations (18%) than the general released population (33%).[74] The study also found that rates of recidivism were negatively correlated with the number of prerelease classes completed (that is, the more classes completed, the lower the

[67] *Id.*
[68] *Id*. at 3.
[69] *Id*. at 4.
[70] *Id*. at 5.
[71] *Id*. at 5-6.
[72] *Id*. at 21.
[73] *Id*. at 10.
[74] *Id.*

rate of recidivism).[75] On the other hand, the study found no significant difference between the SWR participants and the control group in readmission to DOC custody.[76] The qualitative findings (participants' self-reported experiences) were strongly positive regarding the SWR.[77]

One SWR Program Member noted, "It's a nice sense to have that community support – people actually care and want to see me do good. I have incentive already but now even have that support too."[78] Another member shared, "They're just really supportive. They're just there. They show up and call and follow through."[79]

4. Need for further study

The 2020 Helfgott and Gunnison study demonstrated some positive effects of the SWR (lower rearrest and citation rates), and some puzzling non-effects (no change in DOC readmission rates). The study itself noted that more research is required to better understand the reasons for these mixed results, and to explore ways of making the reentry interventions more successful. It would also be meaningful to evaluate the efficacy of this program for subpopulations of women.

VII. Implementation of Gender-Responsive Policies and Procedures in Washington

The DOC has implemented some changes to its policies and procedures, consistent with Gender-responsiveness Policy 590.370, but significant challenges remain, described in more detail below.

A. Health and wellness

DOC's Gender-responsiveness Policy requires services "to address gender specific medical and mental health issues."[80] The DOC's Outpatient Services Policy contains various gender-responsive provisions. It requires that "incarcerated individuals, including community supervision

[75] Id.
[76] *Id*.
[77] *Id.*
[78] *Id.* at 12.
[79] *Id.* at 17.
[80] DOC 590.370(IV).

violators"[81] currently serving community custody violation time in a prison rather than a jail, have access to pregnancy management, pap smears, mammograms, and hormone treatment for gender dysphoria.[82] Of note, a 2019 survey of incarcerated women conducted by the Washington State Office of Corrections Ombuds found that about half of survey respondents reported that their medical health care needs were not met.[83] Several respondents expressed concerns over the $4 copay to access dental and medical care. Indigent individuals had, at the time of the survey, a $10 indigent spendable account cap which may be all they have to purchase hygiene items and commissary food, so the $4 copay is a significant amount for these individuals.[84] In 2020 the indigent spendable account cap was increased to $25.[85]

B. Commissary offerings

After launching the gender-responsive initiative in 2014, the DOC introduced gender-specific items into its commissary offerings.[86] The DOC began offering makeup and Midol, and it provided other options for sale beyond its standard issued products.[87] For instance, DOC provided different bras and feminine hygiene products to purchase so incarcerated women had other options.[88] Supporting the new additions to the commissary lineup, Felicia Dixon, a woman incarcerated at WCCW, stated "a woman who has already probably been abused...already feels down and out about herself in one way and then [the prison] continues to take more and more things away from her just hinders her self-esteem"[89] and talked about how having more options in the commissary provided a welcome shift from that feeling.

[81] WASH. DEP'T OF CORR., DOC 610.650(I)(A), Outpatient Services, Directive (June 12, 2018).
[82] WASH. DEP'T OF CORR., DOC 610.650(II)(E)(12) and (14), Outpatient Services, Directive (June 12, 2018). This DOC policy also references access to "Medical contraceptive treatment, which may be started during the month before release or an approved Extended Family Visit," however DOC staff have indicated that contraception is not currently being offered. Personal communication with DOC staff July 9, 2021.
[83] JOANNA CARNS, WASH. STATE OFF. OF THE CORR. OMBUDS, SURVEY OF INCARCERATED WOMEN 30 (2019), https://oco.wa.gov/sites/default/files/Women%20Survey%20with%20DOC%20Response%20Final_0.pdf.
[84] *Id.* at 27.
[85] See RCW 72.09.015(15).
[86] *Why Offer Gender-Specific Items in the Commissary?*, WASH. DEP'T OF CORR. (Oct. 9, 2014), https://www.youtube.com/watch?v=s0ZG8VTJuF8.
[87] *Id*.
[88] *Id*.
[89] *Id*.

However, increasing the availability of items for purchase does not ensure that **all** women, particularly indigent women, are having their basic hygiene needs met. The 2019 Office of Corrections Ombuds survey mentioned above found that while a large proportion of individuals at MCCCW (about 30%) and WCCW (about 40%), and individuals under DOC jurisdiction at Yakima County Jail (over 60%) indicated that their hygiene needs were **not** being met by the institution.[90] The Ombuds report notes that products in indigent hygiene packs such as lotions, soaps, and shampoos are designed for males of European ancestry, "leaving female, African American, and transgender prisoners with inadequate hygiene items" that reportedly cause "dryness, irritation, acne, rashes, destruction of hair, and hair loss."[91] Respondents also noted insufficient quantities of tampons and pads.[92] Of note, according to staff, DOC now provides tampons and pads that are available in an area where women can access them without going to an Officer.[93] The Ombuds report notes that this creates an issue where indigent individuals and those who lose commissary privileges are dependent on the reportedly insufficient indigent hygiene packs. Individuals who do have limited spending money from family or employment must choose between purchasing "food, postal supplies, or hygiene items from the Commissary" or will accrue "hygiene debt."[94] Individuals also reported difficulty accessing denture cleaning and adhesive pads.[95] Many survey respondents noted that they "would like access to decent hygiene products to be a right rather than a revocable privilege."[96]

Respondents also reported a large variety of issues with clothing needs being unmet, including being cold with insufficient warm layers and blankets, having to wear jackets wet from the day before, having torn and stained underwear and other clothing, and shoes that don't fit properly. Respondents noted that the provided number of underwear were also insufficient, particularly during menstruation, and reported feeling "humiliated when DOC staff require them to show

[90] CARNS, *supra* note 83, at 21.
[91] *Id.* at 22.
[92] *Id.* at 23.
[93] Personal communication with DOC staff, July 28, 2021.
[94] CARNS, *supra* note 83, at 23. For incarcerated parents, another competing priority with limited funds would be phone calls or video visits to contact their children. See *Chapter 16: Consequences of Incarceration and Criminal Convictions for Parents, Their Children, and Families* for more information on the impacts of incarceration for parents and the barriers they face to staying connected with their children.
[95] CARNS, *supra* note 83, at 23.
[96] *Id.*

evidence of soiling from menstruation or incontinence before a request for new underwear will be granted."[97] According to DOC staff, DOC women are now issued seven pairs of underwear and they do not have to show their soiled underwear to get a new pair.[98] DOC policy has also increased the number of blankets and now provides an additional sweatshirt.[99]

Transgender prisoners also reported difficulty getting sufficient quantities of chest binders and boxers.[100] Respondents reported: 1) that clothing is cut for men, allows their bras to show through, and does not fit comfortably; 2) that bras fit poorly, particularly for large-busted women; and 3) that there was limited access to bras needed after mastectomy.[101] In April 2021, DOC reduced the number of bras a woman can have from seven to four, despite the fact that women can have seven pairs of underwear.[102] The DOC Chief of Security Operations stated that, "Four bras is an appropriate number, especially when laundered onsite, and this is also the same for transwomen at men's facilities."[103]

The 2019 Office of the Corrections Ombuds report included several recommendations to address these issues. DOC responded on February 18, 2020 indicating which issues identified by the survey it did not plan to address and why, and which issues it was working to address.[104] A follow-up survey or audit would be needed to track if progress has been made.

C. Policies regarding pregnancy

DOC policy requires comprehensive pregnancy management, which includes prenatal and postpartum care, high-risk care, addiction treatment, testing, and counseling.[105] In addition, DOC

[97] *Id*. at 25.
[98] *Id*. at page 8; Personal communication with DOC staff on July 9, 2021.
[99] Personal communication with DOC staff, August 4, 2021.
[100] CARNS, *supra* note 83, at 25.
[101] *Id.* at 26-27.
[102] WASH. DEP'T OF CORR., STATE-ISSUED ITEMS (2021), https://doc.wa.gov/information/policies/showFile.aspx?name=440050a1.
[103] From email sent by the DOC Chief of Security Operations to WCCW Local Family Council members on June 9, 2021 (on file with author).
[104] *Id.* at 6.
[105] DOC 610.650(II)(E)(12)(b).

allocates extra personal property allowances for pregnant, pumping, and nursing people.[106] In 2010 Washington passed legislation banning the use of restraints on nearly all incarcerated women during labor and during transportation to medical providers or court proceedings during their third trimesters or during postpartum recovery.[107] The Gender and Justice Commission, Open Arms Perinatal Services, and Legal Voice, among others, testified in support of this bill.[108] This legislation expanded previous DOC policies which addressed shackling for pregnant individuals, and addressed the lack of restraint policies in Juvenile Rehabilitation and in many county and city jails and juvenile detention facilities.[109] The statute also prohibits correctional personnel from being in the room during childbirth, unless requested by the medical provider.[110] DOC policy 590.320 and RCW 72.09.588 allow incarcerated mothers to have a doula present during and after childbirth. More research is needed to understand the extent to which these services are available to, or accessed by, incarcerated individuals who are pregnant and what impacts they have on child and maternal health.

WCCW also runs a Residential Parenting Program (RPP) that began in 1999.[111] This program allows pregnant, minimum-security women (Minimum 2 [MI2] or Minimum 1 [MI1)] custody levels, but not Minimum 3 [MI3]) with an earned release date before the child will be 30 months old, an opportunity to keep their babies with them in the prison after giving birth.[112] The RPP, DOC policy 590.320 was established in 2006 and updated most recently in July of 2020. It states

[106] WASH. DEP'T OF CORR., MAXIMUM ALLOWABLE PERSONAL PROPERTY MATRIX: WOMEN'S FACILITIES (2013), https://www.doc.wa.gov/information/policies/files/440000a2.pdf (citing Wash. Dep't of Corr., DOC 440.000, Personal Property for Offenders (2013)).
[107] RCW 72.09.651. RCW 72.09.651(2) prohibits non-medical restraints from being used for any reason during labor. RCW 72.09.651(1) only allows for the use of restraints during transportation during the third trimester or postpartum in "extraordinary circumstances" which "exist where a corrections officer makes an individualized determination that restraints are necessary to prevent an incarcerated pregnant woman or youth from escaping, or from injuring herself, medical or correctional personnel, or others."
[108] SENATE COMM. ON HUM. SERVS. & CORR., S.B. REP. ON ENGROSSED SUBSTITUTE H.B. 2747, 61st Leg., Reg. Sess., at 4 (Wash. 2010).
[109] *Id.* at 2.
[110] RCW 72.09.651(5). If the medical provider requests that correctional personnel be in the room during childbirth, the "employee should be female, if practicable." RCW 72.09.015(2) defines "postpartum recovery" as: (a) the entire period a woman or youth is in the hospital, birthing center, or clinic after giving birth and (b) an additional time period, if any, a treating physician determines is necessary for healing after the woman or youth leaves the hospital, birthing center, or clinic."
[111] *Residential Parenting Program*, NAT'L INST. OF CORR.: JUST. INVOLVED WOMEN PROGRAMS (2021), https://info.nicic.gov/jiwp/node/227.; DOC Policy 590.320 - Residential Parenting Program.
[112] DOC policy 590.320(I)(A), July 17, 2020.

that "The Department has established procedures in partnership with local agencies and providers, including the Department of Children, Youth, and Families (DCYF), Early Head Start (EHS), to allow pregnant individuals at Washington Corrections Center for Women (WCCW) to establish a healthy mother/child attachment, promote positive parenting skills, and provide services for transition to the community."[113] The program also requires that Child Protective Services (CPS) approve placement in the program, and that the participant does not have any of the following: a current no contact order with minor children, a conviction for a crime against children per RCW 28A.400.322, or a conviction for a sex offender and/or sexual motivation behavior.[114]

The 2017 DOC RPP Fact Sheet states that "The DOC has made the RPP part of its strategy to reduce recidivism and break the intergenerational cycle of incarceration. As a group, children of incarcerated parents experience lack of quality care and support, thus putting them at higher risk for emotional and relationship problems, academic difficulties and incarceration later in life."[115]

Formerly incarcerated women report the historical practice of shackling during childbirth, having correctional personnel in the room during childbirth, and other significant issues.[116] At the 2021 Washington State Supreme Court Symposium, Kimberly Mays shared a compelling description of her childbirth experience in 2000 while incarcerated at WCCW. Her experience involved being shackled, having her nose and mouth forcibly covered by a nurse, and having a male Correctional Officer in the ambulance and delivery room in full view of her exposed private parts. Kimberly Mays described how this mistreatment made her feel:

> I felt violated, humiliated, dehumanized, and worthless—like an animal giving birth in front of his human masters. I was so traumatized by that experienced that to this very day I still cannot remember the experience of giving birth to my son,

[113] DOC policy 590.320(I), July 17, 2020.
[114] Personal communication with DOC staff, August 4, 2021.
[115] WASH. STATE DEP'T OF CORR., RESIDENTIAL PARENTING PROGRAM FACT SHEET 1(2017), https://www.doc.wa.gov/docs/publications/fact-sheets/400-FS003.pdf.
[116] SENATE COMM. ON HUM. SERVS. & CORR., S.B. REP. ON S.B. 6500, 61st Leg., Reg. Sess. (Wash. 2010); 2021 WASHINGTON STATE SUPREME COURT SYMPOSIUM, BEHIND BARS: THE INCREASED INCARCERATION OF WOMEN AND GIRLS OF COLOR. The TVW recording of the Symposium is available at: https://www.courts.wa.gov/?fa=home.sub&org=mjc&page=symposium&layout=2.

> nor the face of my beautiful baby boy, nor do I remember the 24 hours I was allowed to hold my baby before the state came to take him to foster care.[117]

More research is needed in Washington to understand if policy changes have impacted the experiences of those who are pregnant upon being incarcerated, and if their unique needs in DOC facilities are being met. Kimberly Mays applauded the passage of the 2010 legislation to limit the use of restraints, but stated that "there is still work to be done to help change the negative attitudes and behaviors of prison staff and hospital staff toward women who give birth while incarcerated."[118]

D. Transgender-specific responsive policies

In January 2020, former DOC Secretary Stephen Sinclair issued a letter to all DOC employees regarding transgender, intersex, and gender-nonconforming staff and incarcerated people.[119] In February 2020, DOC implemented its Transgender, Intersex, and/or Gender Non-Conforming Housing and Supervision Policy.[120] This policy provides direction on assigning transgender people to gender-appropriate housing and shower facilities as well as an appeal process for housing review decisions for incarcerated transgender people, intersex, and gender-nonconforming individuals.[121] The appeal process includes writing to the Designated Deputy Director for decisions made based on facility recommendations, and writing to the appropriate Assistant Secretary/designee for decisions made by the Headquarters Multidisciplinary Team.[122]

The Policy also provides for hormone and mental health treatment for incarcerated transgender people.[123] Transgender people may request different facility-issued undergarments to better match their gender.[124] Finally, the policy outlines protocols for name changes and respecting

[117] WASHINGTON STATE SUPREME COURT SYMPOSIUM. Kimberly Hays description of her childbirth experience is at 2:20:47 in TVW recording.
[118] *Id.*
[119] Letter from Stephen Sinclair, Secretary of the Wash. Dep't of Corr., to All DOC Employees (January 16, 2020).
[120] WASH. DEP'T OF CORR., DOC 490.700, Transgender, Intersex, and/or Gender Non-Conforming Housing and Supervision Policy (Feb. 13, 2020).
[121] *Id*.
[122] *Id*.
[123] *Id*.
[124] *Id*.

preferred pronouns.[125] Anecdotal stories from incarcerated and formerly incarcerated individuals, and preliminary findings from a survey conducted by Disability Rights Washington, detail many areas where improvements are still needed to fully address the needs and rights of transgender individuals in DOC facilities. Disability Rights Washington collected extensive data through interviews with transgender prisoners in Washington. The Gender and Justice Commission received a presentation of preliminary data in 2019. The preliminary data from interviews with over 30 incarcerated transgender women in Washington highlighted many issues: lack of proper undergarments for women housed in male facilities; difficulty accessing hormone replacement therapy (average wait time for access was over two years) and gender affirming surgery; self-harm associated with gender dysphoria; suicidality; barriers to name changes while incarcerated; lack of respect for names and pronouns; lack of privacy; insufficient medical and mental health care; dehumanization; sexual violence and harassment; disproportionate solitary confinement; and other issues.[126]

At the 2021 Supreme Court Symposium, Renee Permenter described her experience as a transgender woman of color while incarcerated in a male facility. She shared her experience getting strip searched by male Correctional Officers and insufficient shower accommodations which were impractical, unreliable, and did not provide full privacy from men living on the tiers above the showers.[127] She described her experience of having access to only one doctor who had no knowledge of transgender health needs or medications, and long delays in accessing mental health providers and hormone replacement therapy. She stated, "I understand that there are policies in place currently that attempt to address some of these issues, but there is a difference between the policies existing on paper and the policies actually being implemented."[128]

[125] *Id.*
[126] The final report from Disability Rights Washington is forthcoming. GENDER AND JUSTICE COMMISSION FRIDAY, NOVEMBER 1, 2019 MEETING NOTES 6 (2019), https://www.courts.wa.gov/content/publicUpload/Gender%20and%20Justice%20Commission%20Meeting%20Materials/20191101_m.pdf; DISABILITY RTS. WASH.: TRANS IN PRISON JUST. PROJECT, TRANS JUSTICE WORK IN WASHINGTON STATE PRISONS (2019), https://www.courts.wa.gov/content/publicUpload/Gender%20and%20Justice%20Commission%20Meeting%20Materials/20191101_d.pdf.
[127] WASHINGTON STATE SUPREME COURT SYMPOSIUM. Renee Permenter's description of her experiences cited here are at 53:30 and 2:30:20 in the TVW recording.
[128] *Id.*

VIII. Continuing Policy and Procedure Improvements Needed

While DOC has made progress in implementing gender-responsive policies, as described throughout this chapter, room for improvement remains and there is a need for additional evaluation and research in Washington to determine if policies and programs are having their intended impact. In addition, some policies have had mixed impacts on incarcerated women. For instance, in 2018, the Washington State Legislature appropriated funding to DOC to implement a body scanners at WCCW as an alternative to highly invasive and traumatic strip searches.[129] The Legislature instructed DOC to "review the use of full body scanners at state correctional facilities for women to reduce the frequency of strip and body cavity searches."[130] It also required DOC to submit a report to the Legislature regarding the effectiveness of this alternative.[131]

Accordingly, WCCW introduced a body scanner for the visitation room in February 2019.[132] In its report to the Legislature, DOC praised how the scanner increased the amount of contraband caught and reduced the time taken for the searches.[133]

Despite its goal, DOC's contraband search policy still negatively impacted women. Pregnant women were still subject to strip searches.[134] Second, as of August 2020, women continued to be strip-searched when they "move[] into a secure housing unit… [w]hen there is a fight within the facility… [when] entering or leaving a secure housing facility for work… [and when] going out on medical/dental trips."[135]

[129] LAWS OF 2018, 226.
[130] *Id.*
[131] *Id.*
[132] Alexandra Barton, *New Body Scanner at Women's Facility*, WASH. DEP'T OF CORR. (Oct. 16, 2019), https://www.doc.wa.gov/news/2019/10162019.htm.
[133] WASH. DEP'T OF CORR., BODY SCANNER PILOT: AN ALTERNATIVE TO STRIP SEARCHES OF INCARCERATED INDIVIDUALS 6-7 (2019).
[134] *Id*. at 8 ("In addition, individuals known to be pregnant would not be subject to a body scan and would continue to require a strip search.").
[135] 8/05/2020 Local Family Council COVID-19 Informational Call Notes, at 1, https://www.doc.wa.gov/family/council-wccw.htm.

Third, the scanner is used for "incoming transports, outside work crews, return from programming areas, visiting, medical transports and all kitchen workers."[136] Having an additional body scanner located in Receiving at WCCW may relieve overuse and limit interference to programing that occurs in the visit room.

Fourth, DOC policy 320.311 still requires a "dry cell watch" (after a positive body scan) for incarcerated women suspected of contraband who do not willingly surrender it.[137] Dry cells are prison cells without a toilet or other plumbing, allowing suspected contraband to be recovered following a bowel movement or other bodily process. DOC policy 420.311 indicates a dry cell watch "must be concluded within 84 hours or after the equivalent of 3 consecutive normal bowel movements, whichever occurs first."[138] Incarcerated women in Washington have often been on dry cell watch for substantially longer – up to 19 days in extreme cases:

> Because of differences between male and female anatomy, a typical dry cell watch for a male individual is within the policy stated 84 hours (the time it generally takes to produce three bowel movements and typically recover contraband through biological processes). During the pilot at WCCW, primarily due to females being able to conceal contraband in the vaginal area, the policy driven 84 hours or three bowel movements did not facilitate the body's biological contraband recovery processes.[139]

This is a concrete example of when policies made for the primarily male incarcerated population are not well adapted for the female population. With the increase of contraband accusations, the body scanners subjected even more women to the grueling dry cell requirement.[140] Therefore,

[136] WCCW Local Family Council 2/23/2020 Meeting Minutes, at 3, https://www.doc.wa.gov/family/council-wccw.htm.
[137] *Id*. at 9 (citing WASH. DEP'T OF CORR., DOC 420.311, Dry Cell Search/Watch (March 1, 2015)).
[138] *Id*. ("DOC Policy 420.311 Dry Cell Search/Watch requires the individual be placed on dry cell watch status for up to 84 hours or three bowel movements with 24-hour extensions granted and documented as needed.").
[139] *Id*.
[140] *See* WASH. DEP'T OF CORR, *supra* note 133, at 6-7 (Table 5). *See id.* at 9, Dry Cell Watch Placement, for the figures showing increases in dry cell watch placement following installation of the body scanner at WCCW.

although body scans in lieu of strip searches moved policy in a gender-responsive way, extended dry cell periods while under surveillance are clearly a practice that needs revision.

IX. Recommendations

- To provide effective gender-responsive and trauma-informed programs, policies, and procedures to all justice-involved women and non-binary, transgender, and other gender nonconforming individuals, the Washington State Department of Corrections (DOC) should consider:
    - Expanding access to more types of programs with guidance from the incarcerated individuals who would be using the programs.
    - Expanding locations of program administration. DOC facilities appear to be the only location at which gender-responsive programming is available. County jail populations might be too transitory to benefit from these programs, but people subject to out of custody supervision might benefit from this valuable tool.
    - Providing training for staff who work with individuals on Community Supervision to increase their understanding of gender-responsive and trauma-informed principles.
    - Ensuring that DOC Policy 610.650-Outpatient Services and the "Washington DOC Health Plan" include complete women's health care services for women incarcerated in DOC facilities, and that these policies are implemented as written.
    - Making all DOC policies, practices, and programs gender-sensitive, responsive, and trauma-informed.
    - Reducing trauma and enhancing safety through the preservation of human dignity by developing trauma-informed alternatives to strip search.
- Research from other states has shown that outcomes of gender-responsive programming depend heavily on the manner in which the programs are administered, which often varies widely. Conduct research, monitoring, and evaluation in Washington to assess the effectiveness of DOC's gender-responsive programming generally, and for subpopulations such as Black, Indigenous, and women of color, in particular.

Chapter 13

Prosecutorial Discretion and Gendered Impacts

Kelly Harris, JD; Joanne Moore, JD; and Claire Mocha, MPH

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I. Summary

Prosecutors have wide discretion in deciding whether and how to charge defendants; to whom diversion and deferral opportunities should extend; whether to recommend pretrial detention or how much bail to request; and when to make plea bargain offers. The evidence from across the U.S., and the limited evidence from Washington State, suggests that Black, Indigenous, and women of color are systematically disadvantaged when compared to their white peers at those discretionary decision points. While judges can oversee some aspects of the power of prosecutors in the context of an individual case, there is a lack of systematic public oversight or accountability, and a lack of data to understand if, how, and where prosecutors may be contributing to disparities in the criminal justice system.

The data we do have, though, suggests that individuals from marginalized communities may experience systematic and cumulative layers of disadvantage, both inside and outside the criminal justice system. Inequities outside of the justice system may compound disparities within the system. For example, racial disparities in arrests negatively influence pretrial bail decisions, which influence plea deals, affect charging decisions, and create a higher likelihood of incarceration and longer sentences for both men and women of color.

Data from the Washington State Patrol confirms that Black, Latinx, and Pacific Islander drivers, and particularly Native American drivers, were searched at higher rates than white motorists in 2009-2015. Native Americans were searched at a rate five times higher than white motorists. And 2019 data from Washington shows that Black and Indigenous women are also arrested at rates higher than their representation in the population. The evidence also suggests that transgender women are subjected to disproportionate arrests, and aggressive or even abusive policing practices.

Looking at charging decisions, female defendants may be more likely to have arresting charges against them dropped or decreased when compared to male defendants (although females with prior felonies may actually be treated more severely than male defendants). For female defendants, having minor children may increase the chances of charges being dropped. There is

a gap in the research regarding outcomes for transgender, gender non-binary, and gender-nonconforming individuals.

In addition, evidence suggests that prosecutors may believe that cases fitting stereotypical ideas of rape and rape victims have the best chances of winning in court. Survivors who are attacked by strangers, who are injured during the attack, or who are attacked in public places are more likely to see charges brought against their attackers. However, these charging patterns do not align with the reality of sexual assault.

The data also shows that prosecutors can (and in some places do) use their discretion to lessen disparities. But more data is needed (particularly on prosecutorial discretion in smaller jurisdictions and rural areas) on outcomes for Asian Americans, Native Hawaiians and Other Pacific Islanders, and Indigenous populations. More data is also needed on the intersection of gender with race, ethnicity, sexual orientation, poverty, and disability. This data is needed to understand the effect of prosecutorial discretion on different populations and to build systems of accountability to counteract documented criminal justice disparities in Washington State.

II. Background

Prosecutors play an extremely powerful role in the criminal legal system. Decisions made by prosecutors, particularly in case charging and plea bargaining, can be as impactful to a criminal defendant as the ultimate sentence. Prosecutors' decisions also impact crime victims. Washington law provides some prosecutorial guidelines to shape a prosecutor's review and charging of criminal referrals. RCW 9.94.A.411 pertains to adult cases and RCW 13.40.077 to juvenile cases. These statutes set out principles for prosecutors, but they are limited. Prosecutors must exercise discretion in cases presenting a variety of circumstances, and their discretion is broad.

Prosecutorial immunity laws protect prosecutors from judicial scrutiny for many types of decisions. Federal civil rights claims are difficult to sustain because victims of biased prosecution

must be able to prove intentional discrimination.[1] These laws, and the lack of published charging standards and detailed charging statistics from individual offices, result in limited public transparency about the charging process. The rules governing discretion are largely a matter of an elected prosecutor's internal policies, and how the assistant prosecutors who make these operational decisions on charging are trained and supervised. In a sense, the broadest check on a prosecutor's discretion is the ballot box. As all county prosecutors in Washington State are elected executive branch officials, if the public is unhappy with a prosecutor's exercise of discretion, voters can elect another prosecutor. However, the electorate is rarely, if ever, informed of this most important prosecutorial practice among elected prosecutors. In 2018, almost three-quarters of prosecutors on the ballot in Washington State were running unopposed.[2] As one Washington State expert noted anecdotally, "there's no mechanism to challenge prosecutorial discretion, [and] no data to check the reality of what's going on." Under the current absence of transparency, elections cannot be expected to provide a substantial check on prosecutorial discretion.

A. Constitutional and ethical limitation on prosecutorial discretion

While prosecutorial discretion is generally not limited by laws, discrimination against constitutionally protected groups is prohibited. Both the case law and ethics rules prohibit a prosecutor's office from exercising prosecutorial discretion based on race or gender discrimination as a denial of equal protection and a violation of ethics laws governing prosecutors' official actions. The United States (U.S.) Supreme Court has established that "[t]he decision to prosecute may not be based on race, religion, or other arbitrary classification."[3] The Washington State Supreme Court has established that while charging and prosecuting in general is a matter of prosecutorial choice, such discretion is subject to constitutional constraints, and selective enforcement deliberately based on unjustifiable standards raises equal protection

[1] *Wayte v. United States*, 470 U.S. 598, 609, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985).
[2] Lilly Fowler, *WA's Prosecutors Are Mostly Male, White - and Running Unopposed*, CROSSCUT (Nov. 2, 2018), https://crosscut.com/2018/11/was-prosecutors-are-mostly-white-male-and-running-unopposed.
[3] *Wayte*, 470 U.S. at 609.

concerns.[4] The Washington State Supreme Court has declared that exercising prosecutorial discretion based on race, religion, or other arbitrary classifications would be an unjustifiable standard and a denial of equal protection.[5] In *State v. Monday*, the Washington State Supreme Court reversed the defendant's murder conviction due to the prosecutor's racially motivated remarks during trial.[6]

The Rules of Professional Conduct (RPCs), adopted by the Washington Supreme Court, set out mandatory ethics requirements for attorneys, which must be followed when prosecutors exercise their discretionary powers. In addition to appellate review, lawyers are subject to discipline when they violate the RPCs. The Washington State Bar Association and the Washington Supreme Court conduct disciplinary processes which can result in publicly reported reprimands, suspension, or disbarment.[7] RPC 8.4, entitled Misconduct, establishes that an attorney's discriminatory act based on sex or race is professional misconduct.[8] RPC 8.4(g) is one of several RPCs establishing that prosecutors, as lawyers serving the public, have exceptional responsibilities and duties to uphold justice and exceptional ethical duties.[9] RPC 3.8, entitled Special Responsibilities of a Prosecutor, sets out singular ethical duties held by prosecutors. Because prosecutors are entrusted by the public with such substantial powers, including prosecutorial discretion, they must act in conformance with their duty to protect the integrity of the justice system:

> Comment 1 (Washington Revision.) A prosecutor has the responsibility of a minister of justice and not simply that of an advocate…This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice

[4] *State v. Monday*, 171 Wn.2d 667, 675-81, 257 P.3d 551 (2011). *See also United States v. Armstrong*, 517 U.S. 456, 470, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996); *State v. Alonzo*, 45 Wn. App. 256, 723 P.2d 1211 (1985).
[5] *State v. Lee*, 87. Wn.2d 932, 936-37, 558 P.2d 236 (1976); *State v. Talley*, 122 Wn. 2d 192, 215, 858 P.2d 217 (1993).
[6] 171 Wn.2d 667 (2011).
[7] Washington RPC 3.8, cmt. 1.
[8] "It is professional misconduct for a lawyer to . . . (g) commit a discriminatory act prohibited by state law on the basis of sex, race (or other specified characteristics) . . . where the act of discrimination is committed in connection with the lawyer's professional activities." RPC 8.4.
[9] The rule establishes that "[L]awyers holding public office assume legal responsibilities beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers." RPC 8.4(g).

> and that guilt is decided upon the basis of sufficient evidence…Competent representation of the government may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or *a* systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.[10]

In addition to the preceding mandatory ethics provisions which apply directly to Washington State prosecutors (and also to federal prosecutors in Washington due to the cross reference to the RPCs by the federal district court rules), the American Bar Association has promulgated national guidance, entitled Standards of Criminal Justice Relating to the Prosecution Function. Washington RPC 3.8 Comment 1 discusses these favorably. They address a prosecutor's active duties with respect to bias:

> (a) A prosecutor should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of the prosecutor's authority.
>
> (b*)* A prosecutor's office should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race*,* in all of its work. A prosecutor's office should regularly assess the potential for biased or unfairly disparate impacts of its policies on communities within the prosecutor's jurisdiction and eliminate those impacts that cannot be properly justified.[11]

Prosecutorial discretion is also addressed by the National District Attorney Association (NDAA) prosecutor guidelines.[12]

[10] RPC 3.8, cmt. 1.
[11] ABA, *Criminal Justice Standards for the Prosecution Function*, std. 3-1.6(a)-(b) (2017).
[12] NAT'L DIST. ATT'YS ASS'N, NATIONAL PROSECUTION STANDARDS: THIRD EDITION, https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf.

B. Understanding the impact of prosecutorial discretion

Federal and state lawmakers placed statutory restrictions on judicial discretion in the form of sentencing guidelines in the 1980s, making charging decisions (rather than judicial discretion at sentencing) the key factor in determining sentences. Social scientists turned to studying prosecutorial decision making.[13] This is a challenging area to study, because in most jurisdictions there is little or no documentation publicly available on how charging and plea decisions are made. The studies that have been published usually focus on individual jurisdictions where the prosecutor's office has agreed to make case records available to researchers; or researchers use state court processing statistics to analyze disparities in charges brought, cases dismissed or diverted, and convictions obtained. While the latter approach has the benefit of making comparisons across jurisdictions, it relies on records with very limited details. To our knowledge, there have been no studies looking exclusively at prosecutorial decision-making in Washington State; therefore, evidence from other jurisdictions in the U.S. and from cities within Washington are examined here.

The following analysis discusses disparities by demographics such as race, ethnicity, and gender. See Section V of the full report for an overview of the limitations of many datasets, such as the systemic undercounting of Latinx and Indigenous populations, limitations of combining diverse populations into one broad category like "Asian," the failure of datasets to differentiate between gender identity and sex[14], and the lack of self-identification in many datasets. Of particular note for this section is that protocols for recording gender, race, and ethnicity in arrest data vary by arrest agency, meaning demographic data may be based on the arresting officer's perception, rather than self-report.[15] We do not know the protocols for coding in every law enforcement

[13] *See* Cassia Spohn, *Reflections on the Exercise of Prosecutorial Discretion 50 Years After Publication of* The Challenge of Crime in a Free Society*: President's Crime Commission: Past and Future*, 17 CRIMINOLOGY & PUB. POL'Y 321 (2018).

[14] The Centers for Disease Control and Prevention defines "gender identity" as "an individual's sense of their self as man, woman, transgender, or something else" and defines "sex" as "an individual's biological status as male, female or something else. sex is assigned at birth and associated with physical attributes, such as anatomy and chromosomes." *Terminology: Adolescent and School Health*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 18, 2019), https://www.cdc.gov/healthyyouth/terminology/sexual-and-gender-identity-terms.htm.

[15] Personal Communication with Brook Bassett, Statistical Compiler, Washington Association of Sheriffs and Police Chiefs (Feb. 24, 2021).

agency in the state. Additionally, data on sexual orientation or transgender, gender non-binary, or gender non-conforming identity are almost non-existent in this context.

III. The Impact of Prosecutorial Discretion on Policing and Arrests

Most cases enter the criminal justice system through an arrest, citation, or referral from the police. As a result, policing decisions and policies largely shape the population encountered by prosecutors. Additionally, prior arrests influence prosecutorial decision-making in charging and plea bargaining, as discussed below. As discussed in "Chapter 11: Incarcerated Women in Washington," there are well-documented patterns of racially disproportionate policing and arrests nationally and in Washington State. Nationally, there has been an historical increase in the incarceration of women, a trend that seems to be continuing in Washington State and which disproportionately impacts Black, Indigenous, and women of color.[16] Nationally, the "war on drugs" in the 1980s has been cited as a driver of racial disproportionality in drug convictions across genders.[17] Research on policing, including Dr. Beckett's 2004 Seattle-based research, highlights implicit bias a contributing factor to racial disproportionality. It also points to police efforts that: [18]

- Target certain geographical areas (resulting in class and race-based targeting);

[16] Ann Carson, Bureau of Justice Statistics, National Prisoner Statistics Program. Generated using the online Corrections Statistics Analysis Tool (2018), www.bjs.gov; TATIANA MASTERS ET AL., *Incarceration of Women in Washington State: Multi-year analysis of felony data* (2020). For more information on trends in incarceration rate by gender and race see "Chapter 11: Incarcerated Women in Washington"

[17] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012); Doris Marie Provine, *Race and Inequality in the War on Drugs*, 7 ANN. REV. L. & SOC. SCI. 41 (2011). For more information on the impacts of the war on drugs on incarceration see "Chapter 11: Incarcerated Women in Washington."

[18] Jamie Fellner, *Race, Drugs, and law enforcement in the United States*, 20 STANFORD LAW & POLICY REVIEW, 2009, at 257-; KATHERINE BECKETT, *Race And Drug Law Enforcement in Seattle* (2004); Katherine Beckett, Kris Nyrop & Lori Pfingst, *Race, drugs, and policing: understanding disparities in drug delivery arrests*, 44 CRIMINOLOGY 105–137 (2006); Katherine BECKETT et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOCIAL PROBLEMS 419–441 (2005); Barbara Ferrer & John M. Connolly, *Racial Inequities in Drug Arrests: Treatment in Lieu of and After Incarceration*, 108 AM. J. PUB. HEALTH 968 (2018); Ojmarrh Mitchell & Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, 32 JUST. Q. 288 (2015); REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/; SAMUEL R GROSS, MAURICE POSSLEY & KLARA STEPHENS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 37 (2017); EVERY 25 SECONDS THE HUMAN TOLL OF CRIMINALIZING DRUG USE IN THE UNITED STATES (2016), https://www.hrw.org/sites/default/files/report_pdf/usdrug1016_web.pdf.

- Focus on outdoor drug exchanges, which are more visible compared to indoor exchanges; and
- Focus arrests on crack-related exchanges.[19]

Additionally, trauma from sexual abuse, long-term domestic violence, and human trafficking are widely recognized as significant driving factors in the incarceration of women.[20] See "Chapter 11: Incarcerated Women in Washington," for more information on the trauma-to-prison pipeline that impacts many women.

Data from the Washington State Patrol confirms that Black, Latinx, and Native Hawaiian and other Pacific Islander drivers, and particularly Native American drivers, were searched at higher rates than white motorists in 2009-2015. Native Americans were searched at a rate five times higher than white motorists. These data were not disaggregated by gender.[21] However, national data indicate that Black women were 17% more likely than white females to be in a police-

[19] *See* Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257 (2009); KATHERINE BECKETT, RACE AND DRUG LAW ENFORCEMENT IN SEATTLE (2004), https://www.prisonpolicy.org/scans/Beckett-20040503.pdf; Katherine Beckett, Kris Nyrop & Lori Pfingst, *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests* 44 CRIMINOLOGY 105 (2006); Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419 (2005); Barbara Ferrer & John M. Connolly, *Racial Inequities in Drug Arrests: Treatment in Lieu of and After Incarceration*, 108 AM. J. PUB. HEALTH 968, 968–969 (2018); Ojmarrh Mitchell & Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, 32 JUST. Q. 288 (2015); REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities; SAMUEL R. GROSS, MAURICE POSSLEY & KLARA STEPHENS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 37 (2017), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1121&context=other; EVERY 25 SECONDS THE HUMAN TOLL OF CRIMINALIZING DRUG USE IN THE UNITED STATES (2016), https://www.hrw.org/sites/default/files/report_pdf/usdrug1016_web.pdf.

[20] Thanos Karatzias et al., *Multiple Traumatic Experiences, Post-Traumatic Stress Disorder and Offending Behaviour in Female Prisoners*, 28 CRIM. BEHAV. MENTAL HEALTH 72 (2018); Christy K. Scott et al., *Trauma and Morbidities Among Female Detainees in a Large Urban Jail*, 96 PRISON J. 102 (2016); BONNIE GREEN ET AL., TRAUMA EXPERIENCES AND MENTAL HEALTH AMONG INCARCERATED WOMEN (2016); ANDREA JAMES, ENDING THE INCARCERATION OF WOMEN AND GIRLS 19 (2019); Gina Fedock & Stephanie Covington, *Female Violent Offending, Theoretical Models of*, SAGE ENCYC. CRIM. PSYCH. 516 (2019); Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 928 (2008).

[21] THE STANFORD OPEN POLICING PROJECT, https://openpolicing.stanford.edu; Joy Borkholder, *Driving While Indian: How InvestigateWest Conducted the Analysis*, INVESTIGATEWEST (Dec. 19, 2019), https://www.invw.org/2019/12/19/driving-while-indian-how-investigatewest-conducted-the-analysis.

initiated traffic stop and were arrested three times as often as white females during police-initiated street and traffic stops.[22]

The evidence suggests that transgender women are also subject to disproportionate arrests. In national studies, transgender women report being "subjected to aggressive, often abusive, policing practices based upon law enforcement's perception that they are universally and perpetually engaged in sex work."[23] While interviews and surveys reveal higher rates of "survival crimes" as a result of high rates of unemployment and homelessness,[24] experts note that this profiling of transgender women results in unnecessary, and at times negative or even violent, interactions with law enforcement.[25]

A. Washington arrest data

Statewide arrest data from the Washington Association of Sheriffs and Police Chiefs show that in 2019, Black and Indigenous women were arrested for all crimes at rates higher than their representation in the population (in the case of Black women, at almost four times the rate). When looking at arrests for drug crimes only, Indigenous, Black, and white women are all overrepresented. Overrepresentation is worse for Indigenous women for drug crimes than for all crimes combined, while the opposite is true for Black women (Table 1).

[22] *Policing Women: Race and Gender Disparities in Police Stops, Searches, and Use of Force*, PRISON POL'Y INITIATIVE (May 14, 2019), https://www.prisonpolicy.org/blog/2019/05/14/policingwomen.
[23] Leonore F Carpenter & R Barrett Marshall, *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof*, 24 WM. & MARY J. WOMEN & L. (SPECIAL ISSUE) 5 (2017).
[24] A series of in-depth interviews with 10 Black trans former offender females in the Northeast U.S. revealed that sex work was commonly used as a means of survival due to post-incarceration unemployment and homelessness and that it often led to re-arrest. Brittany Shakir, Factors of Black Transgender Ex-Offender Women that Contribute to Recidivism (2020) (doctoral dissertation). In a nationally-representative survey of the experiences of transgender individuals, trans people of color report disproportionately high rates of arrest and incarceration. JAIME GRANT, LISA MOTTET & JUSTIN TANIS, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011).
[25] Carpenter & Marshall, *supra* note 23.

Table 1: Washington State Female Arrests and Female Drug Arrests in 2019 By Race, Compared to the Proportion of the Washington State Population (N=45,196)

	American Indian/ Alaska Native	Asian	Black	Native Hawaiian/ Pacific Islander	White
Percent of female arrests	4.3%	3.3%	12.0%	0.2%	80.4%
Percent of female drug arrests	5.7%	2.5%	7.5%	0.2%	84.1%
Percent of Washington's female adult population	1.6%	10.4%	3.5%	0.7%	80.3%

Footnotes for Table 1.

Notes: Cells shaded in light purple note where the proportion of a racial group in each arrest offense category exceeds the proportion of that racial group in the Washington population. "Drug arrests" includes drug equipment violations and drug/narcotics violations (categories from FBI's NIBRS system, https://www.fbi.gov/file-repository/ucr/ucr-2019-1-nibrs-user-manua-093020.pdf/view). Arrest data from Washington Association of Sheriffs and Police Chiefs, 2019. Note that in 2019, just over three percent of female arrestees had race marked "unknown" and were excluded from this analysis. American Indian/Alaska Native disproportionality is likely an underestimate, as the numerator (arrests) does not account for arrests made by tribal police agencies, while the denominator (population) may include people living on reservations. Latinx/Hispanic ethnicity was not analyzed because 15% of female arrests had "unknown" ethnicity. Population data are Washington State Office of Financial Management population estimates derived from American Community Survey data, 2019 and include female residents of Washington State, ages 20+. Due to limitations in the data, we were unable to include adult females ages 18-20 in the population data. Additionally, arrest data do not include individuals categorized as "two or more races" – a category which accounts for

approximately 3.5% of adult females in the statewide population estimates. Due to these limitations in the data, results should be interpreted with caution.

Sources: Adapted from arrest data from Washington Association of Sheriffs and Police Chiefs, 2019; Washington State Office of Financial Management population estimates derived from American Community Survey data, 2019.

Female arrests most frequently fall into the categories of driving under the influence (16.2% of female arrests), simple assault (15%), and shoplifting (9.7%). But arrest policies vary by jurisdiction; and experts noted that "King County has not booked or charged most drug level possession offenses for some time."

Even arrests that end in short jail stays can have serious consequences for the person arrested. In some jurisdictions, transgender or gender non-conforming individuals may be placed in facilities according to the sex assigned to them at birth, potentially exposing them to gender-based violence.[26] This circumstance could lead to these individuals accepting plea offers that will result in their release, even when it may not be in their best interests, just to escape such violence. Being arrested or charged with a crime, even without a conviction, can lead to loss of some types of government aid and job opportunities.[27] Washington State experts confirm anecdotally that arrests can be grounds for losing "the ability to be a relative placement for a child who otherwise will go into foster care," or can prompt Child Protective Services (CPS) involvement "if they are the sole custodian of minors and have no one else who can care for them." See "Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families" for more on this topic.

People with substance use disorders receiving medication-assisted treatment may find their treatment interrupted, as jails in Washington State do not yet uniformly facilitate access to these types of treatment. However, experts note that the Washington Association of Sheriffs and Police Chiefs has been "working actively to provide and facilitate [medication-assisted treatment] in all

[26] GRANT, MOTTET & TANIS, *supra* note 24.
[27] Megan Comfort, *"A Twenty-Hour-a-Day Job": The Impact of Frequent Low-Level Criminal Justice Involvement on Family Life*, 665 ANNALS AM. ACAD. POL. & SOC. SCI. 63 (2016).

jails."[28] Frequent drug users who experience sudden withdrawal during jail stays are at particularly high risk of overdose immediately after leaving jail.[29] While prosecutors have the ability to divert people into treatment programs or to other services, in areas with case filing backlogs this could take several days, during which the individual in question has already been taken to jail and may be at risk of facing the above negative outcomes. There is a lack of evidence regarding how frequently people might be held in jail prior to diversion to treatment in Washington State; however, experts from Washington noted anecdotally, "Prosecutors sometimes seem to delay agreeing to diversion as a way to pressure the defendant into pleading guilty."

In King County, the Law Enforcement Assisted Diversion (LEAD)[30] program, piloted in 2011, was designed to divert individuals who would otherwise be arrested for low-level drug and prostitution crimes directly into a harm-reduction case management program that provides support and connection to community resources. An initial randomized evaluation of the program found that individuals diverted through LEAD had lower odds of re-arrest and charging compared to individuals who were arrested and processed under usual procedures.[31] Another evaluation found that participants are "significantly more likely to obtain housing, employment, and legitimate income in any given month subsequent to their LEAD referral" compared to before participating in the program.[32] And population modeling has estimated that LEAD could lead to significantly lower rates of new cases of HIV and Hepatitis C virus, fewer overdose deaths among people who inject drugs, and a lower jail population.[33] Over 4,000 women were arrested in Washington in 2019 for drug-related and prostitution offenses, and the majority of drug-related

[28] LUCINDA GRANDE & MARC STERN, PROVIDING MEDICATION TO TREAT OPIOID USE DISORDER IN WASHINGTON STATE JAILS 20 (2018).
[29] Cora L. Bernard et al., *Health Outcomes and Cost-Effectiveness of Diversion Programs for Low-Level Drug Offenders: A Model-Based Analysis*, 17 PLOS MED. 1 (2020).
[30] In a movement to de-center the role of law enforcement in diversion, the Seattle-based program is now known as *Let Everyone Advance with Dignity*. LEAD NAT'L SUPPORT BUREAU, www.leadbureau.org.
[31] Susan E. Collins, Heather S. Lonczak & Seema L. Clifasefi, *Seattle's Law Enforcement Assisted Diversion (LEAD): Program Effects on Recidivism Outcomes*, 64 EVALUATION & PROGRAM PLAN. 49, 49–56 (2017).
[32] SEEMA L CLIFASEFI, HEATHER S LONCZAK & SUSAN E COLLINS, LEAD PROGRAM EVALUATION: THE IMPACT OF LEAD ON HOUSING, EMPLOYMENT AND INCOME/BENEFITS (2016).
[33] Bernard et al., *supra* note 29: the authors estimate that over 10 years, LEAD could reduce new cases of HIV by 3.4%, Hepatitis C virus by 3.3%, overdose deaths by people who inject drugs by 10.0%, lower jail populations by 6.3%, and result in significant savings to the healthcare and criminal justice systems.

arrests were for possession and/or consumption.[34] While not all of these individuals would qualify for LEAD, pre-charging diversion programs have great potential to reduce contact with the criminal justice system for the female population. From October 2011-January 2014, 39% of LEAD participants were women, and the majority of participants of all genders were Black, Indigenous, and people of color.[35] Data showing the intersection of gender and race, which would allow us to understand how many Black, Indigenous, and women of color participated in LEAD, were not provided. [See also "Chapter 10: Commercial Sex and Exploitation."] In 2020, the Washington State Association of Sheriffs and Police Chiefs partnered with the LEAD National Support Bureau to provide $1.1 million in grants to local law enforcement agencies in Olympia and Port Angeles to "support local initiatives to properly identify criminal justice system-involved persons with substance use disorders and other behavioral health needs and engage those persons with therapeutic interventions and other services prior to or at the time of booking, or while in custody."[36]

IV. The Impact of Prosecutorial Discretion on Screening and Charging

The most critical of all the duties and responsibilities of a prosecutor is the power to charge someone with a crime. Prosecutors have exclusive control over whether to charge an offense, and what offense should be charged. As discussed more below, prosecutors can use their discretion to charge "conservatively," where they limit their charging to the lowest level crime

[34] TONYA TODD & BROOK BASSETT, CRIME IN WASHINGTON, 2019 ANNUAL REPORT (2020), https://waspc.memberclicks.net/crime-statistics-reports. Female arrests from dataset obtained from Washington Association of Sheriffs and Police Chiefs. Among statewide drug equipment violations for all genders, 83.1% were possessing/concealing, and 13.9% were using/consuming. Among statewide drug/narcotic violations for all genders, 75.6% were possessing/concealing, and 9.9% were using/consuming. Fewer than 10% of all drug-related arrests were for manufacture, distribution, or transport.

[35] CLIFASEFI, LONCZAK & COLLINS, *supra* note 32. Participant gender, race, and ethnicity were reported by the referring officer, as follows: "57% participants were African American, 26% were European American, 6% were American Indian/Alaska Native or Pacific Islander, 4% were Multiracial, 4% were Hispanic/Latino/a, 1% were Asian American, and 2% were 'Other.'" *Id.* at 4.

[36] WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, $1.1 MILLION IN ARREST AND JAIL ALTERNATIVES GRANTS AWARDED TO LAW ENFORCEMENT AGENCIES (2020), https://waspc.memberclicks.net/assets/docs/arrest%20and%20jail%20alternatives%20grants%20-%20statewide%20release.pdf.

and least number of individual offense counts that the facts of a case dictate; or they can use their discretion to charge "liberally," where they charge the highest level offense and the greatest number of individual offenses that the facts support. They have the discretion, for example, to charge crimes that carry mandatory minimum sentences and to allege sentencing enhancements.

Prosecutors may decide not to charge a referred case at all. And as more jurisdictions consider alternative responses to criminal activity such as referral to pre-charge or post-charge deferral programs, prosecutorial latitude in deciding who has the opportunity to enter these programs will become more important. In pre-charge diversion programs, prosecutors have total control to offer entry to the program; for post-charge deferral programs, entry may be governed by a set of qualifying factors.

Prosecutors make their charging decisions based on a wide variety of case-related factors, such as the strength of the evidence in the case, how serious they deem the offense to be, and the wishes of the victim of the crime (if there is one).[37] They may consider the consequences of charging decisions in terms of safety of the victim or community, or the defendant's need for rehabilitation or treatment.[38] Charging decisions may also be driven by a desire to obtain restitution for crime victims.[39]

Contextual factors may shape or constrain charging decisions, including a lack of resources that might lead to a decline in quality investigations or a shortage of courtrooms, judges, and clerks. Prosecutors may also consider fairness and equity issues when deciding whether to file charges, such as declining to file a theft charge for a homeless person stealing food to survive. Also relevant are the prosecutor's relationships with the judges, police, and defense attorneys in their district, as well as local office policies and unstated norms.[40] Factors that are not associated with the legal aspects of the case can also influence charging decisions. When a prosecutor reviews a

[37] BRUCE FREDERICK & DON STEMEN, VERA INST. OF JUSTICE, THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING – SUMMARY REPORT (2012), https://www.ojp.gov/pdffiles1/nij/grants/240334.pdf. This National Institute of Justice-funded study selected two large country prosecutor's offices (anonymous), conducting statistical analysis of case files, surveys of prosecutors, interviews and focus group discussions to analyze prosecutorial decision-making.
[38] ARIANA ORFORD ET AL., PROSECUTORS' DOMESTIC VIOLENCE HANDBOOK 147 (2017).
[39] RCW 9.94A.753(5).
[40] FREDERICK AND STEMEN, *supra* note 37.

police report to make a charging decision, their decision may be influenced by their own personal biases, prejudices, perspectives, experiences, and training. Anecdotally, prosecutors in Washington have noted that it is very common to have different prosecutors in the same office make wildly different charging decisions on the same set of facts.

When members of the public are injured or die during encounters with police, it is often the local prosecutor who decides whether to file charges. The State Attorney General and U.S. Attorney's Office may also investigate and charge, but that is not the norm. Experts note that when prosecutors, local, State or Federal, decline to charge, this decision can have an impact on communities, particularly those who face disproportionate rates of police violence.[41]

A. Disparities in charging

The evidence from jurisdictions across the U.S. suggests that defendant demographics unrelated to their legal case (e.g., gender and race) do sometimes influence charging decisions, although results have found inconsistent effects between locations and charge type. When looking only at gender, female defendants may be more likely to have the original charges against them dropped or lowered when compared to male defendants (although females with prior felonies may actually be treated more severely than male defendants).[42] For female defendants, having minor children may increase the chances of charges being dropped.[43] There is a gap in the research regarding outcomes for transgender, gender non-binary, and gender-nonconforming individuals.

The evidence from other state jurisdictions regarding the impact of race on charging is mixed. A meta-analysis of studies published between 1960 and 2012 found some evidence that race and

[41] *Suquamish Tribal Council Releases Statement on Police Shooting of Stonechild Chiefstick*, SUQUAMISH TRIBAL COUNCIL (Aug. 7, 2019), https://lastrealindians.com/news/2019/8/7/suquamish-tribal-council-releases-statement-on-police-shooting-of-stonechild-chiefstick; Richard Arlin Walker, *Residents Demand Accountability in Fatal Shooting of Chippewa Man*, INDIAN COUNTRY TODAY (July 16, 2019), https://indiancountrytoday.com/news/residents-demand-accountability-in-fatal-shooting-of-chippewa-man?redir=1.

[42] Carlos Berdejo, *Gender Disparities in Plea Bargaining*, 94 IND. L.J. 1247 (2019) (analyzing 45,000 misdemeanor and felony cases between 1999-2006 in Dane County, Wisconsin); Daniel Brice Baker & Shahidul Hassan, *Gender and Prosecutorial Discretion: An Empirical Assessment*, 31 J. PUB. ADMIN. RSCH. & THEORY 73, 73–90 (2021) (including an analysis of case management system data from an unnamed northern county between 2009-2011, examining 105,122 arrest charges).

[43] Frank A. Sloan et al., *Does Having a Minor Child Affect Criminal Charges and Sanctions Imposed on Female Defendants?*, WOMEN & CRIM. JUST. 1 (2019) (including an analysis of 836,384 female felony and misdemeanor defendants in North Carolina).

ethnicity play a role in charge filing decisions, specifically that Black and Latinx defendants had higher odds of being charged than white defendants. However, the study also found a wide variation between jurisdictions, suggesting that local contextual factors also shaped decision making.[44] More recent studies have found contradictory results, specifically that Black and Latinx defendants were more likely to have their case dismissed than white defendants in one jurisdiction,[45] but less likely to be diverted or dismissed in another.[46] In some jurisdictions, prosecutors may become aware of racial disparities in arrests and then use their discretion to dismiss cases if they believe the arrest was baseless or rooted in racially disparate policing practices (see "Section IX.B: Positive prosecutorial discretion and other interventions to reduce criminal justice disparities" below).

In the few studies that look at the intersection of gender and race, Black female defendants were found to have their arrest charges reduced or dropped less frequently than white females in one jurisdiction,[47] but more likely to have charges reduced in another jurisdiction.[48] There is evidence that defendant and victim demographics interact to influence charging decisions. For example, a study of Chicago homicide cases found that Black defendants charged with killing white victims received more harsh charges than all other defendant/victim pairs, and Black and Latinx defendants charged with killing Latinx strangers receive the most lenient charges.[49]

[44] Jawjeong Wu, *Racial/Ethnic Discrimination and Prosecution*, 43 CRIM. JUST. & BEHAV. 437 (2016) (including a meta-analysis of 26 studies from the U.S. examining differences in prosecution between white, Black, and Hispanic/Latinx defendants).
[45] Besiki L. Kutateladze et al., *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, 52 CRIMINOLOGY 514 (2014) (examining felony and misdemeanor cases [185,275 in total] accepted for prosecution by the District Attorney of New York's office between 2010-2011).
[46] Jacqueline G. Lee & Rebecca L. Richardson, *Race, Ethnicity, and Trial Avoidance: A Multilevel Analysis*, 31 CRIM. JUST. POL'Y REV. 422 (2020).
[47] Berdejo, *supra* note 42.
[48] Katrina Rebecca Bloch, Rodney L. Engen & Kylie L. Parrotta, *The Intersection of Race and Gender: An Examination of Sentencing Outcomes in North Carolina*, 27 CRIM. JUST. STUD. 419, 432 (2014) (including an analysis of over 39,000 felony defendants in North Carolina between 1999-2000).
[49] Christine Martin, *Influence of Race and Ethnicity on Charge Severity in Chicago Homicide Cases: An Investigation of Prosecutorial Discretion*, 4 RACE & JUST. 152, 154, 166 (2014). *See also McClesky v. Kemp*, 481 U.S. 279, 286-89, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

Finally, the defendant's prior record can be a factor—defendants with prior arrests or convictions on their record are less likely to have the charges against them dismissed,[50] and their records can justify their exclusion from diversion or treatment programs.[51] As discussed above, there is ample evidence of racially disproportionate effects in policing and arrests. Therefore, using a defendant's prior record to make charging decisions seems like a neutral policy, but it can actually reinforce disparities created in the past.[52]

B. Charging in Domestic Violence (DV) and Intimate Partner Violence (IPV) cases

The Washington Association of Prosecuting Attorneys directs prosecutors to take a victim-centered approach toward charging in DV and IPV cases: the victim's wishes for charging the abuser "should be taken into account, but should not control the decision."[53] DV and IPV charging guidelines help guide, but do not constrain, prosecutorial decision-making.

The limited national evidence regarding disparities in charging in these cases is mixed: one large study found that DV and IPV cases against Black and Hispanic defendants were more likely to be dismissed than cases against white defendants, and that cases for white victims were more likely to be prosecuted.[54] However, studies in other jurisdictions have found no significant effects of victim or defendant race, sex, or sexual orientation on charging decisions.[55] There is a lack of

[50] Ira Sommers, Jonathan Goldstein & Deborah Baskin, *The Intersection of Victims' and Offenders' Sex and Race/Ethnicity on Prosecutorial Decisions for Violent Crimes*, 35 JUST. SYS. J. 178 (2014) (examining data on 541 violent crimes from five jurisdictions (not including Washington) in 2003).
[51] John MacDonald et al., *Decomposing Racial Disparities in Prison and Drug Treatment Commitments for Criminal Offenders in California*, 43 J. LEGAL STUD. 155 (2014) (findings from an analysis of a random smaple of drug arrests (97,507 in total) from California from 1980-2009).
[52] Besiki Luka Kutateladze & Victoria Z. Lawson, *How Bad Arrests Lead to Bad Prosecution: Exploring the Impact of Prior Arrests on Plea Bargaining*, 37 CARDOZO L. REV. 973 (2016).
[53] ORFORD ET AL., *supra* note 38.
[54] Danielle M. Romain & Tina L. Freiburger, *Prosecutorial Discretion for Domestic Violence Cases: An Examination of the Effects of Offender Race, Ethnicity, Gender, and Age*, 26 CRIM. JUST. STUD. 289 (2013) (examining 1,009 DV charges brought in a large urban Midwest county in 2009).
[55] Patrick Q. Brady & Bradford W. Reyns, *A Focal Concerns Perspective on Prosecutorial Decision Making in Cases of Intimate Partner Stalking*, 47 CRIM. JUST. & BEHAV. 733 (2020) (including an analysis of 268 DV incidents reported to Rhode Island police between 2001 and 2005). In a separate study, researchers conducted a survey of 107 prosecutors from geographically diverse parts of the U.S., using vignettes of DV cases with the victim and defendant, gender or sexual orientation was manipulated to assess how these factors affected decisions to bring charges. Jennifer Cox et al., *Partiality in Prosecution? Discretionary Prosecutorial Decision Making and Intimate Partner Violence*, J. INTERPERSONAL VIOLENCE 1 (2019).

empirical evidence from Washington State regarding disparities in charging decisions in DV and IPV cases.

C. Charging in sexual assault cases

Nationally, social scientists have found evidence of high rates of attrition for sexual assault cases, with one large study finding that only 1.6% end up being tried in court while the rest are being dropped during investigation or charging.[56] The national evidence suggests that charging is a significant point of case attrition,[57] and the limited evidence from Washington State shows the same. In a 2001 study of sexual assault of female victims in Washington State, among the 15% of victims of sexual assault who reported the incidence to police, only about half of those saw charges filed.[58] The best national estimate is that charges are filed in 72% of sexual assault cases where arrests are made; however, less than one-fifth of cases reported to police result in an arrest.[59]

Researchers offer a variety of explanation. Some have theorized that prosecutors may choose to bring charges based on assumptions of how potential future juries would view the case, and interviews with prosecutors support this hypothesis .[60] The evidence suggests that prosecutors may believe that cases fitting stereotypical ideas of rape and rape victims have the best chances of winning in court.[61] Victims who are attacked by strangers, who are injured during the attack,

[56] MELISSA S MORABITO, LINDA M WILLIAMS & APRIL PATTAVINA, DECISION MAKING IN SEXUAL ASSAULT CASES: REPLICATION RESEARCH ON SEXUAL VIOLENCE CASE ATTRITION IN THE U.S. 237 (2019) (involving a large, Department of Justice-funded multi-state study analyzing 2,887 cases of sexual assault reported by female victims in six jurisdictions from 2008-2010).

[57] Eryn Nicole O'Neal, Katharine Tellis & Cassia Spohn, *Prosecuting Intimate Partner Sexual Assault: Legal and Extra-Legal Factors That Influence Charging Decisions*, 21 VIOLENCE AGAINST WOMEN 1237 (2015) (describing a qualitative analysis of Intimate Partner Sexual Assault complaints to the Los Angeles Police Department in 2008 that found only 19.8% of cases presented to the prosecutor resulted in filing of charges); Megan A. Alderden & Sarah E. Ullman, *Creating a More Complete and Current Picture: Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Cases*, 18 VIOLENCE AGAINST WOMEN 525 (2012) (reporting that an assessment of criminal sexual assault cases in a large Midwestern police department in 2008 found that only 9.7% of cases resulted in charges).

[58] LUCY BERLINER, SEXUAL ASSAULT EXPERIENCES AND PERCEPTIONS OF COMMUNITY RESPONSE TO SEXUAL ASSAULT: A SURVEY OF WASHINGTON STATE 56 (2001).

[59] MORABITO, WILLIAMS & PATTAVINA, *supra* note 56 (describing that an estimated 18.8% of cases reported to police are cleared by arrest. This study examined cases of sexual assault with female victims ages 12+).

[60] *Id.*

[61] See "Chapter 8: Consequences of Gender-Based Violence: Domestic Violence and Sexual Violence" for more about this.

or who are attacked in public places are more likely to see charges brought against their attackers.[62] Victims with a prior criminal record, who have mental health issues, who used alcohol before the assault, or who invited the attacker into their home are less likely to have charges brought against their attackers.[63] However, these charging patterns do not align with the reality of sexual assault. The national and Washington State data show that most sexual assaults are committed by a person known to the victim; attacks often take place in the victim's or suspect's home; and force is not always used.[64] There is substantial evidence supporting the existence of stereotypes and assumptions about rape in the general public.[65]

Victim non-cooperation is also cited as a reason for rejecting charges.[66] There is a lack of empirical evidence regarding the contextual factors that influence victims to withdraw cooperation. In interviews from other U.S. jurisdictions, prosecutors note that if they anticipate challenges with the case, they may present these weaknesses to victims to discourage them from moving forward; and that inconsistent handovers or snags in the transition when cases pass from law enforcement to prosecutors could potentially be points where victims choose to end their involvement.[67] Victims could also become frustrated and less interested in cooperating after long wait times. Before the pandemic, sexual assault victims in King County waited on average eight months after arraignment of a defendant for any disposition in their case; since the pandemic

[62] Tara N. Richards, Marie Skubak Tillyer & Emily M. Wright, *When Victims Refuse and Prosecutors Decline: Examining Exceptional Clearance in Sexual Assault Cases*, 65 CRIME & DELINQUENCY 474 (2019).
[63] Dawn Beichner & Cassia Spohn, *Modeling the Effects of Victim Behavior and Moral Character on Prosecutors' Charging Decisions in Sexual Assault Cases*, 27 VIOLENCE & VICTIMS 3 (2012) (an analysis of adult sexual assault cases from 1996-1998 in Miami, Kansas City and Philadelphia); MORABITO, WILLIAMS & PATTAVINA, *supra* note 56.
[64] Michael Planty et al., *Female Victims of Sexual Violence, 1994-2010* (2013), http://doi.apa.org/get-pe-doi.cfm?doi=10.1037/e528212013-001. In a review of national incidents of sexual assault against female victims age 12 and older from 200-2010, the Department of Justice reports that 78% of incidents involved an offender who was a family member, intimate partner, friend or acquaintance; only 10% involved a weapon; 35% involved an injury that was later treated; 55% of incidents occurred in or near the victim's home, and an additional 12% in the home of a friend or acquaintance. *Id. See also* TODD & BASSETT, *supra* note 34. Of all rape incidents reported to police in Washington State in 2019, 66.3% occurred at a residence, and only 23.1% were committed by someone who was a stranger to the victim. *Id.*
[65] Katie M. Edwards et al., *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 SEX ROLES 761–773 (2011); Jericho M. Hockett et al., *Rape Myth Consistency and Gender Differences in Perceiving Rape Victims: A Meta-Analysis*, 22 VIOLENCE AGAINST WOMEN 139–167 (2016).
[66] *Id.*
[67] MORABITO, WILLIAMS & PATTAVINA, *supra* note 56, at 75–96. Morabito et al. conducted interviews with 24 prosecutors in six unnamed jurisdictions.

began, that wait has extended to an average 19 months.[68] The King County Auditor's Office notes, "Waiting can be emotionally draining and difficult for victims who are seeking closure, which can discourage them from continuing with prosecution."[69]

There is some evidence to suggest that victim and suspect demographics influence charging decisions in sexual assault cases. A 2019 systematic review of 34 articles published in the U.S. concluded that in sexual assault cases, white victims were more likely than Black victims to have charges filed in their cases, and Black suspects were more likely than white suspects to be charged with more serious crimes and for their charges to be filed as felonies.[70]

With regard to all of these considerations, it is important to note that the vast majority of social science research on this topic focuses on cisgender female victims of male-perpetrated assault. And, as noted in "Chapter 8: Consequences of Gender-Based Violence: Domestic Violence and Sexual Violence," transgender individuals report very high rates of sexual violence and unwanted sexual contact.[71] In addition, there is national evidence that male victims of sexual assault are more likely to have their cases declined by prosecutors.[72] Finally, there is a lack of evidence regarding case charging decisions for victims who are LGBTQ+.

D. Charging in offenses related to the sex industry

See "Chapter 10: Commercial Sex and Exploitation" for a discussion of charging for charging offenses related to the sex industry.

[68] Jesse Franklin, *Prioritize Sexual-Assault Victims in Court Backlog*, SEATTLE TIMES (May 21, 2021).
[69] MIA NEIDHARDT ET AL., SEX OFFENSE CASES: SOME VICTIMS AND THEIR CASES MAY BE HARMED BY GAPS (2020), https://kingcounty.gov/~/media/depts/auditor/new-web-docs/2020/sai-2020/sai-2020.ashx?la=en.
[70] Jessica Shaw & HaeNim Lee, *Race and the Criminal Justice System Response to Sexual Assault: A Systematic Review*, 64 AM. J. CMTY. PSYCH. 256 (2019). The majority of studies only assessed outcomes based on White and Black race of the victim or suspect; one included "Hawaiian" as a race variable but was published in the 1980s.
[71] *See* SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf. In the 2015 U.S. Transgender Survey, nearly half (47%) of respondents reported lifetime prevalence of sexual assault, and 10% reported having been sexually assaulted in the previous year *Id.* at 4-5. While different survey results cannot be compared exactly due to difference in wording of questions, this does appear to be higher than rates for lifetime prevalence of sexual violence for U.S. females.
[72] Richards, Tillyer & Wright, *supra* note 62.

E. Other charging decisions

The recent criminalization of certain activities by the legislature has given prosecutors additional charging tools. One example is the case of "drug-induced homicide," or controlled substances homicide, in which a person can be held responsible for the accidental overdose death of someone to whom they have provided illegal drugs. In Washington State, this is a class B felony.[73] The media report that the use of this law in charging decisions varies widely by jurisdiction. For example, a KING 5 story from 2016 reported that Bremerton police and prosecutors saw this law as an opportunity to seek accountability for dealers in the face of skyrocketing opioid overdose deaths, while the King County prosecutor preferred a public health approach to the opioid epidemic.[74] Notably, while many supporters of this law are focused on punishing dealers, the Washington law doesn't actually specify that the substance must be sold, only "delivered."[75] Researchers note that often there is not a clear line between user and dealer, as people with substance use disorder may also sell drugs to support their own habit.[76] One researcher analyzed state court records from Pennsylvania, concluding that about half of those prosecuted under this crime were friends or partners of the person who died—and about half of those were Black or Hispanic defendants providing to a white user.[77] There is a lack of systematic evidence regarding use of this law in charging decisions in both Washington State and in the U.S.

F. Pre-trial diversion

In many jurisdictions, prosecutors have the option to divert a defendant into a program for drug rehabilitation, community service, job training, or other community programs. If the defendant agrees, the charges against them will be dismissed upon successful completion of the program. One Washington State expert noted anecdotally that prosecutors are the "gatekeepers" to pre-

[73] RCW 69.50.415.
[74] Taylor Mirfendereski, *Fighting Heroin: Dealers Charged with Homicide when Customers Die*, KING 5 NEWS, https://www.king5.com/article/news/local/fighting-heroin-dealers-charged-with-homicide-when-customers-die/281-424682320.
[75] RCW 69.50.415.
[76] Kathryn Casteel, *A Crackdown on Drug Dealers Is Also a Crackdown on Drug Users*, FIVETHIRTYEIGHT (Apr. 5, 2018), https://fivethirtyeight.com/features/a-crackdown-on-drug-dealers-is-also-a-crackdown-on-drug-users/.
[77] Leo Beletsky, *America's Favorite Antidote: Drug-Induced Homicide in the Age of the Overdose Crisis*, UTAH L. REV. 833 (2019).

trial diversion programs, with the final say for who will be accepted to alternative options like drug court or mental health court: "Plenty of defense attorneys 'refer' clients to these alternative programs, and get frustrated when the prosecutor gatekeeper has the final say of whether the person is accepted."

Nationally, evidence suggests that racial disparities exist in pretrial diversion programs, as white defendants are more likely to receive pretrial diversion than Black or Latinx defendants (and more likely than Asian and Native American defendants in the studies that did include that analysis).[78] Some researchers note that if diversion programs have exclusion criteria relating to prior arrests or convictions, this could have the effect of amplifying disparities from earlier points in the system; however, disparities persist even when researchers compare defendants with similar criminal records.[79] These studies did not disaggregate data by gender, and few examine race and ethnicity beyond white, Black, and Latinx. There is a lack of data in Washington State regarding disparities in pretrial diversion by race and ethnicity, gender, or other factors; and there is no entity currently tracking this information statewide.

G. Mandatory minimums

"Chapter 11: Incarcerated Women in Washington" provides an overview of legislative changes in Washington that created enhanced sentences and mandatory minimum sentences for charges relating to the use of firearms and deadly weapons, and the commission of offenses in drug-free zones. Research on the use of mandatory minimums in federal courts has shown evidence of racial disparities;[80] however, research from Washington State is limited. Analysis of drug-free zone charges in Washington State from 1999-2005 suggested that these charges were primarily

[78] Lee & Richardson, *supra* note 46, Black and Hispanic defendants were found to be less likely to receive pretrial diversion than white defendants; MacDonald et al., *supra* note 51, finding that a large proportion of the difference between Black and white drug treatment diversion rates was unaccounted for when controlling for case factors; Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged With Felonies and Processed in State Courts*, 3 RACE AND JUSTICE 210–238 (2013), examining data on male felony defendants 1990-2006 and finding that white defendants were more likely to receive diversion than Black, Latinx, Asian and Native American defendants, regardless of prior convictions.

[79] Schlesinger, *supra* note 78: " Black, Latino, and Asian and Native American defendants have odds of receiving pretrial diversion that are 28%, 13%, and 31% lower, respectively, than those of white defendants with similar legal characteristics." (p. 224).

[80] *See*, *e.g.*, CODY TUTTLE, RACIAL DISPARITIES IN FEDERAL SENTENCING: EVIDENCE FROM DRUG MANDATORY MINIMUMS (2019), http://econweb.umd.edu/~tuttle/files/tuttle_mandatory_minimums.pdf.

being used to encourage guilty pleas or, as one lawyer put it, "as a 'trial penalty' which helps to persuade defendants that they should plead guilty rather than risk facing an enhanced prison term."[81] Although there are far fewer crimes carrying mandatory minimums under Washington State law than under federal law, they do exist. There is a lack of current data or research regarding the use of mandatory minimum charges and effects on gender, race, ethnicity or other factors in Washington State.

V. Prosecutorial Discretion in Pretrial Detention and Bail Recommendations

In Washington State, the majority of people confined in local jails have not yet been convicted of a crime—they are being held pretrial, either without the possibility for release or unable to post bail.[82] Nationally, among the female population, women living in poverty and Black women are detained pretrial at a disproportionately high rate.[83] Pretrial detention has negative impacts on later case outcomes—defendants detained pretrial are more likely to be convicted and receive harsher sentences (see "Chapter 11: Incarcerated Women in Washington" for a more thorough discussion of this topic).

While prosecutors and defense counsel make recommendations about whether to release, on what conditions, and at what bail amount, judges make the decision. Judicial discretion thus serves as a check on prosecutorial discretion with regard to release and bail. There is a lack of data regarding the impact of these judicial decisions by race, ethnicity, gender, or other factors in all counties in Washington State. The reason is that we have no statewide system for tracking or reporting this data. Yakima County, with funding support from the U.S. Department of Justice,

[81] JUDITH GREENE, KEVIN PRANIS & JASON ZIEDENBERG, DISPARITY BY DESIGN: HOW DRUG-FREE ZONE LAW IMPACT RACIAL DISPARITY - AND FAIL TO PROTECT YOUTH 39 (2006), https://justicepolicy.org/research/disparity-by-design-how-drug-free-zone-laws-impact-racial-disparity-and-fail-to-protect-youth.
[82] INTISAR SURUR & ANDREA VALDEZ, PRETRIAL REFORM TASK FORCE: FINAL RECOMMENDATIONS REPORT 39 (2019).
[83] *See* Kelsey L. Kramer & Xia Wang, *Assessing Cumulative Disadvantage against Minority Female Defendants in State Courts*, 36 JUST. Q. 1284 (2019) (assessing felony case data 1990-2009 from 40 large urban counties in the U.S., and finding that Black female defendants are more likely to be detained pretrial than white female defendants); BERNADETTE RABUY & DANIEL KOPF, DETAINING THE POOR 20 (2016) (demonstrating that among people held in jail unable to meet bail, Black and Hispanic women have lower pre-incarceration incomes than their male and white counterparts).

analyzed pretrial detention rates and disparities from 2014-2016 as part of a system improvement process. They found statistically significant racial disparities in pretrial release rates: white defendants were released at higher rates than were Latinx/Hispanic, Native American, Black, Asian, and Pacific Islander defendants.[84] It was reported that this disparity disappeared after Yakima County implemented a pretrial improvement process.[85]

VI. Prosecutorial Discretion in Plea Bargaining

Despite the fact that criminal defendants have a right to a trial by jury, very few defendants exercise this right. One national review of state court plea bargaining concluded that well over 90% of cases are resolved through this process.[86] Plea bargains allow prosecutors to move cases through the criminal justice system more quickly: they "serve an important role in the disposition of today's heavy calendars."[87]

The charging policy of a particular office plays a large part in how a case is plea bargained. As explained by an expert familiar with prosecution practices nationally and in Washington State, offices employing a "conservative" charging policy start out with the lowest level of offense, and fewest number of offenses, and threaten to increase the seriousness of the offense or the number of the offenses charged if the defendant chooses trial over the "as charged" plea offer. Conversely, under a "liberal" charging policy, the negotiation works in reverse, lowering the level of seriousness of the offense or "dismissing" one or more charges in exchange for a plea of guilty. Many times, this charging policy changes according to the philosophy of the elected or appointed

[84] CLAIRE M B BROOKER, YAKIMA COUNTY, WASHINGTON PRETRIAL JUSTICE SYSTEM IMPROVEMENTS: PRE- AND POST-IMPLEMENTATION ANALYSIS 25 (2017).
[85] *Id.*
[86] Brian A Reaves, *Felony Defendants in Large Urban Counties, 2009 - Statistical Tables*, STAT. TABLES 40 (2013), analyzing felony case disposition data from the 75 largest urban counties in the US and finding that 97% of felonies were resolved through plea; Besiki L. Kutateladze & Victoria Z. Lawson, *Is a Plea Really a Bargain? An Analysis of Plea and Trial Dispositions in New York City*, 64 CRIME & DELINQUENCY 856–887 (2018) (finding that 99.2% of misdemeanor cases processed through the New York District Attorney's office were resolved by plea).
[87] *Santobello v. New York*, 404 U.S. 257, 264, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971).

chief prosecutor. Researchers and experts note that both policies have a coercive effect on defendants.[88]

Plea deals are particularly difficult to study empirically, as prosecutors are not required to publicly report deals offered and rejected, or any other aspect of the negotiations. There is no entity in Washington State that systematically tracks demographics of defendants and plea deal resolutions. However, in an examination of sex offense cases in King County, the King County Auditor found that "white defendants represented by public defenders were 10 percent more likely to resolve through a plea agreement compared to cases with non-white defendants."[89] Similarly, the national, literature generally shows that white defendants are more likely to plead guilty than Black and Latinx defendants, who are more likely to go to trial.[90] The same pattern has been found among juvenile justice defendants.[91] However, this data can't tell us empirically if white defendants are being offered plea deals at higher rates than Latinx and Black defendants, or if prosecutors offer less attractive deals to Black and Latinx defendants who then turn those deals down, or if Black and Latinx defendants are less likely to take offered plea bargains. The data also cannot tell us whether the public defense offices studied devoted equivalent amounts of time to Black, Native, and other clients of color as they did to white clients. There is some evidence that when Black and Latinx defendants take plea deals, those deals are less likely to reduce initial charges (noted below), but again, data noting the terms of the final deal taken can't

[88] Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When do Prosecutors Cross the Line?*, 17 NEV. L.J. (2017); James Babikian, *Cleaving the Gordian Knot: Implicit Bias, Selective Prosecution, & Charging Guidelines*, 42 AM. J. CRIM. L. 139 (2015); LINDSEY DEVERS, BAIL DECISIONMAKING: RESEARCH SUMMARY (2011).
[89] MIA NEIDHARDT ET AL., SEX OFFENSE CASES: SOME VICTIMS AND THEIR CASES MAY BE HARMED BY GAPS 33 (2020), https://kingcounty.gov/~/media/depts/auditor/new-web-docs/2020/sai-2020/sai-2020.ashx?la=en. The King County Auditor's office examined a random sample of sexual offense cases (not just sexual assault) reported in 2017. The majority of these were child sex offense cases. Race was missing ("unspecified) in 20% of cases. This analysis did not control for type or seriousness of accused offense.
[90] Lee & Richardson, *supra* note 46 (examining 58,248 state court felony case from 40 large urban counties 2000-2009, and finding that Black defendants were less likely to plead guilty than white or Latinx defendants); Sommers, Goldstein & Baskin, *supra* note 50 (examining violent crime data from 5 US jurisdictions and finding that Black male defendants were less likely to plead guilty than white defendants, especially if the victim of the crime was white); Christi Metcalfe & Ted Chiricos, *Race, Plea, and Charge Reduction: An Assessment of Racial Disparities in the Plea Process*, 35 JUST. Q. 223 (2018) (in an analysis of 907 felony cases from a public defender's office in a large Florida county, 2002-2010, finding that Black females were less likely to plead guilty than white females).
[91] John D. Burrow & Patrick G. Lowery, *A Preliminary Assessment of the Impact of Plea Bargaining Among a Sample of Waiver-Eligible Offenders*, 13 YOUTH VIOLENCE & JUV. JUST. 211 (2015) (from an analysis of juvenile cases eligible for waiver to adult criminal court in South Carolina, 2002-2006 (n=241)).

account for these other factors. Note that the majority of studies only examine Black, white, and Latinx race and ethnicity.

Social scientists have found evidence of disparities in plea deals by comparing the plea deals taken by defendants and controlling for legally relevant factors. The national research suggests that defendants who are detained (either denied bail or unable to pay bail and secure their release) are more likely to take plea deals, and take them more quickly, than defendants who are released (read more about pretrial detention in "Chapter 11: Incarcerated Women in Washington").[92] Defendants with prior arrests appear to take harsher plea deals (with more serious charges and longer sentence recommendations) than defendants without prior arrests.[93] Black and Latinx defendants are less likely to receive plea deals that include reductions in charge severity; this finding is true across and within gender groups.[94]

[92] Meghan Sacks & Alissa R. Ackerman, *Pretrial Detention and Guilty Pleas: If They Cannot Afford Bail They Must Be Guilty*, 25 CRIM. JUST. STUD. 265 (2012). A 2004 review of 634 New Jersey cases found that "defendants who were held pretrial in this sample had their cases disposed of quicker than defendants who were released." *Id.* at 275. *See also* Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201 (2018). Dobbie, Goldin, and Yang examined 421,850 cases from Philadelphia and Miami-Dade between 2006 and 2014, and found that defendants detained pretrial are more likely to plead guilty. They note that defendants released from jail are in a better position to bargain regarding plea deals, while those detained may take the first deal offered in order to obtain release. *See also* Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017) (examining 380,689 misdemeanor cases in Harris County, Texas between 2008 and 2013 and finding that defendants detained pretrial plead guilty at a rate 25% higher than those released); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J. L. & ECON. 529 (2017) (examining 24,679 felony and misdemeanor cases in New York City courts between 2009 and 2013 finding that defendants detained pretrial are more likely to plead guilty, and when they do plead, the deals they take are more severe); Nick Petersen, *Low-Level, but High Speed?: Assessing Pretrial Detention Effects on the Timing and Content of Misdemeanor versus Felony Guilty Pleas*, 36 JUST. Q. 1314 (2019) (an analysis of state court felony data between 1990 and 2004 showed that defendants detained pretrial plead guilty 2.86 times faster than defendants who were released).

[93] Kutateladze & Lawson, *supra* note 52 (reporting findings from an analysis of 211,056 felony and misdemeanor case processings in the District Attorney of New York's office between 2010 and 2011). The authors found that when prosecutors considered previous arrests, "Blacks become 20 percent more likely and Latinos 10 percent more likely to receive a punitive plea offer" than their white counterparts. *Id.* at 986.

[94] Brian D. Johnson & Pilar Larroulet, *The "Distance Traveled": Investigating the Downstream Consequences of Charge Reductions for Disparities in Incarceration*, 36 JUST. Q. 1229 (2019) (examining 20,837 felony defendants in New York between 2010 and 2011, and finding that White female defendants received an average 46.5% "discount" on initial charges in plea deals, compared to a 45.7% reduction for Latina female defendants and 37.3% reduction for Black female defendants); Besiki Luka Kutateladze, *Tracing Charge Trajectories: A Study of the Influence of Race in Charge Changes at Case Screening, Arraignment, and Disposition*, 56 CRIMINOLOGY 123, 146 (2018) (analyzing 170,572 felony and misdemeanor cases in New York between 2010 and 2011, and finding that Black and Latinx defendants were "much less likely than Asian and White defendants to experience a reduction in charges via plea acceptance").

It is almost certain that some proportion of defendants who take guilty pleas are innocent, either of the crime they pleaded guilty to, or of any crime at all.[95] Empirical studies with the lay population show that when people are faced with a choice between a possibly severe consequence later and a known reduced punishment immediately, many will take the reduced punishment even if they are factually innocent.[96] And criminal defense attorneys note that, in some cases, they think there are circumstances when pleading guilty despite being innocent might be to the client's benefit, for example by securing their release from jail or by avoiding a potential trial sentence much more severe than the plea offer.[97] Defendants who are detained pretrial for crimes that might not carry a carceral sentence (such as those charged with low-level misdemeanor offenses) may be particularly vulnerable to making a "false" guilty plea. As one pair of researchers notes, "obtaining a plea from an individual who is deprived of freedom tells you very little about whether or not that person is actually guilty of the crime."[98] A similar pattern has been observed in Tacoma, Washington, where one public defender notes, "poor people will

[95] *See, e.g.*, *Causes of Wrongful Conviction*, WASH. INNOCENCE PROJECT (2021), https://wainnocenceproject.org/causes ("Sometimes a procedurally fair trial can result in an innocent person's conviction. Mistaken eyewitness identification and false confessions can lead to wrongful convictions. Prosecutors can fail to turn over evidence, or defense attorneys don't provide effective counsel. In many cases, racism and implicit bias play a significant role in the wrongful conviction of innocent people of color.").

[96] *See, e.g.*, Lucian E. Dervan & Vanessa Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013) (explaining that from an empirical experiment with 82 college students accused of cheating, more than half of the "innocent" students chose to "falsely admit guilt in return for a reduced punishment"); Vanessa A. Edkins & Lucian E. Dervan, *Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences Against Pretrial Detention in Decisions to Plead Guilty.*, 24 PSYCH., PUB. POL'Y, & L. 204 (2018) (in a vignette study with 155 college students and 206 adults, between one third and one half of participants assigned to the innocent group accepted a guilty plea); Ryan A. Schneider & Tina M. Zottoli, *Disentangling the Effects of Plea Discount and Potential Trial Sentence on Decisions to Plead Guilty*, 24 LEGAL & CRIMINOLOGICAL PSYCH. 288 (2019) (in a vignette study with 1,225 adults recruited online, 11% of "innocent" participants accepted a guilty plea); Miko M. Wilford, Gary L. Wells & Annabelle Frazier, *Plea-Bargaining Law: The Impact of Innocence, Trial Penalty, and Conviction Probability on Plea Outcomes*, 46 AM. J. CRIM. JUST. 554 (2021) (describing a vignette study with 142 college students that found false guilty pleas exceeding 50%).

[97] Rebecca K. Helm et al., *Limitations on the ability to negotiate justice: attorney perspectives on guilt, innocence, and legal advice in the current plea system*, 24 PSYCH., CRIME & L. 915 (2018). In interviews with 189 criminal defense attorneys from across the U.S., over 40% said they had advised a client who they thought was innocent to plead guilty, and over 78% said that, given the current system, there are cases when innocent defendants should plead guilty. *Id.*

[98] Vanessa A. Edkins & Lucian E. Dervan, *Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences Against Pretrial Detention in Decisions to Plead Guilty.*, 24 PSYCH., PUB. POL'Y, & L. 204, 212 (2018).

plead to get out of jail because they can't post the bail."[99] According to one expert in Washington State, individuals vulnerable to assault or sexual violence, including transgender people housed in facilities by the sex assigned to them at birth, may accept guilty pleas to escape a dangerous situation.[100]

Even when detained defendants are facing a carceral sentence where release will not be the outcome of their plea, the crowding, discomfort, and lack of services in many local and county jails may push defendants to plead guilty in order to enter prison more quickly. This appears to be particularly true during the COVID-19 pandemic, as trials are being delayed and the high turnover in jails puts detained defendants at an elevated risk for contracting the virus.[101] As one Washington State defense attorney noted, "In-custody clients are facing a totally different situation than they were pre-COVID . . . Without trials clients are forced to choose between continued COVID exposure and the moving target that is their constitutional right to a speedy and public jury trial."[102] More than two-thirds of defense attorneys surveyed in Washington State in December 2020 said that speedy trial suspensions and jury trial suspensions are causing more clients to plead guilty to get out of jail.[103]

The U.S. Supreme Court has held that when defendants plead guilty and waive their constitutional rights, those pleas "not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[104] However, the existing qualitative research suggests that many plea deals are made because the defendant is under pressure—for example, defendants detained pretrial may plead guilty to secure their release and return to work and family obligations.[105] Additionally, plea deals may be

[99] KAITLYN DUNN, MATT MUNOZ & ANDREW TAYLOR, EXAMINING DISPARITIES AND IMPLICIT BIAS IN THE PROSECUTION OF MISDEMEANORS IN TACOMA MUNICIPAL COURT (2018), https://s3-us-west-2.amazonaws.com/uw-s3-cdn/wp-content/uploads/sites/136/2019/01/12004328/LCY_ImplicitBias.pdf.
[100] For one transgender women's story of her experience being housed with male inmates in jail see *She Protested In Seattle, Then Spent 2 "Terrifying" Days In Jail,* PATCH (June 8, 2020), https://patch.com/washington/seattle/she-protested-seattle-then-spent-2-terrifying-days-jail.
[101] Thea Johnson, *Crisis and Coercive Pleas*, 110 J. CRIM. L. & CRIMINOLOGY ONLINE 1 (2020).
[102] KATRIN JOHNSON & JASON SCHWARTZ, DEFENDING CLIENTS IN THE COVID-19 ENVIRONMENT: SURVEY RESULTS FROM PRIVATE AND PUBLIC DEFENSE COUNSEL 19 (2021).
[103] KATRIN JOHNSON & JASON SCHWARTZ, DEFENDING CLIENTS IN THE COVID-19 ENVIRONMENT: SURVEY RESULTS FROM PRIVATE AND PUBLIC DEFENSE COUNSE*l* (2021) (a total of 396 defense attorneys responded from 34 counties statewide).
[104] *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)
[105] Edkins & Dervan, *supra* note 96.

made with limited understanding of the details and consequences of the deal. Federal and state law requires the court to ensure that the defendant understands the terms and consequences of the plea deal before the court accepts it. But given the press of cases, particularly in our most crowded limited jurisdiction courts (handling misdemeanors and gross misdemeanors), problems can arise.

A major aspect of the defense attorney role is to communicate well with their clients. Defendants' confusion regarding plea bargains often happens largely because of the lack of time public defenders can spend on their cases. In many jurisdictions nationally, they carry staggeringly high caseloads, resulting in little time for client communication. In Washington, public defenders and their clients' situation vastly improved nearly a decade ago, when the Washington Supreme Court adopted the Standards for Indigent Defense, which mandate reasonable caseload limits for all public defense attorneys. A public defender can handle no more than 150 felonies, or 250 juvenile cases, or 400 misdemeanor cases yearly, providing more hours to fulfill their roles, including discussing plea bargains with their clients. The caseload limits are not perfect; they are inconsistently applied, and the specifics on how to count cases are a subject of continued discussion.[106] An earlier public defense pilot program in Thurston and Whatcom counties showed that when public defense attorney caseloads were reduced, they spent one-quarter to one-third of their time per case communicating with their clients.[107] In addition, during the past few years, numerous trainings on client communication have been presented by the Washington Defender Association and the Washington State Office of Public Defense, attended by many hundreds of public defense attorneys.[108]

The "knowing and voluntary" standard set by the Supreme Court requires that defendants be made aware of the direct consequences of their guilty plea, but there is no requirement that

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[107] BILL LUCHANSKY, THE PUBLIC DEFENSE PILOT PROJECTS: WASHINGTON STATE OFFICE OF PUBLIC DEFENSE (2010), http://www.opd.wa.gov/documents/0058-2010_PilotProject.pdf.

[108] *Resources: Training By Year*, WASH. DEFENDER ASS'N (2021), https://defensenet.org/resource-category/trainings-by-year; *Status Reports on Public Defense in Washington State 2006–2009*, WASH. STATE OFF. OF PUB. DEFENSE (2021), https://opd.wa.gov/quicklink-report.

defendants be made aware of all the "collateral consequences,"[109] the formal and informal penalties resulting from criminal convictions. Plea tender forms in Washington have limited treatment of collateral consequences: they only note collateral consequences regarding the right to vote and government assistance.[110] As "Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families" notes, criminal convictions can also limit access to housing, employment, and education, and can have broader impacts on a person's family and wider community. Individuals may be unaware of these life-long consequences when they give up their rights to a trial and take a guilty plea.

Individuals who are Deaf, Hard of Hearing, or DeafBlind (D/HH/DB) or who have limited English proficiency (LEP) require access to a certified interpreter in order to understand and knowingly agree to a plea bargain. However, as discussed in "Chapter 2: Communication and Language as a Gendered Barrier to Accessing the Courts," limited funds, a lack of certified interpreters for languages of lesser diffusion, and court staff unfamiliar with the process for requesting an interpreter may lead to delays and difficulties in securing certified interpreters for court proceedings. Experts in Washington State note anecdotally that the idea of negotiating a plea deal, even when interpreted into a person's first language, is a challenging idea to grasp: "there's lots of confusion. Immigrants give odd looks regarding 'pleading guilty to a lesser charge.'" Even among populations fluent in spoken and written English, defendants may face barriers to full comprehension of the terms and consequences of a plea deal. As noted in "Chapter 2: Communication and Language as a Gendered Barrier to Accessing the Courts," individuals with cognitive disabilities are over-represented in the incarcerated population, particularly among the

[109] Carlie Malone, *Plea Bargaining and Collateral Consequences: An Experimental Analysis*, 73 VAND. L. REV. 1161 (2020). Although the American Bar Association encourages defense attorneys to discuss collateral consequences with defendants, not doing so is not enough basis for defendants to subsequently appeal on the basis of inadequate defense. *Id.* The U.S. Supreme Court changed its consideration of collateral consequences when evaluating ineffective assistance of counsel claims from dividing them into either direct or collateral consequences to the current manner of considering the severity of the consequence instead. *See, e.g.*, Paul Quincy, *Right to Be Counseled: The Effect of Collateral Consequences on the* Strickland *Standard*, 20 U. PA. J. CONST. L. 763 (2017); Soojin Kim, United States v. Reeves*: The Struggle to Save the Direct/Collateral Consequences Test After* Padilla*,* 62 CATH. U. L. REV. 853 (2013).

[110] *Guilty Plea Statement*, WASHINGTON COURTS (2021), https://www.courts.wa.gov/forms/documents/CrR4.2_g_Non-Sex percent20Offense percent201.1.21.pdf.

female population.[111] These disabilities could include language impairments that impact defendant decision-making in the plea deal process.

Meeting the "knowing and voluntary" standard for juveniles may be particularly challenging. Research on human development and decision-making note that children and youth process information and make decisions differently than adults do—thus why the juvenile justice system is separate from the adult system.[112] Cognitive development research has found that youth are also more easily moved by social influence,[113] and tend to weigh immediate gratification more heavily than long-term consequences.[114] Vignette experiments in the lay population nationally suggest that juveniles may be more likely to plead guilty compared to adults.[115] The evidence suggests that youth involved in the criminal justice system have very limited understanding of the proceedings, their rights, and the conditions and requirements placed on them. "Chapter 9: Juvenile Justice and Gender and Race Disparities" notes that youth with intellectual and developmental disabilities appear to be over-represented in the juvenile justice system nationally.[116] Youth involved in the juvenile justice system also have, on average, lower academic achievement than their peers.[117] Given that legal language can be difficult for any person to understand, it seems reasonable to expect that justice-involved youth might face particularly high barriers to comprehension. This has been supported by empirical evidence in Washington State and nationally. In Washington, a team of researchers partnered with the Clark County courts and Benton-Franklin court system to assess how well youth understood court proceedings.[118] They approached 20-30 individual youth in each court and requested permission to accompany them during their court appearance, and to conduct a short survey immediately

[111] JENNIFER BRONSON & MARCUS BERZOFSKY, DISABILITIES AMONG PRISON AND JAIL INMATES, 2011–12 13 (2015).
[112] Jean J. Cabell & Shawn C. Marsh, *Swing and a Miss: Reflections on the "Voluntariness" of Pleas in Juvenile Court*, 117 CHILDREN & YOUTH SERVS. REV. 1 (2020).
[113] *Id.*
[114] Rebecca K. Helm, *Cognitive Theory and Plea-Bargaining*, 5 POL'Y INSIGHTS FROM BEHAV. & BRAIN SCIS. 195 (2018).
[115] *Id.*; Allison D. Redlich & Reveka V. Shteynberg, *To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions.*, 40 LAW & HUM. BEHAV. 611 (2016).
[116] DEV. SERVS. GRP., INC., LITERATURE REVIEW: YOUTHS WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES IN THE JUVENILE JUSTICE SYSTEM (2017), https://www.ojjdp.gov/mpg/litreviews/Intellectual-Developmental-Disabilities.pdf.
[117] DEV. SERVS. GRP., INC., EDUCATION FOR YOUTH UNDER FORMAL SUPERVISION OF THE JUVENILE JUSTICE SYSTEM (2019), https://ojjdp.ojp.gov/mpg/literature-review/education-for-youth-in-the-juvenile-justice-system.
[118] ROSA PERALTA ET AL., WASHINGTON JUDICIAL COLLOQUIES PROJECT: A GUIDE FOR IMPROVING COMMUNICATION AND UNDERSTANDING IN JUVENILE COURT (2012).

after. They found that youth overall showed very little understanding of the proceedings. Nearly one-third of youth interviewed told researchers they had not had a defense attorney present—even though researchers had confirmed they all did.[119]

Similar results were found in interviews with youth who had pleaded guilty to felony offenses in adult court in New York City.[120] Most youth didn't understand even the basic terms of their plea deal or know they'd had the option to go to trial; and none knew that they had waived their right to appeal.[121] Juvenile public defenders from an urban, East Coast jurisdiction confirmed these findings, reporting in interviews that they often don't have enough time to discuss plea deals thoroughly with their clients, as plea offers are often made on the morning of a trial date.[122] These attorneys spent, on average, under an hour discussing plea deals with their clients, focusing primarily on the charges being brought, the sentence on offer, and the evidence presented by the prosecution. Relatively few said they review the rights being waived in the plea deal, and fewer discuss other collateral consequences.[123] Unsurprisingly, under such conditions, "false guilty" pleas do occur. In interviews with youth incarcerated and on probation in two separate studies, researchers found that a quarter or more of youth claimed to be innocent of

[119] *Id.* Most of the youth surveyed were youth of color: 49% Latinx, 39% white, 6% multiracial, 4% Black, and 2% some other race. This research led to the development of the Colloquies Project, a toolkit for courts and judges to improve communication with justice-involved youth. The Colloquies Projects has been implemented in several counties in Washington State, as well as in several other states, and has been shown to greatly increase youth comprehension of court forms and proceedings. However, as the project implementation often depends on key stakeholders within the courts, this project is no longer implemented in Washington State. Personal communication with Rosa Peralta and George Yeannakis (Apr. 30, 2021).

[120] Tarika Daftary-Kapur & Tina M. Zottoli, *A First Look at the Plea Deal Experiences of Juveniles Tried in Adult Court*, 13 INT'L J FORENSIC MENTAL HEALTH 323 (2014) (interviews with 40 youth offenders ages 13-18 tried for felony offenses in adult court in New York City).

[121] *Id.*

[122] Erika N. Fountain & Jennifer L. Woolard, *How Defense Attorneys Consult with Juvenile Clients About Plea Bargains*, 24 PSYCH., PUB. POL'Y, & L. 192 (2018) (from semi-structured interviews with 23 juvenile public defense attorneys in an urban, East Coast jurisdiction).

[123] *Id.*

the charge they pleaded guilty to.[124] In one study, nearly a third of youth who took guilty pleas reported having done so to protect someone else, and 14% said they'd done so under duress.[125]

In summary, the national and limited Washington State evidence suggests that among female defendants, Black and Latina defendants, those living in poverty, those with limited understanding of spoken and/or written English, and those with intellectual disabilities, may be offered pleas with more severe penalties; may be more likely to accept plea deals under coercive conditions; or may have poorer understanding of the consequences of a guilty plea, compared to their peers. However, there is a lack of statewide, empirical evidence regarding outcomes by gender, race, ethnicity, poverty, disability, language, and more in Washington State.

VII. Misdemeanors

While misdemeanors are often overlooked in criminal justice research, some researchers argue they deserve particular attention because of their sheer volume. An estimated 13 million misdemeanor cases are filed every year in the U.S.[126] Misdemeanor offenses are by definition less serious than felonies; however, conviction of a misdemeanor carries many of the same long-term collateral consequences as conviction with a felony. As noted in "Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families," a misdemeanor conviction can be the basis for being denied entry to school, jobs, housing, and more. When social scientists compare felony and misdemeanor charging data, they have found greater gender and racial disparities in misdemeanors compared to felonies, and

[124] Lindsay C. Malloy, Elizabeth P. Shulman & Elizabeth Cauffman, *Interrogations, Confessions, and Guilty Pleas Among Serious Adolescent Offenders*, 38 LAW & HUM. BEHAV. 181 (2014) (a series of interviews with 193 male youth incarcerated in California. Of concern, 5.7% of youth who maintained their innocence despite pleading guilty said they'd been under the influence of drugs or alcohol at the time of their guilty plea); Tina M. Zottoli et al., *Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults who Pleaded Guilty to Felonies in New York City.*, 22 PSYCH., PUB. POL'Y, & L. 250 (2016) (from interviews with 55 adolescents in alternatives to incarceration programs in New York City; almost half of youth in this sample said they'd had less than one hour to make a decision).

[125] Malloy, Shulman & Cauffman, *supra* note 124.

[126] ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICAN MORE UNEQUAL (2018).

theorize that less serious offenses could be more subject to bias in discretionary practices.[127] Moreover, misdemeanor arrest and charge rates appear to fluctuate independently of violent crime rates, suggesting "there is not a direct relationship between misdemeanor enforcement and prevention of more serious crime."[128]

Washington has an estimated misdemeanor caseload rate of 2,698 filings per 100,000 people—lower than the national average of 4,124 per 100,000.[129] Misdemeanors made up about 64% of prosecuted cases in Washington State in 2014, and female defendants in Washington are more likely to have a misdemeanor charge than male defendants.[130] While misdemeanor arrest rates have fallen around the country, they have decreased more rapidly for males than females.[131]

Nationally, researchers note that misdemeanor offenses are often "amorphously defined and subject to significant discretion in policing."[132] This is particularly noted regarding "public order" misdemeanors.[133] Public order offenses are generally non-violent crimes without direct victims and have historically been used to control the movement and activities of Black, Indigenous, and people of color in public spaces.[134] Nearly 12,000 females in Washington were arrested under public order charges in 2019, the vast majority for disorderly conduct, liquor law violations, and trespassing.[135] However, these arrests occurred in counties across Washington State, and may have been charged under local ordinances which vary widely. More research is needed to

[127] Berdejo, *supra* note 42 (finding that the disparity in charge reduction between Black and white women was greater among misdemeanor defendants than felony defendants in Dane County Wisconsin).
[128] BECCA CADOFF, PREETI CHAUHAN & ERICA BOND, MISDEMEANOR ENFORCEMENT TRENDS ACROSS SEVEN U.S. JURISDICTIONS (2020). This longitudinal study of misdemeanor enforcement examined trends in seven U.S. cities, including Seattle, Washington.
[129] NATAPOFF, *supra* note 126.
[130] *Misdemeanor Cases, Washington*, MEASURES FOR JUSTICE, https://measuresforjustice.org/portal/WA/measures/103?c=1&fc=4&ds=1&d=1.
[131] CADOFF, CHAUHAN & BOND, *supra* note 128 (examining misdemeanor trends in Seattle, WA; Los Angeles, CA; St. Louis, MO; Louisville, KY; Durham, NC; Prince George's County, MD; and New York, NY).
[132] Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731 (2018).
[133] Here, we include arrests categorized by the Washington Association of Sheriffs and Police Chiefs as those charged as betting/wagering, curfew/loitering/vagrancy, disorderly conduct, drunkenness and liquor law violations, gambling violations, and trespassing.
[134] U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016), https://www.justice.gov/crt/file/883296/download; Stevenson & Mayson, *supra* note 132; NATAPOFF, *supra* note 126.
[135] Arrest data from Washington Association of Sheriffs and Police Chiefs (2019).

understand the use of public order arrests in Washington State for different populations, and their treatment by prosecutors.

While there is no current statewide research on charging for misdemeanors, data from Seattle reveal significant disparities. A recent analysis of Seattle misdemeanor arrest and charging practices found that, while misdemeanor bookings decreased from 2008-2016, the rate of decline was greater for males than for females.[136] Among females, arrest rates for white and Asian females saw little change from 2008-2016, and both were under 1,000 per 100,000 people in the general population. It is important to note that when diverse populations are grouped together under one broad category, like often happens with the "Asian" category in datasets, disparities for populations within that category may be masked. The arrest rates for Black and Indigenous females were substantially higher during this time, and the rate for Indigenous females increased from 5,960 in 2008 to 8,117 in 2016, as seen in Figure 1.[137]

[136] JACQUELINE B HELFGOTT ET AL., SEATTLE UNIV. DEP'T OF CRIM. JUST., TRENDS IN MISDEMEANOR ARRESTS, REFERRALS, AND CHARGES IN SEATTLE (2018).
[137] *Id.*

Figure 1. Seattle Police Department Misdemeanor Arrest Rates (for 100,000 Population) for Females, by Race, Ages 18-65, 2008-2016 (replicated figure)

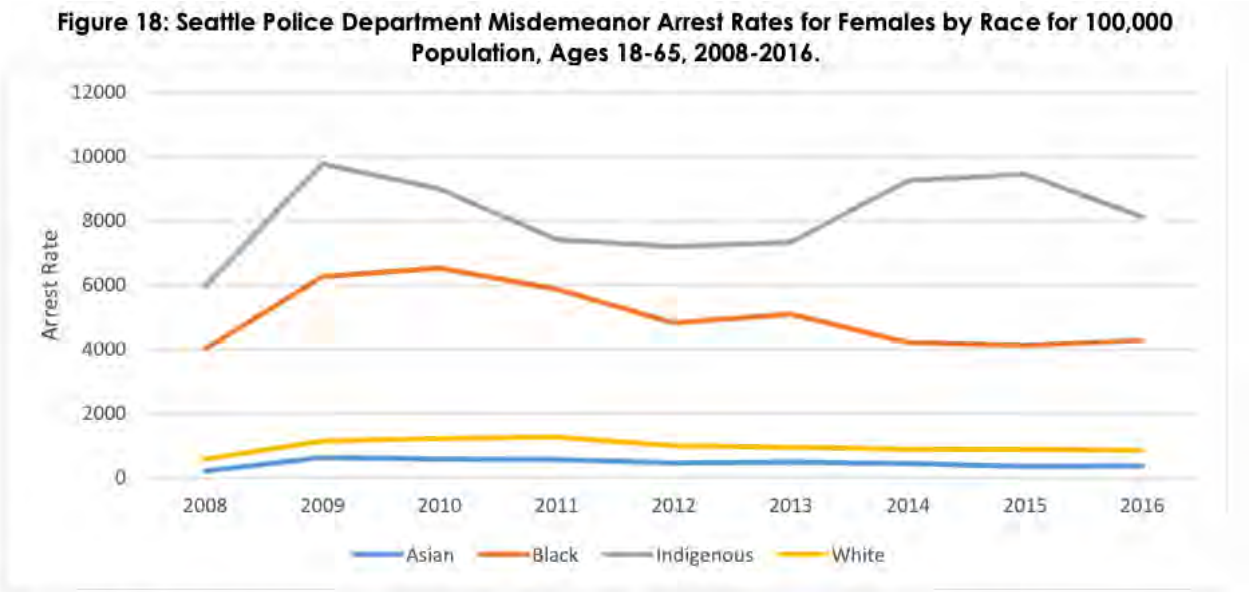

Figure 18 illustrates the misdemeanor arrest rates of females by race (per 100,000 population ages 18-65). The arrest rate for Asian females and White females was low and stable over time. In 2008, the arrest rate of Asian females was 207 and in 2016 rose slightly to 370. Similarly, the arrest rate for White females was 579 and 845 in 2016. The arrest rate for Black and Indigenous females was substantially higher than for Asian and White females, with the rate for Indigenous females the highest of all groups for the entire study period. This pattern of arrests for Indigenous females being higher than all other groups was not the case for male misdemeanor arrests where arrests were consistently higher for Black males. Arrest rates for all racial groups were higher in 2016 than 2008. The arrest rate of Indigenous females in 2008 was 5,960 and 8,117 in 2016. The arrest rate of Black females was 4,004 in 2008 and 4268 in 2016.

Footnotes for Figure 1.

Source: Image replicated from JACQUELINE B HELFGOTT ET AL., SEATTLE UNIV. DEP'T OF CRIM. JUST., TRENDS IN MISDEMEANOR ARRESTS, REFERRALS, AND CHARGES IN SEATTLE (2018).

The majority of misdemeanor arrests in Seattle don't end in conviction, but are deferred, diverted or declined.[138] However, misdemeanor charges demonstrate similar racial disproportionality as seen in arrests, where Black and Indigenous females were charged at rates exceeding three times and four times (respectively) the rates of white and Asian females, as shown in Figure 2.

Figure 2. Seattle City Attorney Misdemeanor Charging Rates (per 100,000 Population), Females by Race, Ages 18-65, 2008-2016 (replicated figure)

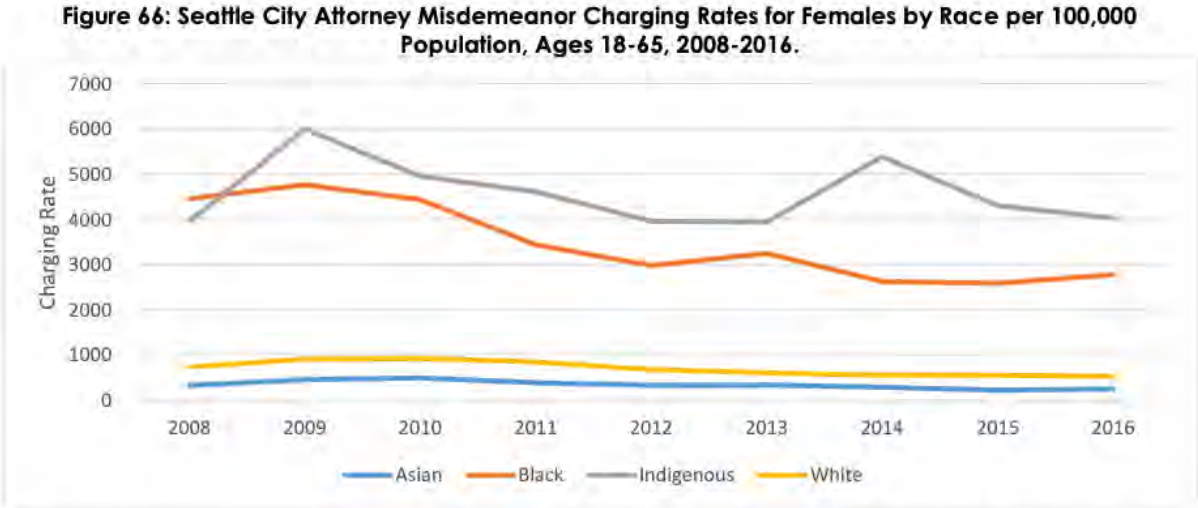

Figure 66 shows misdemeanor charge rates for females by race per 100,000 population, ages 18-65. As was the case for male charging rates, charge rates for Asian and White females were low and stable relative to the Black and Indigenous groups. In contrast with the charging rate patterns for males where the rates were higher for the Black males, for females, the Indigenous group was charged at a higher rate for all years in the study period after 2008 and was the only racial/ethnic group that had a charging rate 2016 (4,025) higher than the charging rate 2008 (3,954). The only year that Black females were charged at a higher rate than all other groups was in 2008 when the rate was 4,447 but after 2008 there was a steady decline to a low point of 2,775 in 2016.

Footnotes for Figure 2.

Source: Image replicated from JACQUELINE B HELFGOTT ET AL., SEATTLE UNIV. DEP'T OF CRIM. JUST., TRENDS IN MISDEMEANOR ARRESTS, REFERRALS, AND CHARGES IN SEATTLE (2018).

[138] Deferral is when prosecutors charge the individual but agree not to pursue conviction if the defendant complies with a set of requirements or avoids re-arrest during a certain period of time. Declination is when prosecutors choose not to file charges. *See* CADOFF, CHAUHAN & BOND, *supra* note 128 (noting that between 23-27% of misdemeanor arrests in Seattle from 2008 to 2016 were declined for prosecution; 32-50% were dismissed; and 34-44% were convicted).

Ballooning unemployment rates and the specter of mass evictions due to the economic downturn during the COVID-19 pandemic may have the effect of increasing offenses relating to poverty, mental health, and substance use disorder as needs increasingly surpass the capacity of available services.[139] The pandemic's economic crisis has disproportionately impacted middle- and low-wage workers and workers who are Black, Indigenous, and people of color, nationally and in Washington State.[140] Enforcement of these misdemeanor offenses, therefore, may result in disproportionate criminal justice contact for women living in poverty and Black, Indigenous, and women of color. Increased data collection and further analysis will be needed to assess if and how misdemeanor arrest and charge trends change during the COVID-19 pandemic.

VIII. Prosecutorial Discretion in Federal Courts

Female defendants are under-represented in the federal courts, but within the federal offender population, Black, Indigenous, and women of color are overrepresented. Women accounted for 12.3% of all people sentenced in U.S. federal court in 2019, and were most commonly sentenced for drug trafficking (34.7%), immigration (19.7%), and fraud (18.6%) offenses.[141] Of female offenders, 43.5% were Hispanic, 32.9% were white, 17.6% were Black, and 6.1% were "other" races.[142] This demographic data, however, is incomplete when broken out by Eastern District versus Western District, and so could not be analyzed by gender, race, and ethnicity for Washington State.[143] To our knowledge, there is no research looking at disparities by gender and race, ethnicity, or other factor specifically for Washington residents in federal courts, although some of the studies cited below include data from Washington in their broader data sets. There is a lack of data regarding transgender individuals in the federal courts.

[139] CADOFF, CHAUHAN & BOND, *supra* note 128.
[140] Armagan Gezici & Ozge Ozay, *An Intersectional Analysis of COVID-19 Unemployment*, 3 J. ECON. RACE POL'Y 270 (2020); *Washington's Economy in the Age of COVID-19*, ECON. OPPORTUNITY INST. (2020), http://www.opportunityinstitute.org/research/post/covid19-toolkit/#wa-covid-econ.
[141] *Women in in the Federal Offender Population, USSCFY15-USSCFY19*, U.S. SENT'G COMM'N, https://www.ussc.gov/research/quick-facts. District-level sentencing data are not broken out by gender.
[142] *Id.* The relatively high proportion of individuals listed as "Hispanic" is likely in part because the federal justice system has jurisdiction over immigration offenses.
[143] Some demographic data were available online but were incomplete.

"Chapter 11: Incarcerated Women in Washington" provides a brief overview of federal sentencing laws since 1989 that have impacted incarceration rates, including the creation of sentencing guidelines; the creation of mandatory minimum sentences for drug charges; and three-strikes sentencing. Researchers and policy experts note that federal prosecutors have gained increased discretionary power from these legislative changes, as they can decide whether or not to bring charges that trigger extremely long sentences.[144] The rate of convictions resulting from guilty pleas rather than trials has increased since the early 1980s, suggesting this increased discretionary power has also given prosecutors more leverage in the plea bargain process.[145] While subsequent U.S. Supreme Court decisions made sentencing guidelines advisory only, meaning that judges regained some level of discretion in sentencing, prosecutors still hold the power to decide whether to file charges, which charges to bring, whether to trigger enhanced sentences or mandatory minimums, whether to offer a plea, what deal to offer, and whether to request a "substantial assistance" departure below the federal guideline sentences.[146]

Federal prosecutors have complete discretion to file prior criminal record information or firearm information with the court if they so choose, triggering mandatory minimum sentences.[147] Whether that information is filed for use at sentencing depends greatly on the current policy of the particular U.S. Attorney for that district. Nationally, mandatory minimums are filed against Black and Hispanic defendants at rates disproportionate to their share of the U.S. population,[148] and research has found wide racial disparities in the use of mandatory minimums for male

[144] Paul J. Hofer, *Has Booker Restored Balance? A Look at Data on Plea Bargaining and Sentencing*, 23 FED. SENT'G REP. 326 (2011); Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 FED. SENT'G REP. (2019).
[145] Hofer, *supra* note 144; Johnson, *supra* note 144.
[146] Brian D. Johnson, *In Search of the Missing Link: Examining Contextual Variation in Federal Charge Bargains across U.S. District Courts*, 35 JUST. Q. 1133 (2018).
[147] JAMIE FELLNER, AN OFFER YOU CAN'T REFUSE: HOW U.S. FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY (2013); Cody Tuttle, *Racial Disparities in Federal Sentencing: Evidence from Drug Mandatory Minimums*, SSRN JOURNAL (2019), https://www.ssrn.com/abstract=3080463.
[148] U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES, FY 2019 1 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY19.pdf ("Hispanic offenders accounted for the largest group (40.4 percent) of offenders convicted of an offense carrying a mandatory minimum penalty, followed by Black (29.7 percent), White (27.2 percent), and Other Races (2.7 percent)").

defendants even when controlling for offense type.[149] In 2019, the U.S. Sentencing Commission reported that a greater proportion of female defendants nation-wide were convicted of an offense carrying a mandatory minimum penalty when compared to male defendants, although the data had significant limitations. It was not disaggregated by race or ethnicity and it does not control for offense type (a larger proportion of male federal offenders are convicted of immigration offenses compared to female offenders).[150] Nationally, the rate of mandatory minimum charging declined 5.3 percentage points from 2010-2016, and there is some evidence that racial disparities have narrowed regarding the use of sentencing departures to provide relief from mandatory minimum charges.[151]

The rate of plea bargaining is incredibly high in federal courts – in 2019, over 98% of convictions were secured through guilty pleas in the Eastern and Western district courts of Washington.[152] The discretion prosecutors have in filing mandatory minimum charges could be used as leverage to convince defendants to plead guilty, as offenders sentenced for offenses with mandatory minimum penalties receive sentences on average more than nine years longer than those convicted without mandatory minimums.[153] Nationally, female defendants are more likely to get

[149] M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences*, SSRN JOURNAL (2012), http://www.ssrn.com/abstract=1985377. In a study examining non-immigration federal cases from 2007-2009 for Black and white U.S. citizens, researchers found that prosecutors were almost twice as likely to file mandatory minimum charges against Black male defendants than white male defendants, even when controlling for legal case characteristics. *Id.*

[150] U.S. SENT'G COMM'N, WOMEN IN IN THE FEDERAL OFFENDER POPULATION, USSCFY15-USSCFY19, https://www.ussc.gov/research/quick-facts. In 2019, 28.5% of female offenders and 25% of male offenders were convicted of an offense carrying a mandatory minimum penalty. Among offenders facing mandatory minimums, 70.3% of female offenders received some form of relief (downward deviation) from the sentence mandated by the charges, compared to 40.2% of male offenders. See also "Chapter 14: Sentencing Changes and Their Direct and Indirect Impact on Women" for more information on disparities in upward and downward sentencing departures.

[151] U.S. SENT'G COMM'N, 2017 OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 89 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf. "While Black offenders convicted of an offense carrying a mandatory minimum penalty continued to receive relief from the mandatory minimum penalty least often, the gap between Black offenders and white offenders has narrowed. In fiscal year 2016, 73.2% of Black offenders convicted of an offense carrying a mandatory minimum penalty remained subject to that penalty, compared to 70.0% of White offenders convicted of such an offense. This difference of 3.2% in fiscal year 2016, compares to a difference of 11.6% in fiscal year 2010 (65.1% of Black offenders convicted of an offense carrying a mandatory minimum penalty compared to 53.5% of white offenders)." *Id.* at 7.

[152] U.S. SENT'G COMM'N, EASTERN DISTRICT OF WASHINGTON, FY 2019 (2019).

[153] U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES, FY 2019 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY19.pdf. In 2019, offenders subject to a mandatory minimum were sentenced to

charge reductions as part of a plea bargain compared to male defendants,[154] and are more likely to plead guilty (and plead guilty more quickly) than male defendants.[155]

Prosecutors can also leverage their discretion in requesting substantial assistance sentencing departures for defendants who provide information relating to other criminal investigations. Nationally, female defendants are more likely to receive downward sentencing departures for substantial assistance,[156] and receive larger substantial assistance sentencing reductions,[157] compared to male defendants. Females who had been using drugs at the time of arrest, and female offenders employed full time at the time of arrest, are particularly more likely than other female defendants to receive substantial assistance sentencing departures.[158] Some race and ethnicity disparities have been found in the use of prosecutor-initiated substantial assistance

an average 141 months of incarceration, compared to 24 months for those not subject to mandatory minimums. *Id.*

[154] Brian D. Johnson, *In Search of the Missing Link: Examining Contextual Variation in Federal Charge Bargains across U.S. District Courts*, 35 JUST. Q. 1133 (2018) Mr. Johnson's research examined non-immigration cases in U.S. states between 2003 and 2006, finding that females were more likely to get charge reductions than male defendants, but not reporting the magnitude of the difference, and also finding significant regional variation by district. There was no analysis of race/ethnicity differences among female defendants.

[155] Sonja B. Starr, *Estimating Gender Disparities in Federal Criminal Cases*, 17 AM. L. & ECON. REV. 127 (2015) Ms. Starr analyzed federal property, fraud, drug, regulatory and violent crimes from 2001 to 2009 in all U.S. state district courts, finding that 97.5% of female offenders pleaded guilty, compared to 96.2% of male offenders, and that female offenders pleaded guilty an average of two weeks earlier than male defendants. There was no significant race gap found among female offenders.

[156] Cassia Spohn & Pauline K. Brennan, *The Joint Effects of Offender Race/Ethnicity and Gender on Substantial Assistance Departures in Federal Courts*, 1 RACE & JUST. 49 (2011). The authors examined data from Minnesota, Nebraska, and Iowa districts between 1998 and 2000, finding that female gender, young age, more dependent children, and higher level of education were all associated with greater likelihood of receiving a downward departure. The analysis did not find evidence of racial or ethnic differences among female defendants.

[157] Mario V. Cano & Cassia Spohn, *Circumventing the Penalty for Offenders Facing Mandatory Minimums: Revisiting the Dynamics of "Sympathetic" and "Salvageable" Offenders*, 39 CRIM. JUST. & BEHAV. 308 (2012) (examining data from Minnesota, Nebraska, and Iowa districts between 1998 and 2000, finding that female defendants were given sentence reductions 14% greater than male defendants in substantial assistance departures; no racial or ethnic differences were found among female defendants).

[158] Natalie R. Ortiz & Cassia Spohn, *Mitigating the Effect of a Criminal Record at Sentencing: Local Life Circumstances and Substantial Assistance Departures Among Recidivists in Federal Court*, 25 CRIM. JUST. POL'Y REV. 3 (2014) (examining data from Minnesota, Nebraska, and Iowa between 1998 and 2000, and looking at offenders with a history of drug crime convictions; they did not find evidence of racial or ethnic differences among female offenders).

departures nationally: specifically Hispanic[159] and Indigenous defendants[160] were less likely to receive these departures than defendants of all other races; and Black males were less likely to receive any type of prosecutor-led sentencing departure than white and Hispanic defendants.[161] Among female defendants, Black females are less likely than Hispanic females and white females to receive a prosecutor-led sentencing departure.[162] These analyses, however, cannot tell us whether prosecutors ask all defendants for substantial assistance and some refuse, whether prosecutors ask for substantial assistance at different rates for different populations, or whether there are disparities in which defendants have the knowledge of other criminal conduct that enables them to provide substantial assistance.

There is remarkably little literature examining plea bargaining disparities by gender and race or ethnicity. More research is needed to understand how prosecutorial discretion in federal courts may be impacting women in Washington State.

IX. Conclusion

A. Cumulative disadvantage

The evidence regarding disparities on the basis of gender, race and ethnicity at each of the points of prosecutorial decision-making has been mixed. However, when studied together, researchers find strong evidence nationally showing cumulative disadvantage, meaning relatively small

[159] Mario V. Cano, Prosecutorial Discretion Across Federal Sentencing Reforms: Immediate and Enduring Effects of Unwarranted Disparity (Dec. 2015) (Ph.D. dissertation, Arizona State University). Mr. Cano examined white, Black and Hispanic offenders convicted of non-immigration offenses between 2001 and 2010 in 89 federal district courts, and found that Hispanic defendants facing mandatory minimum charges had lower odds than Black and white defendants of receiving substantial assistance departures. There was no analysis of gender-race or ethnicity interactions.

[160] Jeffery T. Ulmer & Mindy S. Bradley, *Punishment in Indian Country: Ironies of Federal Punishment of Native Americans*, 35 JUST. Q. 751 (2018). The authors examined non-immigration cases in districts with substantial numbers of Indigenous defendants, including both Washington districts between 2010 and 2012, and finding that Indigenous defendants were less likely to receive substantial assistance downward departures, and more likely to receive upward sentencing departures, than similarly situated white, Black, and Hispanic defendants. Their study did not examine the effect of gender and race or ethnicity.

[161] Bryan Holmes & Christopher D'Amato, *Judicial and Prosecutorial Decision-Making: Assessing the Effects of Race, Gender, and Age on Federal Downward Sentencing Departures, 2013 – 2016*, 43 J. CRIME & JUST. 449 (2020) (examining all felony and serious misdemeanor cases against adult U.S. citizen defendants from 2013 to 2016).

[162] *Id.*

disparities in each step of the process build up to create substantial disparities in final outcomes. We are convinced that the data, considered as a whole, shows: discriminatory policing patterns lead to racial disparities (including among women and girls) in arrests, which negatively influence pretrial bail decisions, which influence the offers and terms of plea deals, which result in more severe charges, higher likelihood of incarceration, and longer sentences.[163] This has been well-documented for Black and Latino males[164] and, to a smaller extent, Black and Latina females,[165] and is at least partly influenced by poverty (by influencing the ability to secure pretrial release through bail and hiring private defense).[166] Megan Kurlycheck and Brian Johnson note that there are relatively few studies that examine how cumulative disadvantage builds in the context of the criminal justice system, and that studies that examine only a single decision point in the continuum will fail to account for the influence of biases and structural inequities earlier in the

[163] Megan C. Kurlychek & Brian D. Johnson, *Cumulative Disadvantage in the American Criminal Justice System*, 2 ANNU. REV. CRIMINOLOGY 291 (2019) (defined by the authors as the "process that encompasses the cumulative impact of a specific form of disadvantage over time and/or the accumulation of multiple, interactive forms of disadvantage, both within and across time points").

[164] *See, e.g.*, Ellen A Donnelly & John M MacDonald, *The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration*, 108 J. CRIM. L. & CRIMINOLOGY 775 (2018) (analyzing 75,912 adult criminal and driving under the influence (DUI) arrests between 2012 and 2014 in Delaware, and finding that the bail and pretrial detention decision explained a significant portion of racial disparities between Black and white defendants in case outcomes); EMILY OWENS, ERIN KERRISON & BERNARDO SANTOS DA SILVEIRA, EXAMINING RACIAL DISPARITIES IN CRIMINAL CASE OUTCOMES AMONG INDIGENT DEFENDANTS IN SAN FRANCISCO (2017) (from a review of 10,753 records from the San Francisco public defender's office between 2011 and 2014, finding that later disparities between Black, white, and Latinx defendant outcomes were explained by the seriousness of the arrest charge and differences in criminal records); Lisa Stolzenberg, Stewart J. D'Alessio & David Eitle, *Race and Cumulative Discrimination in the Prosecution of Criminal Defendants*, 3 RACE & JUST. 275 (2013) (analyzing state court statistics for Black and white felony defendants from 1990 to 2004 in 65 urban counties, and finding that while disparities varied by decision point, overall Black defendants received more severe criminal sanctions than white defendants); John R. Sutton, *Structural Bias in the Sentencing of Felony Defendants*, 42 SOC. SCI. RSCH. 1207 (2013) (analyzing felony defendant outcomes in U.S. courts for Black, white, and Latino male defendants in 2000, and tracing a cumulative effect of pretrial detention through plea bargaining to sentencing); Brandon P. Martinez, Nick Petersen & Marisa Omori, *Time, Money, and Punishment: Institutional Racial-Ethnic Inequalities in Pretrial Detention and Case Outcomes*, 66 CRIME & DELINQUENCY 837, 854 (2020) (detailing a review of adult felony defendant cases in Miami-Dade County from 2011 to 2015, finding that disparities in "detention length and bail amount… contribute to disparate case outcomes").

[165] Don Stemen & Gipsy Escobar, *Whither the Prosecutor? Prosecutor and County Effects on Guilty Plea Outcomes in Wisconsin*, 35 JUST. Q. 1166 (2018) (analyzing non-traffic felony and misdemeanor cases from Wisconsin between 2009 and 2013, finding that white females had a greater chance of having their case dismissed, of being offered a plea bargain with a reduced charge, and of receiving a sentence with no incarceration, compared to Black and Latina female defendants).

[166] See "Chapter 11: Incarcerated Women in Washington" findings regarding poverty and pretrial detention. *See* Stemen & Escobar, *supra* note 165 (finding that defendants with a public defender had significantly worse outcomes throughout the process).

process—and those outside of the system (such as inequities in education, housing, employment, and more).[167]

B. Positive prosecutorial discretion and other interventions to reduce criminal justice disparities

There is a lack of consistent evidence regarding the existence of racial or gender bias among prosecutors in Washington State. Bias is generally very hard to measure. In the case of explicit bias, in most areas of the U.S. it is now considered socially undesirable to endorse explicitly racist and sexist beliefs, and so many people are unlikely to respond honestly to questions about biases they might hold. And implicit bias functions unconsciously, so individuals may not be able to recognize whether and how implicit biases shape their decisions and actions.[168] Among prosecutors, explicit bias may lead them to consciously treat Black, Indigenous, and defendants of color more harshly than their white counterparts, while implicit bias may reinforce ideas about dangerousness or culpability based on race, gender, or other social identity. It's unlikely that prosecutors are more immune from implicit biases than the general population; one study in Tacoma employing an implicit bias test found patterns of racial preference among prosecutors that are consistent with those found in other groups nationally.[169]

However, bias is not the only engine of criminal justice disparities. The evidence reviewed in this chapter strongly suggests that race- and gender-neutral practices and policies can result in disparate outcomes, as they systematically advantage or disadvantage individuals on the basis of external structural inequities. Prosecutors who enact facially neutral policies without consideration of even unintended discriminatory consequences can reinforce or exacerbate those inequities; prosecutors who are attentive to even unintended discriminatory consequences can reduce those disparities. One example is the fact that using prior arrests and convictions, particularly for crimes that don't necessarily correlate with violence (e.g., certain drug offenses),

[167] Kurlychek & Johnson, *supra* note 163.
[168] In this context, implicit bias refers to an unconscious preference for, or aversion to, a certain person or group of people based on prior associations or stereotypes. *Implicit Bias*, PERCEPTION INST., https://perception.org/research/implicit-bias.
[169] KAITLYN DUNN, MATT MUNOZ & ANDREW TAYLOR, EXAMINING DISPARITIES AND IMPLICIT BIAS IN THE PROSECUTION OF MISDEMEANORS IN TACOMA MUNICIPAL COURT (2018), https://s3-us-west-2.amazonaws.com/uw-s3-cdn/wp-content/uploads/sites/136/2019/01/12004328/LCY_ImplicitBias.pdf.

as a tool in decision-making will lead to greater racial and ethnic disparities in case outcomes, because Black, Indigenous, and other communities of color have been subjected to decades of disparate treatment by police stop-and-frisk practices and car searches. Changing charging and bargaining practices to reduce the disparities created by a neutral consideration-of-prior-arrests-and-convictions rule, to eliminate consideration of many priors, would be an example of a rule change that could reduce disparate outcomes. Evidence-based training to pay attention to, and try to reduce, disparate outcomes in the first place, though, seems to be a necessary prerequisite.

Another example is the coercive power of pretrial detention and its impact on plea outcomes. As noted in "Chapter 11: Incarcerated Women in Washington," female defendants who are Black, Indigenous, and people of color are more likely than their white, male counterparts to be living in poverty, and therefore less likely to be able to secure their release with bail. Chapter 11 finds that, at the same time, the impact of pretrial detention on their lives may be greater, because they are disproportionately likely to be single parents and/or be working low-wage jobs without paid leave. That their detention pre-trial should then predispose them to take unfavorable plea deals in order to secure their release is another way in which pre-existing disadvantages are compounded.

The social science literature suggests that prosecutors in some jurisdictions have begun to systematically use their discretion to balance out racial disparities in policing.[170] Prosecutors around the country have adopted certain practices meant to reduce disproportionality in the criminal justice system (sometimes over the objections of law enforcement.)[171] The wide discretion afforded to prosecutors and the variability in practice between jurisdictions means

[170] Kutateladze, *supra* note 94. The author examined over 170,000 felony and misdemeanor cases from 2010 to 2011 in the New York County District Attorney's office, finding prosecutors declined more cases against Black and Latinx defendants than white and Asian defendants, and that the most common reasons for decline were lack of evidence and lack of prosecutorial merit. *See also* Christopher L. Griffin, Frank A. Sloan & Lindsey M. Eldred, *Corrections for Racial Disparities in Law Enforcement*, 55 WM. & MARY L. REV. 1365, 1385 (2017) (analyzing 517,629 Driving While Intoxicated arrests in North Carolina from 2001 to 2011, and finding that prosecutors were more likely to drop charges against Hispanic men, who were "arrested at rates far higher than their underlying incidence of drunk driving would suggest as proportionate," compared to Black and white men).

[171] Caren Morrison, *Progressive Prosecutors Scored Big Wins in 2020 Elections, Boosting a Nationwide Trend*, CONVERSATION (2020), https://theconversation.com/progressive-prosecutors-scored-big-wins-in-2020-elections-boosting-a-nationwide-trend-149322; Jaclyn Diaz, *Judge Blocks LA District Attorney's Reforms*, NPR (Feb. 9, 2021), https://www.npr.org/2021/02/09/965673109/judge-blocks-l-a-district-attorneys-reforms.

that prosecutors across Washington State may be using their discretion to very different ends. The constitution vests prosecutors with enormous discretion and the criminal justice system provides few checks; thus, prosecutors are ultimately answerable to the voters of their jurisdiction. However, in the absence of systematic data collection, it is almost impossible to identify disparities originating in the prosecutor's office, so under the current system voters concerned about equity in the justice system have no way to independently assess prosecutorial practices.

In some states, legislators have mandated statewide criminal justice data collection, finding "that it is an important state interest to implement a uniform data collection process and promote criminal justice data transparency."[172] In some locations, individual jurisdictions have begun collecting, analyzing, and publicizing their own data. Prosecutorial Performance Indicators were developed by researchers and policy-makers to help prosecutors develop and implement relevant indicators regarding organizational capacity, public safety, and equity.[173] The King County Prosecuting Attorney's Office has a public-facing dashboard with data on open cases, felony referrals, declines, filings, dispositions, and demographics of defendants and victims including race, ethnicity, age, and gender (but not in combination).[174] The Philadelphia District Attorney's office has a similar dashboard, allows visitors to open longitudinal reports on arrests, charges, bail, case outcomes and more, along with monthly snapshots on incidents and arrests relevant to public safety.[175]

If the data should demonstrate biased actions by prosecutors, or disparities resulting from prosecutorial practices, who has the power to intervene? In theory, judges can review and reject plea bargains and can diverge from the sentence recommended by prosecutors. However, it is not clear how often that may happen; particularly in the misdemeanor system where detailed review of each plea deal made is unlikely. And of course, unless the details of all plea deals offered are recorded, judges don't have context to understand how final decisions were made. Some

[172] Fla. Stat. § 900.05.
[173] PROSECUTORIAL PERFORMANCE INDICATORS, https://prosecutorialperformanceindicators.org.
[174] *Data Dashboard*, KING CNTY. (2021), https://kingcounty.gov/depts/prosecutor/criminal-overview/CourtData.aspx
[175] *Public Data Dashboard,* PHILA. DIST. ATT'YS OFF. (2021), https://data.philadao.com.

researchers and policy makers advocate for the creation of additional review processes, either civilian review panels,[176] or conviction review units internal to the prosecutor's office.[177] The data we have analyzed does not allow us to draw a conclusion about the best path forward for Washington.

We would be remiss, however, if we failed to note that the data we have on plea bargaining and sentencing – the points in the process where a defense lawyer is ordinarily involved – suggests another area in which changes might be needed. As discussed above, Washington State and national studies of juvenile and adult defendants suggest that many defendants do not fully understand the criminal justice system or their rights, and that they may accept plea deals with incomplete understanding. We have not studied if criminal defense lawyers, or public defenders, in particular, contribute to this problem. If the answer is yes, then two solutions seem obvious: (1) train defense lawyers to overcome this deficiency, and (2) increase opportunities for communication, including remote communication, between clients and attorneys.[178] Additionally, informational materials can be created and made available to all defendants, giving an overview of the different stages of the process and the defendant's rights.[179] These should be as accessible as possible, using multiple formats and languages, and distributed to defendants as early in the process as possible. This could be particularly impactful for youth and their families.[180] Written materials relating to plea deals should contain clear explanations of the collateral consequences of a misdemeanor or felony conviction.

Pretrial detention puts undue pressure on defendants to plead guilty early. Release on recognizance is the default option, according to court rules in Washington State;[181] however, according to the Washington State Auditor (in a pre-pandemic report, when pre-trial detention was far higher than during the COVID-19 pandemic), "[a]bout 72 percent of those awaiting trial

[176] John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157 (2014).
[177] JOHN HOLLWAY, CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE (2016), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty_scholarship.
[178] N.Y. COUNTY LAWYERS ASS'N, *Solving the Problem of Innocent People Pleading Guilty* (2019).
[179] *Id.*
[180] Cabell & Marsh, *supra* note 112.
[181] CrRLJ 3.2 and CrR 3.2.

in jail on a typical day could be released" because they pose little risk to public safety or for failing to appear in court.[182] Increased investment in pretrial services could level the power imbalance between a defendant and a prosecutor during the plea bargain process.

The high volume of cases in many jurisdictions, especially misdemeanor cases, reduces the ability of each system actor to carefully assess case details and make deliberate, thoughtful decisions regarding each defendant.[183] Reducing the volume of people interacting with the criminal justice system can reduce negative outcomes for individuals; allow for more deliberate use of discretion at every stage; and ensure timely access to justice for those involved. This change can be influenced at every step of the process, including increasing opportunities for pre-arrest and pre-file diversion. Diversion programs should be evaluated rigorously to assess their effectiveness in addressing their stated purpose, with special attention to if they are equally effective across all genders, races, and ethnicities. Additionally, referral and participation rates should be evaluated to assess whether access and availability are equitably distributed in Washington State, and barriers to entry (such as prior criminal history) should be analyzed for disproportionate impacts.[184] Experts in Washington State note that individuals with tribal affiliation should be identified early in the process so they can be served through Tribal Health or given services through an Indian health care provider.[185] Finally, taking low-level, victimless crimes that are often the result of poverty, mental health problems, and substance use disorder out of the criminal justice system as much as possible, and referring them to community health systems, could address disparities; it could also save resources by reducing incarceration rates and investing in healthy communities.[186]

[182] MARY MCCARTHY, REFORMING BAIL PRACTICES IN WASHINGTON 11 (2019), https://sao.wa.gov/wp-content/uploads/Tabs/PerformanceAudit/PA_Reforming_Bail_Practices_ar1023411.pdf.
[183] Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. UNIV. L. REV. 261 (2011).
[184] Ronald F Wright & Kay L Levine, *Models of Prosecutor-Led Diversion Programs in the United States and Beyond*, 4 ANN. REV. CRIMINOLOGY 331 (2021).
[185] It is important for any information collected on tribal affiliation to be developed through consultation with each Tribal Government, and with full observation of tribal data sovereignty.
[186] ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICAN MORE UNEQUAL (2018); N.Y. COUNTY LAWYERS ASS'N, *supra* note 178.

C. Gaps and unanswered questions

There is a lack of data regarding the use of prosecutorial discretion in Washington State. There is no legal requirement or statewide system to collect data on charging and plea decisions. As a result, statewide case trends can only be analyzed at the entry point (arrest) or the exit (sentencing). The few attempts at data collection and analysis have centered on Seattle and King County. Even the national social science research often uses datasets from large urban areas. This leaves a significant gap regarding prosecutorial discretion in rural areas. Finally, the literature reviewed here analyzes disparities primarily by white, Black, and Latinx race or ethnicity, often omitting data on Asian Americans, Native Hawaiians and Other Pacific Islanders, and Indigenous populations; and only rarely examining the intersection between race and gender. There is a need for more research addressing these gaps.

Some topics noted in the literature or in the media which merit additional attention include:

- Disparities in arrest and charging for prostitution by gender, race, ethnicity, and sexual orientation.
- Disparities in arrest and charging for statutory rape by gender, race, ethnicity, and sexual orientation.
- The effect of victim demographics on charging patterns beyond domestic violence and sexual assault cases.
- Arrest and charging decisions in violent crimes involving Black transgender women, including arrest and charging in homicide of Black transgender women and treatment of Black transgender women who use violence in self-defense.[187]
- Mandatory minimums and sentencing ranges in Washington State, and their use by prosecutors in leveraging guilty pleas.

[187] Nicole Pasulka, *The Case of CeCe McDonald: Murder - Or Self-Defense Against a Hate Crime?*, MOTHER JONES (May 22, 2012), https://www.motherjones.com/politics/2012/05/cece-mcdonald-transgender-hate-crime-murder.

- Traffic offenses, especially driving with a suspended license, merit particular scrutiny because of their relationship to poverty.[188]
- The effects of "color blind" and "gender blind" charging policies on the disparities in charging for different demographic groups.

XI. Recommendations

- To systematize and incentivize more equitable pretrial, charging, and plea bargain practices, prosecutors in every jurisdiction in the state should conduct an internal analysis of their use of prior arrest, charge, and conviction data in decisions regarding pretrial detention and bail, charging, and plea bargaining, to assess the public safety impact and the gender, race, ethnicity, and LGBTQ+ impacts of using those prior records. Prosecutors should also revisit policies that limited consideration of prior records as part of office charging and plea-bargaining guidelines, to determine more accurate means of protecting public safety while reducing disproportionate impacts.
- To increase the use and effectiveness of pre-arrest and pre-file diversion and deferral programs, the Washington State Legislature should direct the Washington State Institute for Public Policy to partner with relevant state and tribal experts to create and maintain an inventory of criminal justice diversion programs that have proven to be effective for different populations and different needs, with a particular emphasis on cultural competence, trauma-informed care, and gender responsiveness.
    - After the creation of this list, jurisdictions should ensure that any program or treatment required as part of a formal pre-arrest or pre-file diversion agreement must belong to the list maintained by the Washington State Institute for Public Policy.

[188] ROBERT C. BORUCHOWITZ, AM. CONST. SOC'Y FOR L. & POL'Y, DIVERTING AND RECLASSIFYING MISDEMEANORS COULD SAVE $1 BILLION PER YEAR: REDUCING THE NEED FOR AND COST OF APPOINTED COUNSEL 19 (2010), http://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/Boruchowitz%20Diverting%20and%20Reclassifying%20Misdemeanors.pdf.

- To better understand and address disparities in charging, pretrial detention, bail, plea bargain, and diversion or deferral decisions, the legislature should work with the appropriate statewide and county prosecutorial agencies to fund the creation of a statewide system for data collection and publication, and forge partnerships with individual jurisdictions to collect and submit data from charging, bail, pretrial detention, plea bargain, and diversion or deferral decisions, with these data disaggregated by gender, race/ethnicity, sexual orientation and gender identity, and disability. Data should be made available to the public in a timely and accessible manner.

Chapter 14

Sentencing Changes and Their Direct and Indirect Impacts on Women

Marla Zink, JD

Judge Maureen McKee; Sierra Rotakhina, MPH

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I. Summary

The Washington State Legislature has made many changes to the sentencing laws since the 1980s. These reforms have had the overall effect of increasing the length of sentences and therefore increasing overall incarceration rates. Average offender scores increased across all offense categories (violent, drug, property, and public order) from 1986 to 2016. These increases happened despite declines in crime rates and stable recidivism rates during this same time period.

In 1981, the Washington State Legislature enacted the Sentencing Reform Act (SRA). The stated purposes of the SRA are to ensure proportionate sentencing, mete just punishment, punish commensurately with others, protect the public, offer rehabilitative measures, reduce the use of governmental resources, and reduce recidivism. Washington allows judges to issue "exceptional sentences" outside the presumptive sentencing range if warranted by aggravating or mitigating circumstances. Washington provides sentencing enhancements triggered by other aggravating circumstances. Washington also allows certain structured sentencing alternatives such as community-based sanctions and rehabilitative programs.

Gender and other biases appear to play a role in sentencing because disparities exist even when controlling for factors such as seriousness of the offense and criminal history. While there is significant nuance and sometimes conflict in the literature on sentencing by gender, race, ethnicity, and other factors, Washington and national literature largely indicates that women are treated more leniently than men at sentencing. Researchers theorize that stereotypes contribute to this disparity. According to the chivalry/paternalism theory, males, who dominate the criminal justice system, associate women with their mothers, sisters, wives, and daughters. As such, they may be less likely to view some women as dangerous and blame-worthy, as women are often stereotyped as victims, and being nurturing and docile. It is important to note that this stereotype of women as nurturing and docile is not universal. Evidence indicates that Black, Indigenous, and women and girls of color are perceived differently than white women and girls, and the former are depicted very differently in the media from the latter. In addition, women who conform to

the “appropriate” gender role are most likely to be given preferential treatment whereas women who act in a manner outside of the role are more likely to receive harsher punishment.

While the sentencing literature on race and ethnicity is mixed, the body of literature overall shows that Black, Latinx, and Indigenous individuals are punished more severely than similarly situated white offenders under at least some conditions. There is very little research that looks at how race, ethnicity, and gender interact—making it almost impossible to understand sentencing outcomes for specific populations of women. But the few studies that have looked at the intersection of gender, race, ethnicity and other factors suggest that young Hispanic and young Black men have the worst sentencing outcomes while young Black women and young white women tend to receive the most lenient sentences. One study found that young Hispanic women received sentences more similar to those of male defendants than to those of female defendants of other racial or ethnic populations. This certainly suggests that Hispanic women may receive the harshest sentences of all women.

Research has also found that the influence of defendant race and ethnicity was impacted by employment status, education, crime type, seriousness of offense, criminal history, and victim race and ethnicity. These findings highlight the importance of research that considers the interaction of many factors to better understand how bias is amplified for some populations.

II. Introduction

Developments in sentencing laws are one of the most-studied drivers of the increase in incarceration of women. This chapter discusses changes in Washington State sentencing laws throughout the last few decades as a framework for evaluating how those laws impact women. Section IV covers the role of increased long and life sentences. Changes in national sentencing laws are discussed briefly in Section V. In Section VI, we dive more deeply into gender-based disparities in sentencing, discussing both Washington and, more briefly, national information. Finally, we examine disparate impacts of sentencing upon subpopulations, the shortcomings in that research, and the dearth of intersectional data or studies. It is important to note, as discussed at length in “Chapter 11: Incarcerated Women in Washington” and Section V of the full

report ("2021 Gender Justice Study Terminology, Methods, and Limitations"), that there are limitations to the data that this chapter relies upon. For example, the data almost exclusively uses a female/male gender binary that prevents us from understanding impacts to transgender, gender non-binary and gender-nonconforming individuals. There is also a lack of granularly with the race data which erases some populations and likely masks disparities.

The 2021 Gender Justice Study uses the race and ethnicity terms used in the underlying sources when citing data in order to ensure we are presenting the data accurately and in alignment with the how the individuals self-identified. When talking more broadly about the body of literature we strive to use the most respectful terms. See Section V of the full report ("2021 Gender Justice Study Terminology, Methods, and Limitations") for a more detailed explanation of terminology used throughout the report.

III. Sentencing Laws and Practices in Washington State

The Washington State Legislature has made myriad changes to the sentencing laws since the 1980s. These reforms have had the overall effect of increasing the length of sentences and therefore increasing overall incarceration rates.

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

During the 1980s, the Washington State Legislature broadly restructured sentencing laws largely with the intent of shifting from a rehabilitative focus to a punitive one and reducing judicial discretion as a means of preventing disparities. As we will discuss, the pendulum is now swinging back, in recognition that the restructured system did not provide the fairness or proportionality it touted and as sentencing lengths have increased and contributed to mass incarceration in Washington.

In 1981, the Legislature enacted the Sentencing Reform Act (SRA), which took effect for crimes committed on and after July 1, 1984. The stated purposes of the SRA are to ensure proportionate sentencing, mete just punishment, punish commensurately with others, protect the public, offer

rehabilitative measures, reduce the use of governmental resources, and reduce recidivism.[1] The Legislature developed mandatory sentencing ranges for the vast majority of felony offenses based upon two factors: 1) the severity of an offender's current offense; and 2) the offender's prior criminal history (which informs the "offender score").[2] Washington allows judges to issue "exceptional sentences" outside the presumptive sentencing range if the court finds it warranted by aggravating or mitigating circumstances or based on sentencing enhancements.[3] Washington also allows certain structured sentencing alternatives such as community-based sanctions and rehabilitative programs. Examples of these alternative sentences include alternatives to total confinement for sentences of one year or less (Conversion), the First-Time Offender Waiver (FTOW), Drug Offender Sentencing Alternative (DOSA), Family Offender Sentencing Alternative (FOSA), and the Special Sex Offender Sentencing Alternative (SSOSA).[4]

A 2010 report from the Washington State Sentencing Guidelines Commission concluded that there have been demographic shifts in sentencing following passage of the SRA (in the twenty-year period from 1989 to 2008), though it is unclear if these shifts are a result of the SRA or other factors: "The average age at sentencing increased by three years and there was an increase in females sentenced to felonies. Racial disproportionality, though still an issue, decreased slightly."[5]

A Sentencing Guidelines Commission 2019 report reviewing the SRA includes a review of the literature to better understand how sentencing guidelines have impacted racial disparities in sentencing. The report asserts that there is "general knowledge that sentencing disparity has decreased in Washington since it moved to a guidelines system," and the data presented do support a correlation between the SRA and decreased disparities, but this strong causative statement is not necessarily supported in the research. *United States v. Booker*, which found that

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[1] RCW 9.94A.010.
[2] RCW 9.94A.510; RCW 9.94A.505; Rodney L. Engen et al., *Discretion and Disparity Under Sentencing Guidelines: The Role of Departures and Structured Sentencing Alternatives*, 41 CRIMINOLOGY 99 (2003).
[3] Engen et al., *supra* note 2.
[4] RCW 9.94A.680; Engen et al., *supra* note 2.
[5] SENT'G GUIDELINES COMM'N, 20 YEARS IN SENTENCING: A LOOK AT WASHINGTON STATE ADULT FELONY SENTENCING FISCAL YEARS 1989 TO 2008 50 (2010), https://sgc.wa.gov/sites/default/files/public/SGC/publications/twenty_years_in_sentencing.pdf.

U.S. sentencing guidelines must be advisory to comply with the Sixth Amendment, transformed mandatory federal sentencing guidelines to advisory guidelines in a single day. While this is not Washington State specific, it did create a unique opportunity to study the impacts of mandatory sentencing guidelines. The research findings are mixed, with some studies showing that sentences by federal judges following *Booker* had higher racial and ethnic disparities than those before *Booker* while other studies have found that the greater judicial discretion following *Booker* did not correlate with increased racial disparities. Research in other states suggests that states falling in different places on the mandatory-voluntary guidelines continuum did not differ in sentencing disparities, suggesting that higher judicial discretion may not impact racial or ethnic sentencing disparities. These findings led the Sentencing Guidelines Commission to note that there are real risks of increasing racial disparities through changes to the SRA and "there are concerns raised by the research so further investigation is encouraged and should guide implementation of any reforms."[6] Unfortunately there has not been similar study on the impact of the SRA in Washington or federal sentencing guidelines on gender disparities.

1. Sentencing within the standard range

Under the SRA, the offender score is a significant driver of the applicable sentencing range. A person's "offender score" is calculated by the number of points a person has. As a general rule, a felony conviction or a juvenile adjudication for a violent felony offense counts as one point in a person's offender score.[7] There are, however, a multitude of exceptions to this general rule, some of which were present in the SRA in its original form and others of which have arisen in subsequent amendments.[8] For certain offenses, past convictions may count as two or three points instead of just one.[9] The effect of this doubling or tripling of points for purposes of an individual's offender score is an increase in the individual's standard range (in other words, the minimum and maximum sentence). Since the adoption of the SRA in 1981, the Washington State

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[6] SENT'G GUIDELINES COMM'N, FISCAL YEAR 2019: REVIEW OF SENTENCING REFORM ACT 10 (2019), https://sgc.wa.gov/sites/default/files/public/SGC/publications/SRA_review_report_rev20190802.pdf.
[7] RCW 9.94A.525(7).
[8] *See generally* RCW 9.94A.525(8)–(21).
[9] *See generally* RCW 9.94A.525(8)–(21). These offenses include but are not limited to: 1) manufacturing methamphetamine; 2) burglary or residential burglary; 3) sex offenses; 4) failure to register as a sex offender; 5) offenses related to theft of motor vehicles; and 6) domestic violence offenses. RCW 9.95A.525(13)–(21).

Legislature has passed laws increasing sentences in certain circumstances. These laws include the "hard time for armed crime" law, "three strikes and you're out" law, discussed separately below, and the "drug free zone" law, among others.

A 2020 ACLU report uses Washington State Superior Court sentencing data to show the increase in sentence lengths. These data indicate that average offender scores increased across all offense categories (violent, drug, property, and public order) from 1986 to 2016. These increases happened despite declines in crime rates and stable recidivism rates during this same time period. The authors posit that the rising offender scores are a result of statutory changes related to their calculation. The authors include some modeling, which estimates that long, very long, and life without possibility of parole sentences would have been reduced by 39% if offenders' scores had not increased due to legislative changes during this time period.[10] These data are not broken out by gender or race and ethnicity, making it impossible to determine if the trends differed by subpopulation. While there is some discussion of the equity impacts of sentencing guidelines in Washington broadly, and some literature on the equity impacts of federal sentencing guidelines (discussed in more detail above), there is a gap in the literature that would allow us to determine if changes to offender score calculations specifically have had different impacts by subpopulation.

Of note, a 2019 report from the Washington State Sentencing Guidelines Commission found that across the nation the higher the offender score, the higher the recidivism rate—suggesting offender score is a good predictor of future behavior. However, this trend does **not** exist in Washington State where the offender score does not strongly correlate with recidivism. The authors note that Washington is different from other states in that the calculation of the offender score is composed of factors beyond criminal history (e.g., length of time the defendant has been crime free, relationship between prior and current offenses, etc.).[11] As the report recommends, Washington recidivism data should be subject to the rigorous statistical analysis necessary to

[10] The report also does not show data from before the enactment of the SRA in 1984. KATHERINE BECKETT & HEATHER EVANS, ACLU, ABOUT TIME: HOW LONG AND LIFE SENTENCES FUEL MASS INCARCERATION IN WASHINGTON STATE (2020), https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state.

[11] SENT'G GUIDELINES COMM'N, *supra* note 6.

interpret results and institute effective reform and should be recorded in a standardized report. It would be useful to undertake a study examining why such a large percentage of incarceration derives from violations of conditions of release while recidivism is decreasing and whether other sanctions could be equally or more effective.

Increase in sentences for drug offenses

The SRA introduced sentencing ranges with presumptive minimum and maximum sentences for drug offenses as well. Whereas a pre-SRA court set only the maximum term and determined any mandatory minimums with the Parole Board determining the minimum term, post-SRA courts impose the sentence and are generally limited to imposing a sentence within a statutorily-prescribed range.[12] (The exceptions permitting sentences above or below that range are discussed at Section III.A.4).

Sentencing ranges for certain drug offenses including possession of cocaine and heroin have remained relatively static since 1984.[13] For other offenses including manufacturing, delivering, or possessing with intent to deliver certain narcotic drugs including heroin and cocaine, the sentencing ranges increased from 1988 to 1989 as a result of legislative changes to the seriousness level of these offenses.[14] In addition to the increase in standard ranges, beginning in 1989, a past drug offense conviction weighs more heavily when calculating the offender score.[15] For example, an individual, who had two past felony convictions (and no other criminal history) and who was convicted in 1988 of the crime of manufacturing, delivering or possessing with intent to deliver cocaine would have received a sentence of 31 to 41 months. An individual in that same scenario convicted in 1989 would have received a sentence of 67 to 89 months. See "Chapter 11: Incarcerated Women in Washington" for a discussion of changes to the underlying drug laws in 2021. See "Chapter 13: Prosecutorial Discretion and Gendered Impacts" for information on the role of prosecutors.

[12] RCW 9.95.010; RCW 9.94A.505.
[13] RCW 69.50.401(d).
[14] RCW 69.50.401(a)(1)(i).
[15] *Id.*

2. Concurrent versus consecutive sentences

When an individual is sentenced for more than one conviction, the sentences generally run concurrently.[16] A few exceptions have arisen, however, starting in the 1990s. First, sentences for two or more serious violent convictions must generally be served consecutively, which had previously been reserved for three or more serious violent convictions.[17] Multiple crimes related to driving under the influence or for possession of a firearm, theft of a firearm, and possession of a stolen firearm shall be served consecutively.[18] Finally, as discussed below, certain sentencing "enhancements" require the court to impose consecutive sentences unless the court finds a basis for an exceptional sentence.

3. Sentencing enhancements

In addition to the presumptive or base sentence, courts are mandated in certain circumstances to tack on additional time that must be served consecutive to the presumptive or base sentence. Below is a list of the different sentencing enhancements.

a. Firearm and deadly weapon enhancement

In 1995, Washington State citizens passed the "hard time for armed crime" initiative which increased the sentence an individual would receive for committing a felony offense when armed with a firearm.[19] Once an individual is found to have committed a felony with a firearm, the added time is 18 months to five years depending upon the class of felony conviction.[20] This period of time must be consecutive to all other sentencing provisions including any time added for other firearms or deadly weapons and must be served in prison.[21] The time received for the enhancement doubles if a person has received a firearm enhancement or a deadly weapon enhancement for a previous sentence.[22]

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[16] RCW 9.94A.589.
[17] RCW 9.94A.589(b).
[18] RCW 9.94A.589(c), (d).
[19] RCW 9.94A.533(3).
[20] *Id.*
[21] *Id.*; *State v. Santiago*, 149 Wn.2d 402, 417, 68 P.3d 1065 (2003).
[22] RCW 9.94A.533(3).

For individuals convicted of a felony while armed with a deadly weapon other than a firearm, the added time is six months to 24 months depending upon the class of felony conviction.[23] Consecutive sentencing and doubling apply to deadly weapons as with firearms.[24]

b. "Drug free zone" enhancements

In 1989, the Washington State Legislature enacted a law that increased the sentence for an individual convicted of delivering, manufacturing, or possessing certain drugs with intent to deliver if the act occurred in or near certain locations.[25] These locations included a school, school bus, public park, public transit vehicle, public housing project, public transit stop shelter, at a civic center or 1,000 feet from a school, school bus route stop, and civic center.[26] When there is a finding that a drug offense occurred at one of these locations, regardless of whether the individual knew or should have known the location was a drug free zone, an additional 24 months must be served consecutive to the presumptive sentence and must be served in prison.[27] The maximum imprisonment and fine one can receive are also doubled.[28] An accomplice, a person who knowingly assists another to commit an offense, will also receive the enhancement if both the accomplice and principal person committing the offense are within these locations.[29] In addition, one who passes through one of these zones in possession of drugs they intend to distribute elsewhere is also subject to a drug free zone enhancement.[30] In light of the size of zones (1,000 feet) and the numerous locations included around-the-clock (regardless of whether school-bus transit is in effect), drug zones are nearly ubiquitous.[31]

National data indicate that drug free zones disproportionally impact Black, Indigenous, and communities of color, at least in part because people of color are more likely to live in densely

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[23] RCW 9.94A.533(4).
[24] *Id.*
[25] RCW 69.50.435.
[26] RCW 69.50.435(1)(a)-(j).
[27] RCW 9.94A.533(6).
[28] RCW 69.50.435.
[29] *State v. Silva Baltazar*, 125 Wn.2d 472, 483, 886 P.2d 138 (1994).
[30] *State v. McGee*, 122 Wn.2d 783, 864 P.2d 912 (1993).
[31] JUDITH GREENE, KEVIN PRANIS & JASON ZIEDENBERG, DISPARITY BY DESIGN: HOW DRUG-FREE ZONE LAWS IMPACT RACIAL DISPARITY -- AND FAIL TO PROTECT YOUTH 39 (2006), https://www.justicestrategies.org/sites/default/files/publications/Disparity%20by%20Design.pdf.

populated urban neighborhoods than white people. For example, in 2005, 96% of prisoners in New Jersey serving time for drug free zone offenses were Black or Hispanic.[32] While Washington data has not been analyzed in this same way at the state level, data from 1999 to 2005 found that, while in King County Black and white defendants were equally likely to receive drug free zone enhancements if they went to trial, in Pierce County, Black defendants who went to trial were more likely than their white counterparts to receive this enhancement. This has led some legal experts in Washington to indicate that drug free zone enhancements are not being used to deter drug activity near schools, but rather to put pressure on defendants to plead guilty rather than face the risk of a long prison sentence.[33]

c. DUI enhancements

In the 2000s, the Legislature also adopted an enhancement for those convicted of vehicular homicide.[34] Specifically, the court must sentence the individual for an additional two years of total confinement consecutive to all other sentencing provisions for each prior DUI or physical control conviction.[35] This mandatory enhancement also applies to people who have a prior conviction such as negligent driving if the prior conviction derived from a DUI charge.[36]

d. Sexual motivation enhancements

In 2006, the Washington State Legislature adopted an enhancement for those convicted of crimes with sexual motivation.[37] If a person is sentenced to a crime of sexual motivation or sentenced for an anticipatory offense with sexual motivation (such as taking steps in order to commit a crime), the court is mandated to sentence an additional two years for any past class A felony convictions, 18 months for past class B felony convictions and one year for past class C felony convictions.[38] If a person has received a prior sexual motivation enhancement after July 1,

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[32] THE N.J. COMM'N TO REV. CRIM. SENT'G, REPORT ON NEW JERSEY'S DRUG-FREE ZONE CRIMES AND PROPOSAL FOR REFORM 39 (2005), http://sentencing.nj.gov/dfz_report_pdf.html; GREENE, PRANIS & ZIEDENBERG, *supra* note 31.
[33] GREENE, PRANIS & ZIEDENBERG, *supra* note 31.
[34] RCW 9.94A.533(7).
[35] *Id.*
[36] *City of Walla Walla v. Greene*, 154 Wn.2d 722, 728, 116 P.3d 1008 (2005).
[37] RCW 9.94A.533(8).
[38] *Id.*

2006, the subsequent sexual motivation enhancement is doubled.[39] This added time must be served consecutively to any presumptive sentence and must be served in prison.

e. Criminal street gang sentencing enhancement

In the 2000s, the Legislature adopted a sentencing enhancement for adults convicted of "any criminal street gang-related" felony for which the adult involved a minor in committing the offense.[40] It appears the enhancement has been applied in only one case.[41] Once the court makes this finding, the sentence range in this scenario is 125% of the sentencing range for the same crime in which there is no such finding.[42] For example, a person with a certain criminal history committing the crime of theft in the first degree and without gang-related finding and without involving a minor in committing the crime could be sentenced between the range of 22 to 29 months. In contrast, a person with the same criminal history committing the crime of theft in the first degree and with a gang-related finding and with a finding that this defendant involved a minor in the committing of the offense would receive a sentence between the range of 27.5 to 36.25 months in prison.

f. Other types of sentencing enhancements

Other sentencing enhancements – all of which have been adopted after the enactment of the SRA - include: 1) injuring someone while attempting to elude police; 2) having a minor in the car when committing certain felony driving offenses; 3) manufacturing methamphetamine or possessing certain ingredients with the intent to manufacture methamphetamine in the presence of a minor; 4) committing certain drug offenses in a jail or prison; 5) engaging in certain sex offenses involving a minor in exchange for a fee; 6) assaulting a law enforcement officer who

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[39] *Id.*
[40] RCW 9.94A.533(10)(a).
[41] WASH. STATE CRIM. SENT'G TASK FORCE, SENTENCING EFFECTIVENESS WORKING GROUP – GRID SUBGROUP MEETING SUMMARY: SEPTEMBER 15, 2020 1-2 (2020), https://s3.wp.wsu.edu/uploads/sites/2180/2020/12/SU69B41.pdf. There is also an aggravating circumstance at RCW 9.94A.535(3)(aa) for "intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership."
[42] RCW 9.94A.533(10)(a).

is performing their duties; and 7) committing robbery of a pharmacy.[43] Each of these enhancements adds 12 to 24 months to the presumptive sentence.[44]

While there is not literature exploring the gender and other equity impacts of most enhancements, there is evidence that mandatory minimums are a significant source of the racial disparities in sentencing—and the Washington State Sentencing Guidelines Commission recently noted that because "of their mandatory nature and the ineligibility for application of earned release time, most enhancements are, at their core, mandatory minimums."[45] Except for the limited studies discussed in Section VI – we could not identify data showing the breakdown in the use of enhancements by gender or race and ethnicity and no intersectional analysis has been completed.

The Sentencing Guidelines Commission notes that Washington's guidelines provide structure to both judicial and prosecutorial discretion, creating a smaller shift of discretion from judges to prosecutors than happened at the federal level. However, the prosecutorial guidelines are advisory only, which can lead to the uneven application of some enhancements across the state.[46] See "Chapter 13: Prosecutorial Discretion and Gendered Impacts" for more information on prosecutorial guidelines and discretion.

4. Exceptional sentences above or below the guidelines range

While the SRA provides structure to sentencing, it does not eliminate a court's discretion altogether.[47] A judge may depart from a standard range sentence and impose an exceptional sentence above or below the standard range.[48] RCW 9.94A.535(1) lists eleven non-exclusive mitigating factors that are reasons a court may use to reduce a sentence. However, an exceptional sentence cannot be imposed below a mandatory minimum sentence if the Legislature has provided one.[49] RCW 9.94A.535(3) has an exclusive list of over thirty aggravating

[43] RCW 9.94A.533.
[44] *Id.*
[45] SENT'G GUIDELINES COMM'N, *supra* note 6, at 20.
[46] *Id.*
[47] RCW 9.94A.010.
[48] RCW 9.94A.535.
[49] RCW 9.94A.540.

factors that could lengthen a sentence, but which must be charged by the prosecution and found by a jury before the court can use one or more factor to impose an exceptional sentence above the standard range. Only a few aggravating circumstances can be found exclusively by the court and they largely relate to a defendant's criminal history (see RCW 9.94A.535(2)). A two-part test determines whether a factor actually supports an exceptional sentence.[50] First, a judge "'may not base an exceptional sentence on [crime-related] factors necessarily considered by the Legislature in establishing the standard sentence range.'"[51] For example, a lack of criminal history is generally not a sufficient reason to depart from a standard range because that was something the Legislature considered when setting the standard range.[52] However, a lack of criminal history may be considered in combination with a finding that the defendant was 'induced' to commit the crime or lacked a predisposition to commit the crime.[53] As discussed further below, at least some personal characteristics, such as youth, can be considered in imposing a mitigated sentence.

Second, the "'factor must be sufficiently substantial and compelling to distinguish the crime.'"[54] "[A]ny such reasons must relate to the crime and make it more, or less, egregious."[55] For example, family support or being low or moderate risk to reoffend are not considered relevant to the crime.[56] However, the court will accept a stipulation to an exceptional sentence in a valid plea deal as a substantial and compelling reason.[57] The court must explain in writing the reasons for imposing an exceptional sentence.[58]

a. Mitigating circumstances for sentencing below the standard range

The illustrative list of mitigating circumstances provided in RCW 9.94A.535(1) includes the following: 1) to a significant degree, the victim was an initiator, willing participant, aggressor or provoker; 2) the defendant was under duress, coercion, threat, or compulsion on some level; 3)

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[50] *State v. Law*, 154 Wn.2d 85, 95, 110 P.3d 717 (2005); *State v. Graham,* 181 Wn.2d 878, 337 P.3d 319 (2014); RCW 9.94A.535.
[51] *Law*, 154 Wn.2d at 95 (quoting *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997)).
[52] *State v. Freitag*, 127 Wn.2d 141, 143-44, 896 P.2d 1254 (1995).
[53] *State v. Fowler*, 145 Wn. 2d 400, 406-07, 38 P.3d 335 (2002).
[54] *Law*, 154 Wn.2d at 95 (quoting *Ha'mim*, 132 Wn.2d at 840).
[55] *Fowler*, 145 Wn. 2d at 404.
[56] *Id.*
[57] *In re Breedlove*, 138 Wn.2d 298, 300, 979 P.2d 417 (1999).
[58] RCW 9.94A.535.

the defendant was induced by others without apparent predisposition to do so; 4) the defendant's capacity was impaired (but not by voluntary use of alcohol or drugs); 5) the defendant was not the principal in the offense and manifested concern for the victim; 6) the defendant or defendant's children suffered from a pattern of abuse by the victim and committed the offense in response to abuse; and 7) the defendant committed an act of domestic violence after and in response to suffering from a pattern of coercion, control or abuse by the victim. Although this list is non-exclusive, a basis for an exceptional sentence downward must distinguish the case from other cases in the same category of crime.[59] Once a court identifies a basis for an exceptional sentence downward, it must consider the purposes of the SRA as set forth in RCW 9.94A.010 when crafting an appropriate sentence.[60]

As noted above, an example of a mitigating circumstance is that the defendant's capacity was impaired.[61] Impairment of the defendant's capacity by voluntary use of alcohol or drugs, however, does not constitute a mitigating circumstance.[62] Furthermore, the Washington Supreme Court clarified that impairment by alcohol as a result of alcoholism is not, in and of itself, a mitigating factor.[63] The Court even further clarified in *State v. Hutsell* held that "the unforced, and not fraudulently induced, use of drugs or alcohol" regardless of dependence is not a mitigating factor.[64]

RCW 9.94A.535(1)(c) provides a basis for downward departure from the standard range when a defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense, but which significantly affected their conduct. In *State v. Pascal*, the court upheld a sentence in which the trial court imposed a downward departure for first-degree manslaughter based on a failed claim of self-defense based on battered woman's syndrome.[65] The trial court appropriately evaluated the evidence of mitigating factors and determined that the defendant's actions significantly distinguished her conduct from conduct

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[59] *Fowler*, 145 Wn. 2d at 405.
[60] *State v. Alexander*, 125 Wn.2d 717, 730, 888 P.2d 1169 (1995).
[61] RCW 9.94A.535(5).
[62] *Id.*
[63] *State v. Allert*, 117 Wn.2d 156, 164, 815 P.2d 752 (1991).
[64] *State v. Hutsell*, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993).
[65] *State v. Pascal*, 108 Wn.2d 125, 136, 736 P.2d 1065 (1987).

typically present in manslaughter because the record showed the decedent had subjected the defendant to physical beatings and to verbal and emotional abuse both on the day of his death and prior.[66] In addition to the incomplete defense, the *Pascal* Court found the mitigated sentence supported by a former mitigating factor for battered woman's syndrome as well as RCW 9.94A.535(1)(a), which provides that the victim was an initiator, willing participant, aggressor, or provoker of the incident. The specific mitigator for battered woman's syndrome no longer exists. However, RCW 9.94A.535(1)(j) allows a sentencing court to issue a downward departure from the standard range after finding that "the current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse." It stands to reason that at least some defendants who present a failed self-defense claim at trial could still receive an exceptional sentence under this basis, if the trial court issues certain findings.

In *State v. Rogers*, the court reviewed the scope of duress in mitigation of a criminal sentence, compared the application of duress in mitigation with the substantive duress defense established by RCW 9A.16.060, and determined that duress must be from an outside force and not a mental or emotional condition.[67] The Court also interprets the mitigating factor of compulsion as connoting the influence of an outside force.[68] Therefore, as with psychological states, actions arising from drug or alcohol addiction would not constitute compulsion as a mitigating factor.[69]

RCW 9.94A.535(1)(g) provides another basis for an exceptional sentence when the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive considering the seven purposes of the SRA provided in RCW 9.94A.010. Recently, the Washington Supreme Court explained that the multiple sentencing policy applies not only to violent and nonviolent offenses but also to multiple serious violent offenses.[70]

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[66] *Id.*
[67] *State v. Rogers*, 112 Wn.2d 180, 770 P.2d 180 (1989).
[68] *Hutsell*, 120 Wn.2d at 918.
[69] *Id.*
[70] *State v. Graham*, 181 Wn.2d 878, 884, 337 P.3d 319 (2014).

Examples of such exceptional sentences are not simply confined to deviating below the standard range. In *In re Pers. Restraint of Mulholland*, the Washington Supreme Court explained that a court has discretion upon finding one or more mitigating factors justifying an exceptional sentence downward to order concurrent sentences for separate serious violence offenses.[71] A sentencing court also has discretion upon finding one or more mitigating circumstances supporting an exceptional sentence downward to run sentences for firearm-related offenses concurrently.[72]

An individual's youth can also be a basis for imposing a mitigated sentence.[73] Washington recognizes brain development science, which shows the frontal lobe that controls volition continues to develop well into an individual's twenties.[74] Because youthfulness may impact a defendant's culpability and has not been considered by the Legislature in setting the standard range for adults, courts can consider it and reduce an individual's sentence accordingly.

All sentencing guidelines must be imposed equally "without discrimination as to any element that does not relate to the crime or the previous record of the defendant."[75] The reasons for an exceptional sentence must relate to the crime, the defendant's culpability, or the defendant's criminal record.[76] The defendant's personal and unique factors unrelated to the crime, are not relevant.[77] The defendant's race and gender "should play no part in determining the appropriate sentence for a crime. . . . A determinate system, by its nature, should virtually eliminate such sentencing disparities."[78] However, the *victim's* personal and unique characteristics may be relevant.[79]

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[71] *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 331, 166 P.3d 677 (2007).
[72] *State v. McFarland,* 189 Wn.2d 47, 50, 399 P.3d 1106 (2017).
[73] *State v. O'Dell*, 183 Wn.2d 680, 688-96, 358 P.3d 359 (2015).
[74] *Id.* at 695-96 (relying on U.S. Supreme Court cases incorporating juvenile brain science); *In re Pers. Restraint of Monschke*, 197 Wn.2d 305, 482 P.3d 276 (2021).
[75] RCW 9.94A.340; *State v. Law*, 154 Wn.2d 85, 97, 110 P.3d 717 (2005).
[76] *Law*, 154 Wn.2d at 89.
[77] *Id.*
[78] Larry Michael Fehr, *Racial and Ethnic Disparities in Prosecution and Sentencing: Empirical Research of the Washington State Minority and Justice Commission,* 32 GONZ. L. REV. 577, 580 (1997) (quoting SENT'G GUIDELINES COMM'N, SENTENCING POLICY IN WASHINGTON: AN ASSESSMENT 8 (1996)).
[79] *State v. Nguyen*, 68 Wn. App. 906, 919, 847 P.2d 936 (1993) (reasoning an exceptional sentence was justified because the victims were particularly vulnerable based on their age and gender "under the circumstances").

Thus, sentencing courts have discretion to mitigate sentences for virtually any crime except those with a mandatory minimum, some sex offenses, and where the persistent offender laws apply. Because the mitigating factors listed in RCW 9.94A.535(1) are not exclusive, sentencing courts have some discretion to find their own bases for departing below the standard range. Within the constraints discussed herein, parties could advocate for mitigating circumstances based on some of the inequities described herein.[80] Within the described constraints, courts could use their discretion to impose such mitigated sentences.

b. Aggravating circumstances for sentencing above the standard range

The SRA also allows the court to depart above the standard range sentence when certain aggravating circumstances are present. Among the exclusive list of over 30 factors that can serve to increase the length of a sentence are: the victim of the current offense was particularly vulnerable or incapable of resistance, the current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant; the current offense included a finding of sexual motivation; the current offense involved domestic violence or stalking and includes additional circumstances; and a position of trust, confidence, or fiduciary responsibility was used to facilitate the commission of the current offense.

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[80] While historically, a prosecutors' agreement to an exceptional sentence below the standard range helps insulate the below-range sentence from reversal on appeal, it is not and should not be a necessity. *Compare, e.g.*, *State v. Pascal*, 108 Wn.2d 125, 736 P.2d 1065 (1987) (on prosecution's appeal, affirming trial court's sentence below the presumptive SRA range where evidence showed the victim had abused his domestic partner and mother of his child, the defendant, physically, verbally, and emotionally before and on the day he was killed and also acted as the aggressor); *State v. Jeannotte*, 133 Wn.2d 847, 947 P.2d 1192 (1997) (on prosecution's cross-appeal, affirming trial court's sentence below presumptive range based on failed entrapment defense); *State v. Alexander*, 125 Wn.2d 717, 888 P.2d 1169 (1995) (on prosecution's appeal, affirming trial court's sentence below the presumptive range where based on the "extraordinarily small" amount of controlled substance involved, defendant's low level of involvement or sophistication, and defendant's peripheral involvement in the drug hierarchy) *with, e.g.*, *Law*, 154 Wn.2d at 95-104 (on prosecution's appeal, reversing exceptional sentence below the presumptive range as based on factors considered by the Legislature where those factors were defendant's age of 18 and lack of prior contacts with law enforcement; discussing *State v. Ha'mim*, 132 Wn.2d 834, 940 P.2d 633 (1997)); *State v. Freitag*, 127 Wn.2d 141, 145, 896 P.2d 1254 (1995) (on prosecution's appeal, reversing imposition of a reduced sentence because it was based on factors considered by the Legislature in establishing the standard range: lack of criminal history, "her concern for people beyond that normally shown by others," and the trial court's belief that community service would be more appropriate in light of current jail overcrowding); *State v. Gaines*, 122 Wn.2d 502, 859 P.2d 36 (1993) (on prosecution's appeal, reversing exceptional sentence below the presumptive range where trial court based in part on defendant's drug addiction and its causal role in the offense); *State v. Allert*, 117 Wn.2d 156, 815 P.2d 752 (1991) (on prosecution's appeal, reversing exceptional sentence below presumptive range where trial court based on improper factors including defendant's "voluntary use of alcohol").

Additionally, any fact that is the basis of an aggravating factor relied upon by the sentencing court must be proved to a jury.[81] There are limited exceptions including where the defendant and state stipulate that an exceptional sentence serves the interest of justice and the court agrees or, essentially, where the standard offender score calculation allows for too lenient a sentence.[82]

The use of aggravating circumstances can dramatically increase an individual's sentence. For example, in one case, a mother was convicted of assaulting her child by administering eye drops that were believed to have caused conjunctivitis and corneal thinning among other injuries. The prosecution charged and the jury found several aggravating circumstances, deliberate cruelty under RCW 9.94A.535(3)(a), particularly vulnerable victim under RCW 9.94A.535(3)(b), and abuse of position of trust, confidence, or fiduciary responsibility under RCW 9.94A.535(3)(n). The court, at sentencing, used the aggravating circumstances to justify a sentence of 40 years, four times the presumptive standard range based on the mother's lack of prior criminal history.[83]

In another example, the court imposed an exceptional sentence based on the aggravating circumstance that the degree of sophistication rendered the identity theft and forgery offenses "major economic" crimes. As a result of the aggravating circumstance, the sentencing court increased the presumptive sentence of 17 to 22 months, for forgery, and 0 to 12 months, for identity theft, to 36 months each, an increase of between 160 to 300% of the standard range.[84]

Life and long sentences are further discussed below in Section IV. Sentencing disparities based on gender, race, ethnicity, age, and other factors are discussed below in Section VI.

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[81] *State v. Ose*, 156 Wn.2d 140, 148-49, 124 P.3d 635, 639 (2005).
[82] RCW 9.94A.535(2).
[83] *State v. Mothershead*, No. 73634-5-I (Wash. Ct. App. Mar. 28, 2016) (unpublished), https://www.courts.wa.gov/opinions/pdf/736345.pdf.
[84] *State v. Baldwin*, 150 Wn.2d 448, 78 P.3d 1005 (2003).

5. Sentencing alternatives

Washington also allows for sentencing alternatives for specific types of offenders including parents, drug offenders, and sex offenders.[85] These sentencing alternatives are not considered exceptional sentences.[86]

Seemingly most relevant to this Study is the Family and Offender Sentencing Alternative (FOSA).[87] Created by the Legislature in 2010, FOSA allows judges to waive a prison sentence for eligible persons and impose 12 months of community supervision along with conditions for treatment and programming. The FOSA allows parents to maintain family bonds and be productive contributors in their families and communities. FOSA seeks to break the cycle whereby children of incarcerated parents are more likely to end up in the criminal justice system themselves. To be eligible, the individual must be a parent, legal guardian, or custodian with physical custody of at least one minor child, facing more than one year in prison, not subject to deportation, and without prior or current violent felonies or sex offenses.[88] According to data from the Washington State Department of Corrections, FOSAs constitute only 232 of the 97,006 sentences imposed between 2015 and 2019. Of these 232 FOSA sentences, 141 were imposed on women and the other 91 were imposed on men.[89] The data does not allow for an intersectional analysis, nor does it provide information on how often FOSA sentences were requested but denied by the court. Anecdotal information suggests that, at least in some counties, FOSA sentences are requested only by agreement of the parties and thus allow prosecutors a gatekeeping function not inherent in the legislation. These are areas that should be studied and could help to determine how to increase imposition of FOSA sentences. See "Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children,

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[85] RCW 9.94A.655; RCW 9.94A.660; RCW 9.94A.670.

[86] *See State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005) (noting the similarities and differences of procedural requirements between sentencing alternatives and exceptional sentences); *State v. Murray*, 128 Wn. App. 718, 726, 116 P.3d, 1072 (2005) (noting the trial court cannot create a hybrid sentence of a sentencing alternative and an exceptional sentence).

[87] RCW 9.94A.655.

[88] *Id.*

[89] RDA Data Request from Washington State Department of Corrections: FOSA Distribution, SP3930, 2015-2019 (2020).

and Families" for a further discussion of the impacts of incarceration on parents and their families.

Given the role of drug convictions in the increase in incarceration of women, Drug Offender Sentencing Alternatives are also relevant to this Study. DOSA sentences are available for those with drug convictions involving only a "small quantity" of drugs as determined by the judge. There are other eligibility criteria such as the conviction cannot include a violent offense, sex offense, or driving under the influence and the individual has not received a DOSA sentence more than once in the prior ten years.[90] Very little research has been conducted in Washington or nationally to determine if alternative sentences generally, and DOSA sentences specifically, are equitably applied by gender or race and ethnicity. The body of literature only includes one Washington-specific study focused on DOSA sentences.

A 2005 study in Washington State looked at the First Time Offender Waiver, DOSA, and Work Ethic Camp alternatives. This study relies on now old data (1996-1999) from the Washington State Sentencing Guidelines Commission. The analysis found that men were significantly less likely than women to receive the First Time Offender Waiver and the Work Ethic Camp alternatives, but that there were no significant differences by sex for DOSA sentences.[91] This is an interesting finding given the trends in the literature which suggest that women are generally more likely to receive alternative or lesser sentences than men. It raises questions about what is unique about sentencing for women specific to drug crimes. The authors did find that also being eligible for Work Ethic Camp significantly decreased the odds that someone would get a DOSA sentence,[92] but the authors do not speculate how that could interact with gender- and race/ethnicity-based disparities for DOSA sentences. At the time of data collection DOSA sentences were infrequently used, with about one third of counties not using it at all during the study period.[93]

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[90] Randy R. Gainey, Sara Steen & Rodney L. Engen, *Exercising Options: An Assessment of the Use of Alternative Sanctions for Drug Offenders*, 22 JUST. Q. 488 (2005); RCW 9.94A.660.
[91] *Id.* at 505.
[92] *Id.* at 507.
[93] *Id.*

Additionally, the authors found that eligible Hispanic individuals were significantly less likely than white or Black individuals to receive any of the sentencing alternatives. DOSA sentences reflected the apex of the disparity, where the odds of receiving the alternative sentence were 83% lower for Hispanic individuals than white individuals. For Black individuals the only significant difference was for First Time Offender Waivers, where the odds of a judge giving a Black individual this waiver were 26% lower than for white individuals.[94] The authors also conducted interviews with judges, defense attorneys, and prosecutors. These interviews suggest that at least one reason why Hispanic individuals may have been less likely to receive an alternative sentence was related to assumptions and negative attitudes about possible citizenship status.[95]

This study has significant limitations such as: 1) a lack of data analysis looking at the intersection of gender and race or ethnicity; 2) a lack of analysis for Indigenous, Asian, and Native Hawaiian or other Pacific Islanders; and 3) reliance on a dataset that inaccurately represents gender as a binary and that relies on felony judgment and sentencing forms (presumably introducing the same limitations inherent in the Caseload Forecast Council data as outlined in "Chapter 11: Incarcerated Women in Washington"). In addition, these data are now outdated, so it is impossible to determine how generalizable the findings are to Washington today. It would be useful to convene a new study on sentencing alternatives using more recent data and avoiding the identified flaws present in prior studies.

6. Community custody

Under the SRA, many sentences require a term of community custody—supervision while in the community—to follow the period of incarceration.[96] In 2018, the Department of Corrections reported the length of confinement for violations of community custody had been gradually increasing since 2014, even while the rate of violation behavior has remained steady.[97] The result, of course, is more people incarcerated in Washington. The report does not break the data

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[94] *Id.* at 505.
[95] *Id.* at 508.
[96] RCW 9.94A.701-711.
[97] WASH. STATE DEP'T OF CORR., SWIFT AND CERTAIN SANCTIONING: 2018 REPORT TO THE LEGISLATURE 5 (2018), https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=2018%20SAC%20Report%20%28002%29_49eb2d39-061a-4230-b55f-40c7f2cdef85.pdf.

down by gender. More research is needed on the effect of increased community supervision violations on female incarceration in Washington. As noted in "Chapter 11: Incarcerated Women in Washington," nationally, the number of women subject to correctional supervision in the community greatly exceeds the admittedly large number of women confined to jails and prisons.[98]

7. Three strikes mandatory life without parole sentencing

In 1993, Washington State voters approved an initiative that created the persistent offender law, popularly known as the "three strikes and you're out" law.[99] Three-strike legislation was originally intended to remove repeat offenders of serious crimes from society for long periods or life. Washington State was one of the first states to implement three-strike laws.[100]

Under the persistent offender law, an individual must be incarcerated for life without the possibility of parole after receiving, on separate occasions, three convictions—or "strikes"—for certain serious felonies including all Class A felonies, any attempt, solicitation, or conspiracy to commit a Class A felony, and others such as assault in the second degree, extortion in the first degree, and kidnapping in the second degree.[101]

Research from Washington, California, and nationally shows three-strike laws are ineffective in addressing their stated goal of deterring or even preventing crime. They are also costly and discriminatory. A recent Washington study discusses the ineffectiveness and disproportionate impact of three-strikes and other lengthy-sentence legislation, finding "more sparing use of prisons, combined with enhanced crime prevention efforts, expanded and improved rehabilitative programming in prisons, and the development and expansion of restorative justice

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[98] Thomas Bonczar & Joseph Mulako-Wangota, *Corrections Statistical Analysis Tool (CSAT) – Probation*, BUREAU OF JUST. STAT. (June 29, 2020), https://www.bjs.gov/probation/ (count of year-end probation population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool); Thomas Bonczar & Joseph Mulako-Wangota, *Corrections Statistical Analysis Tool (CSAT) – Parole*, BUREAU OF JUST. STAT. (June 23, 2020), https://www.bjs.gov/parole/ (count of year-end parole population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool); E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2016 (2018), https://www.bjs.gov/content/pub/pdf/p16_old.pdf; DANIELLE KAEBLE, PROBATION AND PAROLE IN THE UNITED STATES, 2016 (2018).

[99] Initiative 593 (codified at RCW 9.94A.570).

[100] Michael Vitiello, *Three Strikes Laws: A Real or Imagined Deterrent to Crime?* 29 ABA HUM. RTS. 3 (2002); James Austin et al., *The Impact of 'Three Strikes and You're Out'*, 1 PUNISHMENT & SOCIETY 131 (1999).

[101] RCW 9.94A.570; RCW 9.94A.030(33).

alternatives are far more promising" than lengthy and lifetime prison terms.[102] An analysis of three-strike laws in California using state-level data from 1986-2005, found that these laws appear to be associated with statistically significant but only slightly faster rates of decline for robbery, burglary, larceny, and motor vehicle theft. However, murder rates did not decline based on the three strikes law in California, leading the researcher to ultimately argue that the harshest sentencing punishment might not be the most effective. Other research finds no evidence that three strikes have any intended deterrent effect on crime rates in California.[103] None of these studies look at effectiveness with regard to gender.

In 2019, the Washington State Legislature removed robbery in the second degree from the list of qualifying "strikes."[104] While the final bill does not contain a statement of legislative intent, testimony supporting the bill advocated for the removal of robbery in the second degree because the crime does not involve weapons, bodily injuries, or financial institutions (in fact, it often criminalizes shoplifting while possessing any type of weapon), life sentences for this crime do not affect the crime rate, and the crime has been disproportionately applied by county and race.[105] At the time the bill was passed, a reported 62 persons were serving life sentences based on a robbery in the second degree strike. While the final bill did not include an explicit statement on whether it applies retroactively, the Legislature fixed the issue in separate legislation in 2021, which provides a resentencing for those individuals for whom robbery in the second degree was used as a strike.[106] We examine long and life sentences more broadly in Section IV.

8. Changes to sentencing for sex offenses

Two relatively recent changes in the sentencing of sex offenses in Washington have contributed to longer sentences (for the mostly male defendants) and, therefore, more persons held in custody. First, in 2001, the Washington State Legislature dramatically changed the way

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[102] BECKETT & EVANS, *supra* note 10.
[103] Mike Males & Dan Macallair, *Striking Out: The Failure of California's Three Strikes and You're Out Law*, 11 STAN. L. & POL'Y REV. 65 (1999).
[104] LAWS OF 2019, ch. 187.
[105] *Id.*; S.B. REP. ON ENGROSSED SUBSTITUTE S.B. 5288, 66th Leg., Reg. Sess. (Wash. 2019); H.B. REP. ON ENGROSSED SUBSTITUTE S.B. 5288, 66th Leg., Reg. Sess. (Wash. 2019).
[106] S.B. 5164, 67th Leg., Reg. Sess. (Wash. 2021).

individuals with certain sex offense convictions were sentenced.[107] When a judge determines that an individual's conviction falls within this section, the judge is required to sentence the individual to a maximum term set by statute and a minimum term that is within the standard range or an exceptional sentence pursuant to RCW 9.94A.535.[108] Before the expiration of the minimum term, the indeterminate sentence review board will conduct a hearing to decide whether to release the individual before the maximum term has expired.[109] If the board does not release the person, it can set another minimum term of confinement not to exceed five years before the next review by the board for release.[110] The practical effect of this reform is that most sex offenders spend more time in total confinement.

Second, in an expansion of the persistent offender law passed in 1996, two separate convictions of certain sex offenses result in the mandatory sentence of life without parole.[111] The list of offenses include rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, indecent liberties by forcible compulsion, and a number of violent offenses if with a finding of sexual motivation.[112]

This two strikes and you're out law is expected to replace the civil commitment regime over time as repeat sex offenders will be subject to mandatory lifetime incarceration. Civil commitment for sex offenses began in 1990 when the Legislature passed the Sexually Violent Predator Act.[113] The definition of a "sexually violent predator" is someone who: 1) has been convicted of or charged with a crime of sexual violence; 2) who suffers from a mental abnormality or personality disorder; and 3) the mental abnormality or personality disorder makes the person likely to engage in

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[107] RCW 9.94A.507(1). Individuals who are not persistent offenders are sentenced under the Sex Offender Management Act if convicted of (a) rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; (b) the following crimes with a finding of sexual motivation: murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or (c) an attempt of any offense falling in the above two sections.
[108] RCW 9.94A.507(3)(a).
[109] RCW 9.95.420(3).
[110] RCW 9.95.011(2).
[111] RCW 9.94A.570; RCW 9.94A.030(38).
[112] RCW 9.94A.030(38).
[113] ch. 71.09 RCW.

predatory acts of sexual violence if not confined in a secure facility.[114] If a person is deemed to be a sexually violent predator, the person is committed to the custody of the Department of Social Health Services for placement in a secure facility.[115] A person remains civilly committed only until it is established that they have changed so that they no longer fit the definition of a "sexually violent predator" or are granted—either by the Court or through the agreement of the State—a less restrictive alternative to commitment.[116]

Although civil committees are guaranteed due process rights, practically, few have managed to gain release. Only one cisgender woman has been civilly committed under the Sexually Violent Predator Act, and she was released in 2020 after the prosecution could no longer prove she met the criteria.[117] However, there are several transgender persons civilly committed.

IV. Increased Long and Life Sentences in Washington

As the above section demonstrates, the SRA and its various amendments over the last 30 years have created various mechanisms for imposing long and life sentences partly responsible for the increase in incarceration in Washington. A report released by the ACLU in February of 2020 found that felony sentencing data from the past 30 years indicate that life and long sentences are one driver of the increase in the Washington State prison population.[118] The data in this report are not broken out by gender, so it is unclear if the female and male prison populations have seen different trends. In the future, this area should be examined for gender and intersectional disparities in Washington.

As of 2019, over 41% of Washington's prison population was serving a sentence of ten years or more. Washington State Superior Court sentencing data show a steady increase in life and long sentences between 1986 and 2016, with the life without the possibility of parole sentences showing the most dramatic increase. The authors of the ACLU report attribute this increase in life and long sentences, that notably occurred despite declines in crime rates, to four key policy

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[114] RCW 71.09.020(18).
[115] RCW 71.09.060; RCW 71.09.070.
[116] RCW 71.09.060(1).
[117] *In re L.M.*, Pierce County Superior Court No. 95-2-12979-5 (In April 2020, the case was dismissed and the respondent released because she had been found not to meet the criteria for commitment).
[118] BECKETT & EVANS, *supra* note 10.

changes: 1) the 1993 adoption of the Persistent Offender Accountability Act ("three-strikes law); 2) the 1995 enactment of the Hard Time for Armed Crime Act (which authorized weapons enhancements); 3) the combination of several incremental changes to statutory rules increasing the weight of prior offenses and increasing the offense seriousness level (which, in effect, increases the standard sentencing range); and 4) the decrease in opportunities for parole following enactment of the SRA and subsequent legislation reducing the ability to earn "good time" credits for early release. [119]

The increase in life and long sentences also contributes to an increase in incarceration of older adults. This is of extreme significance during the COVID-19 pandemic given the high risk the virus poses to older adults and those with underlying health conditions, particularly those in congregate living settings.[120] As of May 2021, known COVID-19 outbreaks had occurred at three quarters of the prisons managed by the Department of Corrections, and in many work release facilities.[121] Fourteen incarcerated individuals have died from COVID-19, and thousands have been infected.[122] The Department of Corrections released information on the first three deaths, all of whom were men over the age of 60.[123] The first staff member to pass away was also over 60 years old.[124] However, Department of Corrections subsequently stopped releasing age-based demographic data. According to an updating study by the Marshall Project, COVID-19 rate among

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[119] *Id.*

[120] *Id.*; *Older Adults: COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 3, 2021), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html.

[121] *COVID-19 Data*, WASH. STATE DEP'T OF CORR. (2020), https://perma.cc/7TS4-2DHQ (numbers reported as of May 21, 2021).

[122] *Id.*

[123] *PRESS RELEASE: Third Incarcerated Individual in Washington Dies of COVID-19*, WASH. STATE DEP'T OF CORR. (Nov. 22, 2020), https://www.doc.wa.gov/news/2020/11222020p.htm; *PRESS RELEASE: Second Incarcerated Individual in Washington Dies of COVID-19*, WASH. STATE DEP'T OF CORR. (June 24, 2020), https://www.doc.wa.gov/news/2020/06242020p.htm; *PRESS RELEASE: First Incarcerated Individual in Washington Dies of COVID-19*, WASH. STATE DEP'T OF CORR. (June 18, 2020), https://www.doc.wa.gov/news/2020/06182020p.htm; *PRESS RELEASE: First COVID-Related Incarcerated Death at Stafford Creek*, WASH. STATE DEP'T OF CORR. (Dec. 10, 2020), https://www.doc.wa.gov/news/2020/12102020p.htm; *PRESS RELEASE: First COVID-Related Incarcerated Death at Airway Heights*, WASH. STATE DEP'T OF CORR. (DEC. 18, 2020), https://www.doc.wa.gov/news/2020/12182020p.htm.

[124] *PRESS RELEASE: First Washington Corrections Line of Duty Death from COVID-19*, WASH. STATE DEP'T OF CORR. (May 18, 2020), https://www.doc.wa.gov/news/2020/05182020p.htm. Numerous staff members have also been infected across many facilities. *COVID-19 Data*, WASH. STATE DEP'T OF CORR. (2020), https://perma.cc/7TS4-2DHQ (numbers reported as of May 21, 2021).

people incarcerated in prisons is 6.4 times the rate in Washington's general population.[125] Early in the pandemic, Governor Jay Inslee instituted emergency procedures to release approximately 1,100 individuals from our prisons.[126] Only nonviolent and non-sex-offense offenders nearing the end of their sentences were eligible for release. Washington State courts rejected lawsuits that would have resulted in the release of additional groups or individuals.[127] It also bears noting that prison conditions in Washington State have been widely reported to have worsened during the pandemic—incarcerated individuals have been without volunteer programs, social visits, and most professional visits for months, and time outside the cell has been extremely restricted for long periods of time, resulting in restrictions on access to showers, telephones, fresh air, and medical care. Further, many incarcerated individuals live in fear of contracting the virus and/or dying from it, creating a harshening of punishment unforeseen when most sentences were imposed.[128]

The authors of the ACLU report also posit that tough sentencing laws have increased prosecutor leverage in Washington, leading to an increase in plea deals and a decrease in trials. In 1986 the

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[125] *A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT, https://perma.cc/6M22-KL8V (updated May 31, 2021).

[126] Joseph O'Sullivan, *As COVID-19 Spreads in Washington's Prisons, Advocates Call for Better Conditions, Release of Inmates*, SEATTLE TIMES (Dec. 14, 2020), https://www.seattletimes.com/seattle-news/health/as-covid-19-spreads-in-washingtons-prisons-advocates-call-for-better-conditions-release-of-inmates/.

[127] *Colvin v. Inslee*, 195 Wn.2d 879, 467 P.3d 953 (2020); *In re Pers. Restraint of Pauley*, 13 Wn. App. 2d 292, 466 P.3d 245 (2020), *rev. denied* Order, No. 98586-3 (Wash. Supreme Ct. Aug. 6, 2020); *In re Pers. Restraint of Williams*, No. 99344-1 (Wash. Supreme Ct., oral arg. heard Mar. 11, 2021; orders entered Mar. 12 and Apr. 12, 2021) (although the court held confining 78-year-old Williams "in a space that does not include reasonable access to a bathroom and running water, and failing to provide him appropriate assistance in light of his physical disabilities [which left him confined to a wheelchair], is cruel" in violation of the Washington constitution, the court found the Department of Corrections remedied conditions such that release was not required).

[128] E.g., Lilly Fowler, WA inmates say they're retaliated against for getting COVID-19, Crosscut, https://crosscut.com/news/2020/12/wa-inmates-say-theyre-retaliated-against-getting-covid-19 (updated Dec. 15, 2020) (Department of Corrections uses solitary confinement to isolate sick prisoners; two prisoners who died had waited days to report difficulty breathing); Maggie Quinlan, *70 Percent of Airway Heights Prison Is COVID-19-Positive*, SPOKESMAN REV. (Dec. 24, 2020), https://www.spokesman.com/stories/2020/dec/24/70-of-airway-heights-prison-is-covid-positive. Harsh conditions have been reported in other prison systems as well. *E.g.*, Conrad Wilson, *Federal Lawsuit Calls Out COVID-19 Conditions at Sheridan Prison*, OR. PUB. BROAD. (June 30, 2020), https://www.opb.org/news/article/lawsuit-treatment-inmates-federal-prison-covid-sheridan-oregon; Joint Status Report, *Stirling v. Salazar*, No. 3:20-cv-00712-SB, Dkt. 48 at ¶ 2c (Oct. 30, 2020) (counsel for plaintiff "is hearing complaints that inmates at the FDC continue to be locked in their cells for most hours of the day; some FDC inmates are sleeping on mattresses on the floor of cells, as the third inmate in a two-person cell; and outdoor recreation time is limited to an hour every week").

average sentence imposed at trial in cases involving violent crime was 64 months longer than that imposed via a plea deal. In 2016, this number had jumped to 174 months.[129]

We recommend additional research be conducted using Department of Corrections data on factors that affect the length of time women spend in prison, for example: the extent that infractions increase length of stay in prison as well as at work release/community corrections and the extent that risk classification increases length of stay in prison. It would also be useful to examine the impact and necessity of maintaining distinct rates at which individuals earn a reduction in their sentence for positive behavior in prison ("good time"). For example, for some individuals good behavior results in a reduction of their sentence by one-third while for others it might be only ten percent and for many enhancements, for example, no good time credit can be applied. We also recommend additional research on court-related factors related to length of time served, for example: concurrent versus consecutive sentences and the use of enhancements and their effects on length of sentences.

V. Federal Sentencing Laws and Practices

Federal sentencing laws have developed since 1989 in many ways that impact the increases in incarceration rates. A comprehensive review of federal sentencing laws and practices is beyond the scope of this Washington study. A brief summary is provided.

Prior to 1984, federal courts had wide discretion when imposing sentences. In 1984, Congress passed the Comprehensive Crime Control Act, which included the federal Sentencing Reform Act with the goal, among other things, to reduce disparities in sentencing.[130] This broadly paralleled the change to the SRA in Washington. Under the federal SRA, the U.S. Sentencing Commission developed guidelines creating sentencing ranges with a minimum sentence and a maximum sentence for federal offenses.[131]

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[129] BECKETT & EVANS, *supra* note 10.
[130] Sentencing Reform Act (SRA), Pub. L. No. 98-473 (codified as amended in scattered sections of 18 and 21 U.S.C).
[131] 18 U.S.C. § 3553.

As part of this movement, Congress passed the Anti-Drug Abuse Act of 1986 which created mandatory minimum sentences triggered by certain amounts of controlled substances including cocaine.[132] The Anti-Drug Abuse Act of 1986 created harsher penalties for the average drug users, by criminalizing small amounts of drugs. For example, the Act included a provision that imposed a sentence for simple possession of crack cocaine that was 100 times harsher than simple possession of powder cocaine.[133] In other words, an individual possessing five grams of crack cocaine would receive the same sentence as an individual possessing 500 grams of powder cocaine.

This sentence structure was extended to conspiring to deliver crack cocaine in the Omnibus Anti-Drug Abuse Act of 1988. The Omnibus Anti-Drug Abuse Act of 1988 further singled out crack from other forms of cocaine and for the first time required a five-year mandatory sentence even for first-time offenders and for anticipatory offenses like attempt and conspiracy. These laws, according to Bush-Baskette (2000), removed the consideration of minor children dependent on the defendant and ignore the role the offender played in the crime.[134] Both bills authorized substantial increases in spending on criminal drug enforcement efforts, which led to an increasing amount of female drug arrests nationally, jumping by 95% between 1995 and 1996.[135]

The disparity for crack and powder cocaine was not corrected until 2010 under the Fair Sentencing Act.[136] The Fair Sentencing Act applies retroactively to crimes committed before it became effective but sentenced after the effective date.[137]

Despite declining crime rates, the Violent Crime Control and Law Enforcement Act of 1994 increased funding for police, jails, and prisons, enacted three-strikes sentencing at the federal level, and incentivized states to adopt "truth-in-sentencing" laws that required individuals to

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[132] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. §§ 841-904 (2012)).
[133] 21 U.S.C. § 841(b)(1)(A)(ii)(II); 21 U.S.C. § 841(b)(1)(A)(iii).
[134] Stephanie Bush-Baskette, *The War on Drugs and the Incarceration of Mothers*, 30 J. DRUG ISSUES 919 (2000).
[135] Stephanie S. Covington & Barbara E. Bloom, *Gendered Justice: Women in the Criminal Justice System*, GENDERED JUSTICE: ADDRESSING FEMALE OFFENDERS 3 (2003).
[136] Pub. L. No. 111-220 (Aug. 3, 2010) (amending 21 U.S.C. § 841 et seq.).
[137] *Dorsey v. United States*, 567 U.S. 260 (2012).

serve at least 85% of their sentences.[138] Washington State adopted the first truth-in-sentencing law in 1984, prior to the federal legislation.[139]

In 2004 and 2005, two United States (U.S.) Supreme Court decisions ruled the federal sentencing guidelines were only advisory and not mandatory.[140] The U.S. Sentencing Commission found the guidelines had a stabilizing effect on sentences for some of the most frequently prosecuted federal offenses, including drug trafficking, immigration, and firearms offenses. For other offenses, though, variation became prominent. The Commission found regional and individual-judge variations. It also concluded personal demographics have become more strongly correlated with sentencing outcomes.[141]

In 2018, the First Step Act was signed into law with the stated goal of reducing the federal prison population.[142] The law makes the 2010 Fair Sentencing Act retroactive to individuals sentenced before its implementation, reduces mandatory minimum sentences for some drug offenses, and expands the courts' authority to sentence low-level, non-violent drug offenders below the mandatory minimum. The First Step Act requires the Attorney General to study recidivism, to place prisoners in recidivism-reducing programs, and to provide greater assistance upon reentry into the community. The law also expands the ability of individuals to reduce the time served through earning credits for good behavior and engaging in programming and allows a court to consider compassionate release upon a defendant's motion and in consideration of certain criteria. The ultimate effect of this legislation has yet to be seen; however, it sets forth only incremental and small improvements to the systemic issue of mass incarceration.[143]

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[138] Pub. L. No. 103-322.
[139] PAULA DITTON & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS: SPECIAL REPORT, TRUTH IN SENTENCING IN STATE PRISONS 16 (1999), https://bjs.ojp.gov/content/pub/pdf/tssp.pdf.
[140] *United States v. Blakely*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005).
[141] U.S. SENT'G COMM'N, 2012 REPORT TO THE CONGRESS: CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING (2016), https://www.ussc.gov/research/congressional-reports/2012-report-congress-continuing-impact-united-states-v-booker-federal-sentencing (last visited Oct 2, 2020).
[142] Pub. L. No. 115-391.
[143] SHON HOPWOOD, THE EFFORT TO REFORM THE FEDERAL CRIMINAL JUSTICE SYSTEM 27 (2019); Andrea James, *Ending the Incarceration of Women and Girls*, 128 YALE L.J. F. 772 (2019); Jesselyn McCurdy, *The First Step Is Actually the Next Step After Fifteen Years of Successful Reforms to the Federal Criminal Justice System*, 41 CARDOZO L. REV. 189 (2020).

VI. Sentencing Disparities Based on Gender, Race, Ethnicity, Age, and Other Factors

Gender and other biases (likely implicit) appear to play a role in sentencing because disparities exist even when controlling for factors such as seriousness of the offense and criminal history. Stereotypes are theorized to contribute to the disparity of treatment for men and women. According to the chivalry/paternalism theory, men, who dominate the criminal justice system, associate women with their mothers, sisters, wives, and daughters. As such, they are less likely to view some women as dangerous and blame-worthy, as women are often stereotyped as victims, and being nurturing and docile.[144] It is important to note that this stereotype of women as nurturing and docile is not universal. Evidence indicates that Black, Indigenous, and women and girls of color are perceived differently than white women and girls and depicted differently in media. For example, Black women are often depicted in the media as angry and deserving of harsh punishment, Latinx women as hypersexualized, and Middle Eastern women as extremists.[145] Women who conform to the "appropriate" gender role are most likely to be given preferential treatment whereas women who act in a manner outside of those roles are more likely to be punished.[146]

It is likely that both litigants who make sentencing arguments to the courts and judges who make the ultimate determination hold these biases that lead to the disparities. We explore the findings

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[144] Natalie Goulette et al., *From Initial Appearance to Sentencing: Do Female Defendants Experience Disparate Treatment?*, 43 J. CRIM. JUST. 406 (2015); Barbara A. Koons-Witt, *The Effect of Gender on the Decision to Incarcerate Before and After the Introduction of Sentencing Guidelines*, 40 CRIMINOLOGY 297 (2002); Cortney A. Franklin & Noelle E. Fearn, *Gender, Race, and Formal Court Decision-Making Outcomes: Chivalry/Paternalism, Conflict Theory or Gender Conflict?*, 36 J. CRIM. JUST. 279 (2008).

[145] Danielle C. Slakoff, *The Representation of Women and Girls of Color in United States Crime News*, 14 SOCIO. COMPASS (2020). This literature review outlines the depiction of Black, Ingenious, and women of color in crime news, looking at depictions of both victims and offenders. Of note, the authors found that the depiction of Asian and Indigenous women in the media was under-researched. See "Chapter 9: Juvenile Justice and Gender and Race Disparities" for a further discussion of adultification and other stereotypes about girls of color.

[146] Goulette et al., *supra* note 144; Koons-Witt, *supra* note 144. Angela Davis posits an historical narrative where women have been treated more commonly as insane (and hospitalized) than as criminals (and incarcerated), but when found guilty of crimes, women historically have been treated as "irrevocably fallen," "with no possibility of salvation." ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? SEVEN STORIES PRESS, NEW YORK 65-70 (2003), https://www.feministes-radicales.org/wp-content/uploads/2010/11/Angela-Davis-Are_Prisons_Obsolete.pdf.

showing gender-based and other disparities first for Washington and then summarize national studies.

A. Washington State research: Sentencing disparities based on gender, race, ethnicity, and age

There are few substantive studies of sentencing disparities in Washington. An ACLU report using 1986 to 2017 Washington State Superior Court data provided by the Caseload Forecast Counsel indicates that Black, Indigenous, and people of color (in particular Black individuals and Native Americans) and young people are disproportionally sentenced to life and long sentences in Washington—indicating that disparities in sentence length in Washington do exist.[147] The report relies on sources finding Black defendants were more likely to be sentenced to death and Black felony defendants were 62% more likely to be sentenced to prison than similar white defendants. The report further notes courts levy higher fees and fines upon Latinx defendants than non-Latinx defendants.[148]

A report from the Washington State Institute for Public Policy that focuses on 2019 felony non-drug offenses shows defendants who are Black, Indigenous, and people of color on average, received longer sentences than white defendants.[149] The report also looks at mitigated sentences down (or alternative sentences) and aggravated or enhanced sentences that increase the term of incarceration. In both categories, white defendants fared the best. White defendants were more likely to receive mitigated, or reduced and alternative, sentences than their Asian,[150] Hispanic, Black, and American Indian and Alaska Native (AIAN) counterparts.[151] Moreover, when viewed as a percentage of the minimum sentence range, "White defendants, on average,

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[147] BECKETT & EVANS, *supra* note 10.
[148] *Id.*
[149] LAUREN KNOTH, EXAMINING WASHINGTON STATE'S SENTENCING GUIDELINES: A REPORT FOR THE CRIMINAL SENTENCING TASK FORCE (DOCUMENT NUMBER 21-05-1901) 21 (2021), http://www.wsipp.wa.gov/ReportFile/1736/Wsipp_Examining-Washington-State-s-Sentencing-Guidelines-A-Report-for-the-Criminal-Sentencing-Task-Force_Report.pdf.
[150] Per personal communication with Caseload Forecast Council staff, they very rarely get Felony Judgment & Sentencing forms with "Pacific Islander" marked, raising the possibility that this group is being lost at data collection. To our knowledge, Native Hawaiian and Pacific Islanders are not included in the "Asian" category in Caseload Forecast Counsel Data, so we are using "Asian" here rather than "Asian/Pacific Islander" in contrast to the language used in the underlying WSIPP report.
[151] KNOTH, *supra* note 149, at 32, 32 (ex. 15), 39.

received a departure that was equal to 55.8 percent of the minimum sentence range while defendants who are Black, Indigenous and people of color, on average, received a departure that was only 49.7 percent of the minimum sentence range."[152] White defendants were also less likely to receive aggravated, or increased, sentences than their Asian, Hispanic, Black, and AIAN counterparts. Hispanic defendants received the next greatest proportion of mitigated sentences, but they also received the greatest proportion of aggravated or enhanced sentences. Asian defendants received the lowest percentage of reduced sentences.[153] Moreover, white defendants again received greater benefit, on average, even when they received an increased sentence. "White defendants, on average, received an aggravated departure that was 86 percent of the maximum sentence range while defendants who are Black, Indigenous and people of color, on average, received an aggravated departure that was 146 percent of the maximum sentence range.[154] While firearm and deadly weapon enhancements account for the majority of all sentencing enhancements, white defendants accounted for a substantially reduced percentage of these enhancements (45.2%) as compared to their distribution in all sentences (64%).[155] As discussed in the report, mitigated and enhanced or aggravated sentences reflect discretion of the prosecutor and/or judge, but the data does not allow us to discern which has the greatest impact on the racial disparities. Unfortunately, the report does not break the data down by gender. Further, it is based on data from the Caseload Forecast Council, which has significant limitations with regard to the race and ethnicity data. These data erase Native Hawaiian and other Pacific Islanders completely, and only capture individuals in the "Hispanic" category who had unknown marked for the race field or who had the race field left blank, suggesting that only a subset of the Hispanic/Latinx population are captured in the data. It is not clear how representative this subset of the population is of the larger Hispanic/Latinx population.[156] Moreover, the data reflects a limited portion of enhancements. As the report explains, "Only 2% of the sentences in our analytic dataset included a sentencing enhancement (314 sentences). The

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[152] *Id.* at 33.
[153] *Id.* at 32, 43 (ex. 15).
[154] *Id.* at 33.
[155] *Id.* at 37.
[156] For a more detailed explanation of the limitations of Caseload Forecast Council race and ethnicity data, see TATIANA MASTERS ET AL., INCARCERATION OF WOMEN IN WASHINGTON STATE: MULTI-YEAR ANALYSIS OF FELONY DATA 5-8 (2020).

dataset included only four enhancements: firearm and deadly weapons, vehicular homicide with a prior DUI, sexual motivation, and endangering others while attempting to elude the police. Many of the other enhancements (e.g., protected zones) are more likely with drug offenses, which were excluded from the dataset for this report since our focus was on non-drug offenses." Despite its shortcomings, this report and the data it presents is very concerning.

The Washington Sentencing Guidelines Commission reached consensus that there is "[u]neven application of some [sentencing] enhancements" in Washington, resulting in disproportionate sentences for Black, Indigenous, and people of color. The Commission notes that although the SRA contains guidelines for prosecutors, the guidelines are advisory only. This creates disparities in application of the guidelines among county prosecutor offices, which, in line with national studies, tends to disproportionately affect racial and ethnic minorities.[157]

Only one study has analyzed the equity impacts of upward and downward departures in Washington State specifically. Notably, it is fairly outdated, covers only a three-year period, and does not look at intersectionality. Its findings are also surprising. In a study conducted by Engen and colleagues (2003) of felony sentences ordered by Superior Courts in Washington from 1989-1992 (N=46,552), the researchers found that there was a statistically significant relationship between race, ethnicity, gender, age, type of plea and downward (lesser) sentencing. During the study period, about 20% of eligible cases received a downward departure. This figure includes both discretionary departure provisions and structured sentencing alternatives, such as conversion of a sentence of one year or less, First-Time Offender Waiver, and Special Sex Offender Sentencing Alternative (SSOSA).[158] The fact that Engen's study included these alternatives sentences as downward departures contributes to the surprisingly large percentage of eligible cases the study found as receiving such departures. Downward departures from the sentencing range (or exceptional sentences below the range) accounted for only two percent of the sentences studied.

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[157] SENT'G GUIDELINES COMM'N, *supra* note 6, at 11–12.

[158] Felony sentences as reported to the Washington State Sentencing Guidelines Commission. Engen et al., *supra* note 2.

Women were more likely than similarly situated men to receive a downward departure. The odds of a man receiving a downward departure were 46% less than the odds for a similarly situated woman. Again, this study does not look at the intersection of race, ethnicity, and gender to determine if this trend is true across all racial and ethnic groups (see below for discussion of the limited national literature that has looked at intersection of multiple identities). For defendants who were Black or Hispanic, the odds of receiving a downward departure were about 32% less and 55% less respectively than a non-Hispanic white defendant. The researchers also found that older defendants and those who pleaded guilty were more likely to receive a lesser sentence than the presumed guidelines.[159]

Only incarcerated individuals eligible for alternatives were considered in the analysis, meaning that the cases analyzed were less serious cases. This could indicate that judges choose not to use available sentencing alternatives when the defendant is already facing a very short sentence and that they are more likely to use an alternative sentence when the sentence would be great enough that an alternative would make a meaningful difference. This is an important consideration when interpreting this study, because it highlights an area the analysis did not explore—the sentence severity by subpopulation when comparing those receiving a downward departure to those who may have had a short sentence without a departure.[160]

Upward (harsher) sentencing in Washington State during the study period was very rare, occurring in only two percent of eligible cases. This finding seems quite low in light of the vast number of available upward enhancements and case law demonstrating upward departures can be applied in many ways but downward departures are quite restrictive.[161] It is also possible the data was accurate for the time studied but would be different if later time periods were studied, after amendments to the SRA provided increased opportunities for upward enhancements. For upward sentencing departures, Engen's study found gender did not have a statistically significant relationship. The odds of a Hispanic defendant receiving an upward sentencing departure were 45% higher than a white defendant while Black defendants were 35% less likely than white

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[159] *Id.*
[160] *Id.*
[161] *See e.g.*, *State v. Law*, 154 Wn.2d 85, 110 P.3d 717 (2005).

defendants to receive a harsher sentence. The older defendants had a higher chance of receiving an upward sentencing departure while those who plead guilty were less likely to receive a harsher sentence.[162]

Because the study did not look at intersectionality, it is impossible to determine, for example, if Black, Indigenous, and women of color are receiving upward or downward departures differently than white women. It is important to note that this study was completely quantitative, it does not detail the reasons behind the sentencing departures, and it does not consider whether other stages in the criminal justice process contribute to the discrepancies found.

It would be beneficial to replicate this study, perhaps over a longer period, including both felony and misdemeanor crimes, and separating the sample's race and ethnicity by gender for analysis to allow for the identification of effects based on the intersection of race, ethnicity, and gender. It would also be useful to study where within the standard range, or outside the standard range, judges are sentencing criminal defendants of different races, ethnicities, and genders and upon what factors the judges are basing those decisions.

Study is also needed in the area of the effect of sentencing policy on gender. For example, limiting use of personal characteristics in determining exceptional sentences may harm women more than men. If female offenders are more often single parents than their male counterparts, if female offenders' crimes are more often derived from trauma or psychological conditions, a "neutral" sentencing policy like not considering personal characteristics might impact female offenders to a greater extent than their male counterparts.[163] These might be reasons to do away with the policy for all offenders. It might also show that women receive longer sentences than they should, even if those sentences are often shorter than those of men.

It would also be useful to study what evidence-based curricula and/or programs work for judicial and legal education on gender and race bias and implement mandatory training for the judiciary accompanied by benchcards to help reduce or remove entirely the impact of biases on sentencing.

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[162] Engen et al., *supra* note 2.
[163] Nancy Gertner, *Women Offenders and the Sentencing Guidelines*, 14 YALE J.L. & FEMINISM 291 (2002).

B. Nationwide research: sentencing disparities based on gender, race, ethnicity, age and other factors

1. Gender disparities

No Washington study compares sentences across gender and within the female population intersectionally. This type of research would be particularly useful if it controlled for other points in the criminal justice process where disparities might arise. Nationwide literature looking at state and federal court data largely indicates that women are treated more leniently than males in sentencing. This is supported by women having lower odds of being incarcerated and being more likely than their male counterparts to receive probation versus incarceration. However, the evidence is mixed with regard to whether men or women are more likely to be sentenced to jail versus prison. Sentence length research is also mixed with some studies finding that women receive shorter sentences than men while other studies have found no difference in sentence length based on gender.[164]

There is limited research that looks specifically at exceptional sentences. Nationwide research using sentencing data from federal and state courts indicates that, historically, female defendants have been more likely to receive a downward departure, and receive larger downward departures, compared to male defendants.[165] These national male-female disparities align with the findings of the Washington study discussed above.[166]

For upward departures, the limited research suggests that women were historically less likely than males to receive an upward sentencing departure.[167] Because the existing research relies

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[164] Jill K. Doerner & Stephen Demuth, *Gender and Sentencing in the Federal Courts: Are Women Treated More Leniently?*, 25 CRIM. JUST. POL'Y REV. 242 (2014); Tina L. Freiburger & Alyssa M. Sheeran, *The Joint Effects of Race, Ethnicity, Gender, and Age on the Incarceration and Sentence Length Decisions*, 10 RACE & JUST. 203 (2020); Travis W. Franklin & Tri Keah S. Henry, *Racial Disparities in Federal Sentencing Outcomes: Clarifying the Role of Criminal History*, 66 CRIME & DELINQUENCY 3 (2020).

[165] David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & ECON. 285 (2001); Brian D. Johnson, *Contextual Disparities in Guidelines Departures: Courtroom Social Contexts, Guidelines Compliance, and Extralegal Disparities in Criminal Sentencing*, 43 CRIMINOLOGY 761 (2005); Jill K. Doerner & Stephen Demuth, *The Independent and Joint Effects of Race/Ethnicity, Gender, and Age on Sentencing Outcomes in U.S. Federal Courts*, 27 JUST. Q. 1 (2010); John H. Kramer & Jeffery T. Ulmer, *Downward Departures for Serious Violent Offenders: Local Court "Corrections" to Pennsylvania's Sentencing Guidelines*, 40 CRIMINOLOGY 897 (2002).

[166] Engen et al., *supra* note 2.

[167] Mustard, *supra* note 165; Johnson, *supra* note 165.

primarily on data collected nearly twenty years ago, when incarceration trends were different than current trends, it is unclear if these trends around exceptional sentencing are relevant today. In addition, most of the available research focuses on the effect of race, ethnicity, gender, socioeconomic position, and other factors on sentencing outcomes and length of sentences, but does not focus specifically on upward and downward sentencing departures.

Research on sentencing disparities that only includes findings on one demographic variable (e.g., gender or race) runs the risk of masking the nuanced disparities that may exist within a population. Well-conducted studies control for potential confounding factors (such as age, income, and education). This means that research focusing on one variable still provides meaningful information about how similarly situated individuals may experience different outcomes based on that one factor (e.g., race). For this reason, studies using these methods are included in the analysis below. However, it is important to note that there are limitations with research that does not fully explore the interactions of race, ethnicity, gender, income, education, criminal background, and other factors. It is also important to note that all of this research used a female/male binary variable for sex. This prevents us from understanding disparities for transgender, gender-nonbinary and other gender nonconforming individuals.

2. Racial and ethnic disparities

Hundreds of studies on racial and ethnic disparities in sentencing have been conducted in diverse and expansive contexts nationwide (e.g., jurisdictions with and without sentencing guidelines, federal and state courts, racially diverse and more homogeneous jurisdictions). A 2018 review of this body of evidence by Dr. Travis Franklin concluded that the research is "mixed, conflicting, and potentially inconclusive," with some studies finding that Black, Latinx, and Native American individuals were sentenced more harshly that their white counterparts, some studies finding no race effect on sentencing, and an occasional study finding harsher sentencing for white individuals than their non-white counterparts.[168]

[168] Travis W. Franklin, *The State of Race and Punishment in America: Is Justice Really Blind?*, 59 J. CRIM. JUST. 18–28, 21 (2018).

Very few studies have examined sentencing of Asian individuals and research on Native Hawaiian and other Pacific Islanders is notably lacking. The Franklin review article suggests that the body of evidence on Asian populations is more consistent than the evidence for Black or Latinx sentencing disparities, with the evidence largely suggesting that Asian individuals are treated similarly to, or perhaps even more leniently than white individuals. This greater consistency in the literature may be due to the small number of studies, and should be interpreted with caution. Even within this small, relatively consistent body of literature, some studies have found that Asian individuals are sentenced more harshly than their white counterparts in some situations. For example, one study in New York County found that for most offenses Asians were sentenced less harshly than whites, but among those with felony drug offense and offense against the person charges, Asian defendants were more likely to be sentenced to incarceration compared to similarly situated white defendants.[169]

Franklin concludes that this mixed evidence shows that Black, Latinx, Native American, and Asian individuals are punished more severely than similarly situated white offenders under at least some conditions. So while Black, Indigenous, and people of color are not *always* treated more harshly, they are also not always treated equally to their white counterparts.[170]

Franklin asserts that these mixed findings are actually expected given the lack of uniformity among courts which sit within unique communities and legal cultures. Some early analyses of the body of evidence suggest that harsher sentencing for Black individuals was more prevalent in studies conducted in southern courts than in non-southern courts. However, a proportion of studies in each geographic region found these inequities indicating that there is still work to be done in all regions.[171]

This body of literature summarized in the Franklin article, and the variation between federal and state courts and from region to region, makes it clear that nationwide sentencing research may not be largely generalizable to Washington State and that local research is essential to

[169] Franklin, *supra* note 168.
[170] *Id.*
[171] *Id.*

understand what is happening in in Washington and how to address any inequities that are identified

Since Franklin's review article was published in 2018, several new studies have been conducted to build on the body of literature. These new studies continue to indicate that, while there is still a lack of consensus in the literature, Black, Indigenous, and people of color are sentenced more harshly than their white counterparts. The new literature in this area attempts to uncover some of the nuance within the findings and suggests that several factors such as criminal history, severity of offense, offense type, and rural versus urban location interact with race, ethnicity, and/or gender in sentencing outcomes.[172]

Research exploring exceptional sentences by race and ethnicity found that white defendants were more likely to receive a downward departure (and receive larger downward departures) and less likely to receive upward departures compared to Black and Hispanic defendants.[173] One of the only studies to include Asian defendants, found that Asians were slightly less likely than white offenders to receive a downward sentencing departure.[174]

3. Disparities by age

The small body of evidence on age and sentencing departures is mixed, with some studies finding that older adults are more likely to receive upward departures and others finding the opposite effect with still other studies finding that age does not substantially predict upward departures.[175] As discussed above, the one study conducted in Washington found that older

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[172] Peter S. Lehmann, *Race, Ethnicity, Crime Type, and the Sentencing of Violent Felony Offenders*, 66 CRIME & DELINQUENCY 770 (2020); Kareem L. Jordan & Rachel Bowman, *Interacting Race/Ethnicity and Legal Factors on Sentencing Decisions: A Test of the Liberation Hypothesis*, 0 CORRECTIONS 1 (2020); Peter S. Lehmann & Anna I. Gomez, *Split Sentencing in Florida: Race/Ethnicity, Gender, Age, and the Mitigation of Prison Sentence Length*, 46 AM. J. CRIM. JUST. 345 (2020). For example, at a "criminal history level of 1, Black offenders received sentences that were approximately 7.4% longer than white offenders. Moving up the criminal history scale, this differential became smaller and then disappeared at a criminal history level of 4. By a criminal history level of 6, the pattern of disparity reversed, such that Black offenders received sentences that were approximately 7.4% shorter than white offenders." Franklin & Henry, *supra* note 164, at 22.

[173] Mustard, *supra* note 165; Johnson, *supra* note 165; Brian D. Johnson & Sara Betsinger, *Punishing the "Model Minority": Asian-American Criminal Sentencing Outcomes in Federal District Courts*, 47 CRIMINOLOGY 1045 (2009); Doerner & Demuth, *supra* note 165.

[174] Johnson & Betsinger, *supra* note 173.

[175] Mustard, *supra* note 165; Johnson, *supra* note 165; Brian Iannacchione & Jeremy D. Ball, *The Effect of* Blakely v. Washington *on Upward Departures in a Sentencing Guideline State*, 24 J. CONTEMP. CRIM. JUST. 419 (2008).

defendants were more likely to receive both upward and downward departures.[176] The role of age in departure decisions becomes slightly more clear when considering how it interacts with gender and race or ethnicity, as will be discussed below. Again, there is a broader body of research looking at sentencing generally, but these studies do not indicate if the in/out decisions and sentence length are impacted by sentencing outside of the standard range. This broader body of sentencing research also suggests that looking at age without considering how it interacts with gender, race, and ethnicity is insufficient.[177]

4. Other factors that impact sentencing and the intersection of these factors

The literature indicates that when researching upward and downward departures specifically, or sentencing more broadly, it is important to consider additional factors such as income, education, and criminal background as well as how race, ethnicity, gender, and age interact with these factors. When considering these interactions, it becomes clear that simple analysis looking only at race and ethnicity or only at gender does not provide a full picture.

Now outdated research from federal courts suggests that those without high school diplomas, with low incomes, or without U.S. citizenship status, were less likely to receive downward departures than high school graduates, higher income individuals, and U.S. citizens respectively. In addition, those without a high school diploma were also more likely to receive an upward departure than their counterparts.[178] It is not clear if current or Washington State data would replicate these findings.

The more recent sentencing literature almost unanimously argues that it is essential to consider how different demographic, crime, and community factors interact in order to understand potential disparities. Unfortunately, only one study examined departures from the standard range for men and women by race and ethnicity. This study, using only data for violent offenders in Pennsylvania, found that young Black women were the most likely population to receive a

[176] Engen et al., *supra* note 2.
[177] Freiburger & Sheeran, *supra* note 164; Franklin, *supra* note 168.
[178] Mustard, *supra* note 165.

downward departure, while young Hispanic males were the least likely to receive a downward departure.[179]

Sentencing literature which looks at in/out decisions and sentencing length in federal and state courts (rather than departures from the standard range specifically) indicates young, Black or Hispanic men receive the harshest sentences among all subpopulations.[180] One study found that young, Hispanic men were the most likely to be sentenced to prison while young, Black men received the longest sentences. These racial and ethnic disparities, while not as pronounced as for men, also existed for women in the study. Young Hispanic women received sentences more similar to male defendants than to female defendants of other racial or ethnic populations. In sharp contrast to the harsher punishment given to Black men when compared to white men, Black women were treated similarly or arguably more leniently than white women in sentencing.[181]

Other research has found that the influence of race and ethnicity was also impacted by employment status, education, crime type, seriousness of offense, criminal history, and victim race and ethnicity. These findings highlight the importance of research that considers the interaction of many factors to better understand how bias is amplified for some populations. Recent studies suggest that Black and Latinx individuals face odds of incarceration that are between ten and 50% greater and sentence lengths that are three to ten percent longer than similarly situated white individuals—but that these magnitudes generally become even larger when including analysis by gender, age, employment status, education, etc.[182]

[179] Kramer & Ulmer, *supra* note 165.
[180] Franklin, *supra* note 168; Doerner & Demuth, *supra* note 165.
[181] Doerner & Demuth, *supra* note 165.
[182] Franklin, *supra* note 168.

VII. Bases Behind the Disparate Impact of Sentencing Changes Upon Black, Indigenous, and Communities of Color and Other Marginalized Communities

As discussed above, there is a large body of robust national findings highlighting that Black, Indigenous, and people of color are often not receiving equal treatment during sentencing. Potential reasons behind these disparities are discussed below.

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

Research on the impact of the "tough on crime" policies provide robust empirical support that these policies resulted in the overrepresentation of people of color in the criminal justice system, with Black men composing the greatest percentage.[183] Overall, the "war on drugs" legislative changes and the get "tough on crime" movement have led to a large body of robust findings showing harsher sentencing for Black, Indigenous, and people of color compared to white individuals and of men compared to women.

Despite the goal of reducing disparities by adopting sentencing guidelines, as discussed in Sections III (Washington laws) and V (federal laws), studies of exceptional sentencing use have found that "judicial departures" from the guidelines have continued the trend of disparities

[183] JENNIFER BRONSON & E. ANN CARSON, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., PRISONERS IN 2017 (2019), https://www.bjs.gov/content/pub/pdf/p17.pdf; Zhen Zeng, *BJS Releases Jail Inmates in 2017*, POL. & GOV'T BUS. 230 (2019); Angela J Hattery & Earl Smith, *Families of Incarcerated African American Men: The Impact on Mothers and Children*, 7 J. PAN AFR. STUD. 128 (2014); Lisa Pasko, *Villain or Victim: Regional Variation and Ethnic Disparity in Federal Drug Offense Sentencing*, 13 CRIM. JUST. POL'Y REV. 307 (2002); Michael Rocque, *Racial Disparities in the Criminal Justice System and Perceptions of Legitimacy: A Theoretical Linkage*, 1 RACE & JUST. 292 (2011); Pauline K. Brennan & Cassia Spohn, *Race/Ethnicity and Sentencing Outcomes Among Drug Offenders in North Carolina*, 24 J. CONTEMP. CRIM. JUST. 371 (2008); Jelani Jefferson Exum, *Forget Sentencing Equality: Moving from the'Cracked'Cocaine Debate Toward Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 95 (2014).

based on gender and race.[184] One theory behind the continued disparities associated with the use of exceptional sentencing focuses on the court players, i.e., judge and prosecutor, who make the decision to deviate from the presumed guidelines.[185]

The purpose of a court-ordered sentence is to act as a deterrent, directly and/or indirectly, and to be an appropriate punishment for the violation of a law. Exceptional sentencing is utilized when the sentencing range may be inappropriate for a case judgment for multiple reasons. Referred to as bounded rationality, research shows judges consider three overall factors: blameworthiness or culpability, dangerousness and risk of future crime, and individual offender and organizational sentencing constraints.[186] However, the determination of these three overall factors is based on the judge's individual subjective determination of what is dangerous, their determination of who is responsible, and by the needs of the offender, community, and court. Therefore, every judicial decision/judgment is subjected to the biases and experiences of that judge and the needs and influences of the community that court is within, including during election time.[187]

To determine the influence of the community around the courts, one study conducted an analysis of the Pennsylvania departure decisions for both upward and downward departures. Using data from 1999 and 2000 obtained from the Pennsylvania Commission on Sentencing, as noted above, the study found that young offenders, male offenders, offenders of color, and offenders convicted at trial are less likely to receive downward departures and more likely to receive upward departures. The researcher also found that sentencing departures by courts varied depending on the community and the court size. The larger the court, the higher the rate of both

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[184] Johnson, *supra* note 165; Paula Kautt, *Heuristic Influences Over Offense Seriousness Calculations: A Multilevel Investigation of Racial Disparity Under Sentencing Guidelines*, 11 PUNISHMENT & SOC'Y 191 (2009); Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 LAW & SOC'Y REV. 695 (2010).

[185] Alexes Harris, Heather Evans & Katherine Beckett, *Courtesy Stigma and Monetary Sanctions: Toward a Socio-Cultural Theory of Punishment*, 76 AM. SOCIO. REV. 234 (2011); Johnson, *supra* note 165.

[186] Johnson, *supra* note 165; Kareem L. Jordan & Tina L. Freiburger, *The Effect of Race/Ethnicity on Sentencing: Examining Sentence Type, Jail Length, and Prison Length*, 13 J. ETHNICITY CRIM. JUST. 179 (2015).

[187] Johnson, *supra* note 165; Harris, Evans & Beckett, *supra* note 185; Carlos Berdejó & Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 REV. ECON. & STAT. 741 (2012); Kramer & Ulmer, *supra* note 165; Jeffery T. Ulmer & Brian Johnson, *Sentencing in Context: A Multilevel Analysis*, 42 CRIMINOLOGY 137 (2004); Rocque, *supra* note 183; Murakawa & Beckett, *supra* note 184; Chester L. Britt, *Social Context and Racial Disparities in Punishment Decisions*, 17 JUST. Q. 707 (2000).

upward and downward departures.[188] The findings also found modest support for a social trend theorized by other scholars that may be contributing to exceptional sentencing disparities: fear of the racial group threat based on stereotypes.[189]

One theory for the judicial decision-making process that has resulted in the increased likelihood of upward departures for people of color, especially Black populations, is the racial group threat theory. Racial group threat theory argues that the racialized social systems contribute to the racial disparity to contain the "threat" of racial groups to those in position and power.[190] The "threat" is reinforced by stereotypes, like criminality among people of color, which invokes fear and will often influence the thoughts and actions of people, like judges. Consciously or subconsciously, racial stereotypes influence the decision-making. A prime example is the determination of what makes someone more dangerous compared to another when they committed similar acts. Thus, the racial disparity is reinforced through policies and practices that are explicitly colorblind.[191]

In a study of judicial interviews conducted with criminal justice decisionmakers from three counties within Washington State in combination with three years of felony drug offense data, Steen and colleagues (2005) tested the impact of racial stereotypes on sentencing decisions. They found that offenders being the most like the perceived stereotypes of a dangerous drug offender ("being male, possessing a lengthy criminal history, and being convicted of a drug delivery offense [specifically delivery of heroin, cocaine or methamphetamine]") received less leniency regardless of race. However, race did impact the determination of stereotype.[192] The likelihood of incarceration was high for both white and Black offenders who fit the stereotype of a dangerous drug offender; however, among those who did not fully fit this stereotype (e.g., non-dealers with

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[188] Johnson, *supra* note 165.
[189] *Id.*; Ulmer & Johnson, *supra* note 187; Sara Steen, Rodney L. Engen & Randy R. Gainey, *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing*, 43 CRIMINOLOGY 435 (2005).
[190] Ulmer & Johnson, *supra* note 187; Ben Feldmeyer & Jeffery T. Ulmer, *Racial/Ethnic Threat and Federal Sentencing*, 48 J. RSCH. CRIME & DELINQUENCY 238 (2011); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012).
[191] Traci Schlesinger, *The Failure of Race Neutral Policies: How Mandatory Terms and Sentencing Enhancements Contribute to Mass Racialized Incarceration*, 57 CRIME & DELINQUENCY 56–81 (2008); Ulmer & Johnson, *supra* note 187; Feldmeyer & Ulmer, *supra* note 187; Jordan & Freiburger, *supra* note 186; Steen, Engen & Gainey, *supra* note 189; ALEXANDER, *supra* note 190.
[192] Steen, Engen & Gainey, *supra* note 189, at 441.

no priors) white offenders were less likely to be incarcerated than their Black counterparts. The authors argue that this is a result of: 1) decision-makers being more likely to define low-level Black offenders as a threat compared to similarly situated white offenders; and 2) the greater judicial discretion allowed by sentencing guidelines for low-level offenders. They argue that racial stereotypes cause decision-makers to rectify slight deviations from the stereotype of a dangerous drug offender for Black individuals, and adjust all but the least threatening individuals upward to fit the stereotype. The only Black individuals who seemed to avoid this upward adjustment to fit the stereotype were female nondealers and male nondealers with no priors.[193]

Brennan (2006) examines predictors of sentencing for typical female offenders. She finds that Black and Hispanic females were more likely to receive jail sentences than their white counterparts, but that this was a result of differences in socioeconomic status, community ties, prior record, earlier case processing, and charge severity rather than directly as a result of race or ethnicity.

VIII. Recommendations

- To decrease disparities in sentencing, study what evidence-based programs work to educate the judiciary, the bar, and court partners on how to identify and avoid gender and race bias. Based on the results, the education programs, bench cards, and other resources that have proven to be effective should be continued, expanded, and made mandatory.
- For policy-makers: Consider legislation amending RCW 9.94A.535(1) to recognize that primary caregiving constitutes a mitigating sentencing factor. It is a mitigating factor because family structures can provide support to rehabilitating offenders; courts should therefore be able to consider the role of the offender within their family when determining sentences. Failing to recognize 'primary caregiving' as a mitigating factor also adversely impacts those who generally carry the burden of caregiving, that is,

[193] Steen, Engen & Gainey, *supra* note 189.

predominately women and families without resources. This should be done in the next two years or as soon as possible.

- For policy-makers: To reduce the disproportionate effect of mass incarceration and lengthy sentencing regimes, consider enacting legislation, such as HB 1282 which was considered in the 2021 regular session, to make all incarcerated individuals eligible for earned early release time at the rate of 33% or higher for all sentences and enhancements.
- Adopt the recommendation described in "Chapter 11: Incarcerated Women in Washington," which recommends considering legislation to retroactively account for trauma-based criminalization and incarceration.

Chapter 15

Legal Financial Obligations

Judge David Keenan

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I. Summary

Legal financial obligations (LFOs) have a long history in the United States, and their impact on individuals of different genders varies at different stages in the criminal legal system, from sentencing to reentry. LFOs find their roots in institutional racism, starting with convict leasing in the post-reconstruction South, and today they are levied at every level of trial court, throughout the United States. In Washington, trial courts fine individuals under criminal statutes, may require those individuals to pay the cost to prosecute and defend them, can charge them fees for such bureaucratic tasks as processing their DNA, may require forfeiture of assets, and can require individuals to pay restitution to victims.

While courts must sometimes ask whether an individual can actually afford to pay, many LFOs and certain fines are mandatory. For example, whether low-income or no-income, most people convicted of a felony will have to pay at least $600. When a person is released from a period of incarceration, they can be punished and even returned to jail if they don't pay their LFOs. Those LFOs provide revenue to jurisdictions throughout Washington, many of which employ collection agencies—which then add surcharges—to collect LFO debt. As long as the debt remains, the LFO debtor stays under the court's jurisdiction; no matter their income or obligations, the court can require individuals to keep verifying their ability to pay. Thus, for many, LFOs are a life sentence.

While a great deal of LFO research exists, very little of that research examines the role gender plays in how LFOs are imposed and how individuals of different gender identities—binary and non-binary—are impacted by LFOs. Though this chapter refers to what little reported data there is regarding women and men, none of the data sources examined specified whether the binary gender references were to sex assigned at birth versus gender identity. Indeed, none of the twenty-five states that have provided data to the National Indexing Project on Fines and Fees collect information relating to gender. The data that is available suggests that men are sentenced to higher LFOs than women. However, significantly, the post-conviction LFO-related collateral consequences for women are substantial. Women reentering the community from a period of incarceration, many of whom are mothers, face tremendous obstacles in accessing employment, housing, healthcare, and public benefits. Moreover, women are often burdened with the LFOs of

individuals close to them. Overall, women may bear a disproportionate share of the post-conviction consequences flowing from LFOs. Given the paucity of LFO-related gender-specific data, more needs to be done to collect this information to allow conclusions beyond inferences and anecdotes.

In recent years, stakeholders have sought to reform how and how much Washington courts impose in LFOs. From legislation in 2018 eliminating the onerous 12% interest previously charged on non-restitution LFOs, to current efforts to provide more discretion to judges and more avenues for post-conviction LFO relief, advocates, judges, and legislators are making progress on LFO reform, though none of it is focused on gender disparities. With more data and more research, future reform efforts may be better-informed to address how LFOs impact individuals of various genders.

II. LFOs Started in the Wake of the Civil War and Are Found Today Throughout the Criminal Legal System

LFOs have a long history in the United States, predating by decades the billions of dollars in legal debt many system-involved individuals face today. While fines have been a fixture of the U.S. legal system throughout the country's history, fees—i.e., LFOs not directly tied to a sanction available under a particular criminal statute—are a more recent phenomenon.[1]

For all of the Washington statutes allowing for imposition of LFOs, there is little in the way of a stated purpose for adding fines, fees, and costs to a sentence in a criminal case. The closest Washington law seems to come is this 1989 statement of purpose for legislation relating to the responsibility of individuals sentenced to the Washington State Department of Corrections: "The purpose of this act is to . . . hold[ ] offenders accountable to victims, counties, cities, the state, municipalities, and society for the assessed costs associated with their crimes; and . . . [to] provide[ ] remedies for an individual or other entities to recoup or at least defray a portion of the

[1] Claire Greenberg et al., *The Growing and Broad Nature of Legal Financial Obligations: Evidence from Alabama Court Records*, 48 CONN. L. REV. 1079, 1089 (2016), https://www.sas.upenn.edu/~marcmere/workingpapers/AlabamaLFOs.pdf.

loss associated with the costs of felonious behavior."[2] This legislative statement of purpose is consistent with how many actors in the criminal legal system view LFOs—they are a way to hold an individual accountable to a victim and the community. As noted LFO researcher and author Professor Alexes Harris put it, many officials believe that LFOs allow individuals to "show remorse with every payment."[3] Whether and to what extent LFOs effectively accomplish any of these purposes is discussed in more detail below.

LFOs have a long history of entanglement with institutional racism. With the end of slavery following the Civil War, convict leasing of Black Americans rose throughout the South. Though the Thirteenth Amendment prohibits slavery and involuntary servitude, there is an exception for "punishment for crime."[4] As vagrancy laws proliferated, criminalizing simple unemployment, a jobless, formerly enslaved person could be incarcerated for their condition and forced to work without pay to make the community whole for the crime of having been unemployed in the first instance.[5] Having been convicted of vagrancy or another purported crime, Black Americans in the 1800s might be leased by governments to corporations which in turn paid the LFOs to the leasing officials, but paid the workers nothing.[6] Consequently, the criminalization of unemployment for Black Americans following the Civil War, the imposition of LFOs for these status crimes, and the system of convict leasing to pay the LFOs is sometimes characterized as a replacement for slavery[7] and a continued form of racial domination.[8]

LFO collection was historically a source of revenue as well, for example, to pay the salaries of judges and sheriffs,[9] and that is still sometimes the case today, despite the fact that it is unconstitutional for officials to have a financial stake in the outcome of matters they

[2] LAWS OF 1989, ch. 252, § 1.
[3] Juleyka Lantigua-Williams, *How Prison Debt Ensnares Offenders*, ATLANTIC (June 2, 2016), https://www.theatlantic.com/politics/archive/2016/06/how-prison-debt-ensnares-offenders/484826/.
[4] U.S. CONST. amend. XIII, § 1.
[5] James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1479 (2019), https://www.nyulawreview.org/wp-content/uploads/2019/12/NYULawReview-94-6-Pope.pdf.
[6] Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIO. 1753, 1758 (2010), http://faculty.washington.edu/kbeckett/articles/AJS.pdf.
[7] Pope, *supra* note 5.
[8] Harris et al., *supra* note 6.
[9] *Id*.

adjudicate.[10] Available data reflects that between 2000 and 2014, Washington courts at every level collected almost $2 billion in LFOs, and yet still had another $2.5 billion in outstanding LFO debt in nearly half a million open accounts.[11] As examples, in recent years, King County residents were estimated to owe more than half a billion dollars in legal financial obligations, while residents of Spokane County owed more than $100 million.[12] According to a 2021 report from the Fines and Fees Justice Center, from available data, Washington had the highest amount of LFO debt per capita—$426—of any state.[13]

While LFOs trace their history to slavery and the Jim Crow South, today they are found throughout the criminal legal system, and Washington is no exception.

III. Washington Has a Robust LFO Regime that Can Keep LFO Debtors Tied to the Criminal Legal System for Life

Washington courts—from the smallest town to the largest county—have the obligation, and sometimes the discretion, to impose hundreds of different fines, fees, and costs, as well as restitution. In some cases, a court must determine whether someone can pay the LFO—and if they can't—it cannot be imposed. For many types of LFOs, it simply doesn't matter whether the person being sentenced can pay. For those sentenced to LFOs who cannot pay, they may end up in jail, have their LFO accounts sent to a collection agency, and may stay under the court's jurisdiction for life.

[10] *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S. Ct. 437, 71 L. Ed. 749 (1927) (holding that it is a due process violation for an adjudicating official to have a pecuniary interest in the case outcome).
[11] Alexes Harris, *Fines/Fees Collected & Outstanding Between 2000-2014, WA* (2018) (unpublished presentation) (on file with author) (excludes Seattle Municipal Court); *see also* ALEXES HARRIS ET AL., MONETARY SANCTIONS IN THE CRIMINAL JUSTICE SYSTEM 203 (2017), http://www.monetarysanctions.org/wp-content/uploads/2017/04/Monetary-Sanctions-Legal-Review-Final.pdf; *see also* BRIANA HAMMONS, FINES & FEES JUST. CTR., TIP OF THE ICEBERG: HOW MUCH CRIMINAL JUSTICE DEBT DOES THE U.S. REALLY HAVE? 6 (2021), https://finesandfeesjusticecenter.org/content/uploads/2021/04/Tip-of-the-Iceberg_Criminal_Justice_Debt_BH1.pdf.
[12] Michael L. Vander Giessen, *Legislative Reforms for Washington State's Criminal Monetary Penalties*, 47 GONZAGA L. REV. 547, 574 (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1981792.
[13] HAMMONS, *supra* note 10, at 5.

A. Relevant legal framework

Courts throughout Washington have the authority to impose LFOs. Judicial officers in Washington's Superior Courts may order LFO payment "[w]henever a person is convicted in superior court."[14]

Though available under hundreds of statutes and in amounts small and large, LFOs generally fall into four categories: fines, costs, fees, and restitution. Sometimes combined with costs, LFOs also include fees tied to specific tasks and entities. Washington statutes describe LFOs in various ways, but hew overall to these four buckets. For example, for purposes of LFO collection by state corrections officials, a "Legal financial obligation" means:

> [A] sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction.[15]

1. Fines

Fines are a form of punishment, along with confinement.[16] The maximum fine for a class A felony (e.g., assault in the first degree[17]) under Washington law is $50,000,[18] while the maximum fine for a gross misdemeanor (e.g., vehicle prowling in the second degree[19]) is $5,000.[20]

[14] RCW 9.94A.760(1).
[15] RCW 9.94A.030(31); *see also* RCW 71.11.010(1).
[16] RCW 9A.20.021(1) (setting forth maximum sentences for individuals to "be punished by confinement or fine").
[17] RCW 9A.36.011(2).
[18] RCW 9A.20.021(1)(a).
[19] RCW 9A.52.100(2).
[20] RCW 9A.20.021(2).

Unlike some other LFOs, fine imposition is generally[21] left to the discretion of the judicial officer.[22] Though Washington courts are urged to consider ability to pay when imposing fines, because a fine is not a court cost, the court is not required to inquire into the individual's financial status.[23]

2. Costs

Costs are generally "limited to expenses specially incurred by the state in prosecuting the defendant" and "cannot include expenses inherent in providing a constitutionally guaranteed jury trial."[24] Costs can include the entire lifecycle of a criminal case: the cost of being arrested,[25] being supervised before trial,[26] deferring trial,[27] being tried by a jury,[28] avoiding trial,[29] and being incarcerated.[30] If the individual is incarcerated in the Department of Corrections and sentenced to supervision in the community after a period of incarceration, the Department of Corrections can require the individual to pay costs associated with their own supervision.[31] Assessments are also available in courts of limited jurisdiction, which operate as a form of cost, in that, for example, they are imposed upon individuals "for services provided whenever the person is referred by the court to the misdemeanant probation department for evaluation or supervision services."[32] Some assessments are mandatory. For example, Superior Courts must impose a $500

[21] A small number of fines are mandatory. *E.g.*, RCW 70A.15.3150(3) (minimum $50,000 fine for certain Clean Air Act violations); RCW 46.61.5055(1)(a)(ii) (minimum $350 fines for driving under the influence).
[22] *State v. Clark*, 191 Wn. App. 369, 375, 362 P.3d 309 (2015).
[23] *Id.* (holding that "the trial court is not required to conduct an inquiry into the defendant's ability to pay," but adding that the appellate court would "strongly urge trial judges to consider the defendant's ability to pay before imposing fines"). In contrast to Washington, under federal sentencing guidelines, fines are set out in a range, and courts do consider whether an individual has the ability to pay. U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 19 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201811_fed-sentencing-basics.pdf.
[24] RCW 10.01.160(2).
[25] *Id*. ("Expenses incurred for serving of warrants for failure to appear . . . may be included in costs the court may require a defendant to pay.").
[26] RCW 10.01.160(2) (allowing for imposition of "[c]osts of administering . . . pretrial supervision").
[27] RCW 10.05.170 (allowing courts of limited jurisdiction to levy monthly assessments in deferred prosecution cases, typically where an individual can defer prosecution and upon satisfaction of certain conditions during the deferral period, they may eventually seek dismissal of the charge).
[28] RCW 10.46.190 ("Every person convicted of a crime . . . may be liable to all the costs of the proceedings against [them], including, when tried by a jury in the superior court . . . , a jury fee as provided for in civil actions.").
[29] RCW 10.01.160(2) (allowing for imposition of the cost of "administering a deferred prosecution").
[30] *Id.* ("In no case may the court require the offender to pay more than one hundred dollars per day for the cost of incarceration.").
[31] RCW 9.94A.780(1).
[32] RCW 10.64.120(1) (allowing courts of limited jurisdiction to levy up to $100 per month in such assessments).

victim penalty assessment for every felony ($250 for gross misdemeanors).[33] Monies collected from imposition of these assessments are not direct compensation to victims; rather, they are "for the support of comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes."[34] Relatedly, courts of limited jurisdiction must impose a public safety and education assessment equal to 75% of fines imposed in a given case.[35]

3. Fees

Though fees are often spoken of interchangeably with costs, they do differ in kind and amount. While costs are ostensibly directly tied to the expenses of prosecuting an individual, fees are frequently add-on sums allocated to particular entities. For example, Washington law requires DNA collection from individuals convicted of certain crimes or categories of crimes.[36] The individual providing the DNA is charged $100,[37] a portion of which goes to an account overseen by the Washington State Patrol,[38] which processes the DNA.[39] As another example, courts of limited jurisdiction may charge $43 to each individual upon conviction.[40] For their part, county clerks are required by statute to collect a $200 fee for their "official services" when an individual is convicted of a crime,[41] and "may impose an annual fee of up to one hundred dollars" "[f]or the collection of an adult offender's unpaid legal financial obligations."[42] There are many more fees under Washington law—too numerous to list here. The Washington Administrative Office of the Courts (AOC) maintains a list of many of these fees online for users of its Judicial Information System.[43]

[33] RCW 7.68.035(1)(a).
[34] RCW 7.68.035(4).
[35] RCW 3.62.090(1).
[36] RCW 43.43.754.
[37] RCW 43.43.7541.
[38] RCW 43.43.7532.
[39] *Crime & Forensic Laboratory Services*, WASH. STATE PATROL, https://www.wsp.wa.gov/crime/crime-and-forensic-laboratory-services/.
[40] RCW 3.62.085.
[41] RCW 36.18.020(2)(h).
[42] RCW 36.18.016(29).
[43] *JIS-Link Code Manual – Cost Fee Codes*, WASH. ADMIN. OFF. OF THE CTS., https://www.courts.wa.gov/JisLink/index.cfm?fa=jislink.codeview&dir=clj_manual&file=costfee.

4. Direct restitution

Unlike costs paid for prosecution and fees paid to entities and agencies, restitution is considered payment of "damages"[44] directly to victims. The law requires that restitution be ordered in Superior Court[45] whenever there is a conviction for a crime "which result[ed] in injury to any person or damage to or loss of property."[46] The damages must be somewhat concrete—"easily ascertainable"—and could include, for example, "expenses incurred for treatment for injury to persons, and lost wages resulting from injury."[47] Whatever the courts ascertain, restitution can still be up to "double the amount of the offender's gain or the victim's loss."[48] Significantly, courts must impose interest on restitution, which starts running from the moment sentence is imposed, even if the individual is heading to a lengthy prison stay.[49] The restitution interest rate is 12%,[50] among the highest in the nation.[51] Furthermore, unlike costs, a court cannot reduce the total amount of restitution imposed based on an individual's inability to pay.[52]

5. Court have many ways to impose LFOs

Despite reform efforts in recent years, Washington law still provides numerous ways to impose LFOs, and courts impose millions of dollars in LFOs each year. The Revised Code of Washington includes hundreds of statutes allowing courts to impose fines. When the Washington State Supreme Court Minority and Justice Commission created an LFO calculator under a Department of Justice grant, volunteers poured through every statute containing a fine or fee to help build a tool to allow judicial officers to calculate LFOs and to understand when they must, can, or cannot

[44] RCW 9.94A.030(43).
[45] There is no general statute requiring restitution in cases in courts of limited jurisdiction. Courts of limited jurisdiction do have the authority to impose restitution. *Seattle v. Fuller*, 177 Wn.2d 263, 279, 300 P.3d 340 (2013).
[46] RCW 9.94A.753(5).
[47] RCW 9.94A.753(3).
[48] *Id*.
[49] RCW 10.82.090(1).
[50] RCW 4.56.110(6) ("[J]udgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020."); RCW 19.52.020 ("[A]ny rate of interest shall be legal so long as the rate of interest does not exceed the higher of . . . [t]welve percent per annum.").
[51] *Washington One of Five States Selected for 'Price of Justice' Grant*, DEP'T OF JUST., U.S. ATTY'S OFF.: W. DIST. OF WASH. (Sept. 27, 2016), https://www.justice.gov/usao-wdwa/pr/washington-one-five-states-selected-price-justice-grant.
[52] RCW 9.94A.753(4).

be imposed. The calculator starts with the crime of abandoning a dependent person, and ends with work-permit violations, with many LFOs in between.[53] That it took a federal grant to build a calculator to assist judges with LFO imposition is a testament to how complicated the laws around LFOs are.

6. Courts sometimes have to determine who can afford to pay

The question of who can afford to pay and how courts determine this is found in a combination of statutes, court rules, and case law. When a statute prohibits a court from imposing an LFO on an "indigent" person, indigency is defined in statute to apply to, for example, persons receiving means-tested public benefits such as temporary assistance for needy families and individuals with annual incomes at or below 125% of the federal poverty level.[54] As to rules, courts also look to General Rule 34,[55] which provides a similar though somewhat broader indigency standard than statute, including a catchall provision where "other compelling circumstances exist that demonstrate an applicant's inability to pay fees and/or surcharges."[56] Apart from statutes and rules, courts assessing an individual's ability to pay must "meaningfully inquire" into certain mandatory factors, such as the fact of the individual's incarceration and other debts,[57] and must also consider certain "important factors," such as employment history, income, assets, and living expenses.[58] The law was only changed in 2018 to prohibit courts from imposing discretionary costs upon those unable to pay;[59] such LFOs imposed before the change remain subject to collection.

In addition to an individual's basic economic circumstances, Washington statutes and case law provide for consideration of an individual's mental health, housing, and disability in LFO imposition. For example, before imposing LFOs upon a person with a mental health condition preventing the person from participating in gainful employment—other than restitution or a

[53] *LFO Calculator Project*, WASH. STATE SUP. CT'S MINORITY & JUST. COMM'N, https://www.lfocalculator.org/.
[54] RCW 10.101.010(3)(a)-(c).
[55] *State v. Ramirez*, 191 Wn.2d 732, 750, 426 P.3d 714 (2018).
[56] GR 34(a)(3)(A)-(D).
[57] *State v. Ramirez*, 191 Wn.2d 732, 750, 426 P.3d 714 (2018).
[58] *Id*.
[59] ENGROSSED SECOND SUBSTITUTE HB 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783).

victim penalty assessment—a judge must first determine whether the person has the means to pay.[60] As another example, if a court determines that an individual has a mental illness or is experiencing homelessness, the individual is not in "willful contempt," i.e., not willfully refusing to pay their LFOs, and thus a court in that situation could not punish someone for failing to pay their LFO debt.[61] Relatedly, the availability of Supplemental Social Security Income (SSI) and Social Security Disability Income (SSDI) to pay LFOs has been subject to litigation in Washington appellate courts in recent years. While courts may impose LFOs on an individual whose sole source of income is SSI or SSDI,[62] and a county clerk can require the individual to periodically verify their income status,[63] a court cannot actually order the individual to pay the LFOs from that source of income because attaching such federal benefits violates federal law.[64] Still, given that collecting authorities can require periodic reverification that the individual's sole source of income is still SSI or SSDI, such verification could continue for life.[65]

7. Courts can punish those who don't pay

Courts can jail a person for failing to pay LFOs, and the practice has varied throughout Washington. For example, if a court orders LFOs as part of a felony sentence and the person does not pay, the court can set a "show cause" hearing where the person must explain (i.e., show cause) why they "should not be punished for the noncompliance."[66] That punishment might include jail,[67] work release, home detention, or some other alternative confinement.[68] Importantly, a court may not punish a person for failing to pay LFOs unless that nonpayment is "willful," meaning the person can pay, but won't,[69] and a court cannot punish nonpayment where

[60] RCW 9.94A.777.
[61] RCW 10.01.180(3)(c).
[62] *State v. Catling*, 193 Wn.2d 252, 256, 438 P.3d 1174 (2019).
[63] *State v. Conway*, 8 Wn. App. 2d 538, 550, 438 P.3d 1235 (2019).
[64] *City of Richland v. Wakefield*, 186 Wn.2d 596, 609, 380 P.3d 459 (2016).
[65] *State v. Catling*, 193 Wn.2d 252, 267, 438 P.3d 1174 (2019) (González, J., dissenting) ("Catling qualified for disability income more than 10 years ago and, given his medical condition, will likely remain on it for the rest of his life.").
[66] RCW 9.94A.6333(3)(a).
[67] RCW 9.94A.633(1)(a).
[68] RCW 9.94A.633(1)(b).
[69] RCW 9.94A.6333(3)(c).

the person is experiencing homelessness or suffering from mental illness.[70] In practice, what precisely is willful as to non-payment can be elusive. As Professor Alexes Harris put it: A judge inquiring into someone's resources and spending might ask, "How much did you pay for your manicure? How much for cigarettes?"[71]

Courts outside of the felony sentencing regime have similar powers under a contempt statute,[72] and, like the felony statute, courts in cases involving misdemeanors cannot punish those who lack the financial ability to pay[73] or are living unsheltered or have a mental illness.[74] The sanctions for nonpayment can be severe where a person is held in contempt. Among the punishments available to courts in LFO contempt proceedings is imposing one day in jail for every $25 owed.[75] A 2014 study found that in one Washington county, an estimated 20% of jail inmates were incarcerated because of LFO nonpayment,[76] and still other counties regularly jailed individuals for nonpayment.[77]

8. Nonpayment means court jurisdiction for life

LFOs are frequently a life sentence. LFOs may follow an individual for life, because for any Superior Court conviction for an offense committed on or after July 1, 2000, "the court shall retain jurisdiction over the offender, for purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime."[78] So long as the individual has not paid all of their LFOs, they remain under the court's jurisdiction, and so long as they remain under the court's jurisdiction, a county clerk is authorized to continue to try to verify income and collect.[79] County clerks may

[70] RCW 9.94A.6333(3)(d).
[71] Casey Jaywork, *Paying Your Debt to Society (with 12 Percent Interest)*, SEATTLE WKLY. (June 8, 2016), https://www.seattleweekly.com/news/paying-your-debt-to-society-with-12-percent-interest/.
[72] RCW 10.01.180(1).
[73] RCW 10.01.180(3)(a).
[74] RCW 10.01.180(3)(c).
[75] RCW 10.01.180(4).
[76] AM. CIV. LIBERTIES UNION OF WASH. & COLUMBIA LEGAL SERVS., MODERN-DAY DEBTORS' PRISONS: THE WAYS COURT-IMPOSED DEBTS PUNISH PEOPLE FOR BEING POOR 8 (2014), https://www.aclu-wa.org/sites/default/files/media-legacy/attachments/Modern%20Day%20Debtor%27s%20Prison%20Final%20%283%29.pdf.
[77] AM. CIV. LIBERTIES UNION OF WASH. & COLUMBIA LEGAL SERVS., *supra* note 76, at 8 n.31.
[78] RCW 9.94A.760(5).
[79] *Id*.

even seek normally confidential employment security records for purposes of collecting LFOs.[80] As an example of how long an LFO debtor might remain entangled with the criminal legal system, in a case addressing SSI and LFOs, the defendant had been receiving SSI benefits for 27 years;[81] in such a case, the individual would remain under the court's jurisdiction and subject to income verification, even if they remained on SSI their entire life.

As part of their study, "Modern-Day Debtors' Prisons: The Ways Court-Imposed Debts Punish People for Being Poor,"[82] the American Civil Liberties Union of Washington and Columbia Legal Services interviewed a number of individuals living with LFO debt, including Virginia Anderson. Virginia reported having nearly $7,000 in original Superior Court debt, in addition to over $1,000 in debt from LFOs in a court of limited jurisdiction.[83] Speaking about the burden of making monthly payments, Virginia said:

> When I got out of prison, I was supposed to start paying $50 a month to Benton County District Court and $40 per month to Superior Court. But I couldn't find a job. I was willing to do any work, but it's really hard to get work with a felony record. . . . Sometimes, I have to choose between paying for transportation to my job or food and paying the full amount of my LFOs.[84]

The study authors estimated that—assuming she can keep making payments—it will take Virginia almost 30 years to pay off her LFOs.[85]

As Virginia's story illustrates, a felony record is a barrier to securing employment, and that barrier can perpetuate the LFO life sentence. For example, individuals in Washington can ask a court to vacate convictions for certain felonies.[86] To get a conviction vacated, an individual must first obtain a certificate of discharge.[87] However, to obtain the certificate of discharge necessary to

[80] RCW 50.13.020(2) ("Information or records may be released by the employment security department when the release is . . . [r]equested by a county clerk for the purposes of RCW 9.94A.760.").
[81] *State v. Conway*, 8 Wn. App. 2d 538, 542 (2019).
[82] AM. CIV. LIBERTIES UNION OF WASH. & COLUMBIA LEGAL SERVS., supra note 76.
[83] *Id*. at 11.
[84] *Id.* at 11-12.
[85] *Id.* at 12.
[86] RCW 9.94A.640(1).
[87] RCW 9.94A.640(1).

have the conviction vacated, an individual must first satisfy "all requirements of the sentence, including any and all legal financial obligations."[88] Thus, in the case of someone like Virginia, the felony makes it harder to secure employment, the inability to secure employment makes it harder to pay the LFOs, the inability to pay the LFOs makes it impossible to obtain the certificate of discharge, and the inability to obtain the certificate of discharge makes it impossible to vacate the conviction preventing the employment necessary to pay the LFOs to begin with. See "Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families" for more on the impacts of conviction on securing employment.

B. Trends

1. Increasing types and amounts of LFO imposition

LFO imposition has grown significantly in the last two decades. For example, in a six-year period from 2006 to 2011, the number of court-ordered LFO accounts in Washington State grew by a third to nearly 500,000.[89] During that same time-period, in King County alone, nearly 20,000 new LFO accounts were opened annually.[90] By then, nearly ten percent of the King County adult population owed LFO debt totaling nearly $1 billion.[91]

The average restitution balance per case across all of Washington's courts is $2,744.[92] The average interest owed per case in Washington is $1,249.[93] In contrast to the amount of restitution and interest owed, the average interest paid per case is just $18.[94] Despite the accumulation of millions of dollars of interest annually, for the years 2014-16, Washington's entire Superior Court system applied,[95] on average, just $93,000 per year towards interest on

[88] RCW 9.94A.637(1).
[89] HARRIS ET AL., MONETARY SANCTIONS IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 11, at 203.
[90] *Id*.
[91] *Id*.
[92] *Id*.
[93] *Id*.
[94] *Id*.
[95] County clerks are required to apply payments from defendants in the following order of priority: restitution to victims; restitution to insurance providers; crime victim penalties; and costs, fines, and other assessments. RCW 9.94A.760.

legal financial obligations, while applying nearly $1,000,000 per year towards restitution principal.[96]

In contrast to the substantial amount of LFOs imposed, governments at every level collect relatively little. For example, one study found that from 2014 to 2016, Washington's Superior Courts collected less than $8 million in LFOs.[97] That same study found that Washington's numerous courts of limited jurisdiction collected less than $5 million during the same period, though that excluded data from the Seattle Municipal Court.[98] Moreover, in written testimony to the Washington State House of Representatives in February 2021, Professor Alexes Harris explained that from 2000 to 2014, just 30% of individuals paid off their victim penalty assessments, leaving $170 million in outstanding assessments among nearly 200,000 people who owed an average of $854 per person—just related to the victim penalty assessment.[99] In addition, because governments must expend resources to collect LFOs, the net collections may be even less than reported.[100]

2. Collection agency involvement.

Having imposed tens of millions of dollars in LFOs upon low-income individuals, and having received just a fraction of those millions in payments, some jurisdictions add to those debts by contracting with collection agencies. Washington's Superior and courts of limited jurisdiction are allowed to contract with collection agencies to pursue LFO debt,[101] even for traffic infractions.[102] A county clerk contracting with a collection agency could then add a "reasonable fee . . . to the

[96] TIM FITZGERALD & JOEL MCCALLISTER, REPORT TO THE LEGAL FINANCIAL OBLIGATIONS STAKEHOLDER CONSORTIUM (May 30, 2018).
[97] TIM FITZGERALD & JOEL MCALLISTER, SUBCOMMITTEE 3 FINDINGS, LEGAL FINANCIAL OBLIGATIONS STAKEHOLDER CONSORTIUM (2014-16 COLLECTIONS) (2018) (on file with author).
[98] *Id*.
[99] Hr'g on H.B. 1412 Before the H. Appropriations Comm., 67th Leg., Reg. Sess. (Wash. 2021) (statement of Professor Alexes Harris) (on file with author).
[100] Matthew Menendez et al., *The Steep Costs of Criminal Justice Fines and Fees*, BRENNAN CTR. FOR JUST. (Nov. 21, 2019), https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines ("The high costs of collection and enforcement are excluded from most assessments, meaning that actual revenues from fees and fines are far lower that what legislators expect.").
[101] RCW 36.18.190 ("Superior court clerks may contract with collection agencies under chapter 19.16 RCW or may use county collection services for the collection of unpaid court-ordered legal financial obligations."); RCW 3.02.045(1) ("Courts of limited jurisdiction may use collection agencies. . . .").
[102] RCW 46.63.110)(6)(b).

outstanding debt for the collection agency fee incurred or to be incurred," and that fee could be "up to fifty percent."[103] An analysis of nearly eighty collection contracts among both Superior and courts of limited jurisdiction[104] in Washington found that almost half of those contracts imposed the statutory maximum collection fee.[105] In addition, collection agencies can charge LFO debtors for things like account setup and maintenance, convenience fees for payment, payment plan fees, and late fees.[106] Once levied, the LFO collection fee itself becomes LFO debt,[107] becoming essentially a fifth type of LFO in the form of a surcharge. A local jurisdiction can refer an LFO account to a collection agency after notice and just 30 days.[108] Consequently, once referred to a collection agency, an individual's LFO debt can easily and quickly more than double.[109] In a recent appellate case, a collection agency opposed an LFO debtor's efforts to remove the debt from collection, arguing that Washington courts lack such authority; the Court of Appeals rejected this argument and held that, under RCW 36.18.190, a Washington court "necessarily has the authority to reduce the amount of LFOs by removing an LFO account from a collection agency and thereby removing the collection agency fee from the LFO account."[110]

3. LFOs as a revenue source

Even though Washington jurisdictions collect just a fraction of LFOs imposed, the revenue streams to various priorities are not insignificant. By statute, as counties receive Superior Court LFO payments, they're applied proportionally in the following order: (1) to restitution to victims that have not been fully compensated from other sources; (2) to restitution to insurance or other sources with respect to a loss that has provided compensation to victims; (3) to crime victims'

[103] RCW 19.16.500(1)(b).
[104] Bryan L. Adamson, *Debt Bondage: How Private Collection Agencies Keep the Formerly Incarcerated Tethered to the Criminal Justice System*, 266 N.W. J. OF LAW & POL'Y 305, 336-37 (2020), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1201&context=njlsp (listing the collection-fee percentages for several Washington Superior and courts of limited jurisdiction).
[105] *Id*.
[106] *See id*.
[107] RCW 19.16.500(4).
[108] RCW 19.16.500(2).
[109] Adamson, *supra* note 104.
[110] *State v. Gaines*, 16 Wn. App. 2d 52, 59-60, 479 P.3d 735 (2021).

assessments; and (4) to costs, fines, and other assessments required by law.[111] Washington's AOC maintains a long list of LFOs and the varying percentage splits among numerous accounts.[112] Nationwide, at least 38 U.S. towns and cities receive more than ten percent of their annual revenue just from court fines and fees, with some jurisdictions depending on LFOs for nearly half of their annual revenue.[113]

While much of the discussion concerning LFOs focuses on imposition at sentencing and collection after a period of incarceration, LFO collection happens in prison as well. For example, the Department of Corrections is required to deduct 20% of the wages an individual earns in "correctional industries work programs" to satisfy LFOs.[114] Even money from family or friends sent to in incarcerated individual is garnished at 20%.[115] The Department of Correction's authority to collect LFOs in some instances in actually independent of the court, allowing the Department, for example, to garnish an individual's prison wages to pay for the cost of incarceration, even where a court might have waived that cost.[116]

Though there are hundreds of LFOs available under Washington law, and a robust post-conviction collection and jurisdiction regime exists, data collection, particularly around gender, is still a challenge.

IV. While Research is Scarce, LFOs Do Impact Women and Men Differently, at Sentencing and Post-Conviction

With the exception of a few small studies and the ability to make inferences from other criminal legal system data, there really isn't any Washington LFO data and research specific to gender. The data and research that is available reflects that while men face higher LFOs at sentencing

[111] RCW 9.94A.760(2). The payment distribution priority is similar for courts of limited jurisdiction. RCW 10.01.170(2).
[112] *JIS-Link Code Manual – Cost Fee Codes*, *supra* note 43.
[113] PETER WAGNER & BERNADETTE RABUY, PRISON POL'Y INITIATIVE, FOLLOWING THE MONEY OF MASS INCARCERATION 2 (2017), https://www.prisonpolicy.org/factsheets/money2017.pdf.
[114] RCW 72.09.111(1)(a)(iv).
[115] RCW 72.09.480(2)(c).
[116] *In re Pierce*, 173 Wn.2d 372, 387, 268 P.3d 907 (2011).

than women, women face greater challenges following conviction, both for their own LFOs and those of others.

A. Gender-specific LFO data is generally not being analyzed

While one can make some inferences concerning gender disparities from the general data concerning incarceration and LFOs, LFO data specific to gender either is not available or has not been analyzed. In fact, according to Christopher Albin-Lackey of the National Center for Access to Justice, which oversees the National Indexing Project on Fines and Fees, none of the 25 states the project has collected data from thus far collects and publishes data on gender in connection with legal financial obligations.[117]

Though currently available gender-specific LFO data is sparse, more may become available throughout 2021 and 2022. For example, the final report of the Washington State Supreme Court Minority and Justice Commission LFO Stakeholder Consortium may be issued in summer 2021.[118] In addition, Professor Alexes Harris and a team of researchers anticipate publishing several LFO-related articles in the Russell Sage Foundation Journal of the Social Sciences in 2022, including articles discussing how LFOs impact families and how, if at all, LFOs increase female incarceration.[119]

B. Men may be sentenced to more LFOs in felony cases, and there are race and gender disparities in Washington's largest municipal court

What scant Washington research is available, reflect that at least at sentencing, men may face higher LFOs than women.[120] Indeed, Katherine Beckett and her co-authors found in 2008 that:

[117] E-mail from Christopher Albin-Lackey to author (Oct. 19, 2020, 07:54 PST) (on file with author); *see also* ALEKS KAJSTURA, PRISON POL'Y INITIATIVE, WOMEN'S MASS INCARCERATION: THE WHOLE PIE 2019 1, https://www.prisonpolicy.org/factsheets/women_pie_chart_report_2019.pdf ("The data needed to explain exactly what happened, when, and why does not yet exist, not least because the data on women has long been obscured by the larger scale of men's incarceration.").
[118] The author is a member of the LFO Stakeholder Consortium.
[119] Telephone Interview with Alexes Harris, Presidential Term Professor, Univ. of Wash., Dep't of Socio. (Mar. 2, 2021).
[120] KATHERINE A. BECKETT ET AL., WASH. STATE MINORITY & JUSTICE COMM'N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE 28 (2008), https://media.spokesman.com/documents/2009/05/study_LFOimpact.pdf.

(1) "[d]efendant gender shows a significant effect on the fee and fine amount assessed"; (2) specifically, "convictions involving male defendants are assessed higher fees and fines than those involving female defendants"[121]; and (3) "gender plays a salient role in the amount of fines and fees assessed," where male defendants were "assessed 3.7 percent higher fees and fines than females."[122] The authors hypothesized that, "[b]ecause women as a group have lower earnings than men, and are more likely to bear direct responsibility for children, it is conceivable that judges determine that female defendants are less able to pay than their male counterparts."[123] See "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for more information on income and pay gaps for women, and "Chapter 4: The Impact of Gender on Courtroom Participation and Legal Community Acceptance" for an analysis of the disproportionate share of childcare responsibilities born by women.

While the 2008 study found that men in felony cases were sentenced to slightly higher LFOs than women, a 2020 study focusing on the Seattle Municipal Court found that "Black men and [Black] women are more likely to be incarcerated than White men and women post receiving a fine or fee citation or sentence."[124]

Furthermore, even if the 2008 study's conclusion that men faced higher LFOs than women was correct, women may still face disproportionate pre- and post-incarceration LFO-related burdens. For example, Prison Policy Initiative Legal Director Aleks Kajstura has noted that "[a]voiding pre-trial incarceration is uniquely challenging for women," concluding "that incarcerated women, who have lower incomes than incarcerated men, have an even harder time affording money bail."[125] Women unable to secure pretrial release will necessarily also be unable to keep or seek employment while jailed, making them less able to pay LFOs if they are eventually convicted.

[121] *Id.*
[122] *Id.* at 94.
[123] *Id.* at 31.
[124] FRANK EDWARDS & ALEXES HARRIS, AN ANALYSIS OF COURT IMPOSED MONETARY SANCTIONS IN SEATTLE MUNICIPAL COURTS 2000-2017 26 (2020), https://www.seattle.gov/Documents/Departments/CivilRights/SMC%20Monetary%20Sanctions%20Report%207.28.2020%20FINAL.pdf.
[125] KAJSTURA, *supra* note 117, at 1.

C. LFO-related collateral consequences may disproportionately affect women

Beyond simply presenting often insurmountable debt, LFOs may cause collateral consequences with respect to access to housing, employment, credit, education, and public benefits.[126] The incarceration rate for women in Washington increased by 200% between 1978 and 2015,[127] and the sheer number of women imprisoned in Washington grew eightfold between 1980 and 2016.[128] Though the men's incarceration rate in Washington increased less during the same time-period,[129] the modest reduction in the annual men's Washington prison population was "cancelled out by growth in the women's population."[130] Every year, Washington's jails and prisons release over 60,000 women back to the community.[131] Low income among women and men is correlated with incarceration. Roughly, half of the individuals in Washington reentering the community from a period of incarceration earn less than $20,000 per year, if they are employed at all.[132] One study found that women overall had a median pre-incarceration income that was 58% of that of non-incarcerated women, while similarly-situated men fare even worse at 48%.[133] The disparity was even greater when accounting for race; for example, the median income of pre-incarceration Black women was less than half that of non-incarcerated white women.[134] "See Chapter 11: Incarcerated Women in Washington" for more data on incarceration trends by gender.

[126] Bryan L. Adamson, *supra* note 104.
[127] Wendy Sawyer, *Washington Prison Incarceration Rates: Women*, PRISON POL'Y INITIATIVE (Jan. 2018), https://www.prisonpolicy.org/graphs/WA_Women_Rates_1978_2015.html.
[128] AM. CIV. LIBERTIES UNION, LOOKING INSIDE – A SMART JUSTICE PROFILE OF WASHINGTON'S PRISON SYSTEM 9 (2019), https://50stateblueprint.aclu.org/assets/reports/SJ-Blueprint-WA.pdf.
[129] Wendy Sawyer, *Washington Prison Incarceration Rates: Men*, PRISON POL'Y INITIATIVE (Jan. 2018), https://www.prisonpolicy.org/graphs/WA_Men_Rates_1978_2015.html.
[130] Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POL'Y INITIATIVE (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html.
[131] Wendy Sawyer, *Who's Helping the 1.9 Million Women Released from Prisons and Jails Each Year?*, PRISON POL'Y INITIATIVE (July 19, 2019), https://www.prisonpolicy.org/blog/2019/07/19/reentry/.
[132] Mack Finkel, *New Data: Low Incomes – But High Fees – For People on Probation*, PRISON POL'Y INITIATIVE (Apr. 9, 2019), https://www.prisonpolicy.org/blog/2019/04/09/probation_income/.
[133] Daniel Kopf & Bernadette Rabuy, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), https://www.prisonpolicy.org/reports/income.html.
[134] *Id*.

1. LFOs impact women who head households

Nationwide, some 80% of women in jail are mothers.[135] The added burdens of LFOs on caregivers presents significant challenges, as highlighted in a report to the U.S. Commission on Civil Rights:

> Panelists highlighted that women confront particular difficulties in paying fines and fees. In addition, women are often primary caregivers for their children and shoulder some or all the costs of arranging childcare, education and maintenance. As a result, many women are restricted in their choice of jobs to positions where an organization can accommodate childcare needs and/or provide flexibility in working hours. Some panelists reported that women may be forced to work multiple jobs in order to pay off LFOs as well as generate the income needed to provide for their families. Importantly, the consequences of non-payment can be especially damaging for women. The threat of being returned to jail on account of non-payment is likely to cause enormous turmoil for those with dependent children – more so, where children lack other caregivers.[136]

In addition, already facing barriers in accessing employment and housing, those reentering the community from jail or prison with LFOs may be unable to access public benefits. For example, where a court concludes that an individual has violated the terms of their supervision, the individual might be statutorily ineligible to receive Temporary Assistance to Needy Families (TANF)[137] or benefits from the Supplemental Nutrition Assistance Program.[138] Given that 83% of adult Washington TANF recipients were women in 2019,[139] and that some 80% of women in jail nationally are mothers,[140] LFOs can play an outsized role in determining whether women reentering the community from incarceration are able to access the income and benefits they need to support themselves and their families. See "Chapter 16: Gendered Consequences of

[135] KAJSTURA, *supra* note 117, at 1.
[136] U.S. COMM'N ON CIV. RIGHTS, A REPORT OF THE TENNESSEE ADVISORY COMM. TO THE U.S. COMM'N ON CIV. RIGHTS 18 (2019), https://www.usccr.gov/pubs/2020/01-15-TN-LFO-Report.pdf.
[137] 42 U.S.C. § 608(a)(9)(A)(ii).
[138] 7 U.S.C. § 2015(k)(1).
[139] U.S. DEP'T OF HEALTH & HUMAN SERVS., CHARACTERISTICS & FIN. CIRCUMSTANCES OF TANF RECIPIENTS FISCAL YEAR 24 (2019), https://www.acf.hhs.gov/ofa/data/characteristics-and-financial-circumstances-tanf-recipients-fiscal-year-2019.
[140] KAJSTURA, *supra* note 117, at 1.

Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families" for an in-dept analysis of the impacts of incarceration on mothers and the consequences of incarceration and criminal convictions.

Behind all of the data are real families struggling under the weight of LFO balances often in the many thousands of dollars. Take the example of Maria, who became a single mother in her teens, found herself addicted to heroin, and was eventually convicted for check fraud and drug delivery.[141] Initially sentenced to pay $4,000 in LFOs, earning $9 per hour after release from incarceration, and trying to support two children, Maria's LFO balance ballooned to $13,000 before a collection agency began garnishing her wages.[142] In Maria's own words:

> My LFOs went to collections. I was more inclined to get gas to go to work or buy the kids food or whatever thing I was doing just to survive. It seems illogical to me, especially if you are going to prison, to add something to the end of that. We pay our costs, our way if you will, when you go to prison. You have to work 40 hours a week. Someone coming out, they don't have money. It's almost a guaranteed set up for failure.[143]

Facing collection and garnishment, Maria was paying $500 per month toward her LFOs when she was interviewed.[144]

2. Women may be impacted by LFO debt belonging to others

Apart from addressing their and their children's needs, women—particularly Black, Indigenous, and women of color—must often shoulder the LFO-related burdens of others close to them. As researchers Joshua Page, Victoria Piehowski, and Joe Soss concluded: "Just as men of color are disproportionately targeted for arrest and incarceration, women of color disproportionately shoulder the burdens of the criminal justice field's financial takings."[145] Additionally, a study by

[141] *Sentenced to Debt for Life in Washington State*, LIVING WITH CONVICTION, https://www.livingwithconviction.org/#/maria-2/.
[142] *Id*.
[143] *Id*.
[144] *Id*.
[145] Joshua Page et al., *A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Predation*, 5 RUSSELL SAGE FOUND. J. SOC. SCIS. 152 (2019), https://www.rsfjournal.org/content/rsfjss/5/1/150.full.pdf.

Saneta deVuono-powell and others found that in 63% of cases family members of an incarcerated person paid for their court-related expenses, 83% of these family members were women, and Black women are more likely than other women to be related to an incarcerated person.[146] These findings are consistent with a report by Alabama Appleseed, which reported that "the burden of other people's court debt falls most heavily on middle-aged African-American women."[147]

From the research currently available, numerous studies reflect that women are paying LFO costs for others at a disproportionate rate.[148] Importantly, these studies describe the context within which individuals paying these fees for those close to them make this decision. As described by Katzenstein and Waller, "[i]t is often women footing the bill for a lot of things in prison."[149] Katzenstein and Waller describe a pattern of gendered roles of court-associated fee payment, explaining: "[t]his system of seizure levies tariffs on the mother, grandmother, partner, sister, daughter, or friend (mostly women) of the incarcerated poor (mostly men) to subsidize the carceral state."[150]

The decision to take on the responsibility of court-related fees for another person is notable given the potential negative consequences for the payee. Approximately half of the women bearing the court-related costs of an incarcerated individual are mothers.[151] However, mothers who assist individuals with incarceration fees often face a difficult choice, where some 65% of families reported "difficulty meeting basic needs as the result of a loved one's incarceration."[152]

[146] SANETA DEVUONO-POWELL ET AL., ELLA BAKER CTR., FORWARD TOGETHER, RSCH. ACTION DESIGN, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 9 (2015), http://whopaysreport.org/who-pays-full-report/.
[147] ALABAMA APPLESEED, UNDER PRESSURE: HOW FINES AND FEES HURT PEOPLE, UNDERMINE PUBLIC SAFETY, AND DRIVE ALABAMA'S RACIAL WEALTH DIVIDE 33 (2018).
[148] Mary Fainsod Katzenstein & Maureen R. Waller, *Taxing the Poor: Incarceration, Poverty, Governance, and the Seizure of Family Resources*, 13 PERSPS. ON POL. 638 (2015), https://www.cambridge.org/core/journals/perspectives-on-politics/article/abs/taxing-the-poor-incarceration-poverty-governance-and-the-seizure-of-family-resources/74641000B52C03BF4DFCD2289302D380; DEVUONO-POWELL ET AL., *supra* note 146, at 9; ALABAMA APPLESEED, supra note 147, at 33; Gina Clayton et al., *The Hidden Cost of Money Bail: How Money Bail Harms Black Women*, HARV. J. AFR. AM. PUB. POL'Y 59, 61 (2017), https://search.proquest.com/openview/f6f6969be0d86776796d38c76724a77d/1/advanced.
[149] Katzenstein & Waller, supra note 148.
[150] *Id*.
[151] DEVUONO-POWELL ET AL., *supra* note 146, at 14.
[152] *Id.* at 7.

Therefore, "[f]amilies are often forced to choose between supporting incarcerated loved ones and meeting the basic needs of family members who are outside."[153]

The body of evidence exploring who pays LFOs specifically is still developing. However, there is a larger body of evidence already established focused on who pays justice system costs such as bail, visitation, and critical post-incarceration support such as stable housing and securing employment. This research finds that women are disproportionately likely to provide these forms of support and pay these fees.[154]

3. For most returning to the community from incarceration, LFOs remain, increase, and keep individuals in the system

After time in jail or prison, the potential LFO debt spiral can act to keep individuals in poverty and return them to jail. Bearing in mind that formerly-incarcerated women and men earn significantly less than their non-incarcerated peers,[155] consider the following scenario for an indigent Washington resident sentenced to 40 months in prison at the Monroe Correctional Complex in Snohomish County, a mandatory $500 victim penalty assessment, a mandatory $100 DNA collection fee, and $1,000 in restitution:

- After 40 months in prison, the individual's restitution will grow to $1,400 at the current 12% restitution interest rate, plus the $600 in non-restitution LFOs, for a total of $2,000.
- Assuming the individual can find employment at all, and that the employment is full-time at Washington's minimum wage of $13.50 per hour, the individual would take home just under $2,000 per month—significantly less than, for example, the self-sufficiency standard of $3,066 per month in Snohomish County.[156]
- Assuming the individual could pay $25 per month, it would take some seven years to pay off the $2,000 owing upon release from prison, by which time the original amount would have doubled.

[153] *Id.* at 30.
[154] *See* "Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families."
[155] Kopf & Rabuy, *supra* note 133.
[156] WORKFORCE DEV. COUNCIL OF SEATTLE – KING CTY., THE SELF-SUFFICIENCY STANDARD FOR WASHINGTON STATE 2020 19 (2020), http://www.selfsufficiencystandard.org/sites/default/files/selfsuff/docs/WA2020_SSS.pdf.

- However, assuming that, as is the case for many, the individual either cannot secure employment or misses a payment, the jurisdiction might contract with a collection agency to pursue payment,[157] or the individual might be returned to jail for non-payment if a court concludes the individual is able to pay but will not pay.
- A jurisdiction could add a "reasonable fee . . . to the outstanding debt for the collection agency fee incurred or to be incurred," and that fee could be "up to fifty percent."[158]
- Thus, assuming the individual's account is sent to a collection agency, the original $2,000 could potentially become $3,000 upon assignment, in which case the individual might need 15 or more years to pay off the amount at $25 per month, resulting in the original restitution amount more than quadrupling.
- During the 15 years it takes for the individual to pay off what was originally $1,000 in restitution and $600 in non-restitution LFOs, the court retains jurisdiction over the individual.[159]
- So long as the court has jurisdiction, the clerk is authorized to collect, including requiring the individual to periodically verify their income throughout the fifteen-year repayment period.[160]

Whether in Snohomish County or in any of Washington's 39 counties, and in courts throughout the criminal legal system, LFOs can significantly impact individuals, and not just in pure dollar-for-dollar costs. Through interest and collection surcharges, LFOs can grow over time. One person's LFOs can become another's burden. These impacts vary according to gender, though more data and research are needed to assess and address these impacts. Reform is underway, but that reform is not aimed at gender disparities, strictly speaking.

[157] RCW 36.18.190.
[158] RCW 19.16.500(1)(b).
[159] RCW 9.94A.753(4) ("For an offense committed on or after July 1, 2000, the offender shall remain under the court's jurisdiction until the obligation is completely satisfied, regardless of the statutory maximum for the crime."); RCW 9.94A.760(5) (court retains jurisdiction so long as the legal financial obligation remains unsatisfied, regardless of the statutory maximum for the underlying offense).
[160] RCW 9.94A.753(4); RCW 9.94A.760(5).

V. LFO Reforms Have Taken Place and Are Being Considered, Though None Specific to Gender

A. Recent reform efforts

In 2018, the Washington State Legislature took a significant step in reforming LFO imposition when it passed a bill (HB 1783) changing several laws to eliminate interest on non-restitution LFOs and prohibit cost imposition upon indigent defendants.[161] While HB 1783 abolished interest accrual on non-restitution LFOs as of June 7, 2018,[162] and allows courts to waive any such interest accrued prior to that date, the waiver is not automatic; rather, individuals must petition a court.[163] Additionally, HB 1783 amended several statutes to prohibit cost imposition upon individuals determined to be indigent under statute.[164] HB 1783 also prohibits courts from, for example, jailing an individual for failing to pay LFOs, unless the individual is able to pay but refuses to do so.[165] Separately, HB 1783 provides that failure to pay an LFO is not willful contempt where the court determines that an individual is experiencing homelessness or has a mental illness.[166] In addition, HB 1783 prohibits courts from imposing a $100 DNA collection fee on individuals when DNA has previously been collected.[167] HB 1783 has already allowed many individuals to obtain relief from LFOs, in some cases through specially-organized LFO "reconsideration days" in courts around Washington.[168] As discussed in more detail below, further reform is possible but challenging.

[161] ENGROSSED SECOND SUBSTITUTE HB 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783).
[162] RCW 10.82.090(1).
[163] RCW 10.82.090(2)(a). As discussed *infra*, proposed Washington State Courts General Rule 39 would provide guidance to courts throughout Washington on streamlining processes for individuals to seek statutory interest waiver.
[164] RCW 10.01.160(3) ("The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c)."); RCW 10.46.190 (relating to jury costs); RCW 10.64.015; RCW 9.94A.760(1); RCW 3.62.085 (referring to the $43 conviction fee in courts of limited jurisdiction); RCW 36.18.020(2)(h) (referring to the $200 clerk's fee).
[165] RCW 10.01.180(3)(a); RCW 9.94A.6333(3)(a).
[166] *E.g.*, RCW 10.01.180(3)(c).
[167] RCW 43.43.7541.
[168] Alexis Krell, *'This is a Big Day for Tacoma' – 1,000 Seek Relief from Pierce County Court Debt*, NEWS TRIB. (Sept. 26, 2019), https://www.thenewstribune.com/news/local/article235282562.html (discussing an LFO reconsideration day in Pierce County); *see also* Andrew Binion, *Event Gives People a Chance to Get Out from Under Overwhelming Legal Debt*, KITSAP SUN (Apr. 11, 2019), https://www.kitsapsun.com/story/news/2019/04/10/judge-

B. Possible future reforms

The recommendations below address some of the most pressing needs identified in this chapter: ensuring courts do not impose LFOs on individuals who cannot afford to pay and do not issue warrants where a defendant has been ordered to appear and show cause concerning non-payment of LFOs, but fails to appear for the hearing; increasing and streamlining data collection and access so stakeholders will have a single place to access statewide LFO data; moving forward the Washington State Criminal Sentencing Task Force LFO recommendations; ensuring judges know that supervision fees can be waived at sentencing; ensuring that individuals sentenced to pay LFOs are aware early and often of what relief is available and how to seek that relief; simplifying LFO repayment; identifying alternative sources of funding for courts and victim services; and exploring solutions not directly related to LFOs that could alleviate gender disparities, such as addressing employment and income disparities.

1. Background on data collection needs and current work

Presently, researchers gather data primarily from the Washington AOC, and in some cases, local jurisdictions. In addition to the possible forthcoming reports discussed above,[169] there may be technology approaches to easing data access. For example, a team with Microsoft is currently working on a criminal justice equity tool; the tool presently incorporates sentencing data provided by the Washington Caseload Forecast Council, but might also be able to present LFO data.[170] Any analysis should first consider the reliability of the underlying data, e.g., the sources of that data and how it was collected in the first instance.[171]

On April 25, 2021 the Washington State budget provided funding for the Washington State Institute for Public Policy (WSIPP) "to study legal financial obligations."[172] The scope of the LFO study includes some of the data gathering recommended above, though there is no provision for

legal-debt-forgiveness-criminal-justice-reform-civil-survival/3429426002/ (discussing an LFO reconsideration day in Kitsap County).

[169] *Supra* notes 118-119

[170] Videoconference Interview with Kim Gordon, Anthony Powers, & Kate Sigafoos (Feb. 23, 2021).

[171] For example, see *TATIANA MASTERS ET AL., INCARCERATION OF WOMEN IN WASHINGTON STATE: MULTI-YEAR ANALYSIS OF FELONY DATA (2020)* for information on the limitations of Caseload Forecast Council data.

[172] ENGROSSED SUBSTITUTE SB 5092, at 468-69, 67th Leg., Reg. Sess. (Wash. 2021).

collecting or analyzing data specific to gender. The study would "explore": (1) the amount of LFOs imposed over the last three years; (2) total outstanding LFOs; (3) total annual LFO collections; (4) LFO imposition statutes; (5) the percentage of the "judicial branch" budget supported by LFOs; (6) "programs" funded by LFOs; (7) how other states fund their court systems and whether other states use LFOs to fund courts; and (8) recommendations to the Washington State Legislature concerning "potential methods and processes to delink court related funding and other county and local funding from the collection of legal financial obligations and [how] to provide such funding through other means."[173]

The budget authorization for the WSIPP LFO study provides that WSIPP "may solicit input" from a number of sources, including, in relevant part, Superior Court judges, persons formerly incarcerated and their advocates, academic researchers, persons with LFO expertise, and the Washington State Supreme Court Minority and Justice Commission.[174]

"An initial report" from WSIPP is due to the Legislature by December 1, 2021, and the final report is due December 1, 2022.[175]

2. Washington State Criminal Sentencing Task Force LFO recommendations

A bill (SSHB. 1412) was introduced in the Washington Legislature to codify many of the Criminal Sentencing Task Force's LFO recommendations in the 2021-22 session.[176] With support from the Washington State Supreme Court Minority and Justice Commission, the Superior Court Judges' Association, and others, SSHB 1412 was voted out of the House Civil Rights and Judiciary Committee and House Committee on Appropriations, the bill was not given a floor vote.[177]

[173] *Id*. at 468-69.
[174] *Id*. at 469.
[175] *Id*. at 469.
[176] SECOND SUBSTITUTE HB 1412, 67th Leg., Reg. Sess. (Wash. 2021) (SSHB 1412).
[177] *Bill History*, WASH. STATE LEG. https://app.leg.wa.gov/billsummary?BillNumber=1412&Year=2021&Initiative=false (last visited May 21, 2021).

In addition to the Criminal Sentencing Task Force LFO recommendations, Dismantle Poverty in Washington recently recommended reforming LFO laws, including, for example, eliminating fees charged in connection with payment plans—i.e., "pay to pay" fees.[178]

Though none of these LFO-related recommendations specifically address gender, the recommendations, if adopted into law, may impact individuals of various genders differently. For example, if data are correct reflecting that courts impose slightly more LFOs at sentencing on men than women,[179] then changes to LFO laws at sentencing may benefit men more than women. However, given that many of the recommendations focus on post-conviction relief, those recommendations, if made law, may disproportionately help women dealing with LFO-related collateral consequences, such as women paying others' LFOs.[180]

3. Education concerning LFO relief at and after sentencing.

The standard form community custody Appendix H (Figure 1) used by Superior courts throughout Washington does not currently include a space for waiving supervision fees. While a sentencing judge in Superior Court can waive Department of Corrections supervision fees at sentencing,[181] the standard form community custody Appendix H[182] used by Superior Courts throughout Washington includes language requiring payment of supervision fees, without advising the court or individual being sentenced of the court's ability to waive the fee. Washington Judges have indicated that clarifying this form would raise the visibly for judges so they are aware that this fee can be waived.

[178] DISMANTLE POVERTY IN WASH., BLUEPRINT FOR A JUST & EQUITABLE FUTURE – THE 10-YEAR PLAN TO DISMANTLE POVERTY IN WASHINGTON 42 (2020), https://dismantlepovertyinwa.com/wp-content/uploads/2020/12/Final10yearPlan.pdf.
[179] BECKETT ET AL., *supra* note 120, at 28.
[180] Page et al., *supra* note 145.
[181] RCW 9.94A.703(2)(d).
[182] *Judgment and Sentence Appendix H Community Custody*, WASH. ADMIN. OFF. OF THE CTS. (Oct. 2012), https://www.kingcounty.gov/~/media/courts/superior-court/docs/criminal/criminal-forms/9-judgment-and-sentence-appendix-h-community-custody-pdf-web.ashx?la=en.

Figure 1. Standard Form Community Custody Appendix H

STATE OF WASHINGTON,)
)
Plaintiff,) No.
)
vs.) JUDGMENT AND SENTENCE
) APPENDIX H
) COMMUNITY CUSTODY
Defendant,)
)

The Defendant shall comply with the following conditions of community custody, effective as of the date of sentencing unless otherwise ordered by the court.

1) Report to and be available for contact with the assigned community corrections officer as directed;
2) Work at Department of Corrections-approved education, employment, and/or community restitution;
3) Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
4) Pay supervision fees as determined by the Department of Corrections;

4. State general fund support for courts and victim services.

Decreasing dependence on LFOs to fund the courts and victim services requires identifying new ways to fund victim services, courts, and counties that reduce or eliminate LFO dependence. For example, testimony provided in the Washington State Legislature in February 2021 concerning an LFO reform bill noted that allowing for waiver of the victim penalty assessment would require a new fund to provide for victim services, and yet no such fund with an alternative revenue source was being proposed.[183] During that same hearing in the Legislature, a representative of the Washington Association of Counties summarized the funding issue from the county perspective, testifying:

> If we look back in time we'll see that the legislature originally imposed LFOs to help fund the court system. And over time that has sort of fallen out of favor. And this is exemplified by the introduction of bills that sort of chip away at our ability to impose and collect LFOs. We really need to take a look at how we're going to

[183] Hr'g on HB 1412 Before the H. Appropriations Comm., 67th Leg., Reg. Sess. (Wash. 2021) (statement of Russell Brown, Wash. Ass'n of Prosecuting Att'ys).

> continue to fund the court system if we're not going to have LFOs as an option that is sustainable.[184]

Considering that Washington counties and cities have supported more than 80% of the cost of the state's court system in recent years,[185] LFO reform efforts may need to account for new revenue sources if LFO imposition and collection is curtailed.

Any convening to assess the role of LFOs in funding courts and services should be able to leverage the WSIPP study described above,[186] which would study in relevant part the percentage of the judicial branch budget supported by LFOs, programs funded by LFOs, how other states fund their court systems and whether other states use LFOs to fund courts, and recommendations to the Washington State Legislature concerning potential methods and processes to delink court related funding and other county and local funding from the collection of legal financial obligations, as well as recommendations to provide such funding through other means.

5. Other potential reforms with implications for LFOs

While not directly related to LFOs, there are many areas for potential reform in the criminal legal system which may impact LFOs and gender disparities related to LFOs. For example, considering the income and employment disparities discussed earlier,[187] reforms relating to pretrial release (e.g., relating to cash bail and pretrial services) could help women maintain or seek employment while awaiting trial, increasing their ability to afford LFOs if later convicted. Other areas of reform could include greater resources (e.g., increased access to health, vocation, and education resources) while incarcerated, which would make those reentering the community better able to address their LFO debt, as well as more resources after reentry with respect to things such as access to employment, housing, and credit.

[184] Hr'g on HB 1412 Before the H. Appropriations Comm., 67th Leg., Reg. Sess. (Wash. 2021) (statement of Juliana Roe, Wash. State Ass'n of Ctys.).
[185] *Funding Our Courts: Finding a Balance*, WASH. ADMIN. OFF. OF THE CTS. https://www.courts.wa.gov/programs_orgs/pos_jea/?fa=pos_jea.article1.
[186] *Supra* note 176.
[187] Kopf & Rabuy, *supra* note 133.

VI. Recommendations

- To facilitate a single place to access statewide LFO data, by December 2021, stakeholders should be convened[188] to: (1) assess what LFO data is currently available from each level of court; (2) assess what LFO data is not available; (3) assess how stakeholders (e.g., researchers) currently access available data; and (4) recommend ways to (i) fill in the missing data, and (ii) create a single portal for accessing statewide data. Any analysis should first consider the reliability of the underlying data, e.g., the sources of that data and how it was collected in the first instance. The data should include impact of LFO's by gender, race, and ethnicity as overlapping categories; it should also strive to include who is making the payments (i.e., the sentenced defendant or another family member).
- The Washington State Legislature recently named the Washington State Institute for Public Policy (WSIPP) as the justice system partner responsible "to study legal financial obligations," and provided WSIPP with funding to do so. The scope of the LFO study includes some of the data gathering recommended above, though there is no provision for collecting or analyzing data specific to gender. WSIPP should consult with stakeholders, including the Gender and Justice Commission, immediately about conducting this study. The Gender and Justice Commission should (1) recommend to WSIPP that their data collection and analysis include gender and intersectionality with other demographics, and (2) offer the Gender and Justice Commission's assistance with the study.
- To ensure that LFOs do not pose a barrier to completing a sentence, exiting the criminal legal system, and successfully reentering the community, the legislature should consider enacting the following Washington State Criminal Sentencing Task Force LFO recommendations:
    - Address interest on restitution:
        - Change current law to give judges the discretion to waive or suspend interest on restitution, rather than it being mandatory, based on a finding of current or likely future ability to pay.

[188] Such a convening is already being planned for September 2021, coordinated by the Administrate Office of the Court and co-chaired by Representative (and Gender Justice Study Advisory Committee member) Tarra Simmons and Judge David Keenan (author of this chapter).

        - If restitution is imposed, allow accrual of interest to begin following release from the term of total confinement.
        - Lower the current 12% interest rate on restitution.
    - Waive existing non-restitution interest.
    - Victim Penalty Assessment (VPA):
        - Provide trial court judges with the discretion to reduce or waive the VPA upon a finding by the court that the defendant lacks the present and future ability to pay.
        - Provide trial court judges with the discretion to eliminate stacking of multiple VPAs (multiple VPAs imposed at same time) based on a finding that the defendant lacks the present and future ability to pay.
- Convene stakeholders to collaborate on legislation requiring, at a minimum, that Superior Courts means-test LFOs which are currently mandatory, including, for example, the victim penalty assessment.
- Convene stakeholders to study means-testing imposition of all LFOs in courts of limited jurisdiction, requiring a report and recommendations by November 2022.
- Convene stakeholders to propose draft revisions to CrR 3.4(d) and CrRLJ 3.4(d) concerning the necessity of an individual's presence at a hearing ordered solely to address LFO collection, and the advisability of issuing warrants when an individual fails to appear at such a hearing. Stakeholders should consider whether warrants should still be permitted where, for example, there is proof by a particular standard (e.g., preponderance) that the failure to pay is willful.
- Ask AOC to revise Appendix H of the Felony Judgment & Sentence Form (re Community Custody) to include a space for waiving supervision fees. While a sentencing judge in superior court can waive DOC supervision fees at sentencing, the standard form community custody Appendix H used by Superior courts throughout Washington includes language requiring payment of supervision fees, without advising the court or the defendant of the court's ability to waive the fee.
- Convene stakeholders to make recommendations concerning the use of collection agencies to collect LFO debt. Stakeholders should examine, at a minimum: (1) whether

LFOs should be exempt from referral to collection agencies; (2) whether to increase the minimum collection referral period (currently 30 days under RCW 19.16.500(2)); and (3) whether to reduce collection agency fees (currently up to 50% of the first $100,000 under RCW 19.16.500(1)(b)).

- To ensure that LFOs do not pose barriers to completing a sentence, exiting the criminal legal system, and successfully reentering the community, and to stop dependence on LFO revenue to fund the courts and victim services, by mid-2022, convene stakeholders to: (1) assess what portion of court funding and victim services funding is supported by LFOs; (2) assess the impact of means-testing LFOs currently supporting court funding and victim services funding; (3) assess the economic and social impact of eliminating referral of debts to collection agencies; and (4) recommend alternative sources of funding for courts and victim services.

Chapter 16

Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families

Elizabeth Hendren, JD

Claire Mocha, MPH

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I. Summary

Incarceration can have lifelong adverse consequences for incarcerated parents, their children, their loved ones, and their children's caregivers. This is true even for short periods of incarceration, and this is true even if the incarceration ends without a conviction. Strict timelines, along with barriers to obtaining court documents, responding to them, and appearing in court during incarceration can lead to permanent termination of parental rights, particularly the parental rights of mothers. They can also lead to negative consequences for incarcerated parents in family law cases, especially for mothers.

These consequences have a harsher impact on mothers because incarcerated mothers are significantly more likely than incarcerated fathers to be primary caregivers. They are also significantly less likely than incarcerated fathers to have another parent or family member available to step in to care for their children during detention. Consequently, the children of incarcerated mothers are more likely to be declared "dependent" on the state, which triggers further dependency and termination proceedings.

In addition, health and wellbeing consequences of incarceration can also fall more harshly on women, including mothers, and on other vulnerable populations. Some incarcerated individuals face overcrowding and poor sanitation; limited access to or disruption in behavioral health treatment; limited access to quality healthcare; and violence, harassment and trauma (not necessarily from within the institution). Pregnant and parenting incarcerated people face additional health and wellbeing challenges. Even after release, formerly incarcerated people continue to suffer from such health effects of incarceration.

Further, removing a parent from the family and community causes broader emotional, financial, and health impacts. Parental incarceration has been identified as an Adverse Childhood Experience that can produce serious, lifelong, health, educational, employment, and social consequences for the children of incarcerated parents. Families with incarcerated loved ones shoulder an enormous financial burden when supporting a loved one through the legal process, and during and after incarceration – a burden disproportionally carried by women, especially

Black, Hispanic/Latinx, and Indigenous women.[1] As one astute commentator noted, "Women are the informal reentry system of this country."[2] And both children and families of incarcerated persons and the communities disproportionately impacted by mass incarceration suffer poor health and cumulative consequences.

Criminal convictions and incarceration also lead to adverse consequences after release. Such convictions produce formal legal collateral consequences, such as legal financial obligations (LFOs),[3] barriers to accessing positions requiring occupational licensing, and inability to participate fully in civic life. Such convictions also produce an array of broader and less formal consequences, such as diminished job and housing opportunities. These formal and informal consequences can make it especially hard for formerly incarcerated parents to participate fully in their children's lives.

For example, people with a history of arrest, conviction and/or incarceration experience disproportionately high rates of trauma, poverty, housing insecurity, deportation, and food insecurity. These problems affect not only the formerly incarcerated person, but also their families and loved ones. These problems also tend to have a disproportionately adverse impact based on gender, race, ethnicity, and other demographics. For example, incarcerated women are more likely to have been homeless before incarceration than incarcerated men, and incarcerated Black women more likely to have been homeless before incarceration than incarcerated white women. Individuals experiencing homelessness before incarceration are unlikely to be able to return to a stable home after release. Obtaining housing is a critical component of not only successful reentry but also family reunification after prison.

In sum, whole communities – especially children – suffer during and after the incarceration of the parent. Some of those consequences are intentional, and are part of the legal process. But

[1] The 2021 Gender Justice Study uses the race and ethnicity terms used in the underlying sources when citing data in order to ensure we are presenting the data accurately and in alignment with the how the individuals self-identified. When talking more broadly about the body of literature we strive to use the most respectful terms. See Section V of the full report ("2021 Gender Justice Study Terminology, Methods, and Limitations") for a more detailed explanation of terminology used throughout the report.

[2] GINA CLAYTON ET AL., BECAUSE SHE'S POWERFUL: THE POLITICAL ISOLATION AND RESISTANCE OF WOMEN WITH INCARCERATED LOVED ONES 54 (2018), https://www.becauseshespowerful.org/wp-content/uploads/2018/05/Essie-Justice-Group_Because-Shes-Powerful-Report.pdf.

[3] *See "*Chapter 15: The Gendered Impact of Legal Financial Obligations."

others are likely unintentional, and even the intentional consequences may have impacts on health, employability, housing, parenting, and family life that are far more devastating than was ever intended.

II. Introduction

The American Bar Association defines collateral consequences as "legal penalties that take away rights, access to programs or services, or that impose another type of disadvantage that may not be part of a person's sentence."[4] However, advocates, researchers, and those with lived experience of criminal legal system involvement have highlighted an additional array of consequences and extremely high barriers that go far beyond the formal legal penalties found in statutes.[5] These barriers perpetuate disproportionately high rates of trauma, poverty, and housing and food insecurity among people with a history of arrest, conviction, and/or incarceration, and affect their families and communities as well.

More familiar consequences include legal financial obligations (LFOs) and barriers to employment, housing, education, public benefits and political participation. Incarceration also impacts health and wellbeing, during and after incarceration, and has broader impacts on families, loved ones and communities. For incarcerated parents – especially mothers – lesser-known consequences are related to their parental rights. These consequences are implicated any time a parent becomes incarcerated, regardless of whether or not they are also criminally convicted. This chapter highlights disproportionate impacts by gender, race, ethnicity, and other demographics. For more information on the increase in incarceration rates for women, see "Chapter 11: Incarcerated Women in Washington."

[4] *Reducing the Impact of Collateral Consequences of Convictions*, AM. BAR ASS'N(Dec. 11, 2020), https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/criminal_justice_system_improvements/reducing-the-impact-of-collateral-consequences-of-convictions/.

[5] David S. Kirk & Sara Wakefield, *Collateral Consequences of Punishment: A Critical Review and Path Forward,* 1 ANN. REV. CRIMINOLOGY 171 (2018). Kirk and Wakefield define collateral consequences as "not only (a) the (formal) legal and regulatory sanctions that the convicted bear beyond the sentence imposed by a criminal court but also (b) the (informal) impacts of criminal justice contact on families, communities, and democracy." *Id*. at 172.

As explained further below, many of the consequences have a disparate impact on mothers. Mothers often suffer the harshest consequences of incarceration, even short-term incarceration or detention, because incarcerated mothers are significantly more likely than incarcerated fathers to be primary caregivers. Incarcerated mothers are also significantly *less* likely than incarcerated fathers to have another parent or family member step in to care for their children upon the mother's arrest or detention, potentially triggering events leading to permanent separation from their children. Unfortunately, much of the existing data on incarcerated mothers, particularly Washington data, is not disaggregated to show the intersection of gender with race and ethnicity. However, our findings in other chapters and in our pilot project on incarceration of women in Washington State support the inference that, here too, it is Black, Indigenous, and mothers of color who are most impacted.[6]

III. Direct Impacts for Incarcerated Parents, Particularly Mothers

A. Parental rights: Dependency and termination proceedings have the harshest impact on incarcerated mothers, most likely Black, Indigenous, and mothers of color

As one mother, Kimberly Mays, MPA, shared:

> Being an incarcerated parent while simultaneously trying to navigate an open dependency or family law case regarding the legal rights of your children is a pipeline to termination. Lack of visitation with their children and no access to court-ordered services that are needed to reunite with their children are two of the biggest barriers incarcerated parents face.
>
> Even though my son was placed in Tacoma 30 minutes from Purdy, I only received one visit with my newborn son whom I had given birth to while in prison. I didn't

[6] *See* "Chapter 11: Incarcerated Women in Washington," "Chapter 13: Prosecutorial Discretion and Gendered Impacts," and "Chapter 14: Sentencing Changes and Their Direct and Indirect Impact on Women." *See also* pilot project in Appendix C of the full report: TATIANA MASTERS ET AL., INCARCERATION OF WOMEN IN WASHINGTON STATE: MULTI-YEAR ANALYSIS OF FELONY DATA (2020)

hear from the Department[7] whether my son was dead or alive for about two months after he was born, and I didn't see him until he was three months old.

When I was incarcerated, I desperately needed to communicate with my attorney and my Department social worker who were the very people who could make a difference in my case regarding my legal rights to my son. I had no money to make phone calls or buy JPay[8] stamps, and no way to email parties to my case.[9] I could call my attorney collect, but by the time I would get to a phone he would never be there, and if I left a message he couldn't call me back at the [prison] payphone.[10] It was just a lack of communication, and then it's a circus trying to schedule calls through your CCO[11] because you have got to wait for a meeting with the CCO, then the CCO has to get ahold of the parties you are trying to reach, then schedule an appointment, then get back with you- if they'll do it at all. Sometimes like in my case they'll say they couldn't reach anyone, because they've got too much to do to worry about helping you engage in your case.

Therefore, I was not able to co-create a case plan with the Department, or utilize my Department social worker to help me remedy the barriers to complying with the case plan that was developed for me and not with me. Not having a voice in case planning about my son, and rarely getting communication about how my son was doing, was very discouraging…

None of my court-ordered services were offered in the prison, except substance abuse treatment, but there was a long waiting list and I never got into inpatient treatment while incarcerated, before I was released. So I focused on engaging in every positive program and class available to me within the prison, including a college course in office administration. All of those things significantly helped me

[7] Wash. State Dep't of Children, Youth & Families.

[8] JPay is a vendor with Department of Corrections which provides privatized messaging services between incarcerated individuals and others. Each message requires an electronic "stamp" to be sent, which must be purchased by the incarcerated individual or someone who prepays for their stamps.

[9] Incarcerated individuals do not have access to email.

[10] Prison pay phones can dial out but cannot accept incoming phone calls.

[11] Community Corrections Officers (CCOs) supervise incarcerated individuals.

> to make improvements in my values, my beliefs, and my thinking, which in turn changed my behaviors. But then I found out from the Department that all of the positive things I was doing in prison did not count towards me making progress and being in compliance in my dependency case… I was literally powerless to do anything towards getting my son back, yet the federal time clock towards the termination of my parental rights just kept ticking away until my parental rights for my son were finally terminated.[12]

1. Dependency proceedings

When parents are in jail or prison, in most cases their children cannot live with them.[13] If the incarcerated parent was the primary caretaker prior to incarceration, arrest and incarceration can prompt the state to file a dependency action, which is a legal proceeding initiated by the state against the parents when a child is "dependent" on the state.[14]

A parent's incarceration can trigger a state dependency proceeding in several ways. A child may be declared dependent following a parent or parents' arrest if no one else is available to care for them. Additionally, a parent's criminal conduct may trigger a dependency proceeding to examine their fitness to parent. Finally, neglect after a primary parent goes to prison can also trigger an investigation into a child's home life.[15]

[12] WASHINGTON STATE SUPREME COURT SYMPOSIUM, BEHIND BARS: THE INCREASED INCARCERATION OF WOMEN AND GIRLS OF COLOR (June 2, 2021),, https://www.tvw.org/watch/?eventID=2021061001.

[13] Washington Corrections Center for Women allows, in very limited circumstances, for babies born to incarcerated mothers to reside with them inside the prison. This is the only circumstance in which children and incarcerated parents in Washington are permitted to live together. *Residential Parenting Program Fact Sheet*, WASH. STATE DEP'T OF CORR., 1 (May 2017), https://www.doc.wa.gov/docs/publications/fact-sheets/400-FS003.pdf. ; WASH. STATE DEP'T CORR. POLICY DOC 590.320: RESIDENTIAL PARENTING PROGRAM (2020),, https://www.doc.wa.gov/information/policies/showFile.aspx?name=590320.

[14] "Dependent child" means any child who:
(a) Has been abandoned;
(b) Is abused or neglected as defined in chapter 26.44 RCW by a person legally responsible for the care of the child;
(c) Has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development; or
(d) Is receiving extended foster care services, as authorized by RCW 74.13.031. RCW 13.34.030(6).

[15] RCW 13.34.050; WAC 110-30-0030; WAC 110-30-0110; NELL BERNSTEIN ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED (2007).

A 2010 Bureau of Justice Statistics Special Report found that incarcerated mothers were five times more likely than incarcerated fathers to report that their children were in foster care (11% vs. 2%).[16] The same report found that incarcerated mothers were three times more likely than incarcerated fathers to report that they had provided most of the daily care for their children prior to their incarceration (77% vs. 26%).[17] In addition, 42% of incarcerated mothers in state prisons reported living in a single-parent household with their children in the month preceding their arrest, compared to 14% of incarcerated mothers who reported living in a two-parent household with their children in the month preceding arrest.[18] Notably, 88% of incarcerated fathers reported that at least one of their children was in the care of the child's mother, whereas only 37% of incarcerated mothers reported their children's father as the current caregiver of the children.[19] Mothers in prison most commonly cited their children's grandmother as their children's caregiver (42% of incarcerated mothers), and 23% of incarcerated mothers identified other relatives as the current caregiver of their children.[20]

What emerges from these numbers is a picture of many incarcerated mothers caring for their children on their own, in single-parent households prior to incarceration. Upon a mother's arrest and incarceration, it can be gleaned from the Bureau of Justice Statistics data that there is frequently not another parent who will step in and care for the children of incarcerated mothers in the same way that mothers continue care for the children of incarcerated fathers. It is also worth noting the role grandmothers play in caring for the children of incarcerated mothers. Women disproportionately care for the children of incarcerated parents regardless of the gender of the incarcerated parent.

The lack of childcare responsibilities shared by fathers before or during a mother's incarceration also helps to explain why incarcerated mothers are so much more likely to have children in foster care than incarcerated fathers. The high numbers of incarcerated mothers who report caring for children in single-parent households prior to incarceration indicate the full weight of childcare is

[16] LAUREN GLAZE & LAURA MARUSCHAK, PARENTS IN PRISON AND THEIR MINOR CHILDREN, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., 5(rev. March 30, 2010), https://www.bjs.gov/content/pub/pdf/pptmc.pdf.
[17] *Id*.
[18] *Id.*[19] *Id*
[19] *Id*
[20] *Id* .

often carried by single mothers, and often the other parent still does not care for the children upon the mother's incarceration. This leaves the children of many incarcerated mothers to the care of either grandmothers, other family members, or foster care. In Washington, if a child is in foster care, the child is by definition a dependent child.

Stakeholders and parents who have navigated the child welfare system report that once a parent comes under the watchful eye of the child welfare system, it is very difficult for them, incarcerated or otherwise, to satisfy that system's demands. This is amplified for parents charged with crimes. Ellen Barry, Founding Director of Legal Services for Prisoners with Children in California, writes:

> Given the stringent legal requirements of the existing foster care laws and regulations, it is virtually impossible for incarcerated mothers to comply with the time requirements for reunification with their children. Even if mothers are on parole or probation, the obstacles for reunification are still enormous. Formerly incarcerated women have great difficulty getting jobs with adequate wages, obtaining housing, getting job training, arranging for daycare, and meeting the requirements of the juvenile court reunification agreement. They face enormous discrimination based on their status as former prisoners, and women of color face even more difficulties as a result of both personal and institutionalized racism.[21]

Criminal justice system involvement may also play a role in various discretionary decisions in dependency, termination, and family proceedings, both explicitly in assessing a parent's ability to care for their children and implicitly in assessing the credibility of the parent's testimony. As part of Washington dependency proceedings, Washington State Department of Children, Youth & Families (DCYF) social workers submit detailed reports to the courts about the parents of the children of the proceedings. These reports include detailed information about the parents' living situations, perceived ability to care for their children, and any concerns DCYF social workers have about the parents' ability to care for their children. Stakeholders report that pending criminal

[21] Ellen Barry, *Parents in Prison, Children in Crisis*, *in* OUTSIDERS WITHIN: WRITING ON TRANSACTIONAL ADOPTION 65-66 (Jane Jeong Trenka & Julia Chinyere Oparah eds., 2021).

charges or conviction history of the parents are included in these reports. While not all pending charges or criminal convictions will speak to a parent's ability to care for their children, they are generally deemed relevant to the court's inquiry. Parents' attorneys and formerly incarcerated parents report increased skepticism in such proceedings towards a parent's credibility and ability to make good choices for their child when there is criminal legal system involvement of the parent.

Parents incarcerated for a year or more are at particular risk of having their rights permanently terminated regardless of their criminal offense, due to the termination timeline which mandates the court shall order DCYF to file a termination petition if a child has been in out-of-home care for 15 of the last 22 months.[22] Due to the difficulties of complying with services ordered by the dependency court while incarcerated and navigating reentry upon release, stakeholders report that even parents with sentences of less than a year risk significant changes to their future relationship with their child as soon as a dependency is filed.

After a court determines that a child is dependent and orders that child removed from the home, a permanency plan must be developed within 60 days.[23] The permanency plan must include, among other things, "what services the parents will be offered to enable them to resume custody, what requirements the parents must meet to resume custody, and a time limit for each service plan and parental requirement."[24] The supervising agency must pay for remedial services[25] if the parent is unable to pay.[26]

If a parent is incarcerated, by statute the permanency plan "must include treatment that reflects the resources available at the facility where the parent is confined."[27] Failure to comply with court-ordered services can result in the termination of parental rights.[28]

[22] RCW 13.34.145(5).
[23] RCW 13.34.136(1).
[24] RCW 13.34.136 (2)(b)(i).
[25] Remedial services are time-limited family reunification services which can include "individual, group, and family counseling; substance abuse treatment services; mental health services; assistance to address domestic violence; services designed to provide temporary child care and therapeutic services for families; and transportation to or from any of the above services and activities." RCW 13.34.025(2)(a).
[26] RCW 13.34.025(2)(b).
[27] RCW 13.34.136(2)(b)(i)(A).
[28] RCW 13.34.145.

It is worth noting that Washington's child welfare system has found racial disparities in outcomes at three different points: Black, Indigenous, and children of color are more likely to be referred to Child Protective Services (CPS), more likely to be screened in for intake, and less likely to be placed within a year of intake.[29]

Dependency courts order services that are often unavailable in jails and prisons or inaccessible to incarcerated parents. Incarcerated parents and stakeholders report programming availability differs wildly from prison to prison. Many classes and programs are operated by volunteers, so prisons closer to Seattle, Tacoma, and other densely populated areas can offer more opportunities than prisons in more rural areas. Stakeholders observe that jails tend to offer even less programming options due to the high turnover of jail populations.

Further, the Washington State Department of Corrections (DOC) has its own criteria for determining who can access programming, and those criteria are usually based on the nature of the person's convictions.[30] Treatment ordered by a dependency or family court is not among those DOC criteria. As a result, parents are often ineligible for court-ordered treatment while incarcerated.[31] This means that a dependency court can order an incarcerated parent into substance abuse treatment that is impossible for the parent to access. To be sure, a dependency court may note the severity of the parent's addiction issues and order inpatient treatment, which DOC does provide to some incarcerated individuals. However, if DOC has not identified the parent as a priority for inpatient treatment, DOC may decide to not allow the parent to enroll in substance abuse treatment even if the parent requests to do so repeatedly, or may decide to not allow the parent to enroll on the timeline expected by the courts. In other words, DOC does not give priority to dependency or family law court orders for treatment. DOC should consider updating eligibility for treatment services to prioritize participation by these parents on a timeline that enables them to comply with court orders relating to their children. Better communication between DOC and the ordering court when a parent's failure to participate in ordered treatment

[29] Christopher J. Graham, *2019 Washington State Child Welfare Racial Disparity Indices Report*, WASH. STATE DEP'T OF CHILD. YOUTH & FAMILIES 2020), https://www.dcyf.wa.gov/sites/default/files/pdf/reports/CWRacialDisparityIndices2019.pdf.
[30] *Substance Abuse Treatment,* WASH. STATE. DEP'T OF CORR., , https://www.doc.wa.gov/corrections/programs/substance-abuse-treatment.htm (last visited August 13, 2021).
[31] *Id*.

is due to a lack of Department resources, rather than a parent's willingness to comply, would also help in these situations.

Parents are not always able to communicate these constraints effectively to their attorneys or to the court. Court appearances from prison are difficult to facilitate and it is not uncommon for parents to miss a court appearance through no fault of their own.

Additionally, stakeholders report communication between incarcerated parents and their attorneys is challenging. Not all attorneys will accept collect calls from prison, and not all incarcerated individuals have outside family members putting money on their accounts to make calls. Many attorneys do not know how to properly navigate the DOC process to set up free phone calls with their clients. Incarcerated parents can go months without speaking to their court-appointed attorney.[32] Within this context, the 'why' of why an incarcerated parent has not engaged in court-ordered services can be lost, and instead all that remains in the court file is an order finding that an incarcerated parent has not complied with court-ordered services.

2. Adoption and Safe Families Act and the termination timeline

In 1997, the Adoption and Safe Families Act (ASFA) was passed in response to increased concern about children languishing for long periods of time in foster care. "Adoption was portrayed as better for children than reunification with their biological families."[33] In fact, Congressional records and public discussions sent the clear message that reunification of children with their biological parents, for the sake of family preservation, endangered children.[34] Momentum gathered for the swifter termination of parental rights in order to "free" children for adoption.[35] In Washington State we still use the term "legally free" in reference to children whose parents' rights have been terminated.

ASFA passed three years after Congress passed the Violent Crime Control and Law Enforcement Act of 1994[36] and one year after the Personal Responsibility and Work Opportunity Reconciliation

[32] Interview with Kristina Peterson. May 19, 2021.
[33] DOROTHY ROBERT, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 113 (2001).
[34] *Id*. at 114.
[35] *Id*.at 113-121.
[36] Sometimes referred to as the Crime Bill.

Act of 1996[37] -- in a period steeped with racist and misogynist media and public narratives of the threat of Black men and of lazy and promiscuous Black women who could not properly care for their children.[38] As Dorothy Roberts observes, the strong support for adoption as the solution to the foster care crisis is at odds with the otherwise strong preference of biological parents; suddenly, adoptive families were being described as the "real" families.[39] Roberts suggests that "this preference for adoption over biology is reserved for the poor Black children who are the majority of 'waiting' foster children."[40] She believes that "the main reason for preferring extinction of parental ties in foster care is society's depreciation of the relationship of poor parents and their children, especially those who are Black."[41]

While ASFA was not intended specifically for incarcerated parents, the impacts on incarcerated parents and, most particularly, on incarcerated mothers have been devastating. ASFA requires a mandatory timeline for the termination of parental rights. In Washington State, the federal mandate is implemented in chapter 13.34 RCW: In cases involving children who have been out of home for 15 of 22 months, the state must file a petition for termination of parental rights unless a good cause exception exists.[42] The court may order DCYF to file a petition for termination of parental rights as early as six months after a dependency is filed, at the review hearing.[43]

In 2013 legislation was passed to allow Washington courts to consider a parent's incarceration as a good cause exception that would allow DCYF to not file a termination petition even if the children had been in out-of-home care for 15 of 22 months.[44] While a meaningful step forward, parents' attorneys and attorneys with the Washington State Office of Public Defense and the Washington Defender Association report that incarcerated parents' parental rights are still being terminated in alarming numbers. This is partly due to the fact that courts are only required to consider a parent's incarceration, but no protections are guaranteed. Further, the Washington

[37] Sometimes referred to as the Welfare Reform Act.
[38] Robert, *supra* note 33, at 60-67.
[39] *Id*. at 117-118.
[40] *Id*. at 118.
[41] *Id*. at 120.
[42] RCW 13.34.145(5).
[43] RCW 13.34.138(2)(d).
[44] RCW 13.34.145(5)(a)(iv).

Supreme Court has found that the bill only applies when a parent is incarcerated at the time of the termination trial.[45]

3. Need to break the cycle: Former foster care youth now having to navigate the dependency system as incarcerated parents

"How is the same Department that was responsible for raising me, now going to tell me that I don't know how to parent? Everything I know, I learned under the Department's care."

Ashley Albert

State Raised Working Group

A needed area of research and policy improvements is related to the high rates of incarcerated individuals who are former foster care youth now navigating the dependency system as parents. More research is needed on the intergenerational and cyclical impacts that the rise in female incarceration[46] combined with federal termination timelines have had in fueling foster care caseloads, and how in turn the children of incarcerated parents who age out of those foster care caseloads become incarcerated parents themselves, facing the loss of their own children.

In Washington, several currently and formerly incarcerated individuals who are also former foster care youth have started the State Raised Working Group through the Black Prisoners' Caucus at Monroe Correctional Complex.[47] Member Raymond Williams explains the intergenerational, cyclical nature between foster care and incarceration:

> Failures of all kinds within the foster care system lead youth to grow up homeless, suffering from substance use and behavioral health disorders and ultimately lead to incarceration or death…There is no way to separate the relationship between mass incarceration and the state raised experience…the intergenerational harm of these systems (especially on the lives of marginalized communities) remains startling. The impact on society is broad. Many former foster youth have children.

[45] *In Matter of Dependency of D.L.B.*, 186 Wn.2d 103, 376 P.3d 1099 (2016).
[46] *See* "Chapter 11: Incarcerated Women in Washington."
[47] The State Raised Working Group was started by men in prison (Monroe is a male prison) but they have been trying to coordinate with community members and women in prison. Both men and women are members of the group. Before the COVID-19 pandemic, the working group had meetings that could be attended by community members and formerly incarcerated individuals (with permission) at Monroe.

> Children of foster youth often end up in the system themselves. The cycle continues…. It is extremely rare that a state raised youth who experienced group homes and cycles of incarceration through state care will grow up to be a functional father or parent.[48]

Similarly, Ashley Albert, a formerly incarcerated mother and member of the State Raised Working Group, remembers looking her biological parents up in a phone book and desperately trying to find them as a young teenager in foster care so that she could feel whole again. She later had her own children removed from her care and agreed to the termination of her parental rights in exchange for an open adoption agreement. She now advocates for increased options for post-termination contact between biological parents and their adopted children.[49]

4. Open adoption agreements

Incarcerated parents facing the termination of their parental rights are sometimes presented with an open adoption agreement, which allows for continued contact after the termination of parental rights.[50] There is no publicly available data on how many open adoption agreements have been entered into to date and court files are sealed by statute.[51]

Currently under Washington law, biological parents can only enter into an open adoption agreement prior to the termination of their parental rights.[52] The agreements cannot be court ordered but must instead be agreed to.[53]

What this means in practical terms, according to Washington State practitioners and the testimony of parents, is that parents are presented with the option of open adoption agreements shortly before their termination trial.[54] If they decide to take their termination case to trial and

[48] Jpay e-mail from Jill Malat to Elizabeth Hendren (June 29, 2021).
[49] Interview with Ashley Albert, July 7, 2021.
[50] *4320. Open Adoption Agreements,* WASH. DEP'T OF CHILD., YOUTH & FAMILIES, www.dcyf.wa.gov/4300-case-planning/4320-open-adoption-agreements (last accessed August 13, 2021).
[51] RCW 26.33.330.
[52] RCW 26.33.295(2).
[53] *Id*.
[54] *Supporting Relationships Between Parents and Their Children: Hearings on HB 2733 Before the H. Comm. On Hum. Services & Early Learning*, 2020 Wash. Leg., 66th Sess.. (Feb. 20, 2020), https://www.tvw.org/watch/?eventID=2020021258.

fight to preserve their parental rights, they lose the option of an open adoption agreement because by statute the agreements cannot be entered into after the termination of parental rights.[55] Many biological parents report agreeing to open adoption agreements not because they want to relinquish their parental rights, but because they do not want to risk permanently losing their children without ever seeing them again. Biological parents also report not fully understanding the legal ramifications of signing these agreements and of being under the impression that this was a way to preserve their "rights" since they are given a court document that outlines contact with their children.

In reality, open adoption agreements are a written contract between the biological parents and adoptive parents. The biological parent loses their parental rights but has ongoing contact determined by the terms written into the open adoption agreements. There are no mandatory forms and no guidance in the statute on appropriate contact. Biological parents who have spoken publicly about the terms of their agreements generally report a few professionally supervised visits per year, some phone calls, and sometimes exchanges of photos and letters a few times per year.

There is currently very little legal recourse for biological parents who believe that adoptive parents are not following through with the terms determined in their open adoption agreements. RCW 26.33.295 allows for enforcement of these orders by "a civil action." King County is one of the only counties to date that has developed a local form and process for enforcement.[56]

The most that the biological parent can get from the enforcement process is attorney's fees[57] and an enforcement order. Essentially this results in another court order for an adoptive parent who has already demonstrated that they do not follow court orders.[58] The next step might be to seek to compel enforcement, perhaps by motion for order to show cause why the noncompliant

[55] RCW 26.33.330.
[56] *How to Enforce the Terms of an Open Adoption Agreement,* KING COUNTY, https://kingcounty.gov/~/media/courts/superior-court/docs/family/family-law-instructions/15-01-how-to-enforce-the-terms-of-an-open-adoption-agreement-pdf.ashx?la=en (last accessed August 13, 2021).
[57] Anecdotally, not many private attorneys take these cases, and the financial incentives are limited.
[58] Contempt orders may not be as effective in this context either. Unlike other family law orders, where contempt orders can eventually serve as a basis for changing the order, in this case, by statute, failure to comply shall not be grounds for setting aside an adoption decree. RCW 26.33.295.

parent should not be held in contempt; that option is usually impractical for the unrepresented biological parent.

B. Limited access to court and to representation can lead to negative consequences for incarcerated parents in family law cases, during and after incarceration, especially for mothers

1. Dependency and Termination Impacts on Family Law Proceedings Involving Incarcerated Parents

Even parents who manage to evade the termination of their parental rights still face consequences from dependency proceedings and the looming termination timeline. Dependency proceedings are resolved either through returning the children to their parents, entry of family law orders, or termination of parental rights. Even when a child is placed with another parent or family member (which DCYF must attempt to do, by statute, whenever possible), these placements are still considered out-of-home placements and the child is still considered dependent until the dependency action is dismissed. The dependency proceeding, however, will not be dismissed unless and until there is a family law order.

According to practitioners in Washington, often family law proceedings run concurrent with dependency proceedings until orders are entered in the family law proceedings. Therefore, the looming termination timeline creates a pressure to sign family law orders prior to filing of a termination petition. The concurrent family law trial can be scheduled for after the termination trial, which can happen in many Washington counties like King County which schedules family law trials for a date at least one year after filing. Many parents navigate these proceedings without the benefit of an attorney and may not know how to request an expedited family law trial date. This creates a risky scenario for parents: If they wait for their family law trial to contest the specifics of their visitation and contact with their children, they are forced to proceed with a termination trial in which they may have their fundamental parental rights permanently terminated. Within this context, incarcerated parents are heavily incentivized to agree to any proposed family law orders presented to them prior to their termination trial, even if those orders are unduly restrictive. Due to the lack of representation and legal services available to

incarcerated parents with regards to family law, often incarcerated parents sign family law orders without legal advice, let alone representation.

2. Limited family law legal services for incarcerated parents

As incarcerated parents transition to family law proceedings from dependency proceedings, indigent parents are usually unrepresented in their family law matters[59] even while being represented in their dependency proceedings concerning the same children. While RCW 13.34.090(2) requires appointment of counsel for indigent parents in all stages of dependency proceedings where a child is alleged to be dependent, there is no right to counsel in family law proceedings between private parties, even if a parents' future contact with their children is at stake[60] and even if the family law proceeding stemmed from a dependency proceeding.[61]

Further, federal restrictions on legal aid prohibit organizations that receive federal Legal Services Corporation funding from representing incarcerated litigants in court proceedings.[62] In Washington, Northwest Justice Project, the largest statewide legal aid provider in Washington, receives federal Legal Services Corporation funding and is therefore prohibited from providing court representation to incarcerated litigants. Other statewide legal aid providers rely on other sources of funding in order to be able to serve incarcerated individuals, but those providers do not represent parents in family law matters. As a result, incarcerated indigent parents in Washington usually must represent themselves pro se from prison.

DOC does not permit incarcerated litigants to access the internet. While this policy stems from important safety concerns, it severely hampers the ability of pro se litigants to access the mandatory family law forms located on the courts' website or free pro se assistance resources like WashingtonLawHelp. Some DOC prisons have law libraries, but even with this resource the needed information is inaccessible to many litigants. Law libraries provide access to governing

[59] OFF. OF CIV. LEGAL AID, 2015 WASHINGTON CIVIL LEGAL NEEDS STUDY UPDATE (2015), https://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf.
. *See also* "Chapter 7: Gender Impact in Family Law Proceedings" for further discussion of gender disparities in family law proceedings.
[60] *In* re *Marriage of King*, 162 Wn.2d 378, 174 P.3d 659 (Wash. 2007).
[61] *In re Dependency of E.H.*, 158 Wn. App. 757, 243 P.3d 160 (2010).
[62] 45 C.F.R. § 1637.

statutes and caselaw, but not pro se materials designed for people without a law degree. Kristina Peterson, a formerly incarcerated mother, explained her experience trying to do research on a computer in prison:

> It's confusing. If you don't know what you're looking at, it just completely overwhelms you, and you lose hope. It's not actually thought out at all like, "if you have a divorce, click here." There's nothing like that. It's just a bunch of 'Person v. the state'- just cases where people went to bat with the state. Different scenarios. You're lucky if reading that caselaw you can try to pull out some RCWs.[63]

Further, not all DOC prisons in Washington have law libraries. Four prisons do not have law libraries. DOC policy allows for transfers to prisons with law libraries for certain cases, but prioritizes use of the law library for incarcerated individuals challenging their criminal sentence and/or confinement, civil rights, or dependencies.[64] Individuals wishing to use the law library for family law matters must wait behind individuals with what DOC has deemed more urgent matters, a process that in some circumstances can take weeks.[65]

3. Family law consequences of limited court access for incarcerated parents

An incarcerated parent responding to a family law action must do so within 20 days after they are served.[66] After 20 days, in most family law actions the petitioner can seek a default order if no response is filed, meaning that the petitioner can get a final order without input from the responding party.[67] Due to this short time period, even parents awaiting trial in jail who have not been criminally convicted can have their time and contact with their children dramatically altered if they are unable to access the forms and information needed to respond in a timely manner, and doing so within an incarcerated setting is very challenging.

Within this context, many incarcerated parents are unable to respond to their family law matters in time. As a result, stakeholders and incarcerated parents report that many final orders are

[63] Interview with Kristina Peterson, May 19, 2021.

[64] WASH. STATE DEP'T CORR. POLICY DOC 590.500: LEGAL ACCESS FOR INCARCERATED INDIVIDUALS (2021), https://www.doc.wa.gov/information/policies/showFile.aspx?name=590500.

[65] Interview with Kristina Peterson, May 19, 2021.

[66] WASH. RULE CIV. P. 12(a)(1).

[67] WASH. RULE CIV. P. 55.

entered by default, because incarcerated litigants are unable to respond. Without the incarcerated parent's response, the court lacks information about the facts surrounding a parent's incarceration, their role prior to incarceration in their child's life, and the options to remain engaged in their child's life while incarcerated. This can result in dramatically less contact between a child and incarcerated parent than the full facts of the situation and best interests of the child require, not only for the period in which they are incarcerated but long after their release as well.

4. Family law proceedings after incarceration and conviction

Limited court access during incarceration can have family law ramifications long after a parent is released. The previous section highlighted final orders, which may be detrimental to incarcerated parents, being entered through the default process. While Washington law allows for the modification of a final family law order, the modification standard may further disadvantage the formerly incarcerated parent. Unless the parties agree, the court must retain the current residential schedule except when the child's present environment is detrimental to the child's health.[68] A parent's release from incarceration is not sufficient, in and of itself, to justify a modification of the parenting plan that would return the child to the formerly incarcerated parent. This legal reality can be particularly devastating for formerly incarcerated mothers who were the primary caretakers of their children prior to incarceration. The current modification standard makes it difficult for their children to be returned to them upon release, regardless of what their relationship and duties were prior to incarceration, or how much rehabilitation they can demonstrate.

Further, the modification process requires a new petition and summons. Changing a final parenting plan can be an overwhelming process to pro se litigants, and within the reentry context this creates one more lengthy and complicated task in an already challenging time. In most counties, if the petition for modification is contested, trial may not occur for a full year. In the meantime, the parent will be expected to meet litigation deadlines.

[68] RCW 26.09.260(2).

For parents who do not want to wait a year to potentially see their children again after trial, temporary family law orders are an option. However, the temporary orders process does not allow significant explanation for incarceration or criminal records when an opposing party raises that history. Across the state, these motions have strict page limits and are accompanied by hearings where each party is given roughly five minutes to present their case and respond to accusations from the other party.[69] Within this context, evidence of past incarceration or criminal records can further exacerbate existing issues of credibility and bias, particularly for Black, Indigenous, and mothers of color.[70]

5. The role of intimate partner violence in women's incarceration and subsequent family law proceedings

Intimate partner violence histories among women in prison are well-documented,[71] as is the need for family law services for survivors of domestic violence.[72] There is very little research or scholarship about the specific ways that intimate partner violence, the family law legal system, and limited court access from jails and prisons interact. The story of one formerly incarcerated Washington mother paints a disturbing picture about the likely result – that is, disconnecting parent from child:

[69] *See* SUP. CT. R. FOR KING COUNTY, FAM. L. R. 6(e)(5) (LFLR) (family law declarations and supporting exhibits limited to 25 pages); SUP. CT. R. FOR KING COUNTY, FAM. L. R 6(f)(1) (each party generally given five minutes for argument); SUP. CT. R. PIERCE COUNTY, LOC. SPECIAL PROC. R. 94.04(c)(5)(A) (PCLSPR)(entirety of declarations and affidavits generally limited to 20 pages); SUP. CT. R. PIERCE COUNTY, LOC. SPECIAL PROC. R 94.04 (c)(9) (the court may set strict limits on the time for argument); SUP. CT. R. YAKIMA COUNTY, FAM. L. R. 94.04W(A)(2)(a)(iv) (LFLR)(the entirety of all declarations and affidavits generally limited to 20 pages); SUP. CT. R. YAKIMA COUNTY, FAM. L. R 94.04W(A)(2)(f)(iv) (arguments generally limited to five minutes per side); SUP. CT. R. CLARK COUNTY, LOC. CIV. R. 4.1(d) (LCR) ("All temporary hearings shall be heard only on affidavit unless otherwise ordered by the court" and supporting affidavits generally limited to four per party; affidavits from parties shall not exceed six pages).

[70] *See* Jesse Krohn & Jamie Gullen, *Mothers in the Margins: Addressing the Consequences of Criminal Records for Young Mothers of Color*, 46 U. BALT. L. REV. 237, 257 – 272 (2017).

[71] *See* TRACY L. SNELL & DANIELLE C. MORTON, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., SURVEY OF STATE PRISON INMATES, 1991: WOMEN IN PRISON 5-6 (1994), https://bjs.ojp.gov/content/pub/pdf/WOPRIS.PDF; *See also* NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, ABUSE HISTORY AMONG INCARCERATED WOMEN (2011), http://www.ncdsv.org/images/NCDBW_AbuseHistoryAmongIncarceratedWomen_updated_5-20-2011.pdf (reviewing additional studies); *See* "Chapter 11: Incarcerated Women in Washington" and "Chapter 12: Department of Corrections Gender-Responsive and Trauma-Informed Policies, Practices, and Programs," for more information on the trauma-to-prison pipeline; and "Chapter 8: Consequences of Gender-Based Violence: Domestic Violence and Sexual Assault" for information on gender-based violence in prisons and gender-based violence prior to incarceration.

[72] Off. of Civ. Legal Aid, *supra* note 59.

M. suffered years of physical violence, sexual abuse, and coercive control with the father of her children. She eventually sought help when she learned he was also sexually abusing her children. She called Child Protective Services and sought assistance from a domestic violence program. Unfortunately, she was unable to prove the abuse of the children. Without proof of abuse, she was unable to get a court order that permitted her to take away the children with her, so she returned to the household. The abuse intensified and, feeling helpless, M. turned to the drugs her husband left around to numb her pain. She began to spiral into addiction. Her husband sought and obtained a Domestic Violence Protection Order against her to keep her from their home, but allowed her to return and see their children on condition that she have sex with him.

M. eventually hit a low point and sought recovery services. Three days into her sobriety, while she was still experiencing withdrawal symptoms, she reached a breaking point. She returned to the home and found her husband on the couch with their children, unclothed. Suspecting he had just sexually abused their children again, she grabbed a knife and stabbed him in the neck. She pleaded to assault with a domestic violence enhancement. No evidence of her prior efforts to seek help from domestic violence agencies or Child Protective Services were ever entered into the criminal court record.

M. received no visitation with her children of her marriage while she was incarcerated. She had an older child from a previous relationship who went into CPS custody and was part of a dependency, whom she did get to visit with while incarcerated in prison. She did not see or get to talk to her younger children at all while she was in prison.

While incarcerated, M. attempted to file for divorce so that she could enter a parenting plan to get visitation with her children. She was unable to serve her husband from prison. Upon release she tried again but by then her husband had left the state with her children. She sought legal advice from a free volunteer legal clinic and was told the only way she could proceed with a divorce in Washington

> was if she served her husband by publication, which would cost her $200 that she did not have. She was eventually able to seek legal assistance from legal aid, which assisted in tracking down and serving her husband in another state, but by that time Washington had lost jurisdiction over the children and she was unable to enter a parenting plan as part of her divorce.
>
> Six years after her arrest, CPS in another state removed her children from her husband's care. It was only then, with the cooperation from legal aid from two different states and three years of active litigation, that M. was able to finally enter a parenting plan which placed her children back in her care while making a finding of sexual abuse against her ex-husband. Throughout the litigation, her ex-husband attempted to mischaracterize the legal proceedings in the other courts, raised M.'s criminal history and former drug addiction, sought frivolous orders, and solicited his family members to call Child Protective Services after the courts returned her children to her care. In all, the entire process took nine years from her arrest to entry of a final Washington family law order placing her children with her. M.'s children, six and four at the time of her arrest, were teenagers when they returned to her care.[73]

Advocates argue that many, if not all, incarcerated people - men, women, and non-binary individuals - have histories of trauma and violence. What makes the experiences of many incarcerated women, particularly mothers, unique is the possibility of continued intimate partner abuse throughout their incarceration and reentry and family reunification efforts.

In 2020, the Washington State Legislature recognized the use of abusive litigation as a form of intimate partner violence, and chapter 26.51 RCW became effective on January 1, 2021. RCW 26.51.010 describes the intent behind the statute:

> The legislature recognizes that individuals who abuse their intimate partners often misuse court proceedings in order to control, harass, intimidate, coerce, and/or impoverish the abused partner. Court proceedings can provide a means for an

[73] Elizabeth Hendren interview with M., formerly incarcerated mother, May 13, 2021, (notes on file with author).

> abuser to exert and reestablish power and control over a domestic violence survivor long after a relationship has ended. The legal system unwittingly becomes another avenue that abusers exploit to cause psychological, emotional, and financial devastation… Abusive litigation against domestic violence survivors arises in a variety of contexts. Family law cases such as dissolutions, legal separations, parenting plan actions or modifications, and protection order proceedings are particularly common forums for abusive litigation…

Opportunities for abusive litigation are intensified when a survivor is incarcerated and unable to meaningfully respond to the allegations made against them. Further, as previously noted, credibility may be implicitly undermined when a woman is incarcerated or has a criminal record.

This legislation was an important first step in recognizing the many forms of abuse beyond physical violence, but it is too soon to tell to what extent the new abusive litigation chapter will protect survivors from abusive litigation, and whether it will protect survivors with criminal records.

To curb abusive litigation against survivors with criminal records, courts can play an active role in evaluating whether the protective relief sought against parents with criminal records is reasonable in light of the incarcerated parent's crime. This is consistent with RCW 26.09.191, which delineates **r**estrictions in temporary or permanent parenting plans. For example, a parent with a history of serious drug abuse and resulting criminal behavior may require supervised visitation for a limited amount of time while the parent is demonstrating sobriety. A request for no contact with children and visitation only at the complete discretion of the other parent is possibly not appropriate given the circumstances, and creates a situation ripe for coercion and control around visitation if there is a history of intimate partner violence. See "Chapter 7: Gender Impact in Family Law Proceedings" for more on abusive litigation in family law cases.

6. The cost of court-ordered services and professional supervision in family law proceedings

Finally, the cost of professionally supervised visitation and other court-ordered services remains prohibitively expensive for indigent parents in family law proceedings, and adds yet another reentry fee for parents exiting incarceration. For parents engaged in dependency proceedings,

the state is obligated by statute to pay for any court-ordered supervision or services. There is no such obligation under family law proceedings which do not involve a dependent child. Yet many currently and formerly incarcerated parents in family law proceedings face similar challenges to parents in dependency proceedings, including histories of substance abuse and other issues. Often the protective residential parents reasonably want professional supervision to ensure safe visits for the children, as well as sobriety and domestic violence services. Unfortunately, there are very few providers of these services for indigent parents and those that offer fee waivers or sliding scale fees are in great demand.[74] As a result, the cost of these services becomes a barrier to reunification with children after incarceration while parents are also struggling with employment, housing, access to benefits, and many other reentry issues.

C. Employment barriers

Formerly incarcerated individuals face extremely high barriers to reentry. Barriers in access to employment are among the key factors contributing to disproportionately high rates of trauma, poverty, housing insecurity, deportation, and food insecurity affecting not only formerly incarcerated and other people with criminal records but also their families and loved ones. Many of these high reentry barriers have a disproportionate impact by gender, race, ethnicity, and more. Further, they increase the barriers to family reunification after prison.

Washington State has legal protections for individuals with criminal records seeking employment. The 2018 Fair Chance Act made it illegal for most employers to request information regarding an applicant's criminal record before determining that the applicant is qualified; to categorically exclude individuals with criminal records; and to advertise positions in such a way as to discourage people with criminal records.[75] However, there are exceptions to the law. Private

[74] *See Supervised Visitation*, KING COUNTY FAMILY LAW CASA, https://www.familylawcasa.org/helpful-resources/supervised-visitation/ (last visited Sept. 11, 2021).

[75] RCW 49.94.010. Policies such as this are known around the country as "ban the box," as they eliminated the formerly common practice of requiring job applicants to disclose their criminal record by checking a box on the job application. While ban the box policies were widely supported in the hopes of improving employment outcomes for individuals with criminal justice involvement, researchers have found evidence of some unintended consequences in other states—namely, deeper Black-white disparities in hiring after the policy was implemented. Researchers theorize that in the absence of information on criminal history, employers may rely more on spot judgment and unconscious biases associating Black applicants with criminality. *See* Amanda Y. Agan & Sonja B.

employers may initially discriminate on the basis of criminal records when advertising positions that involve unsupervised childcare or vulnerable persons. As the ACLU notes—to the extent that many in these caretaking positions are Black, Indigenous, and women of color—women of color with criminal records may be shut out of these job opportunities.[76]

Despite legal protections in Washington, individuals with criminal records still face numerous barriers to employment. Employers in Washington can still review an applicant's criminal record in later stages of the hiring process. Individuals can also be barred from employment in certain areas because of licensing restrictions. Nearly a third of U.S. workers need occupational licenses.[77] Professional licensing boards and state licensing agencies can require a background check as part of a license application. State agencies have discretion to deny a license on the basis of a criminal record. The records subject to review are broad: the Washington State massage therapist license application, for example, asks "Have you ever been convicted, entered a plea of guilty, no contest, or a similar plea, or had prosecution or a sentence deferred or suspended as an adult or juvenile in any state or jurisdiction?"[78] In 2019, the Washington Supreme Court held that a state agency violated an applicant's rights to due process by not assessing the individual circumstances of that applicant's felony conviction when the agency denied her application for a childcare license.[79] However, the court's ruling was limited to the case of the individual applicant, not to all applicants. There is reason to believe that licensing requirements and criminal record disclosures may disproportionately impact women, as three of the five most common occupations for women in the U.S. (nurse, teacher, and nursing aid) all require licenses.[80]

Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment* (Univ. of Mich. Law & Econ. Research Paper No. 16-021, 2016), https://ssrn.com/abstract=2795795.

[76] *Employment Discrimination Against Women with Criminal Convictions*, ACLU, https://www.aclu.org/other/employment-discrimination-against-women-criminal-convictions (last visited Sept. 11, 2021).

[77] U.S. COMM'N ON CIVIL RIGHTS, COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION AND THE EFFECTS ON COMMUNITIES (June 2019), https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf.

[78] Wash. State Dep't of Health, MASSAGE THERAPIST LICENSE APPLICATION PACKET, https://www.doh.wa.gov/portals/1/Documents/Pubs/676094.pdf (last visited Sept. 11, 2021) ((emphasis in original).

[79] *WA Lifetime Ban on Childcare Work Held Unconstitutional,* COLLATERAL CONSEQUENCES RESOURCE CENTER (March 4, 2019), https://ccresourcecenter.org/2019/03/04/wa-lifetime-ban-on-childcare-work-held-unconstitutional/.

[80] Joni Hersch & Erin E. Meyers, *The Gendered Burdens of Conviction and Collateral Consequences on Employment*, 45 J. LEGIS. 171 (2018).

Criminal histories have also impacted, as part of moral character and fitness inquiry, the ability to join the Washington State Bar. However, in 2018, the Washington Supreme Court decided *Bar Application of Simmons,* which involved the Washington State Bar denying Tarra Simmons admission due to her criminal record.[81] As the Court wrote, "a moral character inquiry is determined on an individualized basis and that there is no categorical exclusion of an applicant who has a criminal or substance abuse history."[82] This ruling is significant because of the correlation between criminal history and surviving gender-based violence, like sexual assault. In fact, the Court described Ms. Simmons' experience with gender-based violence as an obstacle that she overcame with treatment.[83] The Court noted positively her attention to treating her trauma as a factor in favor of admitting her to the Washington State Bar.[84]

In addition to formal barriers to employment, incarcerated people may face challenges acquiring job skills and education. Education and job training opportunities during incarceration are important to help incarcerated people prepare for reentry. Washington DOC provides a range of education and job training programs in all state prisons, and analysis suggests that participation in these programs has a positive effect on recidivism.[85] It is unclear, however, if these opportunities are equally available in women's and men's prisons, and to all prisoners within each facility. For example, the Office of Corrections Ombuds reports concerns that lack of access to interpreters may limit access to programs for individuals who are Deaf, Hard of Hearing, or DeafBlind and people with limited English proficiency.[86]

[81] *IBar Application of Simmons*, 190 Wn.2d 374, 378, 414 P.3d 1111 (2018).
[82] *Id.* at 378.
[83] *Id.* at 378-9.
[84] *Id.* at 379-80.
[85] MICHAEL EVANS & SUSAN KOENIG, DOES PARTICIPATION IN WASHINGTON'S CORRECTIONAL INDUSTRIES INCREASE EMPLOYMENT AND REDUCE RECIDIVISM?, WASH. STATE DEP'T OF CORR. (October 2011), https://www.doc.wa.gov/docs/publications/reports/200-SR003.pdf. In *Washington Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 90 P.3d 42 (2004), the Washington Supreme Court found that the specific Class I Free Venture Industries programs then operating violated the Washington Constitution. The Court acknowledged the important public policy goals behind correctional industries and stressed that "there are other opportunities, in the form of state-run inmate labor programs, which would not run afoul of article II, section 29". *Id*. at 474; *see also "*Chapter 12: Availability of Gender Responsive Programming and Use of Trauma Informed Care in Washington State Department of Corrections" for more information on evidence-based programming.
[86] ELIZABETH KINGSBURY, SYSTEMIC ISSUES REPORT ON DISABILITES, OFF. OF THE CORR. OMBUDS, (Nov. 22, 2019), https://oco.wa.gov/sites/default/files/ADA%20report%20with%20DOC%20responses%20FINAL.pdf.

It's unknown how frequently applicants are excluded from employment or denied professional licenses in Washington on the basis of criminal justice involvement, and whether there are disparities by gender, race, ethnicity, or other factors. However, the employment outcomes for formerly incarcerated people in the U.S. suggest that formal and informal employment barriers are substantial. The evidence shows that formerly incarcerated people have lower employment rates and lower wages than their peers, and that the effect is particularly strong for Black, Indigenous, and people of color.[87] Individuals with criminal records get fewer callbacks for jobs than individuals without criminal records, regardless of the applicant's level of education or the severity of their sentence. College-educated men with criminal records are half as likely as college-educated men without criminal records to get a callback from a job application,[88] and applicants with a misdemeanor drug conviction and those with a felony drug conviction are equally less likely to get a callback compared to applicants with no criminal record.[89] In Michigan, individuals on parole have an employment rate of only 28%.[90] National data shows that during the first year after release from prison, only 55% of formerly incarcerated people report any earnings to the Internal Revenue Service (IRS); and those that do, have a median annual income of $10,090.[91] These low earnings may reflect the fact that formerly incarcerated individuals tend to be concentrated in low-wage, temporary, or part-time jobs, which is particularly true of Black and Hispanic formerly incarcerated women, and of women overall compared to men.[92]

[87] Robert Apel & Kathleen Powell, *Level of Criminal Justice Contact and Early Adult Wage Inequality*, 5 RSF: THE RUSSELL SAGE FOUND. J. OF THE SOC. SCIENCES 198 (2019).).

[88] Michael Cerda-Jara, Aminah Elster & David J Harding, *Criminal Record Stigma in the College-Educated Labor Market*, POLICY BRIEF: U.C. BERKELEY, INSTITUTE FOR RESEARCH ON LABOR AND EMPLOYMENT (2020) (Black and Latino maleapplicants with a criminal record and a bachelor's degree got fewer callbacks than White men in a California audit study).

[89] Peter Leasure, *Misdemeanor Records and Employment Outcomes: An Experimental Study*, 65 CRIME & DELINQUENCY 1850 (2019) (experimental audit study in Columbus, Ohio found that applicants with commonly male names who had misdemeanor convictions were 13 percentage points less likely to get a callback and there was not a statistically significant difference in callback rates between applicants with misdemeanor and felony convictions).

[90] Josh Seim & David J. Harding, *Parolefare: Post-prison Supervision and Low-Wage Work*, 6 RSF: THE RUSSELL SAGE FOUND. J. OF THE SOC. SCIENCES 173 (2020).

[91] Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, THE BROOKINGS INSTITUTION(March 2018) https://www.brookings.edu/research/work-and-opportunity-before-and-after-incarceration/.

[92] LUCIUS COULOUTE & DANIEL KOPF, OUT OF PRISON & OUT OF WORK: UNEMPLOYMENT AMONG FORMERLY INCARCERATED PEOPLE (July 2018), https://www.prisonpolicy.org/reports/outofwork.html; Joe LaBriola, *Post-prison Employment Quality and Future Criminal Justice Contact*, 6 RSF: THE RUSSELL SAGE FOUND. J. OF THE SOC. SCIENCES 154 (2020) (examination of

Washington State's work release program allows incarcerated individuals to spend the last six months of their incarceration sentence living in a DOC facility in the community while working, studying, or participating in job training.[93] The program was created in 1967 and includes case management, job search support and referrals, release planning, access to community-based services, and intense monitoring and supervision. As of 2019, DOC managed 12 work release facilities for over 700 individuals. In 2019 the Washington State Legislature provided funding support to expand the program, adding 200 beds to counties which previously had no facilities. The new sites were meant to be operational by early 2021, although it's unclear if and how COVID-19 may have disrupted the expansion plan.[94] Transfers to work release were paused in 2020, and some individuals were even returned to prison from work release after testing positive for COVID-19.[95]

Work release seems to be a popular program and a positive way for qualifying incarcerated people to develop skills and supports for post-incarceration. While it would seem intuitive that work release would improve employment outcomes post-release, there is not currently any evidence to support this. The DOC does not currently public demographic details on participants, so it's unknown whether work release participants reflect the makeup of the incarcerated population as a whole, or whether incarcerated women participate at rates proportionate to their share of the incarcerated population.

D. Housing barriers

Obtaining housing is a critical component of not only successful reentry[96] but also family reunification after prison. Yet people with convictions encounter significant barriers to finding housing, both on the private market as well as through government subsidized housing. Housing

longitudinal data on formerly incarcerated individuals in Michigan found that females were underrepresented in the group of formerly incarcerated individuals employed in "high quality" (stable, well-paying) employment).

[93] WASH. STATE DEP'T OF CORR., WORK RELEASE EXPANSION PLAN - 2019 REPORT TO THE LEGISLATURE (2019), https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=DOC%20WR%20Expansion%20Report%202019_ec827832-d277-450e-b02d-2c5a097043e9.pdf.

[94] *Id.*

[95] Lilly Fowler, *WA inmates say they're retaliated against for getting COVID-19*, CROSSCUT (December 9, 2020), https://crosscut.com/news/2020/12/wa-inmates-say-theyre-retaliated-against-getting-covid-19.

[96] *See* WASH. STATE DEP'T CORR., POLICY DOC 350.200: TRANSITION AND RELEASE POLICY(2020), https://www.doc.wa.gov/information/policies/files/350200.pdf.

instability is closely correlated to incarceration. According to the National Resource Center on Justice Involved Women, around 50% of incarcerated women were unhoused during the month prior to their incarceration.[97] The Prison Policy Initiative also highlights that incarcerated women are more likely to be unhoused than incarcerated men and incarcerated Black women more than incarcerated white women.[98] Individuals experiencing homelessness before incarceration are unlikely to be able to return to a stable home with family after release, and will have to secure their own housing.

Public housing agencies have had residency restrictions for criminal history almost since their inception, but perhaps the most severe was the One Strike Rule adopted by the U.S. Department of Housing and Urban Development (HUD) under President Clinton.[99] The One Strike Rule gave local public housing authorities "a wide range of discretion" to deny housing or evict residents over criminal activity, particularly drug activity. Under president Obama, HUD reversed direction and urged local agencies to do the same, emphasizing the importance of housing stability to reentry and reintegration of formerly incarcerated residents.[100] However, local public housing authorities continue to exercise broad discretion in deciding how to use criminal records in housing admissions, affecting not just individuals returning from incarceration, but also their families.[101] Individuals with criminal records can be banned from joining their families already in public housing, and even banned from visiting.[102] The Seattle Housing Authority, for example, conducts a criminal history screening covering the previous two years and retains the right to deny housing to anyone with a history of "drug-related or violent criminal activity," as well as to

[97] Aastha Uprety & Kate Scott, *Domestic Violence Is A Fair Housing Issue: How Criminal Records Screening Policies Can Harm Survivors Of Domestic Violence*, EQUAL RIGHTS CENTER (October 31, 2018), https://equalrightcenter.org/domestic-violence-criminal-records/,*citing Working with Justice Involved Women*, NATIONAL RESOURCE CENTER ON JUSTICE INVOLVED WOMEN (2016), https://cjinvolvedwomen.org/wp-content/uploads/2016/01/Infographic-Final-2-pager.pdf.

[98] Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, PRISON POL. INITIATIVE (August 2018), https://www.prisonpolicy.org/reports/housing.html.

[99] Madeleine Hamlin, *Second Chances in the Second City: Public Housing and Prisoner Reentry in Chicago*, 38 ENVIRON. PLAN. D. 587 (2020).

[100] *Id.*

[101] ANNIE E. CASEY FOUNDATION, A SHARED SENTENCE: THE DEVASTATING TOLL OF PARENTAL INCARCERATION ON KIDS, FAMILIES, AND COMMUNITIES (2016), www.aecf.org/sharedsentence.

[102] Hamlin, *supra* note 99.

people with a history of substance use disorder.[103] The Seattle Housing Authority notes that "policies which automatically ban persons with a criminal history is a social justice issue, poses a barrier to family reunification and access to affordable housing, and can contribute to systemic homelessness."[104] It is unknown whether the Seattle Housing Authority or other local public housing agencies collect data on the amount and demographics of applicants denied housing on the basis of a criminal record.

Private landlords can screen for criminal history up to seven years and deny residency to tenants on that basis.[105] Evidence from other jurisdictions suggests that landlords do routinely use criminal history, including misdemeanor convictions, when accepting tenants.[106] Local ordinances, like Seattle's Fair Chance Housing Ordinance, provide greater protections to potential tenants with criminal histories. Under Seattle Municipal Code 14.09, landlords may not deny housing in most cases to prospective tenants solely based on their criminal history. Seattle's ordinance has been upheld as a model ordinance for supporting incarcerated people.[107] And at the state level, the Washington Law Against Discrimination provides some protection for formerly incarcerated renters. In 2017, the Washington State Office of the Attorney General (AGO) fined five landlords for violating the Washington Law Against Discrimination and Fair Housing Act. The AGO claimed that landlords could not impose blanket bans on people with criminal histories because "certain groups of people, such as African-Americans, have higher statistical rates of arrests and convictions."[108] As a result, the AGO contended that these bans

[103] SEATTLE HOUSING AUTH., ADMISSIONS AND CONTINUED OCCUPANCY POLICY (May 2019), https://www.seattlehousing.org/admissions-and-continued-occupancy-policy.
[104] *Id.* at 64.
[105] RCW 59.18.257.
[106] Peter Leasure & Tara Martin, *Criminal Records and Housing: An Experimental Study*, 13 J. EXP. CRIMINOLOGY 527 (2017) (in Columbus, Ohio, audit study, calls to over 400 property managers found that inquiries from people with misdemeanor and felony drug convictions had a lower positive response rate compared to those with no criminal record).
[107]Charlotte West, *Seattle's Fair Housing Law is the Most Progressive in the country. But Now, Landlords are Challenging It.,* NBC NEWS (May 19, 2019, 2:03 AM), https://www.nbcnews.com/news/nbcblk/seattle-s-fair-housing-law-most-progressive-country-now-landlords-n1004321.
[108] Press Release, Wash. State Off. of the Att'y Gen., AG Takes on Discriminatory Blanket Housing Bans on Renters With Criminal Histories (Jan. 23, 2017), https://www.atg.wa.gov/news/news-releases/ag-takes-discriminatory-blanket-housing-bans-renters-criminal-histories.

have a disparate impact upon these certain groups.[109] Instead, landlords must make individual inquiries into a person's circumstances with respect to their criminal histories.[110]

The evidence suggests that criminal justice involvement has strong negative effects on housing. Having a felony conviction is associated with high rates of housing instability (multiple changes of residence in a short period of time),[111] and some evidence suggests that formerly incarcerated women are more likely to experience homelessness compared to their male peers.[112] Some elements of the criminal justice system may exacerbate this. For example, a study of housing instability among Michigan parolees found that many residential moves were "sanction-related moves," for example moves to mandatory residential drug treatment programs or returns to prison for rule violations.[113] The authors concluded, "the criminal justice system is a key player in generating residential instability: moves due to intermediate sanctions, to treatment or care, to prison, or to absconding status accounted for nearly 60 percent of all moves made by parolees in our sample."[114]

Contextual factors have also impacted housing access for formerly incarcerated individuals. Many U.S. cities have seen rising housing costs and rents over the past few decades, while wages and investments in affordable housing have stagnated, and other semiformal housing options have disappeared; all of which have severely constrained the housing opportunities available for individuals exiting incarceration.[115] For those who do not achieve stable housing, criminalization of nonviolent activities sometimes undertaken to survive, such as petty theft, sex work, or even camping in parks and public spaces creates a pipeline directly back to incarceration.[116]

[109] *Id.*
[110] *Id.*
[111] Brielle Eileen Bryan, Criminal Justice, Self-Sufficiency, and the Life Course: Social and Economic Insecurity After Incarceration and Conviction, (May 2018) (Ph. D. dissertation, Harvard University), https://dash.harvard.edu/bitstream/handle/1/40050077/BRYAN-DISSERTATION-2018.pdf?sequence=4&isAllowed=y.
[112] LaShonda Brenson & Nicholas Bair, U.S. Comm'n on Civil Rights, Women in Prison: Seeking Justice Behind Bars (Feb. 2020), https://www.usccr.gov/pubs/2020/02-26-Women-in-Prison.pdf.
[113] Claire W. Herbert, Jeffrey D. Morenoff & David J. Harding, *Homelessness and Housing Insecurity Among Former Prisoners*, 1 RSF: The Russell Sage Found. J. of the Soc. Sciences44 (2015).
[114] *Id,* at. *74.*
[115] *Id.*
[116] *Id.*; *See* "Chapter 10: Commercial Sex and Exploitation" for detailed discussion.

DOC's transition and release process works with individuals who are nearing the end of their sentence to help them find post-release housing. DOC will not release an individual who has not identified a stable address for post-release residency [117] until the last possible moment. For those individuals unable to move in with family or friends, or without the ability to secure their own housing, there are a number of transitional housing programs available. One option is the Earned Release Date Housing Voucher Program . The voucher program was created in 2009, as DOC recognized that it was increasingly holding people past their release date, sometimes for months beyond the date, because of their inability to identify appropriate housing.[118] DOC gives approved individuals paid housing vouchers to cover up to three months of housing after release. The voucher cap is $500 per month, so it seems reasonable to assume that most housing options available will be group housing. A 2015 evaluation found a slight reduction in recidivism over 18 months among Housing Voucher Program participants compared to a group of similarly-situated individuals released just prior to the program's start.[119] This reduction in recidivism is notable, considering that those participants are likely subject to more supervision than individuals living with family or independently, and therefore more likely to have supervision violations observed and flagged.[120] The evaluation did not compare long-term housing outcomes for Housing Voucher Program participants to non-participants.[121] DOC does not publish demographics of program participants, so it is unknown whether participation rates reflect the demographics of the incarcerated population, or whether outcomes differ by demographics. We also don't know what challenges such housing options place on parents, especially mothers who are primary care givers and trying to reunite with their children.

Transitional housing, also known as halfway housing, refers to facilities that house individuals released from prison during some portion of their community supervision. Unlike work release housing, however, halfway homes are run by private for-profit or nonprofit providers that

[117] Zachary Hamilton, Alex Kigerl, & Zachary Hays, *Removing Release Impediments and Reducing Correctional Costs: Evaluation of Washington State's Housing Voucher Program*, 32 JUST. Q. 255 (2015).
[118] *Id. at 263 (*"In 2008, over 1,200 Washington State inmates were held past their ERD (earned release date), totaling over 135,000 days (an average of 107 days per inmate)"*).*
[119] Hamilton, Kigerl, & Hays, *supra* note 117.
[120] *Id*.
[121] *Id.*

contract with DOC.[122] While some provide services or treatment on site, others provide only housing. Transitional housing facilities with no onsite services are not subject to any state licensing requirement, and investigative reporting has found evidence of overcrowding and unsafe living conditions at facilities run by one provider operating homes in King and Snohomish counties. [123] The lack of licensing and transparent oversight makes it difficult to know what conditions are like in DOC-contracted transitional housing providers. Additionally, there is a lack of information regarding the availability of group housing and transitional housing options that are gender-specific or safe and appropriate for LGBTQ+ individuals; survivors of sexual assault, domestic violence, or intimate partner violence; or parents, particularly mothers trying to reunite with their children.

E. Public benefits

In the 1990s, the federal Personal Responsibility and Work Opportunities Reconciliation Act banned states from giving certain public benefits to people with felony drug convictions, although Washington State since overturned the ban.[124] Currently, the Washington State Department of Social and Health Services (DSHS) may suspend state or federal benefits if it finds that a recipient is a "fleeing felon" or is violating conditions of probation or parole, or if the recipient has been found guilty of benefits fraud.[125] These benefits may include Temporary Assistance for Needy Families, Pregnant Women Assistance, and State Family Assistance, and Housing and Essential Needs Assistance.[126] It's unknown how many people in Washington State are ineligible under these limits for cash assistance programs, and whether there are disparities by gender, race, ethnicity, or other demographic factors.

Certain other benefits, such as Medicaid, Medicare, and Social Security, are suspended during incarceration. Applying to get these benefits reinstated after incarceration can be difficult,

[122] Sydney Brownstone, *A Seattle-Area Sober Housing Company Promised Respite from Homelessness. Tenants Found Chaos.*, THE SEATTLE TIMES, March 14, 2021, https://www.seattletimes.com/seattle-news/homeless/a-seattle-area-sober-housing-company-promised-respite-from-homelessness-tenants-found-chaos/.
[123] *Id. (*DOC cut funding to the subject of this reporting, Damascus Homes LLC, in October, 2020).
[124] Cynthia A. Golembeski, Ans Irfan & Kimberly R. Dong, *Food Insecurity and Collateral Consequences of Punishment Amidst the COVID-19 Pandemic*, 12 WORLD MED. & HEALTH POL. 357 (2020).
[125] WAC 388-442-0010(1).
[126] *Id.*

considering the other challenges and time constraints formerly incarcerated individuals face during reentry. The Washington State Office of Corrections Ombuds found that the re-establishment process post-incarceration could take several months, depriving individuals with disabilities of the resources they need during the precarious reentry period.[127] DOC is currently exploring models to partner with the Social Security Administration to ensure reinstatement of benefits at release.[128]

F. Health consequences of incarceration are harsher for women, including mothers, and marginalized populations

Incarceration entails key challenges to an individual's health and wellbeing, both during and after incarceration. Some people incarcerated in prisons and jails face overcrowding and poor sanitation; limited access to or disruption in behavioral health treatment; barriers to accessing quality health care; and violence, harassment, and trauma.[129] Even after release, formerly incarcerated people continue to suffer from the health effects of incarceration. Pregnant and parenting incarcerated people face additional health and wellbeing challenges.

People in prison, and particularly women in prison, bear a disproportionately high burden of infectious disease, chronic disease, and behavioral health challenges. Despite the fact that incarcerated people have a constitutionally mandated right to health care, in general the conditions of incarceration have been shown to worsen many existing health conditions due to structural inequities caused by poverty and racism, as well as exposing incarcerated people to new health conditions. Poor quality care and low access to care during incarceration and poor linkages to care after release mean that even after release, formerly incarcerated people continue to face these burdens, often with few supports or resources beyond those informally offered by their loved ones and communities.

[127] Kingsbury, *supra* note 86.
[128] *Id.*
[129] *See* "Chapter 12: Availability of Gender Responsive Programming and Use of Trauma Informed Care in Washington State Department of Corrections" for more on the expereinces of incarcerated individuals and "Chapter 8: Consequences of Gender-Based Violence: Domestic Violence and Sexual Assault" for more on sexual assault in prisons and jails.

The incarcerated population has higher rates of mental illness, substance use disorder, and chronic illnesses compared to the unincarcerated population; and within the incarcerated population, incarcerated women have higher rates of mental illness, substance use disorder, and chronic illness compared to incarcerated men.[130] More than two-thirds of U.S. incarcerated women were estimated to have substance use disorder from 2007-2009,[131] and more than a fifth of incarcerated women met the threshold for "serious psychological distress" in 2011-2012.[132] The higher rates of health problems in incarcerated women may be a result of a combination of known factors such as the "trauma to prison pipeline," and the connection between poverty and incarceration for women, particularly Black, Indigenous and women of color and LGBTQ+ people (for more, see "Chapter 11: Incarcerated Women in Washington"). Women enter incarceration with varying and complex health needs. Prisons in Washington routinely screen for health conditions and disabilities that will require treatment or accommodations during incarceration, but the Office of the Corrections Ombuds noted in a 2020 report that "invisible" disabilities such as undiagnosed mental illness are often missed on screening, and therefore could continue unaddressed.[133] Meanwhile, local and county jails in Washington are not subject to any statewide

[130] JENNIFER BRONSON ET AL. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DRUG USE, DEPENDENCE, AND ABUSE AMONG STATE PRISONERS AND JAIL INMATES, *2007-2009* (2017), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5966 (in data from 2007-2009, 58% of people incarcerated in state prison and 63% of those incarcerated in jails met the criteria for SUD, compared to 5% of the general population, and the rates for incarcerated females (69.2% in women in prison and 72.3% of women in jail) were higher than the rates in incarcerated males (56.9% of men in prison and 61.8% of men in jail)); JENNIFER BRONSON & MARCUS BERZOFSKY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011-12 (2017), https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf (14% of people in state and federal prisons and 26% of people in jail met the threshold for "serious psychological distress" compared to an estimated 5% in the general population, and the rates in incarcerated females (20% in women in prison and 32% of women in jail) were higher than the rates in incarcerated males (14% in men in prison and 26% in men in jail)); LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES, 2011-12, 23 (rev. Oct. 4, 2016), https://bjs.ojp.gov/content/pub/pdf/mpsfpji1112.pdf (41% of people in state and federal prisons and 39.8% of people in jail reported a current chronic condition in 2011-2012, and a higher proportion of women in prisons and jails reported ever having a chronic condition than men in prisons and jails); Seth J. Prins, *Prevalence of Mental Illnesses in U.S. State Prisons: A Systematic Review*, 65 PSYCHIATRIC SERVICS 862 (2014) (review of 28 scientific articles confirmed a higher prevalence of mental illness in the incarcerated population compared to the general population).

[131] Bronson et al., *supra* note 130.

[132] Bronson & Berzofsky, *supra* note 130.

[133] OFF. OF THE CORR. OMBUDS, OFFICE OF THE CORRECTIONS OMBUDS SURVEY OF INCARCERATED WOMEN (2020), https://oco.wa.gov/sites/default/files/Women%20Survey%20with%20DOC%20Response%20Final_0.pdf. OCO distributed surveys in Washington's two female prisons as well as to those being held in Yakima County Jail under contract with DOC and received 772 in June 2019. It's unknown if the survey forms were translated into any

oversight. We are unaware of any comprehensive, public data on rates of physical or behavioral health needs in the incarcerated population in Washington, but from available data we assume they mirror national trends.[134]

Incarcerated people have a constitutionally protected right to health care, unlike the general population.[135] Because of this, some research has found improved outcomes for certain health indicators under the conditions of incarceration. For example, births among incarcerated people show lower rates of pre-term birth compared to the general population.[136] Similarly, most incarcerated groups have lower mortality rates (adjusted for age) than their counterparts in the general population, an effect which is particularly strong among Black men.[137] However, the same research found that "Hispanic female prisoners were the only group not at a mortality advantage relative to the general population."[138] Findings on mortality rate may be impacted by compassionate release policies. Although compassionate releases are hard to get, very ill incarcerated individuals may be released from prison to die in the community.[139] Additionally, studies that compare the health of people in prison with their similarly situated "peers" are comparing incarcerated people against communities and families outside of prison who, while not incarcerated themselves, have been deeply shaped by decades of mass incarceration and the resulting social upheaval, loss of income, and emotional toll. See below for evidence regarding the health impacts of incarceration on families and communities. Researchers note that for

languages besides English or made accessible to those with disabilities. Additionally, it's unknown what the total number of female prisoners was at the time, and what response rate was achieved, or how representative the responses were of the whole population.

[134] In 2016, the Department of Social and Health Services (DSHS) examined DSHS and Health Care Authority (HCA) data and found that of Medicaid enrollees who had been booked into jail in 2013, 61% had SUD treatment needs, 58% had mental health treatment needs, and 40% had both SUD and mental health treatment needs, *See* PAULA DITTON HENZEL ET AL., BEHAVIORAL HEALTH NEEDS OF JAIL INMATES IN WASHINGTON STATE (2016), https://www.dshs.wa.gov/sites/default/files/rda/reports/research-11-226a.pdf.

[135] Note, however, that the right for healthcare does not mean a right for free healthcare. Health care for prisoners is "fee for service," meaning state law requires DOC to charge incarcerated individuals small amounts for self-initiated health care services. For further discussion of health care access issues see part F.4. *infra*.

[136] Carolyn Sufrin et al., *Pregnancy Outcomes in US Prisons, 2016–2017*, 109 AMER. J. PUB. HEALTH 799 (2019) (preterm birth rate in Washington prisons in 2016-2017 was 6%, compared to the general Washington preterm birth rate of 8.17% at in the same year).

[137] Christopher Wildeman et al., *Mortality Among White, Black, and Hispanic Male and Female State Prisoners, 2001–2009*, 2 SSM - POPULATION HEALTH 10 (2016).

[138] *Id*.

[139] Michael Massoglia & William Alex Pridemore, *Incarceration and Health*, 41 ANN. REV. SOCIO. 291 (2015).

disadvantaged communities, jails and prisons may in fact be a primary source of health care, "which reflects the withering health and social safety net that fails to advance equity in many of our communities."[140] Therefore, any improved health outcomes during incarceration should not be taken to suggest that incarceration has a positive effect on health. In fact, the available research suggests that incarceration generally increases health risks and the burden of disease for the incarcerated population.[141]

1. Conditions and programs for individuals who are pregnant and parentings

Mass incarceration has forcefully interrupted the exercise of reproductive rights for thousands of American women, disproportionately impacting Black, Indigenous, and women of color. Nationally, mothers are removed from their children; their legal rights might be placed in peril; pregnant women may be subjected to humiliating and dangerous practices during childbirth; and control over their bodies and fertility is limited. In California prisons for example, the State Auditor found deficiencies in informed consent processes in the case of 39 of 144 incarcerated women who underwent sterilizations between 2005 and 2011.[142]

Over time, through advocacy and legislation, conditions have improved for incarcerated parents in the U.S. and in Washington. For example, as a result of earlier collaboration between the Gender and Justice Commission and stakeholders, Washington State outlawed shackling of incarcerated individuals during childbirth in 2010.[143] DOC's residential parenting program allows pregnant individuals who qualify to keep their infants with them in a special facility for families until their release.[144] This has the potential to decrease the trauma of separation and foster

[140] Cynthia A. Golembeski et al., *Improving Health Equity for Women Involved in the Criminal Legal System*, 30 WOMEN'S HEALTH ISSUES 313, 314 (2020).
[141] JULIA ACKER ET AL., ROBERT WOOD JOHNSON FOUND., MASS INCARCERATION THREATENS HEALTH EQUITY IN AMERICA (2019), HTTPS://WWW.RWJF.ORG/EN/LIBRARY/RESEARCH/2019/01/MASS-INCARCERATION-THREATENS-HEALTH-EQUITY-IN-AMERICA.HTML#:~:TEXT=MASS%20INCARCERATION%20DISPROPORTIONATELY%20IMPACTS%20LOWER-INCOME%20COMMUNITIES%2C%20COMMUNITIES%20OF,BOTH%20WHILE%20CONFINED%20AND%20LONG%20AFTER%20THEIR%20RELEASE..
[142] *See* CAL. STATE AUDITOR, REPORT 2013-120, STERILIZATION OF FEMALE INMATES 1 (June 2014), https://www.auditor.ca.gov/pdfs/reports/2013-120.pdf.
[143] RCW 72.09.651
[144] WASH. STATE DEP'T CORR. POLICY DOC 590.320: RESIDENTIAL PARENTING PROGRAM (2020),, https://www.doc.wa.gov/information/policies/showFile.aspx?name=590320. Only women incarcerated while pregnant are eligible. A woman who is incarcerated a week or two after giving birth, for example, is not eligible to have her newborn join her.

healthy bonding, although not all incarcerated pregnant women qualify for the program.[145] As noted above, people incarcerated in prisons have more complex health needs than the general population, and imprisoned pregnant individuals have specific health needs. The relatively low rate of preterm birth in the prison population in Washington would seem to indicate that pregnant people's health needs are being met while in prison. There is a lack of data regarding women's satisfaction with OB-GYN and maternal health services in Washington prisons, or for pregnancy outcomes specifically for subgroups within the female prison population such as Black, Indigenous and women of color or LGBTQ+ individuals. And there is a lack of data regarding pregnancy outcomes for people incarcerated in jails in Washington State. Nationally, only about one third of jails report routinely screening for pregnancy at intake.[146] This practice could risk delaying important access to prenatal care or even endangering the pregnancy through dangerous restraint practices or forced withdrawal from opioids without medication.[147]

More than half of women in prison in Washington are parents of minor children.[148] In many states, including Washington, a smaller number of imprisoned women means fewer prisons for women, which means women are more likely to be incarcerated far from home. Washington's prisons for women are both located near Puget Sound – in Gig Harbor and Belfair. This has implications for family visitation. Long distances make it difficult for children to visit their mothers in prison; in 2015, only 27% of female parents in Washington prisons said they'd had an in-person visit with their children in the past year.[149] Incarcerated mothers who have regular contact with their children have improved mental and physical health outcomes.[150] Washington State began

[145] Noelle E Fearn & Kelly Parker, *Washington State's Residential Parenting Program: An Integrated Public Health, Education, and Social Service Resource for Pregnant Inmates and Prison Mothers*, 2 CAL. J. OF HEALTH PROMOTION 15 (2004).
[146] C. M. Kelsey et al., *An Examination of Care Practices of Pregnant Women Incarcerated in Jail Facilities in the United States*, 21 MATERN CHILD HEALTH J 1260–1266 (2017).
[147] *Id.,* Mary Peeler et al., *Best Practices for Pregnant Incarcerated Women With Opioid Use Disorder*, 25 JOURNAL OF CORRECTIONAL HEALTH CARE 4–14 (2019).
[148] WASH. STATE DEP'T OF CORR., CHILDREN OF INCARCERATED PARENTS (2016), https://www.doc.wa.gov/docs/publications/infographics/100-PO005.htm (in a 2015 survey, 56.0% of incarcerated women and 45.2% of incarcerated men reported having at least one minor child).
[149] LEON DIGARD ET AL., VERA INST. OF JUST., A NEW ROLE FOR TECHNOLOGY? IMPLEMENTING VIDEO VISITATION IN PRISON (Feb. 2016). .
[150] Timothy G. Edgemon, Mental Health and Punishment: Exploring the Relationship Between Contact with the Criminal Justice System and Mental Health (2020) *(*Ph. D. dissertation, University of Georgia*)*; Ann E. Stanton & Susan J. Rose, *The Mental Health of Mothers Currently and Formerly Incarcerated in Jails and Prisons: An*

piloting video visitation for incarcerated people in 2013 and currently offers the service in every prison.[151] Video visitation undoubtedly helps reduce distance barriers for families and loved ones of incarcerated people. However, users of Washington's system note that it is far from perfect, having a high cost (about $13 for half an hour) and suffering from frequent glitches.[152] The system needs improvement, and DOC is working with the provider to address these problems. However, families and loved ones of incarcerated people also note that video visitation is a welcome supplement to, but not a replacement for, in-person visitation.[153] Just as many people have been unable to see their loved ones in person during the COVID-19 pandemic, those with a loved one incarcerated in Washington prisons have been impacted during COVID-19 as DOC cancelled in-person visitation.[154]

There is a lack of data regarding the number of individuals in jails who are parents, however, it is likely to be similar to the rates of parents in prison. A survey of individuals incarcerated in jails in San Francisco and Alameda County found that 69% reported being the primary parent or caregiver to a child or young adult under the age of 25.[155] While parents in local jails may be incarcerated geographically closer to their children, families still face barriers to communication, including costs of phone calls and visits. Only 35% of respondents reported having a jail visit with their child, and the vast majority of visits that do occur take place through glass, with no opportunity to touch or hug.[156]

Integrative Review on Mental Health, Mental Health Treatment, and Traumatic Experiences, 16 J. OF FORENSIC NURSING 224 (2020).

[151] Digard et al., *supra* note 149; *Video Visits*, WASH. STATE DEP'T OF CORR. (2021), https://www.doc.wa.gov/corrections/incarceration/visiting/video-visits.htm.

[152] Loretta Pedersen, *Punishing Relations - How WA DOC's Collateral Damage and Hidden Costs Imprison Families*, WASH. CORRECTIONS WATCH (Jan. 2021), https://washingtoncorrectionswatch.files.wordpress.com/2021/01/punishing-relations-e28093-how-wa-docs-hidden-costs-and-collateral-damage-imprison-families-2.pdf.

[153] *Id.*

[154] *Prison Facility Alerts & Notices*, WASH. STATE DEP'T OF CORR., https://www.doc.wa.gov/information/alerts.htm#prison-alerts (last visited Aug. 13, 2021).

[155] Katie Kramer & Sharon McDonnell, *Children, Parents, and Incarceration: Descriptive Overview of Data from Aladema and San Francisco County Jails*, SF.GOV (March 2016), https://sfgov.org/sfreentry/sites/default/files/Documents/CIP%20Jail%20Survey%20-%20Full%20Report%20FINAL%203%2015%2016.pdf.

[156] *Id.*

2. Overcrowding, hygiene, and treatment access

While pregnant and parenting incarcerated people face specific challenges, incarceration impacts the health and wellbeing of all incarcerated people. Prison and jail overcrowding can be a barrier to accessing programming and treatment as funding for services fails to keep pace with rising rates of incarceration,[157] and overcrowding and shared use of hygiene facilities, combined with poor ventilation, increases the transmission of infectious diseases.[158] For obvious reasons, overcrowding and poor ventilation and hygiene have implications for vulnerable prisoners during the COVID-19 pandemic. See "Chapter 11: Incarcerated Women in Washington" for more on COVID-19 in prisons.

Limited findings provide a small window into the conditions in Washington's jails. Ten of Washington's 59 city, county, and tribal jails reported in 2019 an average daily population above design capacity.[159] A recent survey of incarcerated women under DOC supervision provided a window into living conditions in one county jail. In 2014, increases in the incarcerated female population exceeded the capacity of the state's two female prisons, and so DOC contracted with Yakima County Jail to house up to 60 incarcerated women there.[160] Women incarcerated at Yakima County Jail responding to a statewide survey in 2019 reported significantly worse conditions than their counterparts in DOC prisons.[161] They reported unmet hygiene and clothing needs, a complete lack of mental health access, poor food quality, and lack of access to programming. DOC cancelled the contract with Yakima County Jail and moved all prisoners back to DOC prisons in 2020 when COVID-19 releases mandated by Governor Inslee once again reduced prison populations.[162] Similarly, a recent audit of King County's two jails suggest that jail

[157] *Id.*; DAVID CLOUD, VERA INST. OF JUST., ON LIFE SUPPORT: PUBLIC HEALTH IN THE AGE OF MASS INCARCERATION (2014), https://storage.googleapis.com/vera-web-assets/downloads/Publications/on-life-support-public-health-in-the-age-of-mass-incarceration/legacy_downloads/on-life-support-public-health-mass-incarceration-report.pdf.
[158] Lauren Brinkley-Rubinstein, *Incarceration as a Catalyst for Worsening Health*, 1 HEALTH JUST. 3 (2013); Massoglia and Pridemore, *supra* note 139.
[159] *Historicall Statistics, 2019*, WASH. ASSOC. OF SHERIFFS AND POLICE CHIEFS(2020), https://www.waspc.org/cjis-statistics---reports.
[160] Press Release, Wash. State Dep't of Corr., anelle Guthrie, Corrections Cancels Contract to House Women at Yakima County Jail (June 17, 2020), https://www.doc.wa.gov/news/2020/06172020p.htm.
[161] Off. of the Corr. Ombuds, *supra* note 133.
[162] Guthrie, *supra* note 160.

crowding has significant and direct effects on the health and wellbeing of incarcerated individuals and staff.[163]

Given the lack of statewide oversight over jails, it is difficult to assess conditions for people with disabilities in jails. A 2016 Disability Rights Washington surveys of jails in Washington State noted that individuals with cognitive disabilities and mental illnesses were often held in solitary confinement because of a lack of appropriate facilities.[164] The Office of Corrections Ombuds conducted a comprehensive review of concerns for individuals with disabilities in state prisons in 2019, after hearing concerns that people with disabilities were not receiving equal treatment or equal access to programs and services.[165] Some systemic issues were identified.[166] DOC received the report and communicated plans to address the identified issues, including better data collection to track programming and facilities access for people with disabilities to identify ongoing disparities.[167]

The lack of mental health treatment is especially concerning given the higher rates of behavioral health needs among the jailed population compared to the incarcerated population in prison nationwide.[168] Despite the documented high needs for behavioral health treatment among incarcerated populations, treatment access varies by location and between prison systems and jails. In Washington State, DOC has a number of treatment options available for individuals diagnosed with Substance Use Disorders in prisons.[169] However, only 14 of 33 Washington jails surveyed in 2018 reported providing medication for treatment of Substance Use Disorders and

[163] GRANT DAILEY ET AL., ADULT JAILS NEED RISK-BASED APPROACH TO IMPROVE SAFETY, EQUITY, KING COUNTY AUDITOR'S OFFICE (April 6, 2021), https://kingcounty.gov/~/media/depts/auditor/new-web-docs/2021/jail-safety-2021/jail-safety-2021.ashx?la=en.
[164] AVID Prison Project Disability Rights Wash., *County Jails, Statewide Problems: A Look at How Our Friends, Family and Neighbors with Disabilities are Treated in Washington's Jails* (April 2016), https://www.disabilityrightswa.org/reports/county-jails-statewide-problems/.
[165] Kingsbury, *supra* note 86 (report does not offer a breakdown or analysis by gender).
[166] *Id*. The screening process to identify individuals with disabilities on entry was found to miss certain types of disabilities, particularly "invisible" disabilities such as traumatic brain injury, intellectual and learning disabilities, and psychiatric disorders. Individuals with these conditions would then not be given access to needed accommodations. There were also problems identified with the accommodations request process and grievance process. Additionally, some programs, services and facilities were found to be inaccessible for some, including the law library, education, work, and other programming.
[167] *Id.*
[168] Bronson and Berzofsky, *supra* note 130; Bronson et al., *supra* note 130.
[173] Golembeski et al., *supra* note 140.

withdrawal symptoms,[170] despite the fact that medication-assisted treatment is widely acknowledged to safely and effectively ease dangerous withdrawal symptoms and leads to improved treatment and recovery outcomes and decreased overdose deaths.[171] Without access to medication-assisted treatment during their jail stay, and without the reentry planning and support that prisons usually provide, individuals leave jail with a higher risk of relapse and overdose.[172]

3. Violence, harassment, and trauma

Individuals incarcerated in prisons and jails might endure harsh practices such as shackling, body searches, restraint, and seclusion in solitary confinement, all of which can exacerbate conditions for individuals suffering from Post-Traumatic Stress Disorder (PTSD), trauma, and mental health problems.[173] Nationally, there is evidence that although women are less likely than men to behave violently in prison, they are punished more frequently and more severely for minor offenses, such as cursing, being disruptive, disobeying orders, and being "insolent."[174] Local evidence suggests that Black women face more frequent and severe discipline. The King County jail's audit found that on intake, Black people were given higher risk scores which led to higher likelihood of restrictive housing; and that Black women in particular, received more frequent and harsh sanctions: "Black women received 70 percent more days in restrictive housing per infraction on average than other women, while White women receive 40 percent fewer days per infraction than other women."[175] Nationally, women with mental health problems and Substance Use Disorders are also disciplined at disproportionately high rates.[176] Imprisoned people who are LGTBQ+, particularly transgender people, face abuse, stigmatization, and social isolation, and may be held more frequently in solitary confinement than with the general prison population.[177]

[173] Golembeski et al., *supra* note 140.
[173] Golembeski et al., *supra* note 140.
[173] Golembeski et al., *supra* note 140.
[173] Golembeski et al., *supra* note 140.
[174] Brenson & Bair, *supra* note 112.
[175] Dailey et al., *supra* note 163, at 35 (reporting the race groups White, Black, AIAN and API but not noting ethnicity).
[176] Brenson & Bair, *supra* note 112.
[177] Brenson & Bair, *supra* note 112; Baćak, et al. (2018). Incarceration as a health determinant for sexual orientation and gender minority persons. American Journal of Public Health, 108(8), 994-999.

Among Washington's female prison population, LGBTQ+ individuals; Black, Indigenous and women of color; and immigrants report experiencing harassment while incarcerated.[178]

Adequate training, staffing, and preparation for corrections officers helps them respond to unpredictable behavior or threatening situations in ways that decrease the need for violence. DOC, in response to findings by the Office of Corrections Ombuds, has committed to delivering more trauma-informed and gender-responsive training to corrections staff.[179]

4. Health and healthcare quality and access during incarceration, reentry and post incarceration

In Washington State, health care during incarceration in prison is provided directly by DOC where possible. Health care is "fee for service," meaning state law requires DOC to charge incarcerated individuals small amounts for self-initiated health care services.[180] This is meant to "discourage unwarranted use of health care services caused by unnecessary visits to health care providers."[181] Under this system, no imprisoned individual can be denied healthcare due to a lack of funds; but if they don't have any funds in their commissary account, a negative balance is added and debt accrues. When new funds are deposited into their account, either from work or by loved ones outside of prison, the medical debt has to be paid off before funds can be used for anything else.[182] Essentially, people low on funds might have to choose between accessing health care, buying personal hygiene items from the commissary, and phone calls to loved ones outside.[183]

It can be argued that this policy has a disproportionate impact on incarcerated women, as they enter prison with more health needs than men;[184] use healthcare services at a higher rate than

[178] Off. of the Corr. Ombuds, *supra* note 133 (report does not specify whether the harassment is from other incarcerated individuals, staff, or both). For more, *see "*Chapter 12: Availability of Gender Responsive Programming and Use of Trauma Informed Care in Washington State Department of Corrections."
[179] *Id.*
[180] RCW 72.10
[181] *Id*.
[182] Holly M. Harner, Brian R. Wyant & Fernanda Da Silva, *"Prison Ain't Free Like Everyone Thinks": Financial Stressors Faced by Incarcerated Women*, 27 QUAL. HEALTH RES. 688 (2017).
[183] *Id.*
[184] Maruschak, *supra* note 130.

incarcerated men;[185] and enter incarceration poorer than incarcerated men.[186] While healthcare visit costs are usually just a couple of dollars, evidence from other states suggests that the fee for service model does result in incarcerated women delaying or avoiding health care, with one interviewed women noting, "$5 is like $500 for us."[187] While there is a lack of data on if and how frequently incarcerated women in Washington State delay or avoid care over the cost, women in Washington State have expressed concern over the $4 copay.[188] People report long waits for specialized treatment and mental health, as reported by Office of Corrections Ombuds:

> It reportedly can take months to get a follow up appointment after an initial screening that costs a $4 copay in which they are told, as 29 respondents shared, to take ibuprofen and drink more water as a generic remedy to all kinds of specialized medical problems… Many respondents lament that general population prisoners are only allowed three visits to Mental Health per year… and report waiting weeks to months to see a mental health provider.[189]

Additionally, d/Deaf individuals report having challenges accessing health services because of inadequate access to interpreting services.[190]

The period immediately following incarceration is notoriously dangerous. The death rate for formerly incarcerated individuals in Washington during the first two weeks after their release is more than three times higher than the death rate of the general population.[191] This is particularly true of formerly incarcerated individuals with Substance Use Disorders, as substance use was found to be a contributing factor in nearly a third of deaths of people recently released from

[185] Harner, Wyant, and Da Silva, *supra* note 182.
[186] Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL. INITIATIVE (May 10, 2016).
[187] Harner, Wyant, and Da Silva, *supra* note 182 at 692.
[188] Off. of the Corr. Ombuds, *supra* note 133.
[189] *Id.,* at 32-35 (total of 772 completed surveys).
[190] Kingsbury, *supra* note 86.
[191] Ingrid A. Binswanger et al., *Risk Factors for All-Cause, Overdose and Early Deaths After Release from Prison in Washington State*, 117 DRUG AND ALCOHOL DEPENDENCE 1 (2011) (these data predate the highest spikes in opioid overdose mortality).

Washington prisons.[192] The infectious diseases responsible for the most fatalities were viral hepatitis, HIV and septicemia, suggesting a need for stronger linkages to care and harm-reduction policies.[193] Experiencing homelessness after release from prison was associated with an increased risk of death from all causes.[194] DOC's treatment arm provides education and opioid overdose prevention kits to individuals being released after short periods of incarceration, and reentry Medical Assistance Treatment referrals to individuals being released from a number of jails around the state.[195]

In the longer term, formerly incarcerated people continue to face poor health outcomes. As noted above in the subsection on barriers to housing and employment, formerly incarcerated people have higher rates of housing instability and food insecurity.[196] Accessing healthcare and other services is challenging, confusing, and time consuming, so individuals may experience lapses in medication or other treatments.[197] For example, women who experienced incarceration during their pregnancy subsequently reported facing numerous barriers to accessing prenatal care, particularly lack of transportation and lack of childcare, and lack of time due to multiple other responsibilities mandated by the conditions of their release or conviction.[198] Individuals returning to rural areas will find fewer resources and may struggle to access transportation to access needed services.[199] Stress, fear, and anxiety accompany reentry, negatively impacting mental health especially for those with preexisting behavioral health problems.[200] Additionally,

[192] Ingrid A Binswanger, *Epidemiology of Infectious Disease– Related Death After Release from Prison, Washington State, United States, and Queensland, Australia: A Cohort Study*, 131 PUB. HEALTH REPORTS 9 (2016) (examining 76,208 men and women released from prison in Washington State 1999-2009, excluding compassionate release).
[193] *Id.*
[194] Binswanger et al., *supra* note 191, examining a sample of 1,972 deaths from the same dataset above.
[195] Substance Abuse Recovery Unit Brochure (wa.gov) (2020), https://www.doc.wa.gov/docs/publications/500-BR002.pdf.
[196] Binswanger et al., *supra* note 191; Alexander Testa & Dylan B. Jackson, *Food Insecurity Among Formerly Incarcerated Adults*, 46 CRIM.AL JUST. AND BEHAV. 1493 (2019).
[197] Binswanger et al., *supra* note 191; Cloud, *supra* note 157.
[198] Alexander Testa & Dylan B. Jackson, *Incarceration Exposure and Barriers to Prenatal Care in the United States: Findings from the Pregnancy Risk Assessment Monitoring System*, 17 IJERPH 7331 (2020) (examination of nationally representative longitudinal data of parents of infants born in the US from 2009-2016).
[199] Carrie Ann Langley, Transitions from Jail in the Rural Community for Adults with Mental Illness (2021) (Ph. D. dissertation, University of Arizona) , https://repository.arizona.edu/bitstream/handle/10150/656838/azu_etd_18577_sip1_m.pdf?sequence=1&isAllowed=y (qualitative study with adults living with mental illness and recent jail incarceration in Arizona (n=8)).
[200] Binswanger et al., *supra* note 191.

incarceration is highly stigmatized. Stigmatization has a negative impact on health outcomes, as individuals who experience or anticipate discrimination may avoid accessing care. They are also are more likely to engage in risky health behaviors.[201] Individuals leaving prison or jail may avoid social interactions and reconnecting with or asking for support from loved ones.[202] Stigma, disruption to social connections, and lack of resources may lead some to engage in survival sex, trading sex for access to resources, which is associated with a higher risk of sexually transmitted infection and HIV transmission.[203] Each of these factors may be more or less relevant for those released from prison or jail. Jail stays are shorter, and so may not be as disruptive to family and social ties; prison stays are longer, but prisons often provide more support in release planning, and people are often released to community supervision, which may be a source of support as well.

IV. The Consequences of Incarceration for Families and Communities

> Long before women became the fastest-growing incarcerated population, they were already entangled in the criminal legal system. They were the mothers, grandmothers, wives, aunts, sisters and daughters of the men and boys who make

[201] Gina Fedock & Sophia Sarantakos, *Physical and Mental Health Disparities for Young Women with Arrest Histories*, 42 HEALTH & SOC. WORK e102 (2017) (examination of self-reported health histories for 9,899 women aged 18-255 from a 2011 national survey); Mark L. Hatzenbuehler, Jo C. Phelan & Bruce G. Link, *Stigma as a Fundamental Cause of Population Health Inequalities*, 103 AM. J. PUB. HEALTH 813 (2013) (review of the literature linking stigma and health outcomes); Kelly E. Moore & June P. Tangney, *Managing the Concealable Stigma of Criminal Justice System Involvement: A Longitudinal Examination of Anticipated Stigma, Social Withdrawal, and Post-Release Adjustment: Managing the Concealable Stigma*, 73 J. OF SOC. ISSUES 322 (2017) (analysis of survey data from 197 men in jail 2008-2010; Nicole Redmond et al., *Perceived Discrimination Based on Criminal Record in Healthcare Settings and Self-Reported Health Status among Formerly Incarcerated Individuals*, 97 J URBAN HEALTH 105 (2020) (surveys with 743 individuals from a clinic network released from 2013-2015); Ann Elizabeth Stanton, Overwhelmed: a Qualitative Study of the Mental Health Experiences of Mothers of Minor Children After Release from Jail and Prison (May 2018) (Ph. D. dissertation, University of Wisconsin Milwaukee), https://dc.uwm.edu/cgi/viewcontent.cgi?article=2930&context=etd , (survey of formerly incarcerated females who were mothers of minor children in urban Wisconsin in 2017 (n=25)).

[202] Hatzenbuehler, Phelan, and Link, *supra* note 202.

[203] Ingrid A. Binswanger et al., *Gender and Risk Behaviors for HIV and Sexually Transmitted Infections Among Recently Released Inmates: A Prospective Cohort Study*, 26 AIDS CARE 872 (2014) (study of 200 male and female individuals released from Washington prisons in 2010-2012); Andrea K. Knittel et al., *Incarceration and Number of Sexual Partners After Incarceration Among Vulnerable US Women, 2007–2017*, 110 AM. J. PUB. HEALTH S100 (2020) (data from 3,180 women in 9 US states from2007-2017).

> up the majority of the more than 2 million people incarcerated in the United States.
>
> It is women who have held families together, paid bails, raised children, sent commissary money, and provided housing and reentry services when local, state and federal policies have ignored their needs. These women have intimate knowledge of how incarceration affects their communities. And yet in criminal justice debates, their experiences and expertise are too often ignored.[204]
>
> -Andrea James, founder and executive director of the National Council for Incarcerated & Formerly Incarcerated Women and Girls

The removal of a person from their family and community has deep and long-lasting impacts on those they leave behind, with emotional, financial, and health impacts rippling beyond the immediate family and through the community. Families with incarcerated loved ones experience stigma, shame, and isolation. Families also shoulder an enormous financial burden when supporting a loved one through the legal process, and during and after incarceration. Women, especially Black, Hispanic/Latinx, and Indigenous women, are disproportionately impacted by these emotional and financial burdens. The cumulative impact on communities disproportionately impacted by mass incarceration contributes to the cyclical reproduction of poverty, and the mass removal and disenfranchisement in these communities lessens the formal political power and apportioning of resources.

A. The children of incarcerated parents

The consequences of parental incarceration extend far beyond the consequences to the parent. Parental incarceration has been identified as an Adverse Childhood Experience which can result in very serious, lifelong health, educational, employment, and social consequences for the children of incarcerated parents without proper support and mitigation of the trauma they endure.

[204] Andrea James, *Women and girls must be at the center of reimagining safety*, WASH. POST, March 16, 2021, https://www.washingtonpost.com/opinions/2021/03/16/women-girls-must-be-center-reimagining-safety/?fbclid=IwAR1PwUmx8h5pPYD_G0TBqImLFLDAPPQw4AryRiE6FB9G-sq7S6-VGCbodE8.

An estimated five million U.S. children have been directly impacted by the incarceration of a parent.[205] Incarceration of a parent has impacts on children including reduced material resources and resulting consequences like food and housing insecurity, and emotional disruption leading to mental health challenges and disruptions to cognitive and social-emotional development. When the primary caregiver for a child is incarcerated, they face the risk of having their parental rights terminated, which impacts the child as well as the parent.

For the most part, Washington is not even tracking the number of children of incarcerated parents in a comprehensive way, let alone providing them with the supports they need during this traumatic period of their childhoods. One way of mitigating the trauma of incarceration and building resiliency is to facilitate contact and visitation between incarcerated parents and their children, when appropriate. Unfortunately, even before the restrictions mandated by the COVID-19 pandemic, no county jails in Washington consistently provided for in-person visitation between incarcerated parents and their children. For over a year, as of this writing, no prisons or jails in Washington allow for the children of incarcerated parents to visit their parents in person due to COVID-19.

B. Financial consequences

Incarceration of parents, guardians, or others who provide household financial support creates a financial disruption that can deeply impact daily life. A study of family member incarceration from 14 U.S. states (including Washington) found that two in three families surveyed reported "difficulty meeting basic needs as a result of their loved one's conviction and incarceration."[206] Mothers with incarcerated male partners may take on longer work hours or additional jobs to fill the income gap in their household.[207] The reduction in household resources can lead to poverty, food insecurity, and housing instability for families and children.[208] One study found that paternal

[205] Annie E. Casey Found., *supra* note 101.
[206] SANETA DEVUONO-POWELL ET AL., ELLA BAKER CENTER FOR HUMAN RIGHTS, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES (Sept. 2015), https://www.ellabakercenter.org/sites/default/files/downloads/who-pays.pdf.
[207] Angela Bruns, *The Third Shift: MultipleJob Holding and the Incarceration of Women's Partners*, 80 SOC. SCI. RSCH. 202 (2019) (examination of nationally representative data found that partner incarceration is associated with women working multiple jobs); Clayton et al., *supra* note 2.
[208] Elizabeth J. Gifford, *How Incarceration Affects the Health of Communities and Families*, 80 N. C MED. J. 372 (2019).

incarceration increased the odds of child homelessness by 95%, with a stronger effect for Black children than white and Latinx children.[209] After incarceration, when the formerly incarcerated individual rejoins their family, lower employment rates and wages, and legal barriers to accessing public services, can impact the entire family.[210] Housing restrictions can prevent families from reuniting: for example, as discussed above, if one family member is barred from living in public housing due to a drug conviction, they may be unable to join the rest of their family living there and can even be barred from visiting.[211] Families wanting to reunite and live together may experience the same barriers to access faced by their formerly incarcerated loved one.[212]

There are additional financial burdens associated with the incarceration of a family member or loved one. Those burdens are often carried by female family members.[213] Families may contribute financially to finding legal representation or securing bail release from jail while awaiting trial.[214] They often send money to the incarcerated person for costs incurred in prison, like hygiene and food items from the commissary and healthcare costs.[215] Then there are costs associated with maintaining communication, such as sending mail and packages; making phone and video calls; obtaining transportation; and paying fees to cover background checks for prison visits.[216] As noted above, Washington DOC's video visitation system is a welcome tool to expand communication access for families and loved ones, but at a high price.[217] Washington State's Office of the Corrections Ombuds conducted a brief survey of families of incarcerated people and found that approximately half of respondents reported spending $5,000 a year or more to

[209] Christopher Wildeman, *Parental Incarceration, Child Homelessness, and the Invisible Consequences of Mass Imprisonment*, 651 ANN.OF THE AM. ACAD. OF POL. AND SOC. SCI. 74 (2014) (examination of nationally representative data, sample size n=3,774).
[210] Clayton et al., *supra* note 2.
[211] Annie E. Casey Found., *supra* note 101.
[212] *Id.*
[213] *See "*Chapter 15: The Gendered Impact of Legal Financial Obligations"
[214] Clayton et al., *supra* note 2.
[215] *Id.*; deVuono-Powell et al., *supra* note 206; *Survey of Families of Incarcerated Individuals*, OFF. OF THE CORR. OMBUDS (Nov. 20, 2019), https://oco.wa.gov/sites/default/files/Results%20from%20Costs%20to%20Families%20Survey_0.pdf.
[216] DEVELOPMENT SERVICES GROUP, INC., OFF. OF JUV. JUST. AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUST., LITERATURE REVIEW: YOUTHS WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES IN THE JUVENILE JUSTICE SYSTEM (2017), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/intellectual-developmental-disabilities.pdf; Digard et al., *supra* note 149; Off. of the Corr. Ombuds,, *supra* note 215.
[217] Pedersen, *supra* note 152.

support their incarcerated loved one, and one in five respondents reported spending $10,000 a year or more.[218] Top costs included video visitation, packages and mail, costs of travel to visit, commissary deposits, and phone calls.[219] Given that incarcerated people disproportionately come from families living in poverty, these expenses are particularly onerous. While the survey doesn't explicitly address the gendered impact of these costs, the many included quotes and stories from the 123 submitted responses clearly show that it is the wives, girlfriends, and mothers of the incarcerated individuals that are carrying this burden.[220]

From one multi-state survey, more than a third of families "reported going into debt to pay for phone calls or visitation."[221] And the expenses don't end when the sentence does. Many families know that their loved one will continue to rely on them for financial support after release from prison, and worry about their ability to provide it. Depending on the conditions of the person's release, their family may be called on to provide housing and basic needs, pay for required treatment programs, support with legal financial obligations, and more. As one family member of an incarcerated person in Washington State noted, "I believe that my participation in his life and my spending costs during his incarceration on basic necessities and gifts of love will positively impact his reentry. However, the more I spend now may mean less than [sic] I can spend to help him when he releases."[222] Anecdotally, community organizations and advocates note that women, particularly Black women, shoulder a disproportionate share of this burden: "Women are the informal re-entry system of this country."[223]

C. Health consequences

Children and family members of incarcerated loved ones experience emotional pain, trauma, and stress, which can result in poor physical and behavioral health outcomes. Children of incarcerated parents suffer not only the pain of separation but also the stigma and shame associated with

[218] Off.of the Corr. Ombuds, *supra* note 215.
[219] *Id.*
[220] *Id*.
[221] deVuono-Powell et al., *supra* note 206.
[222] Off.of the Corr. Ombuds, *supra* note 215.
[223] Clayton et al., *supra* note 2, at 54. For more, *see "*Chapter 15: The Gendered Impact of Legal Financial Obligations."

incarceration.[224] The resulting traumatic stress can lead to behavioral disturbances and disruptions to cognitive development, with long-term mental health problems.[225] These, in turn, can lead to behaviors that are associated with poor physical health outcomes, such as risky health behaviors,[226] as well as poor educational outcomes.[227] When a child's primary parent or caregiver is incarcerated, children face more extreme disruption to their lives, including changing residence, changing schools, and even removal from the home into the child welfare system.[228] Additionally, researchers have found evidence for what they call "intergenerational transmission" of criminal justice involvement. To be clear, this does not in any way suggest genetic transmission of behaviors leading to criminal justice involvement; rather, it posits that parental incarceration is so disruptive to children's development that the trauma may lead to coping behaviors that put them at risk of contact with the criminal justice system as they grow.[229] There is a significant body of research assessing the consequences of mass incarceration of Black, Indigenous, and men of color, particularly Black men, on remaining female heads of household. Women with incarcerated male partners experience depression and anxiety from separation and increased burdens of childcare and financial obligations.[230] They may feel stigmatized and isolated from social support.[231] Emotional and mental health challenges such as chronic toxic stress are associated with poor cardiovascular health and other physical health impacts.[232] And

[224] Gifford, *supra* note 208.
[225] Ashley Provencher & James M. Conway, *Health Effects of Family Member Incarceration in the United States: A Meta-Analysis and Cost Study*, 103 CHILD. AND YOUTH SERVICES REV. 87 (2019) (meta-analysis of the research concluded that children with an incarcerated family member have mental health or behavioral problems at rates twice as high and engage in risky health behavior at rates three times as high as their peers).
[226] *Id.*; Tyson Whitten et al., *Parental Offending and Child Physical Health, Mental Health, and Drug Use Outcomes: A Systematic Literature Review*, 28 J. CHILD. FAM. STUD. 1155 (2019).
[227] Christopher Wildeman, Alyssa W Goldman & Kristin Turney, *Parental Incarceration and Child Health in the United States*, 40 EPIDEMIOLOGIC REV. 146, 150 (2018) (systematic review of 62 studies finding "uniform evidence that paternal incarceration imperils children's educational experiences").
[228] Kramer and McDonnell, *supra* note 155.
[229] Sytske Besemer et al., *A Systematic Review and Meta-Analysis of the Intergenerational Transmission of Criminal Behavior*, 37 AGGRESSION AND VIOLENT BEHAV. 161(2017).
[230] Terry-Ann Craigie, *Male Incarceration and Female Labor Market Outcomes*, FEMINIST ECON. (forthcoming 2021), https://www.ssrn.com/abstract=3709551 ; Evelyn J. Patterson, Ryan D. Talbert & Tony N. Brown, *Familial Incarceration, Social Role Combinations, and Mental Health Among African American Women*, 83 J. MARRIAGE FAM. 86 (2021).
[231] Clayton et al., *supra* note 2.
[232] *Id.*; Gifford, *supra* note 209; Hedwig Lee et al., *A Heavy Burden: The Cardiovascular Health Consequences of Having a Family Member Incarcerated*, 104 AM. J. PUB. HEALTH 421 (2014).

dealing with extreme stress may lead to coping behaviors that have negative physical health impacts, such as substance use.[233] In short, family member incarceration "has profound effects on the health and well-being of the adult women left behind… (and) has almost certainly exacerbated racial health disparities in the United States."[234] The impact of female parental incarceration on children and families has found mixed evidence.

Because incarcerated women are more likely than their male counterparts to have been primary caregivers for their children prior to incarceration, children with incarcerated mothers are more likely to pass into the care of family members or enter the child welfare system. From a research standpoint, children with welfare system involvement are less likely to be represented in study sample pools, and so studies of children with incarcerated parents may not fully represent experiences of maternal incarceration.[235] The 2010 Bureau of Justice Statistics Special Report found that more incarcerated mothers than incarcerated fathers reported a history of homelessness, abuse, and mental health problems prior to incarceration.[236] Such conditions also impact children living with mothers under these circumstances.[237]

D. Community consequences

The accumulation and concentration of these consequences in already under-resourced Black, Indigenous, and communities of color has exacerbated existing racial population health disparities. As one systematic review noted, "disparities between African-American and white infant mortality rates would have been 10% lower in the absence of mass incarceration."[238] Racial

[233] Angela Bruns & Hedwig Lee, *Partner Incarceration and Women's Substance Use*, 82 J. MARRIAGE FAM. 1178 (2020) (analyzing nationally representative data and finding a significant association between partner incarceration and drug use for Black women); Hedwig Lee & Christopher Wildeman, *Things Fall Apart: Health Consequences of Mass Imprisonment for African American Women*, 40 REV.OF BLACK POL. ECON. 39 (2013)(chronic stress can prompt individuals to adopt risky health behaviors as a coping mechanism).
[234] Christopher Wildeman, Alyssa W. Goldman & Hedwig Lee, *Health Consequences of Family Member Incarceration for Adults in the Household*, 134 PUB. HEALTH REP. 15S (2019).
[235] David S. Kirk & Sara Wakefield, *supra* note 5 (many of the studies examining the impacts of parental incarceration on children use data from the Fragile Families and Child Wellbeing Study, a longitudinal study representative of US cities of children born to unmarried mothers, but children entering the foster system are lost to follow up by these studies and therefore often not represented in the findings).
[236] Glaze & Maruschak, *supra* note 16.
[237] Jessica Dahlgren, Maternal Primary Caregiver Criminal Justice Involvement: The Importance of Understanding Child Outcomes (Oct. 2, 2020) (Ph.D. dissertation, Oregon State University), https://ir.library.oregonstate.edu/concern/graduate_thesis_or_dissertations/c247f052w.
[238] *Id*. at *152.*

disparities in the rates of infectious diseases (such as HIV) and chronic diseases (such as cardiovascular disease) have also been exacerbated by mass incarceration.[239] Even when controlling for factors like poverty, healthcare access, and more, researchers have found associations between high incarceration rates and high rates of poor health, disease, and disease leading to death in the community at the county level,[240] and associations between high incarceration rates and high rates of mental health problems in the community at the state level.[241] Mass incarceration has changed how resources are allocated across the U.S.. People incarcerated in state prisons are classified as residents of their correctional facility rather than their pre-incarceration residence; since prisons are commonly located in rural areas, census counts overestimate the functional residency of rural, majority white areas at the expense of urban areas that are made up of majority Black, Indigenous, and communities of color. This deprives Black, Indigenous, and communities of color of federal money and political representation to which they would otherwise be entitled.[242] Finally, mass incarceration interrupts a community's "collective efficacy" and social capital by disrupting social connections, removing resources, disengaging residents from the political system, and concentrating social and economic disadvantage.[243]

V. Recommendations

- The Washington State Legislature should, consistent with RCW 72.09.495, RCW 74.04.800, RCW 43.216.060, and RCW 43.63A.068, receive data from DOC, the DCYF, Department of Early Learning, Office of Superintendent of Public Instruction, and

[239] Joëlla W. Adams et al., *Potential Drivers of HIV Acquisition in African-American Women Related to Mass Incarceration: An Agent-Based Modelling Study*, 18 BMC PUB. HEALTH 1387 (2018); Wildeman, Goldman, and Lee, *supra* note 239.
[240] Robert R. Weidner & Jennifer Schultz, *Examining the Relationship Between U.S. Incarceration Rates and Population Health at the County Level*, 9 SSM - POPULATION HEALTH 100466 (2019).
[241] Edgemon, *supra* note 150.
[242] Acker *et al*., *supra* note 141.
[243] Gipsy Escobar & Sema Taheri, *Incarceration Weakens a Community's Immune System: Mass Incarceration and COVID-19 Cases in Milwaukee*, PRISON POL. INITIATIVE (June 2, 2020), https://www.prisonpolicy.org/scans/measuresforjustice/Incarceration_Weakens_Community_Immune_System_Preliminary_Results.pdf.

Department of Commerce on how many children in Washington are impacted by parental or primary caregiver's incarceration, as well as data on available programs and resources to support the specific needs of the children of incarcerated parents, so that Washington has a comprehensive understanding of the needs, available support, and identified gaps in data collection and services.

- The Washington State Legislature may want to consider ways to equitably increase access to and eligibility for Parenting Sentencing Alternatives to prison confinement, so more parents can serve more of their sentences in the community with their children. Specific consideration should be given to any racial, ethnic, or gender disparities within the existing Family and Offender Sentencing Alternative (FOSA) and the Community Parenting Alternative (CPA) programs.
- Stakeholders, in consultation with experts on child psychology and on parent-child visitation in incarceration settings, should convene county jail leadership across Washington State to develop guidance on meaningful in-person visitation for parents and children in those settings.
- Stakeholders should study the causes of, and offer solutions for, the lengthy delays in establishing consistent phone calls and visits between dependency-involved parents serving DOC sentences and their children, so these families can maintain continuous, uninterrupted contact, even if parents are transferred to different facilities.
- Stakeholders should study ways to make it less expensive for incarcerated individuals to maintain contact with their families and support systems. Specifically, consider ways to: reduce or eliminate the cost of emails; reduce or eliminate the cost of video conferences; and, reduce or eliminate the cost of phone calls.
- To provide incarcerated parents with meaningful court access, stakeholders should determine: (1) whether to increase the response deadline beyond 20 days for incarcerated parents in family law matters, and (2) how to ensure that these parents can access mandatory family law forms and legal information.

- The Washington State Legislature, donors, and other funders should consider allocating funding to indigent incarcerated parents for access to legal services, including representation in their family law matters involving minor children.
- Incarcerated parents who are ordered into treatment by dependency and family law courts should have access to such treatment while incarcerated. DOC should update its eligibility requirements for such treatment services to prioritize participation by these parents within a timeline that allows them to comply with such civil court orders relating to their children. DOC should also tell the court when a parent's failure to participate in ordered treatment is due to lack of DOC resources, rather than the parent's unwillingness to comply.
- Judicial officers should be trained on the social and emotional needs of children of incarcerated parents. This would equip judicial officers hearing dependency and family law cases to craft visitation orders consistent with best practices for facilitating the resilience of children of incarcerated parents.

III. Goals and Recommendations

1. Improve data collection in every area of the law that this report covers: ensure collection and distribution of accurate, specific data, disaggregated by gender, race, ethnicity, and LGBTQ+ status, in the criminal, civil, and juvenile areas of law covered here.
2. Improve access to the courts in every area of the law that this report covers: expand remote access, adopt more flexible hours, increase access to legal help, reduce communication barriers, and ensure that courts treat all court users in a trauma-responsive manner.
3. Address the impacts of the vast increase in convictions and detentions over the last generation: (a) recognize and remedy the increase in conviction rates and incarceration length for women, especially Black, Indigenous, and other women of color, and (b) recognize and remedy the consequences that the increased incarceration of Black, Indigenous, and other men of color over the last generation has had on women and other family members.
4. Reduce reliance on revenue from court users to fund the courts.
5. Identify the best evidence-based curricula for judicial and legal education on gender and race bias.

Goal 1

Improve data collection in every area of the law that this report covers: ensure collection and distribution of accurate, specific data, disaggregated by gender, race, ethnicity, and LGBTQ+ status, in the criminal, civil, and juvenile areas of law covered here.

Recommendations

- The Washington State Center for Court Research (WSCCR) should convene a stakeholder workgroup to develop a comprehensive inventory of justice system related data systems, the information collected in each, the gaps and limitations in the data, the entities responsible

for the data, and the opportunities for sharing data across systems. This mapping of justice system data will inform planning next steps to improve justice system related data and data sharing in Washington State. (Overarching recommendation)

- WSCCR should convene stakeholders to develop best practices and standards for collecting demographic data in the justice system (e.g., race, ethnicity, gender identity, gender expression, sexual orientation, educational attainment, income, etc.). This group of stakeholders should coordinate with similar efforts being conducted by the executive branch and local government where appropriate. (Overarching recommendation)
- Low-income care givers often lack access to safe, affordable, quality, childcare, and this limits their ability to access courts. To remove such barriers and improve all court users' ability to conduct court business using remote means: (Chapter 1)
    - Courts should retain and expand the best of the remote access opportunities that the courts adopted during the COVID-19 pandemic (e.g., digital platforms accessible via computer or smart phone) – the ones that maximize communication and language access without penalizing litigants for using remote means. Publish (electronically) accessible directions on how to access court business and documents remotely, and limit fees for accessing court business and documents remotely.
    - Courts should consider more flexible hours of operation or, with increased funding, expanded hours of operation.
    - Stakeholders should explore additional way to improve access opportunities such as funding and distributing devices (laptops, tablets, phones, etc.) that can support remote access in community and childcare centers, women's shelters, schools (as appropriate in individual jurisdiction); expanding on-site childcare centers at courthouses; or supporting other means (such as vouchers) to access childcare to attend court.
- The Washington State Legislature should consider funding "navigators" in courts in all counties to assist those seeking help with family law issues, and should also consider funding them for other areas of law. (Chapter 1)
- In order to determine whether women (including Black, Indigenous, women of color, and women in poverty) and LGBTQ+ people are disproportionately underrepresented in the jury

selection process and why, by the end of 2021, stakeholders, such as the Washington State Supreme Court Minority and Justice Commission and the Washington Pattern Jury Instructions Committee, should convene a jury diversity workgroup to build on prior data collected by the Minority and Justice Commission by studying the following: (Chapter 3)

  - By the end of 2022, the workgroup, with assistance from AOC, should determine how best to mandate and fund collection of demographic data at every stage of the jury selection process in every Washington jurisdiction.
  - By the end of 2023, the workgroup, with assistance from WSCCR, should collect and study court data to determine whether Black, Indigenous, and women of color or LGBTQ+ people are disproportionately excused from jury service for hardship, for cause, or based on peremptory challenges, and whether different subpopulations are affected differently.

- Recent data shows that significant numbers of potential jurors in Washington lack the resources to participate in jury service. The Washington State Legislature should consider funding research to identify the level of juror compensation that would most effectively increase participation by low-income people. (Chapter 3)
- To measure progress, the judicial branch and its leaders should work with researchers to evaluate their efforts to create a more diverse, inclusive, and respectful environment. Conducting regular surveys will help to track whether planned processes have been implemented and whether an anti-harassment policy is producing the desired effects. The survey methodology, when fully implemented, will enable the judicial leadership to monitor the sustainability and effectiveness of the anti-harassment efforts. The methodology should allow the branch to disaggregate the data by race, ethnicity, sexual orientation, and gender identity or expression to reveal different experiences across populations. The results of surveys should be shared publicly to demonstrate that the branch takes the issue seriously. (Chapter 4)
- Stakeholders should convene a workgroup – in consultation with AOC data management professionals – to outline ways to collect the court data that is needed to identify trends in

harassment and discrimination case filings and resolutions by race, ethnicity, gender, and other demographic factors. (Chapter 5)

- Stakeholders should convene a workgroup to identify resources needed to ensure that the Washington State Human Rights Commission has capacity to: 1) investigate all claims in a complete and timely manner, 2) analyze barriers to reporting and any disproportionate impact barriers have on marginalized groups, and 3) regularly analyze and report on the demographics of workplace harassment and discrimination. (Chapter 5)
- Justice system partners should consider analyzing the number and demographics of employees and employers who are not covered by the Washington Law Against Discrimination (WLAD) because of its employer-size exemption (*see* RCW 49.60.040(11)). The analysis should address: 1) whether this exemption has a disparate impact on the groups whom the law intends to protect (*see* RCW 49.60.010), and 2) the demographics of WLAD-exempt business owners to better understand how these exemptions impact women and minority owned businesses. (Chapter 5)
- In order to eliminate discrimination based on gender, race, and ethnicity in the calculation of tort damages, stakeholders should study whether Washington courts should discontinue use of race- and gender-based life expectancy, work life expectancy, loss of household services, and historical earnings tables for the calculation of economic damages. If the conclusion of such further study is that the race- and gender-based tables should no longer be used, stakeholders should then determine whether to promote other means of calculating economic damages, instead. (Chapter 6)
- In the 2022 legislative session, the Washington State Legislature should consider repealing requirements related to the filing of "residential time summary reports" in dissolution cases involving children (RCW 26.09.231, RCW 26.18.230). In its place, the Legislature should consider adopting a requirement that an appropriate entity conduct an annual record review based on a sample of cases to collect the data currently required by RCW 26.18.230, and to publish an annual report based on the data collected. (Chapter 7)
- In 2022, the AOC, in consultation with the Gender and Justice Commission and other relevant stakeholders, should develop and implement a plan to regularly collect data from

Washington's Superior Courts to determine how often parents who owe child support are: (1) named in a bench warrant for failure to appear at a hearing for alleged failure to pay child support; (2) arrested and incarcerated, even temporarily, on that bench warrant; and (3) arrested and incarcerated for failure to pay child support. This data should include information about the gender, race, and ethnicity of the parent and whether the parent was represented by counsel before the bench warrant issued. (Chapter 7)

- To monitor the efficacy of laws and regulations that combat gender-based violence and to identify gaps in protection, statewide data on the following topics should be collected: the barriers to enforcement of firearms surrender orders; the efficacy of domestic violence perpetrator treatment (in light of our pilot project report on the value of DV-MRT treatment); the prevalence and consequences of sexual assault in prison – especially for understudied populations; the prevalence and consequences of coercion for sex and sexual assault in the workplace – especially for female workers in the farm labor, service, and related low-paying industries; and data on the investigation and processing of sexual violence cases, including time from the alleged assault to filing, to resolution via the court process, and the reasons for any delays. This work will require legislative funding. (Chapter 8 and Chapter 5)
    - One component of this data collection could be development of a statewide online dashboard where law enforcement reports its data, as it already does pursuant to the Safety and Access for Immigrant Victims Act (2018) and pursuant to SHB 1501 (2017) to track denied firearm transactions.
    - Requirements for the data could include the following: (1) data collected should include disaggregated demographic information, including gender information that goes beyond the male-female binary, and (2) that non-confidential data and information about the process should be transparent and available to the public to promote system accountability.
- The Legislature should fund Washington-specific primary research to evaluate the current requirement for mandatory arrest in domestic violence cases, including research regarding the impact on women; Black, Indigenous, and other people of color; immigrants; those living in poverty; and LGBTQ+ people. (Chapter 8)

- WSCCR and juvenile justice stakeholders should develop standards to collect and report demographic data by entities operating in all phases of the juvenile justice system (initial referral, diversion/prosecution, detention, adjudication, disposition, use of manifest injustice/decline, and outcome). Data should include self-identified sexual orientation, gender identity, gender expression, race, and ethnicity; age; developmental challenges; and status as a parent. (Chapter 9)
- WSCCR should maintain and publish uniform data on the rate of youth arrests in each Washington county by subpopulations, including gender, race, ethnicity, age, and referral charge. (Chapter 9)
- WSCCR should expand the annual juvenile detention report to examine county detention admissions by gender, race, ethnicity, age, admission reason, and length of stay. (Chapter 9)
- WSCCR and juvenile justice stakeholders should develop uniform standards to collect and report demographic data for school-based referrals. Data should include self-identified sexual orientation, gender identity, gender expression, race, and ethnicity; age; developmental challenges; and status as a parent. Use this data to (1) identify student populations and geographic locations with the greatest need, (2) develop restorative programs tailored to specific needs at the local level, and (3) reduce criminal referrals. (Chapter 9)
- Courts and the Washington State Legislature should study and consider expanding education, accountability and therapeutic options for those benefiting from Commercial Sexual Exploitation (CSE), and should determine how to fund those programs. (Chapter 10)
- To better understand the demographics of sexual exploitation, particularly of children and youth, Washington State should establish and fund a cross-sector database and develop criteria for safely sharing that data while protecting the identity and privacy of survivors. The following steps could be taken to implement this: (Chapter 10)
    - Develop and implement data sharing agreements to track cases of sex trafficking of children and youth, including information related to victim identification and service provision, across all state agencies. Such agreements should include standardized identifiers and definitions and established protocols to share information, protect the confidentiality of children and youth, and be limited in scope.

- Develop and implement data sharing agreements among all public agencies and publicly funded private agencies that provide services to children and youth who have experienced sex trafficking. Such agreements should include standardized identifiers and definitions and established protocols to share information, protect the confidentiality of children and youth, and be limited in scope.
- Require state agencies and private agencies that receive public funding to collect and report aggregate data about the sex trafficking of children and youth and their agency's response to the Washington State Legislature or the Governor for public dissemination.

- Data that is collected is inconsistent. Washington State should consider funding development, validation, and adoption of a short trauma and sexual exploitation screening tool for all youth who enter detention, child welfare, health care, or any other state system, and make the tool available to others who come in contact with at-risk or trafficked children (e.g., school counselors). That tool should contain demographic information and the data should be entered into the statewide database. (Chapter 10)
- Government data collection should follow the best practices recommended by the 2020 *Incarceration of Women in Washington State* pilot study commissioned by the Gender and Justice Commission. The pilot study sets forth comprehensive recommendations for improvements in data collection as well as additional analyses and research to be implemented by the Caseload Forecast Council, the Washington State Legislature, and the Department of Corrections (see pages 31-32 of the *Incarceration of Women in Washington State* pilot study). (Chapter 11)
- When sufficient bail data can be obtained from the counties, WSCCR should study the impact of pretrial reform (including bail reform and more widespread pretrial services, such as those enacted by Yakima County) on wellbeing, recidivism, incarceration, community safety, and failure to appear rates. (Chapter 11)
- WSCCR and/or other stakeholders should undertake a study of (1) the impacts of incarcerating women for violating conditions of release, and (2) whether other sanctions could be equally or more effective. (Chapter 11)

- In the short term (next two years), criminal justice stakeholders, including the Department of Corrections and Juvenile Rehabilitation Administration, should study the effect that the increasing detention of girls - especially Indigenous, Latinx, and Black girls - has on this state's large incarcerated-adult female population. We also recommend finding a way to measure disparities impacting other populations not currently represented in the data, such as Native Hawaiian and other Pacific Islander populations. (Chapter 11)
- Research from other states has shown that outcomes of gender-responsive programming depend heavily on the manner in which the programs are administered, which often varies widely. Conduct research, monitoring, and evaluation in Washington to assess the effectiveness of DOC's gender-responsive programming generally, and for subpopulations such as Black, Indigenous, and women of color, in particular. (Chapter 12)
- To better understand and address disparities in charging, pretrial detention, bail, plea bargaining, and diversion or deferral decisions, the Washington State Legislature should work with the appropriate statewide and county prosecutorial agencies to fund the creation of a statewide system for data collection and publication. This group should also determine the best way to ensure that individual jurisdictions collect and submit data from charging, bail, pretrial detention, plea bargain, and diversion or deferral decisions, and that this data is disaggregated by gender, race, ethnicity, sexual orientation, and disability. Data should be made available to the public in a timely and accessible manner. (Chapter 13 and Chapter 11)
- To decrease disparities in sentencing, study what evidence-based programs work to educate the judiciary, the bar, and court partners on how to identify and avoid gender and race bias. Based on the results, the education programs, bench cards, and other resources that have proven to be effective should be continued, expanded, and made mandatory. (Chapter 14)
- To facilitate a single place to access statewide Legal Financial Obligation (LFO) data, by December 2021, stakeholders should be convened[1] to: (1) assess what LFO data is currently available from each level of court; (2) assess what LFO data is not available; (3) assess how

[1] Such a convening is already being planned for September 2021, coordinated by AOC and co-chaired by Representative (and Gender Justice Study Advisory Committee member) Tarra Simmons and Judge David Keenan (author of this chapter).

stakeholders (e.g., researchers) currently access available data; and (4) recommend ways to (i) fill in the missing data, and (ii) create a single portal for accessing statewide data. Any analysis should first consider the reliability of the underlying data, e.g., the sources of that data and how it was collected in the first instance. The data should include impact of LFO's by gender, race, and ethnicity as overlapping categories; it should also strive to include who is making the payments (i.e., the sentenced defendant or another family member). (Chapter 15)

- The Washington State Legislature recently named WSIPP as the justice system partner responsible "to study legal financial obligations," and provided WSIPP with funding to do so. The scope of the LFO study includes some of the data gathering recommended above, though there is no provision for collecting or analyzing data specific to gender. WSIPP should consult with stakeholders, including the Gender and Justice Commission, immediately about conducting this study. The Gender and Justice Commission should (1) recommend to WSIPP that their data collection and analysis include gender and intersectionality with other demographics, and (2) offer the Gender and Justice Commission's assistance with the study. (Chapter 15)
- The Washington State Legislature should, consistent with RCW 72.09.495, RCW 74.04.800, RCW 43.216.060, and RCW 43.63A.068, receive data from DOC, the DCYF, Department of Early Learning, Office of Superintendent of Public Instruction, and Department of Commerce on how many children in Washington are impacted by parental or primary caregiver's incarceration, as well as data on available programs and resources to support the specific needs of the children of incarcerated parents, so that Washington has a comprehensive understanding of the needs, available support, and identified gaps in data collection and services. (Chapter 16)
- Stakeholders should study the causes of, and offer solutions for, the lengthy delays in establishing consistent phone calls and visits between dependency-involved parents serving DOC sentences and their children, so these families can maintain continuous, uninterrupted contact, even if parents are transferred to different facilities. (Chapter 16)

- Stakeholders should study ways to make it less expensive for incarcerated individuals to maintain contact with their families and support systems. Specifically, consider ways to: reduce or eliminate the cost of emails; reduce or eliminate the cost of video conferences; and, reduce or eliminate the cost of phone calls. (Chapter 16)
- The Caseload Forecast Council (CFC) should write a report outlining: (1) the current limitations of data from Felony Judgement and Sentencing (FJ&S) forms, and (2) possible solutions. For FJ&S data, it would be beneficial for the CFC to immediately begin coding "Hispanic/Latinx" as a separate ethnicity variable rather than as a race, so that CFC's data is comparable to Office of Financial Management population estimates and would allow for accurate disproportionality analyses. CFC should also issue corrections to past reports which have included inaccurate disproportionality analyses for the Latinx population. We recommend considering legislative changes, changes to and standardization of the FJ&S forms, education and outreach to courts to support more standardized and complete data collection, changes to coding methodologies and internal documentation of coding methodologies, and needed updates to CFC databases.
- The CFC should immediately develop a codebook clearly outlining how data from the various FJ&S forms used by counties across the state are coded. This should be a living document that is updated any time a form comes in with data response options that are not currently addressed in the codebook. This codebook should always accompany the dataset when FJ&S data is shared with outside researchers.
- The CFC should immediately ensure that all CFC reports analyzing FJ&S data clearly outline the limitations of the race and ethnicity data including, but not limited to, the frequency with which the race and ethnicity fields are left blank on the forms, the lack of representation of Native Hawaiian and Other Pacific Islander and multiracial individuals in the dataset, the lack of consistency and standardization in how counties provide the data and which FJ&S forms are used, a lack of consistency related to who identifies an individual's race and ethnicity, and a lack of granular race categories which may mask disparities for some populations.
- The CFC, beginning with the 2021 Adult General Disproportionality Report, should include racial disproportionality analysis for the male incarcerated population and the female

incarcerated population in addition the analyses currently conducted for the combined population.

Goal 2

Improve access to the courts in every area of the law that this report covers: expand remote access, adopt more flexible hours, increase access to legal help, reduce communication barriers, and ensure that courts treat all court users in a trauma-responsive manner.

Recommendations

- To improve access to interpreter services for people with limited English Proficiency (LEP) and d/Deaf, Hard of Hearing, and DeafBlind individuals in legal proceedings and court services and programs, stakeholders should convene to do the following: (Chapter 2)
    - Review accessibility – at all levels of court – by limited English language users statewide, including people with hearing loss, to court interpreting services, and develop an action plan to address identified barriers.
    - Suggest procedures to monitor and enforce the requirement that each court develop and annually maintain a language access plan pursuant to RCW 2.43.090; address whether the Washington Administrative Office of the Courts (AOC) needs to increase staffing within the Interpreter Services Program to assist courts in creating and implementing their language access plans and in making their language access plans accessible electronically.
    - Address the establishment of interpreter training programs in Washington, partnering with other state agencies and community colleges, to create dedicated language interpretation programs and to provide resources to develop new interpreters in the wide variety of languages we need to meet the language interpretation needs of government programs.
    - AOC should partner in the development of a certification program for American Sign Language (ASL) court interpreter certification.

- To improve access to the courts for those with limited English proficiency, the Washington Pattern Forms Committee should help translate key court information and forms into our state's top 37 languages (per the Office of Financial Management). To that end, the Committee should: (1) create a list of vital documents (including civil protection order requests and other court forms, information about language services, directions on how to access court in-person and remotely, etc.), and (2) determine how to make them most accessible to the people who need them. With regard to translating forms that trigger court action after filing (such as requests for protection orders), we suggest a pilot project in selected counties to test the feasibility of different approaches to gaining court action based on such translated documents. (Chapter 2)
- AOC should create guidance for and offer assistance to Washington courts in creating and maintaining accessible websites, including translations and disability accommodations. (Chapter 2)
- AOC should determine how best to acquire language data on LEP parties, witnesses, etc. from Superior, District, and Municipal courts, to enable AOC to identify and address gaps in language services delivery. (Chapter 2)
- In order to enhance jury participation by Black, Indigenous, women of color, women in poverty, and LGBTQ+ people, by the end of 2023, the jury diversity workgroup should encourage courts to consider creative alternatives that accommodate jurors with caregiving responsibilities. Courts should consider whether they can accommodate parenting schedules for jurors who need to pick up children after school or childcare. The workgroup and Supreme Court Commissions should seek funding with court partners to develop creative pilot projects and measure their success. The workgroup should develop best practices for judges to account for the effects on jury diversity when evaluating juror hardship, and train judges on these best practices. (Chapter 3)
    - Apply the remote practices recommendation described in "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for voir dire (jury selection).
    - Apply the childcare access recommendation described in "Chapter 1: Gender and Financial Barriers to Accessing the Courts" to jurors.

- Apply the flexible hours recommendation described in “Chapter 1: Gender and Financial Barriers to Accessing the Courts” to jurors.
- By the end of 2022, the jury diversity workgroup should develop best practices for courts to account for the barriers to service for LGBTQ+ jurors, including adding nonbinary gender choices to all forms and referring to jurors by their correct pronouns and chosen names. Train judges and court staff on these best practices.

- Recent data shows that significant numbers of potential jurors in Washington cannot afford to participate in jury service. (Chapter 3)
  - In order to reduce or eliminate financial barriers to jury service, the workgroup should, by the end of 2023, explore how best to require or incentivize employers to provide paid time off for jury service, following models in other states.
  - The legislature should consider adopting a statewide juror compensation increase sufficient to meaningfully increase juror attendance.
- To develop a more inclusive and respectful work environment, the judicial branch and its leaders should take explicit steps to promote equity, diversity, and inclusion, and to foster a culture that values individual differences in age, gender, sexual orientation, gender identity or expression, disability, race, and ethnicity. (Chapter 4)
- To improve transparency and accountability, the judicial branch and its leaders should be as transparent as possible (while respecting the rights of the accused person) about how they are handling reports of workplace harassment. Decisions regarding disciplinary actions, if required, should be made in a fair and timely way. This accountability can ensure that the court workforce feels supported by their organizations, because perceived organizational support is significantly associated with lower rates of workplace harassment. (Chapter 4)
- The Gender and Justice Commission should continue to develop programs to increase the number of women, including women and other persons of color, in both the bench and bar.(Chapter 4)
- The Gender and Justice Commission should partner with the associations representing Washington courts and clerks' offices to educate and advocate for the adoption of the Model Anti-Harassment policy by courts across Washington.

AOC should track the progress on adopting the policy and should develop a method for evaluating outcomes of the policy. (Chapter 4)

- Every Washington court should publicize its procedure for filing complaints of sexual and other types of discrimination and harassment, and include this procedure on its website. (Chapter 4)
- The Washington State Bar Association should identify (or convene stakeholders to identify) ways to minimize barriers within the profession related to: pay disparity, promotion opportunities, career complications, and workplace environment. The group should focus on barriers related to age, gender, sexual orientation, gender identity or expression, disability, race, ethnicity, family and care responsibilities, and the impact of the COVID-19 pandemic. (Chapter 4)
- Stakeholders should convene to consider proposing to the Washington State Legislature that it increase funding for civil legal aid in the 2022 legislative session to provide greater access to legal representation for both parties in family law cases, particularly cases involving minor children. (Chapter 7)
- Stakeholders should convene to propose to the Washington State Legislature during the 2022 legislative session that it fund a pilot project, in selected counties, that would provide appointed counsel at public expense to indigent parents in family law cases in which one or both parents are seeking restrictions on the other parent's residential time with a child. The pilot project should be tailored to the needs of the chosen county(ies), should provide metrics to evaluate the fiscal and justice impact by gender, race, ethnicity, and LGBTQ+ status, and should include a public report on the findings. (Chapter 7)
- In order to make Washington law's recognition of committed intimate relationships more accessible and understandable to people who cannot afford a lawyer, the AOC should develop forms to be used to file petitions brought under that doctrine. (Chapter 7)
- In order to improve access to the courts for litigants in cases involving gender-based violence, the Washington State Legislature should allocate increased funding to the Office of Civil Legal Aid for more civil legal aid attorneys who can assist victims of domestic and sexual violence with their legal issues. Although Washington State has enacted laws that provide protections

to victims of domestic and sexual violence, legal assistance is needed to enforce them. (Chapter 8)

- Stakeholders, including the District and Municipal Court Judges Association (DMCJA) and Superior Court Judges Association (SCJA), in coordination with AOC, should review the HB 1320 work group's future recommendations[2] and develop a model guidance memo to implement them. (Chapter 8)
- Given that the evaluation of Domestic Violence Moral Reconation Therapy (DV-MRT) showed it to be a promising practice in reducing domestic violence recidivism, and that litigants bear significantly lower costs to participate in the program, more courts in Washington State should consider implementing court-based DV-MRT programs. (Chapter 8)
- The Gender and Justice Commission should support the Tribal State Court Consortium's efforts regarding a judicial branch response to the pervasive problem of Missing and Murdered Indigenous Women and People and enforcement of Tribal Court protection orders. (Chapter 8)
- Juvenile courts, including those in rural areas, should have designated probation counselors who are trained to identify and respond to sexually exploited children. Where a youth is on probation, their probation counselor should be part of any multidisciplinary team convened to help and to provide services to an exploited minor. (Chapter 10)
- Washington State should expand therapeutic courts for victims/survivors of exploitation. Defendants charged with crimes related to exploitation should be admitted into those courts. Those therapeutic courts should place an emphasis on connecting these individuals with robust local services, including housing, substance abuse and mental health treatment, and training/employment opportunities, to facilitate exit from the sex industry. (Chapter 10)
- All courts and courtrooms should be trauma-informed and trauma-responsive. (Chapter 10)
- To provide incarcerated parents with meaningful court access, stakeholders should determine: (1) whether to increase the response deadline beyond 20 days for incarcerated

[2] This work group will be convened by the Washington State Supreme Court Gender and Justice Commission, with its report due to the courts by July 1, 2022.

parents in family law matters, and (2) how to ensure that these parents can access mandatory family law forms and legal information. (Chapter 16)

- The Washington State Legislature, donors, and other funders should consider allocating funding to indigent incarcerated parents for access to legal services, including representation in their family law matters involving minor children. (Chapter 16)
- Incarcerated parents who are ordered into treatment by dependency and family law courts should have access to such treatment while incarcerated. DOC should update its eligibility requirements for such treatment services to prioritize participation by these parents within a timeline that allows them to comply with such civil court orders relating to their children. DOC should also tell the court when a parent's failure to participate in ordered treatment is due to lack of DOC resources, rather than the parent's unwillingness to comply. (Chapter 16)

Goal 3

Address the impacts of the vast increase in convictions and detentions over the last generation: (a) recognize and remedy the increase in conviction rates and incarceration length for women, especially Black, Indigenous, and other women of color, and (b) recognize and remedy the consequences that the increased incarceration of Black, Indigenous, and other men of color over the last generation has had on women and other family members.

Recommendations

- To reduce disparities in arrest, detention, and resolution of juvenile cases, and to reduce the number of girls detained for status and misdemeanor offenses, stakeholders should: (Chapter 9)
    - Identify and develop, throughout the state, community-based resources that address the needs of youth involved in the juvenile justice system for status offenses so they may be safely served in the community.
    - Identify and develop, throughout the state, culturally-competent community mentoring programs upon which schools, law enforcement, prosecutors, and courts can draw instead of referring low-risk criminal behavior for prosecution.

- To assess and develop gender-responsive and culturally-competent resources for status and juvenile offenders that respond to individualized needs derived from individualized assessment, stakeholders should: (Chapter 9 and Chapter 10)
    - Follow the status of the Kitsap County girls' court, including WSCCR's current evaluation, and consider new recommendations based on this data.
    - Maintain an inventory of gender- and LGBTQ+-specific programming and services offered at Echo Glen Children's Center and Ridgeview Group Home and track their progress. Based on tracking of these programs (and any others), identify gaps in gender-responsive programming and build programs to address the gaps.
    - Maintain an inventory of the gender- and LBGTQ+-specific programming and services offered through Washington's juvenile courts. Track program effectiveness, identify program gaps and deficiencies, develop solutions to deficiencies, and fund effective program development.
- Washington State should institute demand-reduction efforts specific to the exploitation of children, including: (Chapter 10)
    - Stakeholder trainings should address the demand for sex from children and identify upstream strategies to prevent Commercial Sexual Exploitation of Children (CSEC).
    - All criminal statutes that address demand for sex from children should be enforced.
    - Broader prevention efforts should include public awareness and education about the harms of sex buying and the role of buyers as exploiters of children.
    - Technology-based interventions should address the demand for children on a broad scale.
- Continue to develop multidisciplinary systems-wide responses, with a focus on upstream prevention and a public health approach. Judges in state and tribal courts should be encouraged to convene and work with broad multidisciplinary collaborations of those who come in contact with sexually exploited minors and young adults. Those collaborative groups should develop locally appropriate policies and procedures for multidisciplinary responses designed to keep youth out of the system, and to respond in a trauma-responsive manner

when system involvement is necessary. To the extent possible, the group should include systems and service providers (e.g., courts, law enforcement, defense attorneys, service providers, survivors, school systems, child welfare, health care providers). (Chapter 10)

- The Washington State Legislature should adequately fund both the receiving centers authorized under the Safe Harbor Bill HB 1775 and residential treatment beds for sexually exploited youth who suffer from co-occurring disorders, including Post-Traumatic Stress Disorder (PTSD), substance abuse disorder, and other mental health issues. (Chapter 10)
- Drugs are often used to coerce people as a means of control. The Washington State Legislature should consider amending the definition of coercion in trafficking and CSE laws to include supplying, furnishing, or providing any drug or illegal substance to a person, including to exploit the addiction of the person or cause the person to become addicted to the drug or illegal substance. (Chapter 10)
- The Washington State Legislature should consider enacting an affirmative defense for victims of sexual exploitation to other crimes committed as a direct result of their exploitation (exploitation as victims of crimes includes but is not limited to commercial sexual abuse of minors [CSAM], promoting CSAM, trafficking in the first or second degree, dealing in depictions of a minor engaged in sexually explicit conduct). (Chapter 10)
- Current efforts in Washington State to reduce justice system involvement and its harms for adults in the sex industry vary by jurisdiction and are implemented through discretionary and locally implemented policies. The Governor, Legislature, or Attorney General should create a bipartisan collaborative group to work with appropriate state, county, local, and tribal law enforcement, prosecutors, and stakeholder groups to recommend best practices and guidelines. (Chapter 10)
- The Washington State Legislature recently enacted SB 5476 (2021), which codifies simple drug possession as a misdemeanor; requires law enforcement to divert certain suspects to assessment, treatment, or other services and encourages prosecutors to do the same; and invests in programs and oversight. The Gender and Justice Commission should partner with stakeholders to evaluate that new law's impact on women and girls, including Black, Indigenous, and other women and girls of color, in terms of incarceration rates, legal financial

obligations (both of their own and of their family members and partners), treatment impact, and public safety. (Chapter 11)

- During the 2022 legislative session, the Washington State Legislature should again consider legislation to retroactively account for trauma-based criminalization and incarceration, similar to the way that the Survivors Justice Act, HB 1293 (proposed during the 2021 Regular Session) and N.Y. Penal Law § 60.12 address this problem in the area of domestic violence trauma. The Legislature should consider whether other sources of trauma, such as adverse childhood experiences, surviving through war, etc., should be included in any such legislation. (Chapter 11 and Chapter 14)
- In the short term (next two years), criminal justice stakeholders should convene to consider whether to amend CrR 2.2, CrRLJ 2.2, CrR 3.2, and/or CrRLJ 3.2 to limit trial court power to issue bench warrants for failures to appear and to consider alternative methods of addressing non-appearances. (Chapter 11)
- To provide effective gender-responsive and trauma-informed programs, policies, and procedures to all justice-involved women and non-binary, transgender, and other gender nonconforming individuals, the Washington State Department of Corrections (DOC) should consider: (Chapter 12)
    - Expanding access to more types of programs with guidance from the incarcerated individuals who would be using the programs.
    - Expanding locations of program administration. DOC facilities appear to be the only location at which gender-responsive programming is available. County jail populations might be too transitory to benefit from these programs, but people subject to out of custody supervision might benefit from this valuable tool.
    - Providing training for staff who work with individuals on Community Supervision to increase their understanding of gender-responsive and trauma-informed principles.
    - Ensuring that DOC Policy 610.650-Outpatient Services and the "Washington DOC Health Plan" include complete women's health care services for women incarcerated in DOC facilities, and that these policies are implemented as written.

  - Making all DOC policies, practices, and programs gender-sensitive, responsive, and trauma-informed.
  - Reducing trauma and enhancing safety through the preservation of human dignity by developing trauma-informed alternatives to strip search.
- To systematize and incentivize more equitable pretrial, charging, and plea bargaining practices, prosecutors in every jurisdiction in Washington State should conduct an internal analysis of their use of prior arrest, charge, and conviction data in decisions regarding pretrial detention and bail, charging, and plea bargaining, to assess the public safety impact and the gender, race, ethnicity, and LGBTQ+ impacts of using those prior records. Prosecutors should also revisit policies that limited consideration of prior records as part of office charging and plea-bargaining guidelines, to determine more accurate means of protecting public safety while reducing disproportionate impacts. (Chapter 13 and Chapter 11)
- To increase the use and effectiveness of pre-arrest and pre-file diversion and deferral programs, the Washington State Legislature should direct the Washington State Institute for Public Policy (WSIPP) to partner with relevant state, local, and tribal experts to create and maintain an inventory of criminal justice diversion programs that have proven to be effective for different populations and different needs, with a particular emphasis on cultural competence, trauma-informed care, and gender-responsiveness. (Chapter 13)
  - Courts should not order defendants into any program or treatment that has not proven to be effective enough to make that list.
- For policy-makers: Consider legislation amending RCW 9.94A.535(1) to recognize that primary caregiving constitutes a mitigating sentencing factor. It is a mitigating factor because family structures can provide support to rehabilitating offenders; courts should therefore be able to consider the role of the offender within their family when determining sentences. Failing to recognize 'primary caregiving' as a mitigating factor also adversely impacts those who generally carry the burden of caregiving, that is, predominately women and families without resources. This should be done in the next two years or as soon as possible. (Chapter 14)

- For policy-makers: To reduce the disproportionate effect of mass incarceration and lengthy sentencing regimes, consider enacting legislation, such as HB 1282 which was considered in the 2021 regular session, to make all inmates eligible for earned early release time at the rate of 33% or higher for all sentences and enhancements. (Chapter 14)
- To ensure that LFOs do not pose a barrier to completing a sentence, exiting the criminal legal system, and successfully reentering the community, the legislature should consider enacting the following Washington State Criminal Sentencing Task Force LFO recommendations: (Chapter 15)
    - Address interest on restitution:
        - Change current law to give judges the discretion to waive or suspend interest on restitution, rather than it being mandatory, based on a finding of current or likely future ability to pay.
        - If restitution is imposed, allow accrual of interest to begin following release from the term of total confinement.
        - Lower the current 12% interest rate on restitution.
    - Waive existing non-restitution interest.
    - Victim Penalty Assessment (VPA):
        - Provide trial court judges with the discretion to reduce or waive the VPA upon a finding by the court that the defendant lacks the present and future ability to pay.
        - Provide trial court judges with the discretion to eliminate stacking of multiple VPAs (*multiple VPAs imposed at same time*) based on a finding that the defendant lacks the present and future ability to pay.
- Convene stakeholders to collaborate on legislation requiring, at a minimum, that superior courts means-test LFOs which are currently mandatory, including, for example, the victim penalty assessment. (Chapter 15)
- Convene stakeholders to study means-testing imposition of all LFOs in courts of limited jurisdiction, requiring a report and recommendations by November 2022. (Chapter 15)
- Convene stakeholders to propose draft revisions to CrR 3.4(d) and CrRLJ 3.4(d) concerning the necessity of an individual's presence at a hearing ordered solely to address LFO collection,

and the advisability of issuing warrants when an individual fails to appear at such a hearing. Stakeholders should consider whether warrants should still be permitted where, for example, there is proof by a particular standard (e.g., preponderance) that the failure to pay is willful. (Chapter 15)

- Ask AOC to revise Appendix H of the Felony Judgment & Sentence Form (re Community Custody) to include a space for waiving supervision fees. While a sentencing judge in superior court can waive DOC supervision fees at sentencing, the standard form community custody Appendix H used by superior courts throughout Washington includes language requiring payment of supervision fees, without advising the court or the defendant of the court's ability to waive the fee. (Chapter 15)
- Convene stakeholders to make recommendations concerning the use of collection agencies to collect LFO debt. Stakeholders should examine, at a minimum: (1) whether LFOs should be exempt from referral to collection agencies; (2) whether to increase the minimum collection referral period (currently 30 days under RCW 19.16.500(2)); and (3) whether to reduce collection agency fees (currently up to 50% of the first $100,000 under RCW 19.16.500(1)(b)). (Chapter 15)
- The Washington State Legislature may want to consider ways to equitably increase access to and eligibility for Parenting Sentencing Alternatives to prison confinement, so more parents can serve more of their sentences in the community with their children. Specific consideration should be given to any racial, ethnic, or gender disparities within the existing Family and Offender Sentencing Alternative (FOSA) and the Community Parenting Alternative (CPA) programs. (Chapter 16)
- Stakeholders, in consultation with experts on child psychology and on parent-child visitation in incarceration settings, should convene county jail leadership across Washington State to develop guidance on meaningful in-person visitation for parents and children in those settings. (Chapter 16)

Goal 4

Reduce reliance on revenue from court users to fund the courts.

Recommendations

- Stakeholders should propose an amendment to GR 34 to allow fee waivers based solely on the litigant's attestation of financial status, without additional proof. Allowing presentation of such waivers to the Clerk or other designated non-judicial officer should also be considered to help streamline the procedure. Information about fee waivers should be prominently displayed (in multiple languages) at the courthouse and online. (Chapter 1)
- Stakeholders should convene a workgroup to analyze the application of GR 34 fee waivers to name change recording fees. The workgroup should consider ways to reduce barriers to name change recording for indigent individuals. (Chapter 1)
- GR 34 is not always interpreted to extend fee waivers to fees associated with parenting classes, family law facilitators, and other family law costs and fees. GR 34 should be amended to explicitly extend waivers to all such fees. (Chapter 1)
- Courts should be required to accept electronic (as well as hard copy) filings and submissions of all documents. (Chapter 1)
- To ensure that LFOs do not pose barriers to completing a sentence, exiting the criminal legal system, and successfully reentering the community, and to stop dependence on LFO revenue to fund the courts and victim services, by mid-2022, convene stakeholders to: (1) assess what portion of court funding and victim services funding is supported by LFOs; (2) assess the impact of means-testing LFOs currently supporting court funding and victim services funding; (3) assess the economic and social impact of eliminating referral of debts to collection agencies; and (4) recommend alternative sources of funding for courts and victim services. (Chapter 15)

Goal 5

Identify the best evidence-based curricula for judicial and legal education on gender and race bias.

Recommendations

- The judicial branch should deliver regular workplace harassment prevention trainings that drive real changes. (Chapter 4)
- The judicial branch and its leaders should follow best practices to design and deliver prevention trainings for all types of workplace harassment, including harassment based on gender, race, ethnicity, or LGBTQ+ status. (Chapter 4)
- These trainings should focus on changing behavior, not on changing beliefs. Anti-harassment programs should encourage the support of certain populations that are more likely to experience workplace harassment than others (including, but not limited to sexual and gender minorities; women; Black, Indigenous, and employees of color). These training programs should be evaluated to determine whether they are effective and what aspects of the training(s) are most important to changing culture. (Chapter 4)
- By not later than 2022, the Court Education Committee of the Board for Judicial Administration (BJA) should partner with the Gender and Justice Commission to develop a training for judges on how to model and, if necessary, control their courtrooms in ways that immediately address inappropriate gender-biased conduct on the part of attorneys and court personnel. (Chapter 4)
- To improve the effectiveness of measures, such as anti-bias training, to reduce bias towards litigants in court, the Gender and Justice Commission should authorize the creation of a list of trainings for judges, court staff, and potential jurors, which have proven to be effective at reducing bias in the judiciary and among jurors. (Chapter 5)
- In 2022, the Gender and Justice Commission should convene stakeholders to evaluate what evidence-based programs are most effective in educating judicial officers, attorneys, and third-party professionals in family law cases about domestic violence and racial or gender

bias, including training on bias based on gender, sexual orientation, gender identity, and intersecting implicit biases. (Chapter 7)

- Based on the results of this evaluation, AOC should update and continue to publicize its training curricula for Title 26 Guardian ad Litem (GALs) and Courthouse Facilitators to include or expand training on domestic violence and on bias based on race, ethnicity, gender, sexual orientation, gender identity, and intersecting implicit biases. Training curricula should also be updated as needed to reflect changes in Washington law that have increased legal recognition and protections for gay and lesbian couples and parents. (Chapter 7)
- In light of the findings about the disparate impact of gender-based violence on women, Black, Indigenous, and people of color, immigrants, those living in poverty, and LGBTQ+ people and the continuing barriers to their access to justice, the Gender and Justice Commission should partner with stakeholders and experts to suggest modifications to judicial branch education on gender-based violence for judges, law enforcement, attorneys, and others working on such cases. (Chapter 8)
- Washington State should require regular evidence-based education and training for all court personnel (including judges, court staff, prosecutors, defense attorneys, and law enforcement) about the dynamics and complexities of trauma and human trafficking. It should address the impact of systemic racial, cultural, and gender-based bias on those affected by CSE. (Chapter 10)
- Training for judges and court staff should acknowledge and provide tools to reduce the effects of secondary or vicarious trauma on judges, staff, and the people they serve. (Chapter 10)
- Judicial officers should be trained on the social and emotional needs of children of incarcerated parents. This would equip judicial officers hearing dependency and family law cases to craft visitation orders consistent with best practices for facilitating the resilience of children of incarcerated parents. (Chapter 16)

IV. Pilot Project Methods

A. Process for Selecting Pilot Projects

As part of the 2021 Gender Justice Study, the Gender and Justice Commission conducted five projects to fill research and data gaps identified in the course of conducting the study. In order to identify projects, the Commission solicited ideas from stakeholders. After the Commission vetted and scoped the project proposals submitted by stakeholders, proponents of select proposals were invited to present their project ideas to the Gender Justice Study Task Force and the Gender Justice Study Advisory Committee.

Advisory Committee members made recommendations to the Commission about which projects to implement. The Task Force Members then applied an assessment tool to each pilot (Appendix B). The assessment tool includes criteria to ensure selected projects were evidence-based and feasible, and would advance justice and promote equity. The Commission originally selected four pilot projects in 2019, and was able to additionally conduct a survey of jury service in trial courts in 2021 when an opportunity to partner with the University of Washington School of Public Health arose.

B. Pilot Projects Selected

1. Washington State Courts Workplace Harassment Survey

A survey of employees working in Washington courts, Superior Court Clerks' Offices, and Judicial Branch agencies. The survey includes information on workplace sexual harassment; harassment based on gender, race, ethnicity, and sexual orientation; and general workplace bullying and harassment.

2. Evaluation of Washington State Domestic Violence – Moral Reconation Therapy (DV-MRT) Programs Process and Outcomes

An evaluation of the implementation of and effectiveness of DV-MRT, a specific form of treatment for domestic violence offenders that a small number of courts in Washington are offering.

3. Incarceration of Women in Washington State: Multi-Year Analysis of Felony Data

Analyses of Washington State Caseload Forecast Council felony data to identify racial inequities in the incarceration of women.

4. Evaluation Report: On-Site Childcare Programs in County Courthouses & Their Effect on Access to the Justice System

An evaluation of two courthouse childcare programs in Washington State to determine how they are implemented and what role they may have in addressing barriers to court access.

5. Jury Diversity: A Survey of Washington State Trial Courts - Analysis of Court Demographic Data Collection and Juror Accommodations

A survey of Washington trial courts to identify: 1) demographic data collected on potential jurors at each stage of the jury selection process, 2) barriers to data collection, 3) accommodations made for jurors, and 4) barriers to providing accommodations.

V. 2021 Gender Justice Study Terminology, Methods, and Limitations

A. Terminology

1. Race and Ethnicity

There are significant limitations to terms used to discuss race and ethnicity. Race and ethnicity terms are socially constructed and each term comes with unique limitations.[1] Looking at the terms Hispanic, Latinx, and Latina/o as an example highlights this complexity. "Hispanic" is rooted in a history of Spanish "colonialism, slavery, [and] genocide . . . across the Americas."[2] The term "Latinx" is used by a wide range of individuals and organizations in place of Latina/o as a more inclusive, gender-neutral term[3] However, in 2019 the Pew Research Center found that only three percent of survey respondents who identified as Hispanic or Latino reported using the term "Latinx" to describe themselves.[4] This Pew survey highlights that there is not consensus around the best term(s) to use. In addition, there are significant limitations of terms that have been used as identifiers for so many different aspects of one's identity such as race, ethnicity, shared Spanish colonial histories, fluency in the Spanish language, and geographic ancestry.[5]

Terms used to describe and categorize Indigenous populations are also riddled with limitations and problems. The Urban Indian Health Institute, in its report titled MMIWG: WE DEMAND MORE, indicates that they "use the terms Native, Native American, and American Indian/Alaska Native interchangeably in [their] report to acknowledge the varying ways that North American

[1] Carlos E. Santos. *The History, Struggles, and Potential of the Term Latinx*, 4 LATINA/O PSYCH. TODAY 7 (2017).
[2] Robyn Schelenz & Nicole Freeling, *What's in a Name? How the Concepts of Hispanic and Latino Identity Emerged*, UNIV. OF CAL. NEWSROOM (Oct. 10, 2019), https://www.universityofcalifornia.edu/news/whats-in-a-name-how-concepts-hispanic-and-latino-identity-emerged.
[3] Santos, *supra* note 1, at 11.
[4] Luis Noe-Bustamante, Lauren Mora & Mark Hugo Lopez, *About One-in-Four U.S. Hispanics Have Heard of Latinx, but Just 3% Use It*, Pew Rsch. Ctr. (Aug. 11, 2020), https://www.pewresearch.org/hispanic/2020/08/11/about-one-in-four-u-s-hispanics-have-heard-of-latinx-but-just-3-use-it.
[5] Santos, *supra* note 1, at 11.

Indigenous peoples are forced to identify within the American racial structure and English language."[6]

There are also significant data limitations for Asian and Native Hawaiian and other Pacific Islander populations in most datasets and research. These are discussed in more detail in the section on data limitations, but deficiencies in the underlying data often make it challenging to identify the best terminology to use for these populations. For example, research and datasets often do not clearly describe how Native Hawaiian and Other Pacific Islanders were coded in the dataset, making it challenging to ensure we were using language in this study that best describes the actual underlying data.

This study also acknowledges that race is a social construct and recognizes the limitations of both the terminology coded into datasets and used in research, and the race and ethnicity data that this report relies upon. Often reports, research articles, and datasets cited here do not describe if race or other demographic information was self-reported or, if so, what options individuals were given. This report generally uses the terminology that was used by the authors of the underlying source to avoid the risk of inadvertently misrepresenting the underlying research findings. For example, if a study participant self-identified as Hispanic, this is the term used when discussing that research in this report. While this approach preserves the underlying research and data most closely, it also creates an inconsistent use of race and ethnicity terminology throughout this report.

2. Sex and Gender Identity

The underlying datasets and research often use only binary gender options, do not clarify how transgender individuals were coded, or fail to differentiate between gender identity and sex.[7] These limitations are discussed in more detail in the data limitations section. From a terminology

[6] ABIGAIL ECHO-HAWK, ADRIAN DOMINGUEZ & LAEL ECHO-HAWK, MMIWG: WE DEMAND MORE 4 (2019), https://www.uihi.org/resources/mmiwg-we-demand-more.

[7] The Centers for Disease Control and Prevention defines "gender identity" as "an individual's sense of their self as man, woman, transgender, or something else" and defines "sex" as "an individual's biological status as male, female or something else. Sex is assigned at birth and associated with physical attributes, such as anatomy and chromosomes." *Terminology: Adolescent and School Health*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 18, 2019), https://www.cdc.gov/healthyyouth/terminology/sexual-and-gender-identity-terms.htm.

perspective, this makes it challenging to determine the best terms to use when discussing the research and underlying data. For example, most prison and jail datasets use a female/male binary. This fails to account for anyone who is intersex, nonbinary, or otherwise does not identify as female or male. In addition, Washington State anecdotes and research indicate that incarcerated individuals are often housed based on their sex assigned at birth rather than their gender identity.[8] This means that the female and male coding for these datasets actually represents "individuals incarcerated in female facilities" and "individuals incarcerated in male facilities" regardless of their true gender identity. The authors have tried to be thoughtful and accurate throughout this report by critically examining how the sex or gender identity data was collected, and the deficiencies in that dataset in order to use the most accurate terms throughout.

3. Sexual Orientation

Underlying research and datasets are also not always clear on how data on sexual orientation has been collected or coded. Some researchers have collected these data with discrete self-identified response options (e.g., heterosexual, lesbian, gay, or bisexual) while other researchers have collected data using questions about attraction or behaviors, then used these data to code people as heterosexual or non-heterosexual. Research and reports will often also conflate gender identity and sexual orientation, or combine the analysis for "sexual and gender minorities." Throughout this report the authors have been careful to accurately describe the population included in the underlying research and data and to disentangle, when possible, the findings based on sexual orientation and those based on gender identity. The authors also tried to understand the complex intersection of gender identity, sexual orientation, and other factors in

[8] Disability Rights Washington has collected extensive data through interviews with transgender prisoners in Washington. The Gender and Justice Commission received a presentation of preliminary data in 2019. The final report form Disability Rights Washington is forthcoming. GENDER AND JUSTICE COMMISSION FRIDAY, NOVEMBER 1, 2019 MEETING NOTES 6 (2019), https://www.courts.wa.gov/content/publicUpload/Gender%20and%20Justice%20Commission%20Meeting%20Materials/20191101_m.pdf; DISABILITY RTS. WASH., TRANS IN PRISON JUST. PROJECT, TRANS JUSTICE WORK IN WASHINGTON STATE PRISONS (2019), https://www.courts.wa.gov/content/publicUpload/Gender%20and%20Justice%20Commission%20Meeting%20Materials/20191101_d.pdf; Nick Garber, *She Protested in Seattle, Then Spent 2 "Terrifying" Days in Jail*, PATCH (June 8, 2020), https://patch.com/washington/seattle/she-protested-seattle-then-spent-2-terrifying-days-jail.

the rare cases where the data allowed. In cases where the underlying data and sources present combined information for lesbian, gay, bisexual, and transgender populations, or when the report is talking about a body of literature that address both sexual orientation and gender identity, the term LGBTQ+ is used for consistency. The use of this term is meant to be inclusive of individuals who identify as Two-Spirit, Intersex, Asexual, etc.

4. Other Terminology

There are other terms used in the report where there is a lack of consensus about the best term to use (e.g., using “survivor” or “victim” in cases of domestic or sexual violence). In these instances, we have tried to note the limitations of the terms being used within the relevant chapters.

B. Methods

1. Combining Various Types of Expertise

A study of this type requires analysis of statutes, court rules, case law, internal policies and procedures, anecdotal evidence, social science research, and primary datasets. For this reason, we conducted the study through extensive collaboration between legal professionals, social science researchers, and people with lived experience working in or navigating the court and justice systems. We fostered this cross-sector collaboration in three primary ways:

1) Creating small teams for each chapter of the report that included at least one legal expert and at least one social science researcher. These experts worked together to write a first draft of the report, merging the analysis of the legal framework with the analysis of the social science evidence and data.

2) Seeking consistent feedback and guidance throughout the research and writing from members of the Gender and Justice Commission (see membership above) and the Gender Justice Study Advisory Committee (see membership above).

3) Broadly circulating drafts of the sections to individuals and organizations with diverse perspectives and relationships with the court and justice systems, meeting with these experts, and integrating feedback from these experts.

2. Inclusion Criteria for Research and Data

We applied flexible inclusion criteria when conducing literature reviews (see Appendix A). The reviews were traditional narrative literature reviews that sought to provide an accurate and unbiased representation of the body of literature on a topic. These were not systematic reviews, which would have required strict inclusion and exclusion criteria, identical search terms across all members of the study team, and documentation of the number of abstracts and articles reviewed and included or excluded. Traditional narrative literature reviews were more appropriate for the goals of this study, which aims to present the literature on numerous parts of the justice system, and the complicated and nuanced interactions between the various parts.

We conducted the literature reviews and legal research between April 2019 and May 2021, and each chapter was researched at different times within that window. Once the literature reviews and legal analyses were completed, we attempted to add any new research, data, case law, and statutory changes that became available between the completion date for that chapter and June of 2021. However, we did not conduct formal supplemental literature reviews or legal research for each chapter once the initial literature review for that chapter was completed. It is possible that some new research or changes to the legal framework were not captured.

C. Limitations

1. Lack of Washington Specific Data and Data That Looks at Gender or the Intersection of Gender with Race, Ethnicity, Income, or Other Factors

One goal of the report was to analyze Washington State specific data, research, and legal frameworks to identify gender inequities in the court and justice systems. Another goal was to study whether (and if so, how) those inequities were amplified for people who are also subjected to poverty, racism, homophobia, ableism, and other forms of discrimination. Our work was often limited by a lack of Washington (and sometimes national) data and research that analyzes data by gender. Looking at how gender and race, sexual orientation, income, and other factors interact was even more challenging due to insufficiencies in the data. There is a pressing need to:

1) Collect more data, and data that is high-quality;

2) Collect data that goes beyond the male/female gender binary, and that captures sexual orientation, income and granular race and ethnicity; and
3) Generate reports and data fact cards for existing datasets that look at how different demographic factors interact or amplify inequities.

2. Limitations of Existing Datasets

A major limitation of this study is that it relies on research and data that are imperfect. This is particularly true for demographic information such as data on sex, gender, race, and ethnicity. As noted above, the datasets and research often use only binary gender options, do not clarify how transgender individuals are being coded, or fail to differentiate between gender identity and sex. This limitation in the data makes it difficult to understand the experiences and potential disparities impacting transgender and gender non-binary individuals. In addition, this suggests a high likelihood of gender-misclassification within the data where these populations are likely to go uncounted or be inaccurately classified. With regard to data related to incarceration specifically, individuals are likely misclassified in incarceration-related data included in this report if they are housed in facilities based on their sex assigned at birth rather than their gender identity.

Race and ethnicity data is also limited by several factors. It is often unclear if an individual's race and ethnicity was self-identified or based on the assumptions of an observer. Anecdotal evidence suggests that race or ethnicity data that is not self-identified is much less accurate in correctly identifying some populations compared to others. This indicates that data which is not self-identified is inaccurate, but also that the inaccuracies are not consistent across all racial or ethnic groups.[9] Even when an individual is given the opportunity to self-identify their race and ethnicity, the categories from which they must choose may lack granularity or have other limitations. Data collected with insufficient granularity can mask disparities. For example, when datasets combine

[9] One researcher shared her experience cross-checking race and ethnicity healthcare data by calling respondents and asking them to self-identify their race. The researcher found that the rate of the data matching the self-identified responses "was high for 'White' and 'Black' (the rate was 97 and 96 percent, respectively). Only 52 percent of Asian, 33 percent of Hispanic or Latino, and 33 percent of American Indian or Alaska Native beneficiaries were correctly identified." Heather Krause, *What To Do When You Can't Pick The Data*, WE ALL COUNT (Jan. 22, 2021), https://weallcount.com/2021/01/22/what-to-do-when-you-cant-pick-the-data.

the very diverse populations of Asian and Native Hawaiian or Other Pacific Islanders into one category, it overgeneralizes the data and often hides disparities experienced by some populations within that category. This poses problems, because data for many Native Hawaiian and Other Pacific Islander populations indicates that these populations suffer clear disparities in education and other arenas – more than other populations included in the usual "Asian Pacific Islander" category.[10] This is also true for recent African immigrant and other immigrant populations whose unique outcomes and needs are masked through data aggregation.[11] In addition, there is a lack of consistency and consensus in how to code and analyze race and ethnicity data, leading to these variables sometimes being handled separately and other times being merged into one race/ethnicity variable. This makes it difficult to compare numbers across multiple datasets. In addition, some methods can inflate or deflate numbers for certain populations, particularly Latinx populations.[12]

Many populations are almost completely erased from the data through imperfect data collection. For example, people who identify as more than one race are often coded as "multiracial." The multiracial category can be valuable, because it is important to identify disparities for populations who identify as two or more races. But the multiracial category can also be misleading and artificially deflate the numbers for other racial categories. This occurred with the 2010 Census data: it indicates that high number of Indigenous, Black, and Asian populations were likely to identify with more than one race;[13] so Indigenous individuals might identify as Black or Asian and

[10] *Asian Americans and Pacific Islanders in Washington State*, WASH. STATE COMM'N ON ASIAN PAC. AM. AFFS. (2019), https://capaa.wa.gov/resources; SHIRLEY HUNE & DAVID T. TAKEUCHI D, ASIAN AMERICANS IN WASHINGTON STATE: CLOSING THEIR HIDDEN ACHIEVEMENT GAPS (2009), https://www.digitalarchives.wa.gov/GovernorGregoire/oeo/educators/asian_american_ach_gap_report.pdf; Samuel D. Museus & Peter N. Kiang, *Deconstructing the Model Minority Myth and How it Contributes to the Invisible Minority Reality in Higher Education Research*, 142 NEW DIRECTIONS FOR INSTITUTIONAL RSCH., 5 (2009); Robert T. Teranishi, *Asian American and Pacific Islander Students and the Institutions That Serve Them*, 44 CHANGE: MAG. HIGHER LEARNING, 16 (2012).

[11] Randy Capps & Michael Fix, *Sensitive Subjects: Research Choices and Presentational Challenges in Studying Immigrant Children and Families*, 141 NEW DIRECTIONS FOR CHILD & ADOLESCENT DEV. 79 (2013).

[12] *See, e.g.*, TATIANA MASTERS ET AL., INCARCERATION OF WOMEN IN WASHINGTON STATE: MULTI-YEAR ANALYSIS OF FELONY DATA (2020).

[13] *2010 Census Shows Multiple-Race Population Grew Faster Than Single-Race Population*, U.S. CENSUS BUREAU (Sept. 27, 2012), https://www.census.gov/newsroom/releases/archives/race/cb12-182.html.

be coded as multiracial; the result is that they are not accounted for in the datapoints for Indigenous populations, thereby deflating those numbers.

3. Highlighting Disparities Can Perpetuate Stereotypes

Learning about extreme disparities can cause people to become more, rather than less, supportive of policies that create and enforce those disparities, driving people to support harsher criminal-justice policies based in racial bias.[14,15] In the case of the justice system, the discussion of racial disparities can often trigger negative stereotypical associations with Black, Indigenous, and other people of color.[16] Without personal experience with racial inequality, people may understand disparities differently. Some interpret extreme disparities in the justice system to be a result of systemic racial bias, while others attribute the disparities to the incorrect belief that some racial groups are more prone to engage in criminal activity.[17] In that way, revealing disparities in the justice system might ingrain bias, even though the bias results from racism and sexism. For example, witnessing multiple police encounters with a particular race may cause someone to conclude that a group has inherently higher crime rates, rather than realizing certain groups are targeted by police[18]

But it is inaccurate to attribute such disparities to actual differences in criminality by race. The disproportionality of Black, Indigenous, and people of color represented in the criminal justice system is startling, and the way these disparities are discussed is critical. In any discussion of inequity, it is important to avoid contributing to bias.

The 2021 Gender Justice Study presents extensive data on disparities in the justice system based on race, gender, sexual orientation, and other factors. It is essential that readers of this report understand that these inequities are a result of historical and current, institutional and individual,

[14] Rebecca C. Hetey & Jennifer L. Eberhardt, *The Numbers Don't Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System*, 27 CURRENT DIRECTIONS PSYCH. SCI. 183 (2018).
[15] Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCH. SCI. 1949 (2014).
[16] Hetey & Eberhardt, *supra* note 14.
[17] *Id.*
[18] Yuan Meng & Fei Xu, *How Do Disparities Reproduce Themselves? "Ground Truth" Inference from Utility-Maximizing Agent's Sampling Behavior*, COGSCI 903 (2020).

and implicit and explicit bias and discrimination in the system. There is no evidence to support that these disparities are a result of different rates of criminality.

4. The impact of COVID-19 and other resource limitations

The Gender and Justice Commission began the work of scoping and planning for the 2021 Gender Justice Study in 2016. When much of the content of this report had already been drafted, the COVID-19 pandemic hit in early 2020. The study authors acknowledge that this event impacted every aspect of life, including the justice system. Data clearly shows that the pandemic has disproportionally impacted historically marginalized communities such as Black, Indigenous, and communities of color with higher rates of infection, higher COVID-related hospitalizations and deaths,[19] and harsher financial impacts.[20] It has also impacted Asian communities, in particular, with increased violent hate crimes. The data also shows that women have disproportionally shouldered the increased childcare responsibilities resulting from school and childcare closures,[21] and have left the workforce at incredibly high rates.[22]

The data on the impacts of COVID-19 is still developing since the pandemic is ongoing. In addition, the Gender and Justice Commission did not have the resources to expand the scope of this

[19] *COVID-19 Data Dashboard*, WASH. STATE DEP'T OF HEALTH, https://perma.cc/F7FT-CS2Y (last accessed May 28, 2021); *The COVID Racial Data Tracker*, THE ATLANTIC, https://perma.cc/4MFG-CV6W (last accessed May 31, 2021); *COVID-19: Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://perma.cc/Q6M9-75TT (last accessed May 31, 2021); *COVID-19 Hospitalization and Death by Race/Ethnicity*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://perma.cc/9TNQ-TS9E, (updated May 26, 2021); *see also* Gina Kolata, *Social Inequities Explain Racial Gaps in Pandemic, Studies Find*, N.Y. TIMES (Dec. 9, 2020), https://www.nytimes.com/2020/12/09/health/coronavirus-black-hispanic.html.

[20] *Quick Figures: Dramatic Decline in Employment Hits Women Even More Severely Than Men*, INST. FOR WOMEN'S POL'Y RSCH. (2020), https://iwpr.org/wp-content/uploads/2020/05/QF-Breadwinner-Mothers-by-Race-FINAL.pdf.

[21] Dalvin Brown, *Women Take on a Greater Share of Parenting Responsibilities Under Stay-at-Home Orders*, USA TODAY (May 8, 2020), https://www.usatoday.com/story/money/2020/05/08/women-take-on-more-their-kids-remote-learning-responsibilities/5178659002; Daniel Carlson, Richard Petts & Joanna Pepin, *Changes in Parents' Domestic Labor During the COVID-19 Pandemic*, SOCARXIV (May 6, 2020), https://osf.io/preprints/socarxiv/jy8fn; Titan Alon et al., *The Impact of COVID-19 on Gender Equality*, 4 COVID ECONOMICS 62 (2020), https://cepr.org/file/9014/download?token=S-8mCQli; Gema Zamarro & Maria J. Prados, *Gender Differences in Couples' Division of Childcare, Work, and Mental Health During COVID-19*, CESR-SCHAEFFER WORKING PAPER SERIES 1 (2020), https://cesr.usc.edu/documents/WP_2020_003.pdf.

[22] *Labor Force Statistics from the Current Population Survey, Household Data Seasonally Adjusted: A-3. Employment Status of the Civilian Noninstitutional Population by Sex and Age, Seasonally Adjusted*, U.S. BUREAU OF LAB. STAT. (July 2, 2021), https://www.bls.gov/web/empsit/cpseea03.htm; INST. FOR WOMEN'S POL'Y RSCH., QUICK FIGURES: DRAMATIC DECLINE IN EMPLOYMENT HITS WOMEN EVEN MORE SEVERELY THAN MEN (2020), https://iwpr.org/wp-content/uploads/2020/05/QF-Breadwinner-Mothers-by-Race-FINAL.pdf; Zamarro & Prados, *supra* note 21, at 1.

current study to include a comprehensive analysis of the impacts of COVID-19 on gender disparities in the court and carceral systems in Washington. However, the authors did try to highlight relevant equity impacts of the pandemic for each substantive area of study. These findings are weaved throughout the report in the relevant chapters. Current efforts, such as the work being done by the Board for Judicial Administration's Court Recovery Task Force, and future studies to more comprehensively assess the impacts of COVID-19 on the justice system and on equity, are essential. The pandemic has created unique scenarios that will allow for research that were previously unavailable, such as studying the impacts of decreasing the prison, jail, and juvenile detention populations, or studying how remote court proceedings have impacted equitable access to the courts, court-ordered programs, and outcomes in court. The Gender and Justice Commission supports rigorous research on the impacts of COVID-19 with the goal of informing the development of evidence-based policies and procedures that promote equitable access to justice.

As with any project, we were limited by time and resource constraints. While this report covers multiple topics with significant detail, we also had to scope out important research questions. For example, some important aspects of the justice system that merit focus in future studies on gender inequities include comprehensive analyses of: 1) policing, 2) dependency, 3) immigration status barriers, 4) barriers due to the intersection of age and gender, 5) veteran status barriers, and 6) the impacts of COVID-19 on court access and incarcerated populations.

VI. Appendices

Appendix A. Research Inclusion Criteria

Appendix B. Criteria for Selecting Pilot Projects

Appendix C. Pilot Project Reports

Appendix A. 2021 Gender Justice Study Legal Research and Literature Review Inclusion Criteria

A. Include the Following Types of Sources:

- Legal Sources/Legal Environment:
  - Relevant Washington primary sources including statutes, regulations, cases, court rules, etc.
  - Relevant Washington-specific internal policies, procedures, etc. (e.g., internal court procedures; government agency guidelines and policies such as from the Department of Corrections, prosecutors' offices, Attorney General's Office)
  - Secondary sources such as law review/journal articles, legal-related books and dissertations, and "legal" literature/reports published by dependable agencies, organizations, etc.
- Social Science Sources
  - Peer-reviewed original studies, review articles, and meta-analyses
  - Grey literature published by dependable agencies, organizations, etc.
  - Dissertations

B. Scope:

- Compile comprehensive bibliographies for bodies of evidence that are:
  - Small (less than 20 sources);
  - Consist of significant disagreement or conflicting evidence; and/or
  - Have not been sufficiently analyzed by others through reports, review articles, or meta-analyses.
- Include the review article or meta-analysis and anything published since the review article or meta-analysis for bodies of evidence that are:
  - Robust;
  - With general consensus among the sources; and
  - That have been sufficiently analyzed by others through reports, review articles, or meta-analyses.

- If the review article or meta-analysis does not sufficiently describe important data do some source mining to include the most robust empirical evidence and most relevant studies cited in the review article in your bibliography

C. Publication Dates:

1. Washington State Specific Resources

- Regardless of the size of the body of evidence, include all Washington State specific sources published since 1989.
- If you identify 20 or fewer Washington State specific resources, include Washington State specific sources published in any year.

2. National Resources

If you identify 20 or fewer national resources, include sources published in any year. If you identify more than 20 relevant resources, include sources published since 2009.

Appendix B: 2021 Gender Justice Study Criteria for Selection of Pilot Projects

Pilot Project Proposal Name: _____

This pilot project is an evidence-based or promising practice or will fill a gap in the literature.	
This pilot is financially feasible given the current grant funding.	
This project is appropriate for a judicial branch entity to implement.	
We have identified a site/Court where we can implement this pilot project.	
We have identified a partner that can implement this project (e.g. academic institution for research project, etc.).	
The outcomes of this pilot project are measurable within 1 year.	
There is a plan for sustaining this pilot project beyond the study period (if applicable).	
This pilot addresses at least one study priority area where gender disparities have been identified.	
This pilot project addresses multiple study priority areas.	
This pilot project received support from the Advisory Committee.	
This pilot project received support from the Task Force.	
This pilot project would advance justice.	
This pilot focuses on populations who research indicates are most marginalized by gender-based bias (e.g., promotes equity).	

Appendix C. Pilot Project Reports

Washington State Courts Workplace Harassment Survey

Evaluation of Washington State Domestic Violence – Moral Reconation Therapy (DV-MRT) Programs Process and Outcomes

Incarceration of Women in Washington State: Multi-Year Analysis of Felony Data

Evaluation Report: On-Site Childcare Programs in County Courthouses & Their Effect on Access to the Justice System

Jury Diversity: A Survey of Washington State Trial Courts - Analysis of Court Demographic Data Collection and Juror Accommodations

2021: HOW GENDER AND RACE AFFECT JUSTICE NOW

WASHINGTON COURTS
ADMINISTRATIVE OFFICE OF THE COURTS

GENDER AND JUSTICE COMMISSION

Promoting Gender Equality in the Justice System

Workplace Harassment Survey: Washington State Courts, Superior Court Clerks' Offices, and Judicial Branch Agencies

GENDER AND JUSTICE COMMISSION
GENDER EQUALITY IN THE JUSTICE SYSTEM

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0998

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EXECUTIVE SUMMARY

This report describes findings from the state-wide Workplace Harassment Survey, as well as recommendations for action, based on key survey findings. The study population included all court employees, employees of non-court judicial agencies (Administrative Office of the Courts [AOC], Office of Civil Legal Aid, Office of Public Defense, and Commission on Judicial Conduct), as well as Superior Court Clerk's Office employees. The inclusive nature of the survey made it possible to estimate the extent and types of workplace harassment experienced by employees as a whole, as well as by identifiable demographic subgroups who might be expected to experience higher exposure to harassment based on their status or identity. The purpose of the survey was to establish a current baseline of workplace harassment—the most pervasive, people-driven risk in the workplace[1]—within the judicial branch, from which to evaluate progress on this issue via future survey administrations.

Key findings include:

- The study found that 57% of respondents who participated in the survey experienced at least one type of workplace harassment on at least one occasion in the past 18 months. Yet many employees did not recognize certain behaviors as "harassment," even if they viewed them as problematic or offensive. Although some of these experiences do not correspond strictly to the legal definition of harassment, they are serious enough to create a work environment that a reasonable person would consider unwelcome, offensive, or disrespectful.
- To give a sense of magnitude of these findings, assuming a court workforce of approximately 4,500 individuals, these figures translate into 2,565 court employees who experienced some type of workplace harassment at least once in the past 18 months.
- Overall, respondents reported an aggregate total of 6,086 separate harassment problems. That is, on average, 3.5 problems per person. The majority of these experiences (77%) included some form of non-sexual work-related harassment. Some examples of these behaviors include giving unreasonable deadlines or unmanageable workloads, excessive monitoring of work, assigning meaningless task, or being blocked from promotion or training opportunities.
- Sixteen percent (16%) of respondents reported experiencing harassment based on their sexual orientation, 8% experienced gender-based harassment, 6% experienced race-based harassment, and 4% experienced unwanted sexual attention. Although less than 1% of survey respondents (n = 41) experienced sexual coercion, the severity of those incidents suggests a need for prevention efforts and specific consideration.
- Approximately 44% of employees who experienced harassment in the past 18 months did not seek help. Of those who tried to get help, 65% were able to obtain some resolution of their problem(s), including 9% who obtained a complete resolution of their problem(s). The most commonly cited reasons for not searching help were fear of repercussions (60%), the status of the perpetrator (57%), lack of confidence in reporting practices (54%), and the belief that incident would be perceived as acceptable by the organization (50%).

[1]Einarsen, S., Hoel, H., Zapf, D. & Cooper. C.L. (2011). The Concept of Bullying and Harassment at Work: The European Tradition. In S. Einarsen, H. Hoel, Zapf, D, and C.L. Cooper (Eds.) Bullying and Harassment in the Workplace. Developments in Theory, Research, and Practice. Second Edition. CRC Press, Taylor and Francis, Boca Raton, London, New York.

- The study found that harassment experiences are not limited to any one group. However, certain populations are more likely to experience workplace harassment than others.
- The highest rates of any workplace harassment were reported by employees who identified as Indigenous[2], (82%), bisexual (84%), gay or lesbian (73%), multiracial (66%), court clerks[3] (65%), and women (62%), relative to all respondents (57%).
- Indigenous employees, as a group, experienced the highest average number of harassment problems (7.29 per person) compared with any other racial or ethnic group. This estimate (7.29 problems per person) does not indicate how often (or how systematically) they have been exposed to these behaviors; it only represents an estimated number of different kinds of harassment behaviors they have been exposed to.
- Sexual minorities[4], as a group, were significantly more likely than their heterosexual peers to experience at least one type of workplace harassment on at least one occasion in the past 18 months (76% for sexual minority group vs. 57% for heterosexual respondents). The between-group differences in prevalence were the most dramatic for the harassment based on sexual orientation (39% for non-heterosexual and 14% for heterosexual respondents), gender-based harassment (20% vs. 7%), and unwanted sexual attention (10% vs. 3%).
- Women (including transgender women) were significantly more likely than men (including transgender men) to experience incidents of gender-based harassment (9% vs. 4%) and work-related harassment (59% vs. 44%). When looking more closely at work-related harassment, results revealed significant gender differences for nine out of 14 behavioral situations described in the survey. Women were significantly more likely to report having their opinions ignored (37% vs. 25%), being exposed to an unmanageable workload (28% vs. 16%), having someone withholding information that affects their performance (27% vs. 15%), being shouted at or being the target of spontaneous anger (23% vs. 13%), being ignored or excluded (23% vs. 12%), being subjected to excessive monitoring (23% vs. 16%), receiving repeated reminders of errors (22% vs. 13%), and having someone spreading rumors about their competence (19% vs. 13%).
- Intersectionality analysis revealed that the issues most frequently identified by Black, Indigenous and women of color and sexual-minority women are simultaneously similar yet different from the experiences of single-race white women and heterosexual women:
    - Black or African-American and white women employees did not differ significantly in the prevalence of any type of harassment, except for race-based harassment (21% vs. 5%).
    - Hispanic/Latinx and white women experienced the same levels of overall workplace harassment (61%), but their experiences were significantly different in the prevalence of workplace maltreatment based on sexual orientation (26% for Hispanic/Latinx women vs. 16% for white women) and race (11% vs. 3%).

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[2] This report uses "Indigenous" throughout to represent respondents who selected "American Indian, Alaska Native, First Nations, or other Indigenous Group Member" response option alone or in combination with any other race or ethnicity.

[3] Throughout the report "court clerks" refers to employees who self-identified their role as "court clerks." This includes court clerks who have administrative responsibilities, at all levels of courts: some work for elected Superior Court clerks; some work for appointed Superior Court clerks; some work in the Municipal or District courts, the Court of Appeals, and the Supreme Court. The report distinguishes between court clerks and Superior Court Clerks due to their different rates of experienced harassment.

[4] "Sexual minorities" or "non-heterosexual respondents" includes respondents who responded to the question on sexual orientation by marking "gay or lesbian," "bisexual," "asexual," "pansexual," or "questioning."

  - Indigenous women experienced the highest prevalence of overall workplace harassment (85%) compared with their single-race white peers (61%) or any other racial and ethnic group (based on the percentage point differences).
  - Sexual minority women were significantly more likely than heterosexual women to experience sexual-orientation based harassment (41% vs. 15%), gender-based harassment (22% vs. 8%), and work-related harassment (79% vs. 58%).
  - Non-white sexual minority women (n=15) were significantly more likely than non-white heterosexual women (n=201) to experience harassment based on sexual orientation (40% vs. 18%).

- We found a significant association between an employee's position and workplace harassment. Court clerks, as a group, experienced workplace harassment at a higher rate (65%) than respondents with any other appointment type. Judicial assistants experienced the second highest rate of harassment (61%). Among all survey respondents, Superior Court Clerks (49%) and Judges or Commissioners (51%) experienced the lowest rates of harassment. These numbers, however, are still alarming. They mean that one out of every two Judges or Commissioners and one out of every two Superior Court Clerks experienced some type of workplace harassment at least once during the preceding 18 months.

- When asked about the perpetrator of the "worst" harassment incident, 19% of respondents indicated that the perpetrator was their supervisor or manager, 15% indicated that it was someone more senior (other than manager or supervisor), and 9% indicated that the perpetrator was a Judge or Commissioner. For 9% of employees, the perpetrator was someone of equal seniority, and for 5% the perpetrator was someone junior to them.

- A sizable share of respondents experiencing workplace harassment in the past 18 months reported having a major problem with work withdrawal (20%); and with searching for a new job (22%). Seeking fresh employment due to harassment was identified as a major problem by 44% of Black or African American employees and 43% of gender minority[5] employees.

- Respondents who experienced workplace harassment in the past 18 months and those who did not differed strongly in their awareness of their workplace policy and procedures, and their views of the organization's stance on diversity and its commitment to take steps to protect the safety of employees. The biggest difference between these two groups were found in their level of confidence that their organization would deal with concerns or complaints in a thorough, confidential, and impartial manner (87% vs. 60%).

- When analyzing the association between organizational factors and harassment, we found that 1) awareness of policy (i.e., employees' awareness and understanding of anti-harassment policy and procedures) and 2) expectation of response (i.e., employees' confidence that the organization would respond to harassment), all other conditions being equal, significantly <u>decreased</u> employees' likelihood of harassment.

[5] The gender minority group consists of one transgender woman, two transgender men, eights genderqueer or gender non-conforming respondents, and two who are questioning their gender identity.

RECOMMENDATIONS BASED ON KEY SURVEY FINDINGS

1. **Create diverse, inclusive, and respectful environments**

   The judicial branch and its leaders should take explicit steps to promote equity, diversity, and inclusion; and foster a culture that values individual differences in age, gender, sexual orientation, gender identity or expression, disability, and race or ethnicity.

2. **Deliver regular workplace harassment prevention trainings that drive real changes**

   The judicial branch and its leaders should follow best practices in designing and delivering prevention trainings for all types of workplace harassment, including non-sexual harassment. These trainings should focus on changing behavior, not on changing beliefs. Anti-harassment programs should encourage the support of certain populations that are more likely to experience workplace harassment than others (including, but not limited to sexual and gender minorities; women; Black, Indigenous and employees of color). These training programs should be evaluated to determine whether they are effective and what aspects of the training(s) are most important to changing culture.

3. **Improve transparency and accountability**

   The judicial branch and its leaders should be as transparent as possible about how they are handling reports of workplace harassment. Decisions regarding disciplinary actions, if required, should be made in a fair and timely way. This accountability can ensure that the court workforce feels supported by their organizations, because perceived organizational support, as we showed in this report, significantly reduces the likelihood of workplace harassment.

4. **Measure progress**

   The judicial branch and its leaders should work with researchers to evaluate their efforts to create a more diverse, inclusive, and respectful environment. Conducting regular surveys will help to track whether planned processes have been implemented and whether anti-harassment policies are producing the desired effects. The survey methodology, when fully implemented, will enable judicial leadership to monitor the sustainability and effectiveness of the anti-harassment efforts. The methodology should allow to disaggregate the data by race, ethnicity, sexual orientation, and gender identity or expression to reveal different experiences across populations. The results of surveys should be shared publicly to demonstrate that the branch takes the issue seriously.

INTRODUCTION AND SURVEY OBJECTIVES

This report describes findings from the state-wide Workplace Harassment Survey, as well as recommendations for action based on key survey findings. The survey defined "harassment" as unwelcome conduct that is severe enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Exposure to such treatment, if persistent over time, reportedly creates more devastating problems for employees than all other kinds of work-related stress put together.[6] The survey intentionally did not focus on capturing only harassment that might be legally actionable—unwelcome or offensive conduct that: (a) is based on sex (including sexual orientation, pregnancy, and gender identity), race, color, national origin, religion, age, disability, and/or genetic information and (b) is detrimental to an employee's work performance, professional advancement, and/or mental health. The survey used a broader definition of harassment because previous research found that using a legal definition of harassment as the basis for measuring the prevalence of harassment can lead to underestimation of such conduct.[7] On the other hand, the survey could not capture all "unwelcome, offensive or disrespectful" behaviors that can be experienced at the workplace.

The objectives of the survey were to:

- Understand the landscape of harassment experienced by employees of Washington's courts, Judicial Branch agencies, and Superior Court Clerks' Offices, including how frequently it occurs, who is most affected, and the surrounding circumstances.
- Understand harassment experiences of employees in underrepresented and/or marginalized groups, including women; Black, Indigenous and people of color; and sexual- and gender-minority individuals; and employees in different positions, including judicial leadership, administrative assistants, county clerks, and court administrators.
- Understand to what degree employees are able to access necessary help to address workplace harassment; and for those who do not, the reasons why.
- Understand the impact of workplace harassment on the employees' psychological and physical health.
- Understand which workplace climate factors are associated with harassment.

To address these objectives the survey was designed to include several topical sections presented to the respondents in a sequential manner. The survey began by broadly asking whether respondents had experienced workplace harassment in the past 18 months[8]. If they had, respondents were further offered a list of behaviors and asked whether and how often they had experienced those behaviors and how those behaviors impacted the respondents. All respondents were also asked whether they

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[6] Einarsen, S., Hoel, H., Zapf, D. & Cooper. C.L. (2011). The Concept of Bullying and Harassment at Work: The European Tradition. In S. Einarsen, H. Hoel, Zapf, D, and C.L. Cooper (Eds.) Bullying and Harassment in the Workplace. Developments in Theory, Research, and Practice. Second Edition. CRC Press, Taylor and Francis, Boca Raton, London, New York.

[7] Ilies, R., Hauserman, N., Schwochau, S., & Stibal, J. (2003) Reported Incidence Rates of Work-Related Sexual Harassment in the United States: Using Meta-Analysis to Explain Reported Rate Disparities. *Personnel Psychology,* 56(3): 607-631.

[8] Covering both in-person work environment and remote work environment due to COVID-19. An 18-month reporting period (i.e., in the last 18 months) was chosen to cover 10 months prior to the "Stay Home, Stay Healthy" order implemented on March 23, 2020 due to COVID-19 and 8 months into the order. Traditionally, shorter periods have been used in harassment surveys. However, since one objective of the study was to establish a baseline, it was necessary to use a longer reporting period due to the pandemic.

had witnessed harassment in the workplace in the past 18 months. If they had, respondents were given an option to provide an example of one instance of harassment they witnessed. For those who reported experiencing harassment, additional questions were asked about circumstances surrounding the worst harassment incident, ability to get help, and satisfaction with that help. All respondents were asked about their knowledge of organizational anti-harassment policies and procedures, and perceptions of workplace climate. In addition, the survey asked for demographic data, organization type, appointment type, and length of employment. Workplace harassment was measured across six substantive areas covering 63 specific situations that could potentially rise to a "legally actionable" problem, along with an open item for write-in responses of "other behavior(s)." These situations included not only co-workers (i.e., a superior, subordinate, colleague, etc.), but also anyone whom an employee interacts with at the workplace (i.e., independent contractor, client, customer, or visitor). The six substantive areas of workplace harassment included: 1) unwanted sexual attention, 2) sexual coercion, 3) gender-based harassment, 4) sexual orientation-based harassment, 5) non-sexual work-related harassment, and 6) race-based harassment. Definitions for each type of harassment are presented below:

- ***Unwanted sexual attention -*** Situations in which someone makes unwelcome attempts to establish a sexual relationship with a person, despite this person's efforts to discourage these attempts. This category includes expressions of romantic or sexual interest that are unwelcome, unreciprocated, and offensive to the target. Examples include unwanted touching, hugging, stroking, and persistent requests for dates[9].
- ***Sexual coercion -*** Situations in which favorable professional treatment is conditioned on sexual activity.
- ***Gender harassment –*** Situations in which an employee is subjected to hostile treatment or exclusion based on gender or perceived gender. Gender harassment can take the form of sexist, crude, offensive, or hostile behaviors that are devoid of sexual interest, but aim to insult or offend on the basis of gender stereotypes.
- ***Sexual orientation-based harassment*** – Situations in which an employee is subjected to negative employment action, denial of certain benefits, comments about mannerisms or sexual activity, sexual jokes, or requests for sexual favors solely because of their real or perceived sexual orientation: lesbian, gay, bisexual, asexual, pansexual, or straight (heterosexual).
- ***Race-based harassment—***Situations in which an employee is subjected to negative employment action, denial of certain benefits, or comments about appearance solely because of their race.
- ***Work-related harassment –*** Situations of abusing power or position through persistent vindictive, cruel, or humiliating attempts to hurt, criticize, and condemn an individual or group of employees.

A majority of survey measures were based on validated survey scales. However, some measures were modified based on the specific target population (court employees, Superior Court Clerk's Office employees, and employees of non-court judicial branch agencies) and the survey objectives. Prior to survey administration, the instrument underwent cognitive testing with three volunteers. The purpose of cognitive testing was to determine how potential participants interpreted the items and response options, and whether the items were understood and interpreted as intended. Cognitive

[9] Lonsway, K.A., Cortina, L.M., & Magley, V.J. (2008) Sexual harassment mythology: Definition, conceptualization, and measurement. *Sex Roles*, 58, 599-615.

testing was performed by the AOC/Washington State Center for Court Research (WSCCR) researcher via Zoom. Before administering the survey, items (e.g., wording, instructions, confidentiality statement) were slightly revised based on the findings of these tests.

SURVEY IMPLEMENTATION

The survey was formatted into a web-based tool using SurveyMonkey software. Washington State Supreme Court Gender and Justice Commission staff sent a notification letter via email on behalf of WSCCR to: 1) Court Administrators and Presiding Judges to all court levels (district, municipal, appeals and Supreme Court), 2) the leadership of non-court judicial branch agencies (Office of Civil Legal Aid, AOC, Commission on Judicial Conduct, and Office of Public Defense), 3) and Superior Court Clerks.[10] The letter explained the survey and requested that these leadership groups distribute the survey link and invitation letter from WSCCR to all full-time and part-time employees with an available work email address.[11] The message communicated the importance of responding to the survey—it explained why the survey is being conducted and how the results will be used. Letters of support for the survey from the Superior Court Judges Association, the District and Municipal Court Judges Association, the District and Municipal Court Management Association, and the Washington State Supreme Court Gender and Justice Commission were attached in relevant emails.

The study team also contacted the District and Municipal Court Judges Association and Superior Court Judges Association, asking them to raise awareness about the survey among their members and court employees. Approximately four weeks after the invitation letter, the study team sent a reminder/thank you letter to thank individuals who had already responded to the survey and to ask those who had not completed the survey to do so. At approximately four weeks and eight weeks after the first reminder/thank you letter, the study team sent second and third reminder/thank you letters stressing the importance of the survey. The study team emailed these letters out through the leadership groups described above in the same way that the original survey invitation was distributed.

Responses to the survey were completely voluntary. The survey allowed respondents to skip questions; therefore, each question might have some degree of item non-response associated with it. The item non-responses analysis revealed that questions asking about race/ethnicity, gender identity, sexual orientation, income, education, and job position held had the highest non-responses rate, between 12% and 18%. For example, 104 respondents (6%) skipped the question about sexual orientation, 7% (n=117) selected the option “prefer not to answer,” and a handful of respondents reported being distressed, upset, or offended by this question. Although the survey promised confidentiality, some respondents were probably concerned about having their answers tied to other identifying information. More than one-fifth (23%) of all respondents said that they are not open about their sexual orientation to anyone at work and 9% are only open to a few people at work. The number of respondents who skipped the question about gender identity was even higher, at 18%.

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[10] The President of the Washington State Association of County Clerks sent the notification letter to the Superior Court Clerks on behalf of WSCCR. The email from the President provided support for the survey and encouraged Superior Court Clerks to forward the survey link on to employees in their Offices.

[11] Disseminating the survey through court leadership, judicial branch agency leadership, and Superior Court Clerks introduced many limitations to the survey such as: 1) creating an inability to calculate a firm response rate, 2) potential introduction of bias in which employees received the survey based on whether or not leadership in their entity wanted them to take part in the survey, and 3) a potential perception by employees that their leadership would have access to the data (despite assurances in the invitation letter that data would go directly to WSCCR and not be shared outside of WSCCR). However, because Washington’s court system in not unified and there is no central entity which maintains employee email addresses for all court employees, this was the only available mechanism to reach all employees.

It is crucial to note that asking respondents to identify many aspects of their identities (e.g., race, ethnicity, gender identity or expression, sexual orientation, and age) that could make them identifiable if looked at in combination is a challenge for any survey, but it is particularly challenging for a workplace harassment survey distributed by organizational leadership and conducted by WSCCR. While WSCCR is an independent research entity that strictly observes all legal and ethical data standards to protect confidentiality, it is administratively located inside AOC, and, thus, might not be perceived by many court employees as an independent research entity.

Overall, 1,745 employees fully or partially responded to the survey. Because we do not know how many employees actually received a link to the survey, given that the dissemination model depended on an intermediary (e.g. Court Administrators or Presiding Judges) to forward the survey invitation on to employees, we cannot estimate with certainty the response rate. However, if we assume that everyone who was targeted received the link, the response rate is around 34%.

DATA ANALYSIS

We used descriptive statistics (counts, percentages, frequency, means, and standard deviations) in the data analysis. Counts were converted to percentages to make comparisons between subgroups of respondents. Throughout the report, percentages denote the percentage of respondents indicating a certain response option, among all survey respondents answering this item, unless noted differently.

Cross-tabulations and significance tests were conducted where applicable[12]. Because the data were not normally distributed, we used Chi-square test[13] to examine differences between two or more subgroups of respondents. The results of two-way cross-tabulations by subgroup are presented in the Appendix. In cases when Chi-square test was not appropriate, all inter-group differences, should be interpreted with caution and reported only as the percentage point difference (or simply the arithmetical difference between the two numbers).

Multivariate logistic modeling techniques were used to predict whether an employee experienced any workplace harassment in the past 18 months depending on their awareness of policy, materials received, diversity, appreciation, respect, and expectation of response, while controlling for gender, age, education, length of employment, and hours worked per week.

Throughout the report, we use bar charts to distill the tabular data presented in the Appendix into an easy-to-grasp visual form. When applicable, significant differences across subgroups are denoted by a symbol (*)[14]. Every figure included in the report is referenced to an appropriate table in the Appendix.

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[12] Chi-square, like any analysis, has its limitations. One of the limitations is that all participants measured must be independent, meaning that an individual cannot fit in more than one category. If a participant can fit into two different categories a Chi-square analysis is not appropriate.

[13] One of the largest strengths of Chi-square is that it makes no assumptions about the distribution of the population. Other statistics assume certain characteristics about the distribution of the population such as normality.

[14] A significance level of 0.05 was used to conclude that there is a statistically significant association between the variables.

SURVEY FINDINGS

FINDING 1: The estimates of workplace harassment depends on how the harassment is defined and what measurement method is used

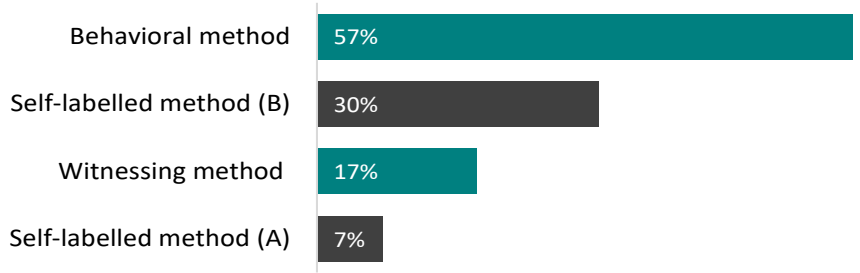
This survey provided an opportunity to assess employees' understanding of the term harassment by using three different methods to measure the prevalence of workplace harassment:

1. **Self-labelled method:**
   A. When respondents are asked to apply the label of harassment to their own experiences, without the survey providing any guidance about the meaning of harassment.
   B. When respondents are provided a broad description of harassment without the survey using the term itself.
2. **Behavioral exposure method:** When respondents are provided with a list of behaviors and asked whether they have experienced each of those behaviors.
3. **Witnessing method:** When respondents are asked whether they have witnessed workplace harassment directed at someone else, providing a very broad definition of harassment.

Different methods produced different estimates for the prevalence of harassment (Figure 1). The highest estimates (57%) were produced by the behavioral exposure method, and the lowest estimates were produced by the self-labeling method (A) with no definition provided (7%). These findings suggest that many employees do not label certain forms of unwelcome behaviors as "harassment", even if they view them as problematic or offensive. However, when respondents were asked whether they experienced a situation(s) they felt was inappropriate, offensive, or intimidating—a core feature of workplace harassment—30% responded affirmatively. These results show that workplace harassment can be difficult to recognize and some behaviors that occur at work might have been normalized, especially if they are somewhat subtle or not recognized by others.

Estimates produced by the witnessing method (17%) fell between the estimates of the self-labeling method (A) (with no definition provided) and behavioral exposure method. Because the behavioral exposure method has been considered to be more objective[15], the majority of the analyses in this report are conducted with the data produced by this method.

FIGURE 1: PERCENTAGE OF RESPONDENTS REPORTING HARASSMENT, BY METHOD



[15] Einarsen, S., Hoel, H., Zapf, D. & Cooper. C.L. (2011). The Concept of Bullying and Harassment at Work: The European Tradition. In S. Einarsen, H. Hoel, Zapf, D, and C.L. Cooper (Eds.) Bullying and Harassment in the Workplace. Developments in Theory, Research, and Practice. Second Edition. CRC Press, Taylor and Francis, Boca Raton, London, New York.

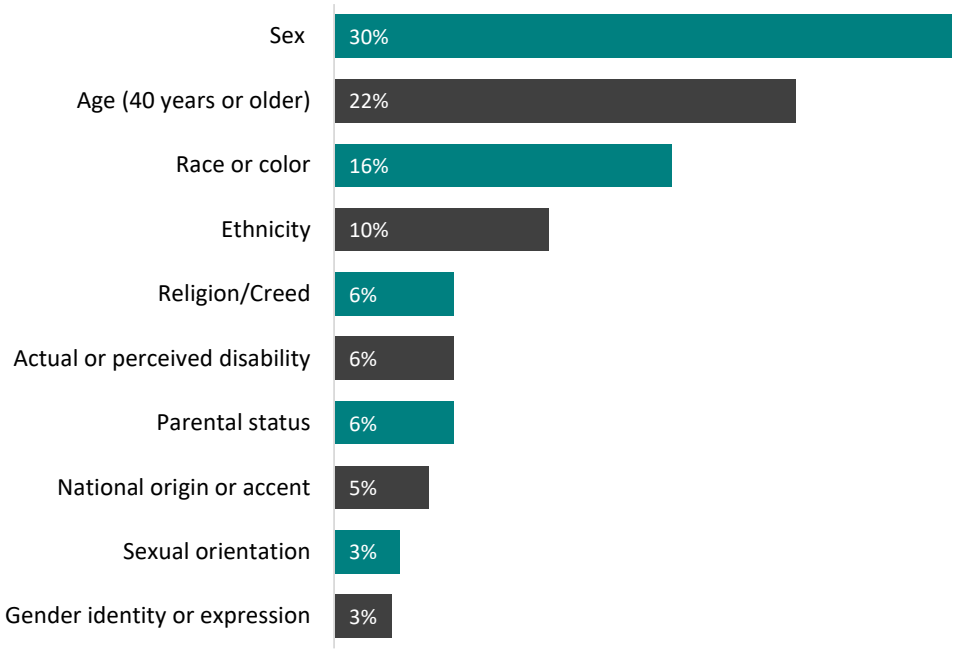
FINDING 2: The most commonly perceived reasons for harassment included sex, age, race or color, and ethnicity

In this section, percentages denote the percentage of respondents indicating that response option, among all survey respondents answering this item.

Respondents who experienced a situation(s) in which anyone in the workplace (i.e., a superior, subordinate, coworker, independent contractor, client, customer, or visitor) said or did something that was inappropriate, offensive, intimidating, or hostile, were further asked to identify one or more reasons why they believe they were subjected to this behavior. These respondents were identified by the self-labelling method (B) (for a definition, see page 9).

The most often cited reason for negative workplace experiences was sex (30%), followed by age (22%), race or color (16%), and ethnicity (10%) (Figure 2). In addition, 6% believed that religion was the reason for inappropriate behavior directed at them, 6% believed that the reason was their disability and/or parental status, and 5% thought it was their national origin or accent. Less than 5% believed that the reasons for negative experiences at work were their sexual orientation and/or gender identity[16].

FIGURE 2: PERCEIVED REASONS FOR INAPPROPRIATE BEHAVIOR (N=505)



Note: Since respondents could indicate multiple reasons, the categories are not mutually exclusive.

[16] Providing “sex” and “gender identity or expression” as two separate response options prompted respondents to interpret the terms "on the basis of sex" and “on the basis of gender identity or expression” as two different concepts; thus, two different reasons for harassment. Of note, a combined total of 31% of respondents selected “sex,” or “gender identity or expression,” or both response options.

FINDING 3: The areas most impacted by harassment were promotion, evaluation, and training

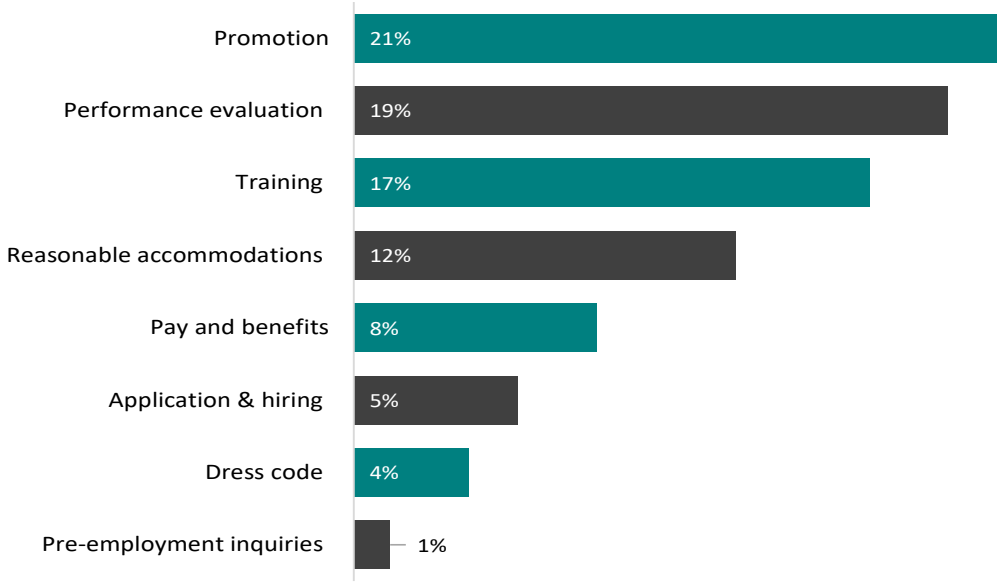
In this section, percentages denote the percentage of respondents indicating that response option, among all survey respondents answering this item.

In addition to perceived reasons for harassment, respondents who experienced a situation(s) in which anyone in the workplace (i.e., a superior, subordinate, coworker, independent contractor, client, customer or visitor) said or did something that was inappropriate, offensive, intimidating, or hostile, were asked to identify one or more area(s) in which workplace harassment has affected their career (Figure 3).

More than one fifth (21%) of respondents identified by self-labeling method (B) believed that workplace harassment impacted their chances of promotion (i.e., their ability to move to a higher-level job, to be delegated greater responsibility, authority, or higher pay), 19% reported that harassment impacted their access to fair performance evaluations, and 17% felt that harassment impacted their ability to receive training necessary to fulfil their duties.

Twelve percent (12%) reported harassment impacting their access to reasonable accommodations (e.g., part-time or modified work schedules, modified equipment or devices, adjusted training materials or policies, qualified readers or interpreters, assistive animals on the worksite, etc.) and 8% thought that harassment limited their ability to receive pay and benefits (e.g., sick leave, safe leave, vacation leave, parental leave, family medical leave, insurance, access to overtime as well as overtime pay, and retirement programs).

FIGURE 3: AREAS MOST IMPACTED BY HARASSMENT AMONG RESPONDENTS WHO WERE IDENTIFIED BY SELF-LABELING METHOD (N=505)



Note: Since respondents could indicate multiple areas, the categories are not mutually exclusive.

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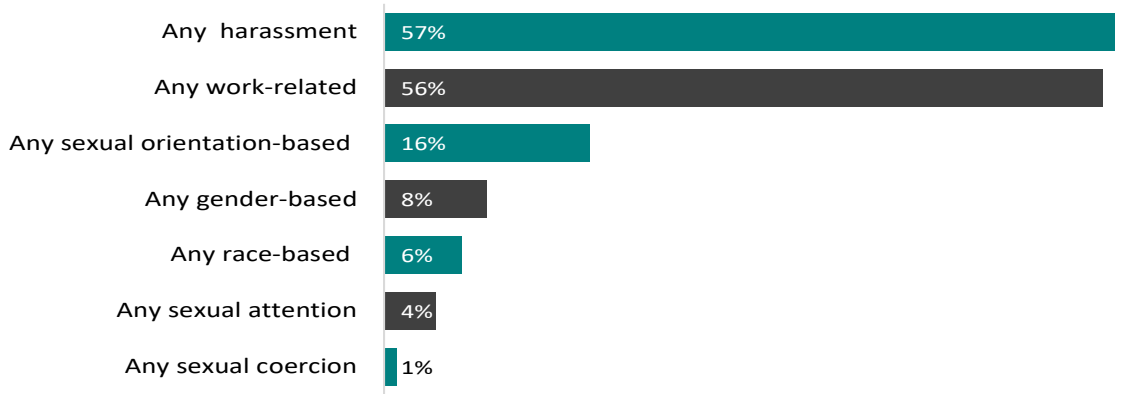
FINDING 4: Behavioral exposure method revealed that more than half of survey respondents experienced harassment at least once in the past 18 months

In this section, percentages denote the percentage of respondents indicating that response option, among all survey respondents answering this item.

Figure 4 presents the percentage of survey respondents who reported being exposed to at least one behavior constituting harassment in each of the six substantive areas of workplace harassment included in the study (see Table 1, Appendix). Since respondents could indicate multiple harassment experiences in different categories (e.g., unwanted sexual attention, gender-based, sexual coercion, race-based, work-related, sexual orientation-based), the six categories are not mutually exclusive.

Among all respondents, 57% experienced any harassment at least once in the past 18 months (i.e., they answered affirmatively to at least one of the 63 behavioral situations included in the survey). The overwhelming majority of workplace harassment involved some form of non-sexual work-related[17] harassment (56%). Some examples of these behaviors include giving unreasonable deadlines or unmanageable workloads, excessive monitoring of work, assigning meaningless task, or being blocked from promotion or training opportunities. Sixteen percent (16%) reported experiencing harassment based on their sexual orientation, and individuals who reported having a sexual orientation other than heterosexual (including gay or lesbian, bisexual, asexual, pansexual, or questioning) were more likely to experience sexual orientation-based harassment (39%) than their heterosexual peers (14%). Eight percent (8%) experienced gender-based harassment, 6% experienced race-based harassment, and 4% experienced unwanted sexual attention. Although less than 1% of survey respondents (n = 41) experienced sexual coercion and, therefore, were excluded from most analyses due to sample size, the severity of those incidents suggests a need for prevention efforts and consideration.

FIGURE 4: PERCENTAGE OF RESPONDENTS EXPERIENCING HARASSMENT, BY TYPE (N=1,745)

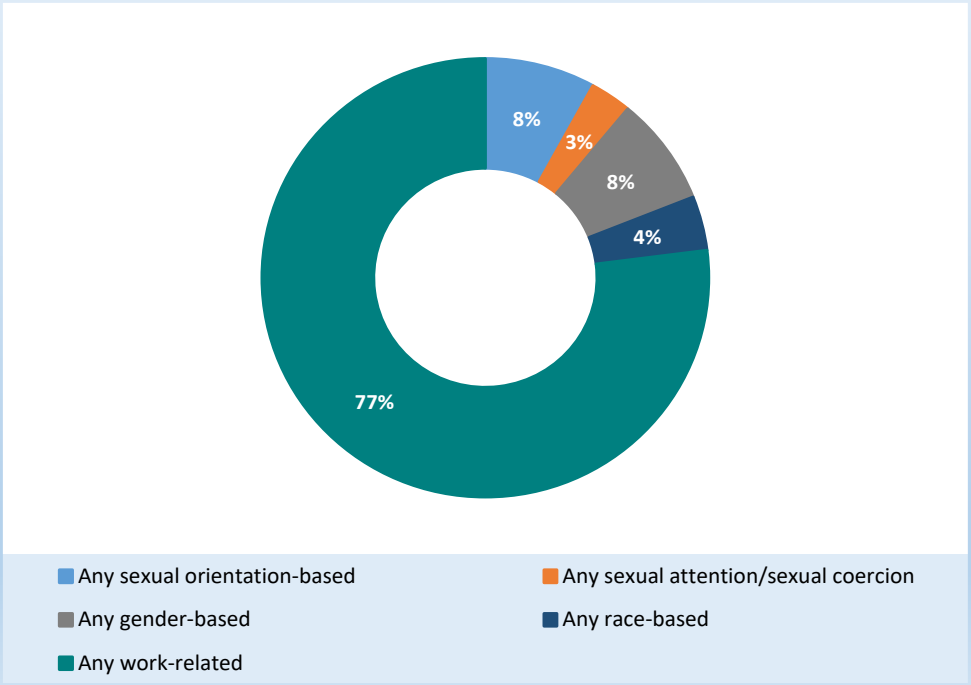


[17] Work-related harassment encompasses the situations of abusing power or position through vindictive, cruel, or humiliating attempts to hurt, criticize, and condemn an individual or group of employees. Such conduct can occur in person, in written communications, via email, phone, or social media.

Overall, survey respondents reported an aggregate total of 6,086 separate harassment problems experienced in the past 18 months. Figure 5 shows the relative percentage of these problems, by type of harassment, as a percentage of all harassment problems reported in the survey. Work-related harassment (77%) accounted for the majority of harassment experiences reported in the survey. Some examples of these experiences include being exposed to demeaning or derogatory remarks, being ignored or excluded from work activities where they should have been present, being interrupted or talked over, being exposed to an unmanageable workload, being blocked from promotion or training opportunities, being ordered to do work below competence level, or having key areas of responsibility removed or replaced with more trivial tasks. Some of these behaviors may be relatively common in the workplace (e.g., being interrupted or talked over), but when persistently directed toward the same individual, they become an extreme source of stress[18] and lead to more negative effects on health than passive and indirect harassment (e.g., social isolation)[19].

Gender and sexual orientation-based harassment each accounted for 8% of all reported harassment problems, race-based harassment accounted for 4%, and unwanted sexual attention (combined with sexual coercion) accounted for 3% of all reported harassment experiences.

FIGURE 5: HARASSMENT PROBLEMS AS A PERCENTAGE OF ALL SUBSTANTIVE HARASSMENT SITUATIONS REPORTED (N=6,086)



[18] Zapf, D. & Einarsen, S. (2001). Bullying in the workplace: Recent trend in research and practice – an introduction. *European Journal of Work and Organizational Psychology*, 10(4), 369-373.

[19] Einarsen, S., Hoel, H., Zapf, D. & Cooper. C.L. (2011). The Concept of Bullying and Harassment at Work: The European Tradition. In S. Einarsen, H. Hoel, Zapf, D, and C.L. Cooper (Eds.) Bullying and Harassment in the Workplace. Developments in Theory, Research, and Practice. Second Edition. CRC Press, Taylor and Francis, Boca Raton, London, New York.

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FINDING 5: Who is the most targeted by workplace harassment?

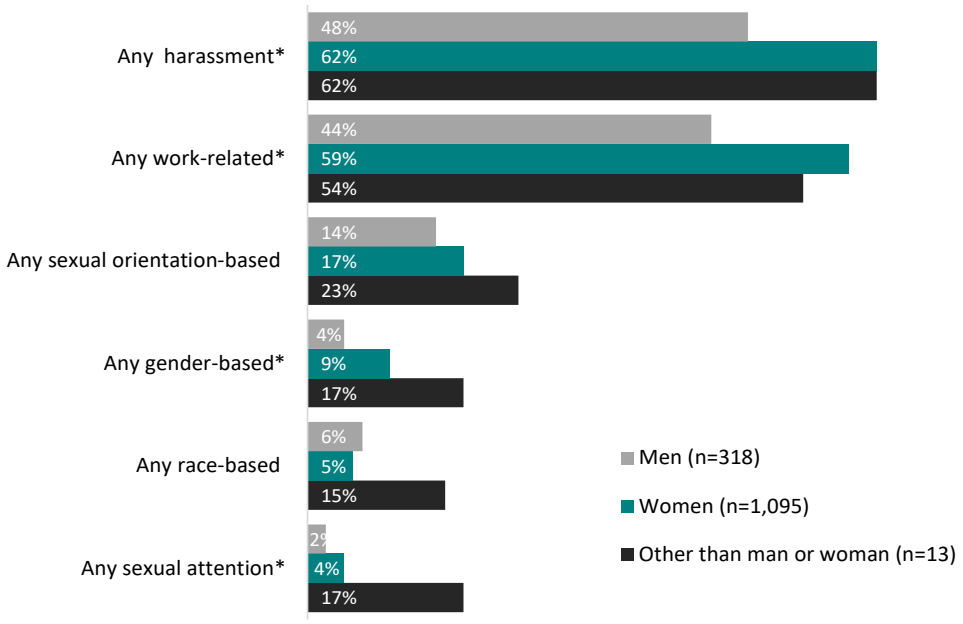
In this section, all percentages denote the percentage of a certain group (e.g., women) who indicated experiencing any harassment in the past 18 month.

Harassment experiences are not limited to any one group. However, certain populations are more likely to experience workplace harassment than others. The prevalence and relative percentages of workplace harassment experienced by the entire survey group and several distinct subgroups of respondents are presented in Table 1 (See Appendix). Table 1 also reports the total number of respondents in each subgroup, the cumulative number of harassment problems reported by each subgroup, as well as the average number of harassment problems per person within each subgroup.

Gender Identity

Workplace harassment disproportionately impacts employees across gender lines (Figure 6). Respondents who self-reported having a gender identity other than "man" or "woman" (n=13) (including transgender man, transgender woman, genderqueer or gender non-conforming, and questioning) reported experiencing unwanted sexual attention at a statistically significantly higher rate (17%) than respondents who self-identified as a woman (4%) or man (2%) [$\chi 2$ =29.601, p<.001].

FIGURE 6: HARASSMENT, BY GENDER IDENTITY



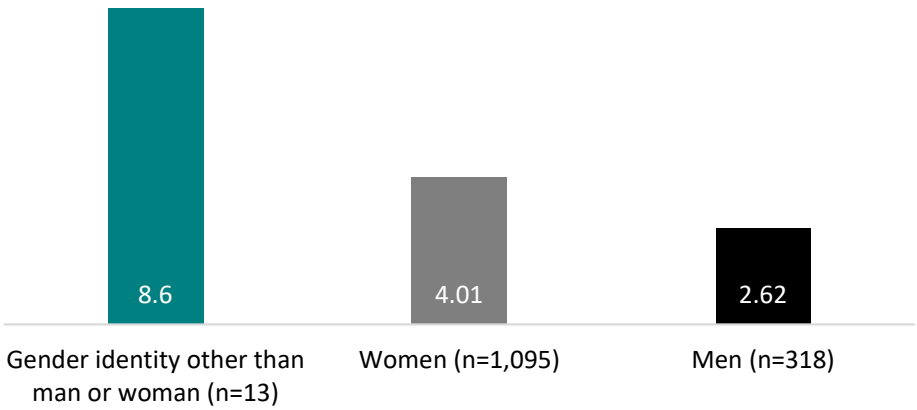
Note 1: 319 respondents did answer a question asking about gender identity.
Note 2: Statistically significant differences are noted by (*).
Note 3: For the purposes of this table "Women" include respondents who marked "woman," "Men" include respondents who marked "man," and "Other than man or women" includes respondents who marked "transgender man," "transgender woman," "genderqueer or gender non-conforming," or "questioning."

They also experienced gender-based harassment at a significantly higher rate (17%) than women (9%) and men (4%). More women experienced work-related harassment (59%) compared with men (44%) or gender minority employees[20] (54%) ($\chi 2 = 22.657$, $p < .001$].

Overall, gender minorities[21] who experienced harassment in the past 18 months, reported 112 different harassment problems, this is, on average, 8.6 problems per person. That was higher than the average number of harassment problems experienced by women (4.01 problems per person) or men (2.62 problems per person) (see Figure 7).

To put this estimate into perspective, gender minority respondents, on average, experienced more than eight out of the 63 behavioral situations included in the survey on at least one occasion during the preceding 18 months. This estimate does not indicate how often (or how systematically) they have been exposed to these behaviors; it only represents an estimated number of different kinds of harassment behaviors they have been exposed to during the preceding 18 months.

FIGURE 7: AVERAGE NUMBER OF HARASSMENT PROBLEMS, BY GENDER IDENTITY



[20] While portions of this report analyze the data for all women (including respondents who marked "woman" or "transgender woman") and all men (including respondents who marked "man" or "transgender man"), other analyses include transgender women and men in a category combined with respondents who identified as genderqueer or gender non-conforming, and questioning. This was to avoid the risk of masking any harassment experiences unique to transgender individuals that would have occurred by combining them with the much larger groups of respondents who marked "woman" or "man." The sample sizes for transgender, genderqueer or gender non-conforming, and questioning individuals were too small to analyze each of these populations separately (n=13).

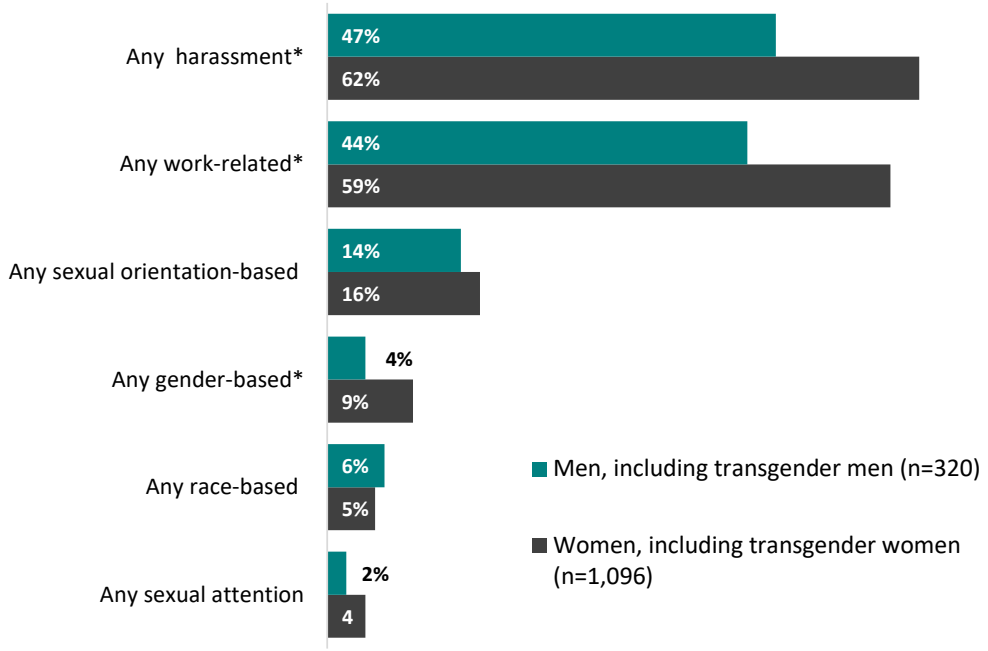
[21] The gender minority group consists of one transgender woman, two transgender men, eights genderqueer or gender non-conforming respondents, and two who are questioning their gender identity.

Supplementary Analysis: Gender Differences Using Binary Approach

We also run the analysis based on gender using a binary approach that only included respondents who identified either as a woman (including transgender woman) [n=1,096] or a man (including transgender man) [n=320]. The results of this analysis are presented in Figure 8. Women were significantly more likely than men to be exposed to overall harassment (62% vs. 47%; $\chi 2$ =21.97, p<.001), any work-related harassment (59% vs. 44%; $\chi 2$ =23.70, p<.001), and any gender-based harassment (9% vs. 4%; $\chi 2$=7.456, p=.003).

When looking more closely at different behaviors that are a part of work-related harassment, the most prevalent type of harassment, results revealed significant gender differences for nine out of 14 behavioral situations described in the survey (see Table 2, Appendix). Women were significantly more likely than men to report being interrupted or talked over (41% vs. 28%; $\chi 2$ =17.965, p<.001), having their opinions ignored (37% vs. 25%; $\chi 2$ =18.426, p<.001), being exposed to an unmanageable workload (28% vs. 16%; $\chi 2$ =20.53, p<.001), having someone withholding information that affects their performance (27% vs. 15%; $\chi 2$ =19.26, p<.001), being shouted at or being the target of spontaneous anger (23% vs. 13%; $\chi 2$ =15.49, p=.004), being ignored or excluded (23% vs. 12%; $\chi 2$ =20.93, p<.001), being subjected to excessive monitoring (23% vs. 16%; $\chi 2$ =13.633, p=.009), receiving repeated reminders of errors (22% vs. 13%; $\chi 2$ =19.603, p<.001), and having someone spreading rumors about their competence (19% vs. 13%; $\chi 2$ =9.86, p=.043).

FIGURE 8: HARASSMENT, BY GENDER



Note: Statistically significant differences are noted by (*).

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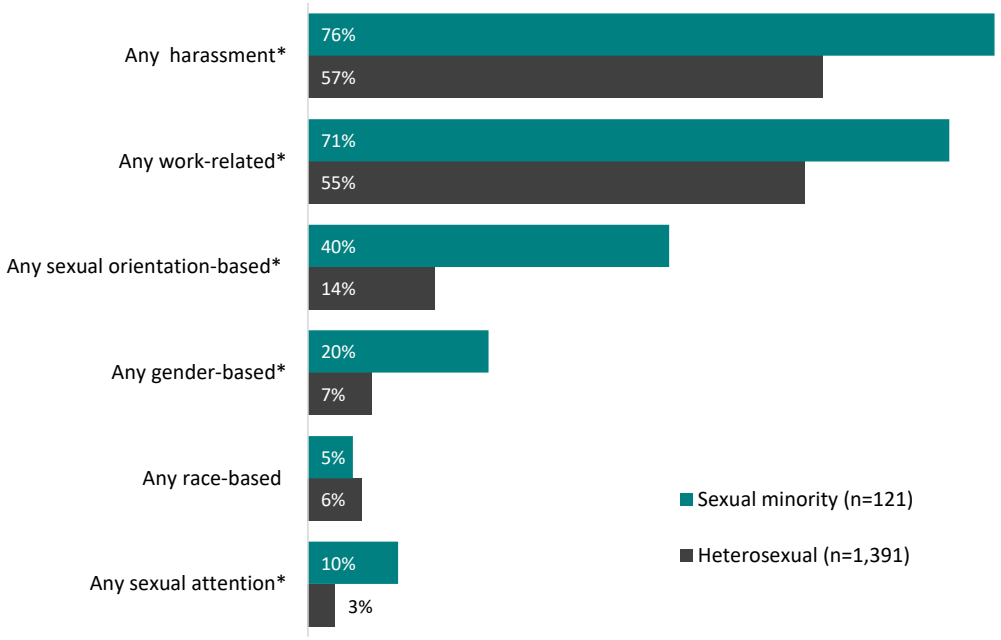
Sexual orientation

Respondents who self-identified with a sexual orientation other than heterosexual (including gay or lesbian, bisexual, asexual, pansexual, and questioning) were significantly more likely than respondents who identified as heterosexual to experience all types of harassment, except race-based harassment (see Figure 9). Overall, 76% of sexual minorities experienced at least one type of harassment on at least one occasion during the past 18 months, compared with 57% of their heterosexual peers ($\chi2$ =17.31, p<.001). The between-group differences in prevalence were the most dramatic for the harassment based on sexual orientation (40% for sexual minority group and 14% for heterosexual respondents, $\chi2$ =52.18, p<.001), gender-based harassment (20% vs. 7%; $\chi2$ =26.45, p<.001), and unwanted sexual attention (10% vs. 3%; $\chi2$ =13.68, p<.001).

Gay, lesbian, and bisexual respondents were at increased risk of workplace harassment compared to heterosexual respondents. Our results show that employees who self-identified as gay or lesbian (n=44) or as bisexual (n=55) were more likely than their heterosexual colleagues to experience all forms of harassment, except race-based harassment (Table 1, Appendix); and bisexual respondents were more likely to be targeted than any other group. The differences were particularly striking for work-related harassment, with 82% of bisexual employees experiencing any work-related harassment compared with 67% of gay or lesbian and 55% of heterosexual peers (Table 1, Appendix).

FIGURE 9: HARASSMENT, BY SEXUAL ORIENTATION

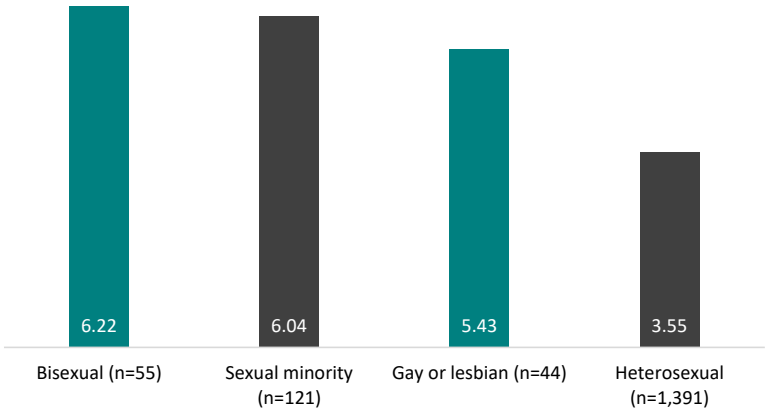


Note 1: Statistically significant differences are noted by (*).

Figure 10 visually presents the average number of harassment problems per person across four subgroups of respondents[22]. Overall, respondents who self-identified other than heterosexual (including gay or lesbian, bisexual, asexual, pansexual, and questioning) and who experienced harassment in the past 18 months, reported, as a group, 731 harassment problems. This is, on average, 6.04 problems per person. That was higher than the average number of harassment problems experienced by heterosexual employees (3.55 problems per person) (see Figure 10).

Bisexual respondents, as a group, experienced the highest average number of harassment problems (6.22 per person), compared with gay or lesbian (5.43 problems per person) and heterosexual respondents (3.55 problems per person). Again, this estimate does not indicate how often (or how systematically) they have been exposed to these behaviors; it only represents an estimated number of different kinds of harassment behaviors bisexual respondents have been exposed to during the preceding 18 months.

FIGURE 10: AVERAGE NUMBER OF HARASSMENT PROBLEMS, BY SEXUAL ORIENTATION



Note: The four groups are not mutually exclusive. Sexual minority group includes respondents who self-identified as gay or lesbian, bisexual, asexual, pansexual, or questioning.

[22] These four groups are not mutually exclusive. Heterosexual (n=1,319) and sexual minority (n=121) groups are mutually exclusive; while bisexual (n=55) and gay or lesbian (n=44) are also a part of the sexual minority group.

Race and ethnicity

Figure 11 and Table 1 (see Appendix) show the percentage of respondents in each of the seven racial and ethnic groups (e.g. white; non-white; American Indian, Alaska Native, First Nations, or other Indigenous Group Member; Asian; Black or African-American; and Hispanic, Latinx or Spanish origin; multiracial) who indicated experiencing various forms of harassment at least once in the past 18 months. Because Chi-square analysis was applicable only for inter-racial comparisons against the "white" group, all other inter-racial differences should be interpreted with caution and reported only as the percentage point difference (or simply the arithmetical difference between the two numbers)[23].

The main findings include:

1. Single-race white and all non-white respondents (combined) did not differ in the prevalence of most types of workplace harassment, except for race-based harassment; where non-white respondents (15%) were five times more likely to experience at least one instance of race-based harassment in the preceding 18 months, compared with their white peers (3%) [$\chi 2$ =67.848, p<.001].
2. American Indian, Alaska Native, First Nations, or Other Indigenous Group Member respondents (Indigenous), the smallest of the groups (n=55), experienced the highest prevalence of overall workplace harassment (82%) compared with their single-race white peers (59%; $\chi 2$ =11.753, p<.001) or any other racial/ethnic group (based on the percentage point differences).
3. Looking at specific types of harassment, Indigenous respondents were significantly more likely than their single-race white colleagues to experience all types of workplace harassment included in the study: any unwanted sexual attention (9% vs. 3%; $\chi 2$ =6.001, p=.014), any gender-based harassment (16% vs. 8%; $\chi 2$ =5.360, p=0.021), any sexual-orientation-based harassment (26% vs.15%; $\chi 2$ =4.414, p=.036), any race-based harassment (15% vs. 3%; $\chi 2$ =21.865, p<.001), and any work-related harassment (81% vs. 56%; $\chi 2$ =14.106, p<.001).
4. Asian respondents[24] experienced any harassment at a significantly lower rate compared with their single-race white colleagues (44% vs. 59%; $\chi 2$ =6.133, p=.013), but they were three times more likely to experience race-based harassment (9%), relative to white respondents (3%) [$\chi 2$ =9.385, p<=.002].

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[23] The survey included self-reported race and ethnicity and allowed for multiple answers to be recorded. The directions for this question include the words "Mark all that apply" and the response choices were: (1) American Indian, Alaska Native First Nations, or Other Indigenous Group Member; (2) Asian; (3) Black or African American; (4) Hispanic, Latinx or Spanish origin; (5) Middle Eastern or North African; (6) Native Hawaiian or Other Pacific Islander; (6) White; and (7) Some other race (please specify). The latter allowed for a write-in option. The item non-response rate for this question was 18% (i.e., 312 respondents did not provide answer for this question). Only three (n=3; 0.2%) self-identified as Middle Eastern or North African and only four respondents (0.2%) self-identified as Native Hawaiian or Other Pacific Islander. For the purpose of this report, every entry – including multiple response entries – is coded for each racial/ethnic category. For example, respondents who self-identified as American Indian, Alaska Native First Nations, or Other Indigenous Group Member (Indigenous) alone (n=14) or in combination with any other race or ethnicity (n=41), were classified as Indigenous. Similarly, respondents who self-identified as Black or African-American alone (n=55) or in combination with any other race or ethnicity (n=20), were classified as Black or African-American. The Asian group consisted of respondents who marked "Asian" alone or in combination with any other race or ethnicity. Respondents who marked "Middle Easter or North African" alone or in combination with any other race/ethnicity were coded MENA (n=7). Respondents who marked "Native Hawaiian or Other Pacific Islander" alone or in combination with any other race or ethnicity were marked NHOPI. Respondents who self-identified as "Hispanic, Latinx or Spanish origin" alone or in combination with any other race or ethnicity were coded as "Hispanic/Latinx." To make comparisons, the white category consists of respondents who marked "white" only. We also included "multiracial group" that consists of respondents who chose two or more races or ethnicities.

[24] It is also important to note that the Asian category groups very diverse populations into one category, which may mask disparities for subpopulations within that group.

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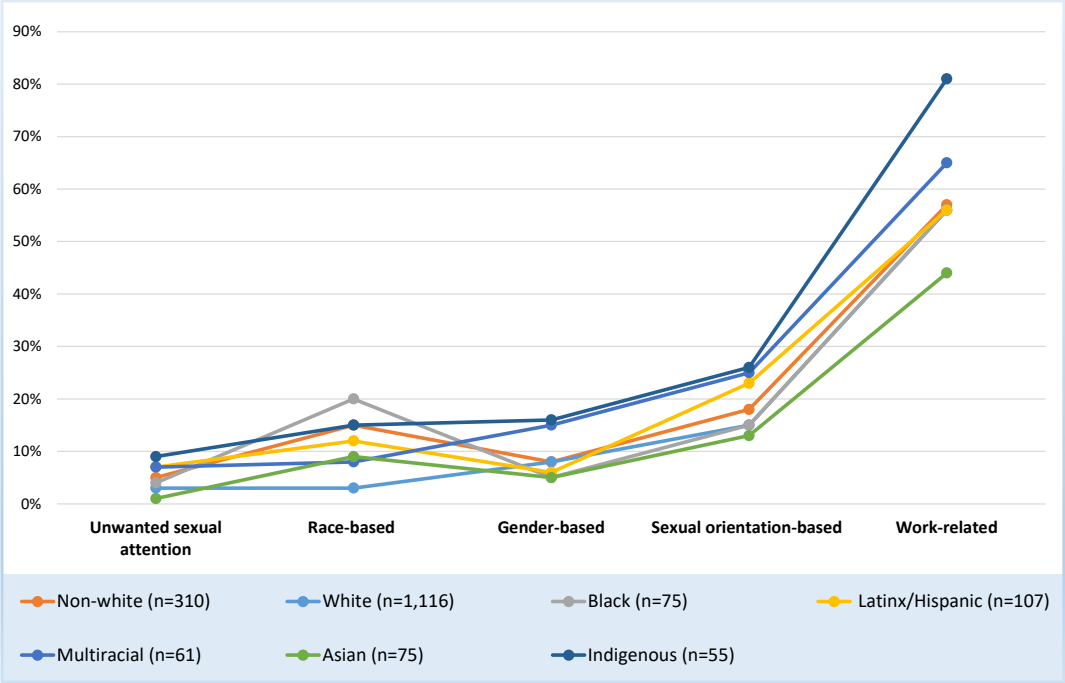
FIGURE 11: WORKPLACE HARASSMENT, BY RACE AND ETHNICITY (N=1,433)

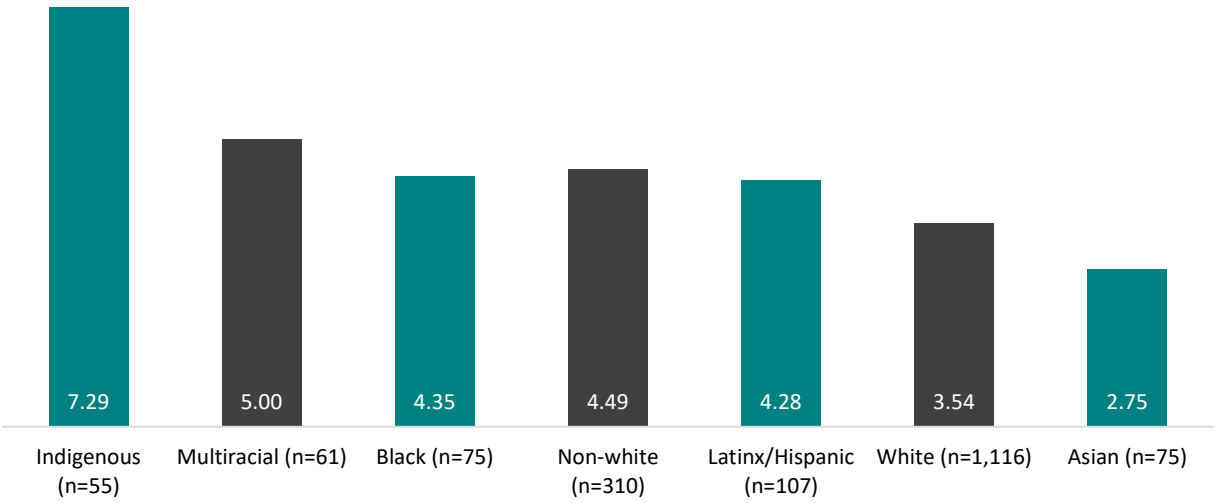


5. Black or African-American and white respondents did not differ significantly in the prevalence of any type of harassment, except for race-based harassment, where Black or African-American employees were six times more likely to experience workplace mistreatment than their single-race white peers (20% vs. 3%; $\chi 2 = 54.863$, $p < .001$).
6. Hispanic, Latinx or Spanish Origin and white respondents experienced the same levels of overall workplace harassment (59%), but there were two areas where Hispanic/Latinx and white employees had strikingly different experiences. In particular, Hispanic/Latinx respondents, relative to their single-race white peers, experienced significantly higher rates of sexual orientation-based harassment (23% vs. 15%; $\chi 2 = 5.206$, $p = .023$), and race-based harassment (12% vs. 3%; $\chi 2 = 23.972$, $p < .001$).
7. Multiracial respondents (i.e., respondents who chose two or more races or ethnicities), compared with their single-race white colleagues, experienced significantly higher rates of gender-based harassment (15% vs. 8%; $\chi 2 = 3.948$, $p = .047$); sexual orientation-based harassment (25% vs. 15%; $\chi 2 = 4.100$, $p = .043$), and race-based harassment (8% vs. 3%; $\chi 2 = 5.465$, $p = .019$).

Figure 12 presents the average number of harassment problems per person across seven racial and ethnic groups. There, once again, Indigenous employees, as a group, experienced the highest average number of harassment problems (7.29 per person) compared with any other racial group. To put this estimate into perspective, Indigenous employees, as a group, were exposed to a larger number of situations and contexts where they experienced harassing behavior(s) on at least one occasion during the preceding 18 months. This estimate (7.29 problems per person) does not indicate how often (or how systematically) they have been exposed to these behaviors; it only represents an estimated number of different kinds of harassment behaviors they have been exposed to.

Multiracial; Black or African American; and Hispanic Latinx, or Spanish Origin respondents, who experienced harassment in the past 18 months, had similar averaged number of harassment problems per person (5.00, 4.35, and 4.28, respectively). However, a similar average number of problems does not mean that the issues experienced were the same for different racial and ethnic groups. Asian respondents who experienced harassment during the preceding 18 months, on average, had the lowest average number of problems (2.75 per person).[25]

FIGURE 12: AVERAGE NUMBER OF HARASSMENT PROBLEMS, BY RACE AND ETHNICITY



[25] It is important to note that the Asian category combines very diverse populations into one category, which may mask disparities for subpopulations within that group.

Intersectionality Analysis

This section focuses on workplace harassment of women at the intersection of gender, race and ethnicity, and sexual orientation. The results show the issues most frequently identified by Black, Indigenous and women of color and sexual-minority women are simultaneously similar yet different from the experiences of single-race white women and heterosexual women. We focused the intersectionality analysis on sexual minority women based on the high rates of harassment in this population. While the analysis identified high rates of harassment for gender minorities as well, the samples sizes for those populations were too small to allow for intersectionality analysis.

1. White and non-white women did not differ in the prevalence of most types of workplace harassment, except for race-based harassment; where non-white women (15%) were significantly more likely than their single-race white peers (3%) to experience at least one instance of race-based harassment during the preceding 18 months ($\chi2$ =53.830, p<.001).
2. Black or African-American and white women did not differ significantly in the prevalence of any type of harassment, except for race-based harassment; where Black or African-American women were four times more likely to experience workplace mistreatment than their single-race white peers (21% vs. 5%; $\chi2$ =45.976, p<.001).
3. Hispanic/Latinx and white women experienced the same levels of overall workplace harassment (61%), but their experiences were significantly different in the prevalence of workplace maltreatment based on sexual orientation and race (Table 3, Appendix). In particular, Hispanic/Latinx women, relative to their single-race white peers, experienced significantly higher rates of sexual orientation-based harassment (26% vs. 16%; $\chi2$ =6.187, p=.013) and race-based harassment (11% vs. 3%; $\chi2$ =17.610, p<.001).
4. Asian women experienced any harassment at a lower rate compared with their single-race white colleagues (48% vs. 61%; $\chi2$ =3.742, p<=.053), but they were three times more likely to experience race-based harassment (9%), relative to white women (3%) [$\chi2$ =7.265, p<=.007].
5. Indigenous women experienced the highest prevalence of overall workplace harassment (85%) compared with their single-race white peers (61%; $\chi2$ =9.066, p=.003) or any other racial and ethnic group (based on the percentage point differences). Looking at specific types of harassment, Indigenous women were significantly more likely than their single-race white colleagues to experience race-based harassment (13% vs. 5%; $\chi2$=12.026, p<.001) and work-related harassment (82% vs. 59%; $\chi2$ =9,113, p=.003).
6. Multiracial women, compared with their single-race white colleagues, experienced significantly higher rates of race-based harassment (10% vs. 3%; $\chi2$ =6.338, p=.012).
7. Sexual minority women (including gay or lesbian, bisexual, asexual, pansexual, and questioning) were significantly more likely than women who identified as heterosexual to experience sexual-orientation based harassment (41% vs. 15%; $\chi2$ =35.747, p=<.001), gender-based harassment (22% vs. 8%; $\chi2$ =19.571, p=<.001) and work-related harassment (79% vs. 59%; $\chi2$ =13.810, p=<.001).
8. Non-white sexual minority women (n=15) were significantly more likely than non-white heterosexual women (n=201) to experience harassment based on sexual orientation (40% vs. 18%; $\chi2$ =4.348, p=.037).

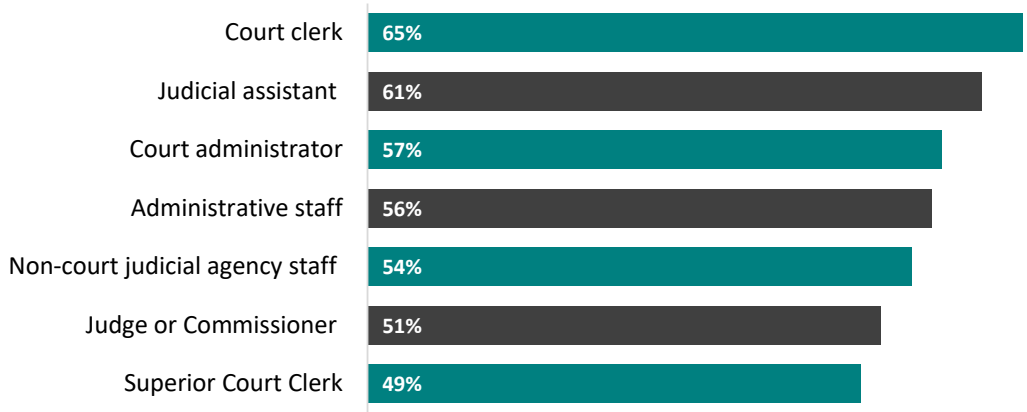
Appointment type

Research consistently investigates harassment in the framework of the imbalance of power between the employees. The courts as well as non-court judicial agencies, like any other governmental organizations, operate in environments in which the power structure of an organization is hierarchical with strong dependencies on those at higher levels. To explore how power imbalance is associated with workplace harassment, the survey included a question about the respondent's appointment within the organization. Figure 13 displays the prevalence of overall workplace harassment among the respondents with different appointments (see also Table 1, Appendix).

We found a significant association between an employee's position and experience of any workplace harassment ($\chi 2$ =23.954, p=.046). Court clerks[26], as a group, experienced any workplace harassment at a higher rate (65%) than respondents with any other appointment type. Judicial assistants experienced the second highest rate of harassment (61%). Among all survey respondents, Superior Court Clerks (49%) and Judges or Commissioners (51%) experienced the lowest rates of harassment. These numbers, however, are still alarming. They mean that one out of every two Judges or Commissioners and one out of every two Superior Court Clerks experienced some type of workplace harassment at least once during the preceding 18 months.

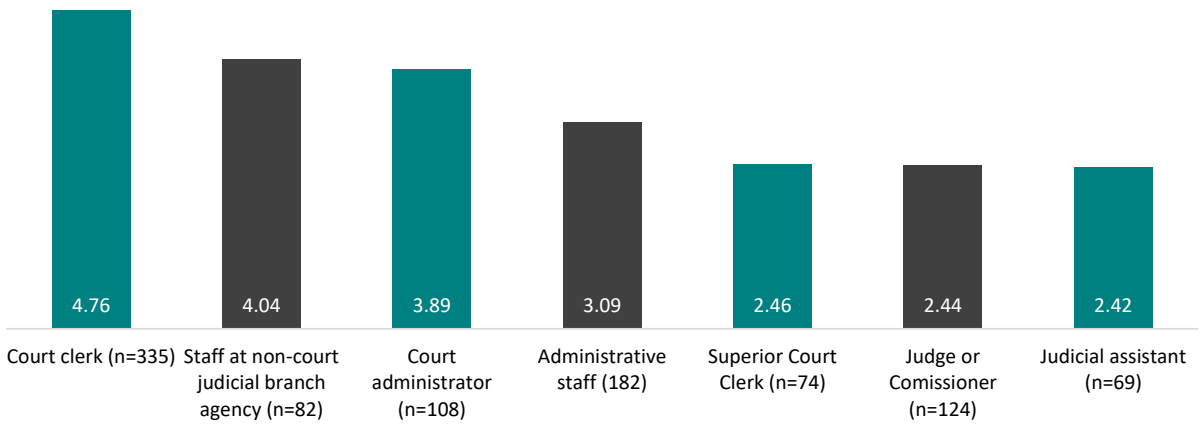
Figure 14 visually presents the average number of separate harassment problems reported by employees with different appointment types. Court clerks, as a group, reported an aggregate of 1,593 separate harassment problems with an average of 4.76 problems per person. This is the highest number of harassment problems (4.76 per person), compared with employees with any other types of appointment. Superior Court Clerks, Judges or Commissioners, and Judicial Assistants, who experienced harassment during preceding 18 months, had similar averaged number of harassment problems per person (2.46, 2.44, and 2.42, respectively).

FIGURE 13: ANY WORKPLACE HARASSMENT, BY APPOINTMENT TYPE



[26] Court clerks include employees who have administrative responsibilities, at all levels of courts: some work for elected Superior Court Clerks; some work for appointed Superior Court Clerks; some work in the Municipal or District courts, the Court of Appeals, and the Supreme Court. The report distinguishes between court clerks and Superior Court Clerks due to their different rates of experienced harassment.

FIGURE 14: AVERAGE NUMBER OF HARASSMENT PROBLEMS, BY APPOINTMENT



FINDING 6: CIRCUMSTANCES SURROUNDING WORKPLACE HARASSMENT

In this section, percentages denote the percentage of respondents indicating that response option, among all respondents experiencing any harassment in the past 18 months.

Survey respondents who experienced workplace harassment in the past 18 months were asked follow-up questions about the circumstances surrounding the "worst" incident, or the incident that had the greatest effect on them.

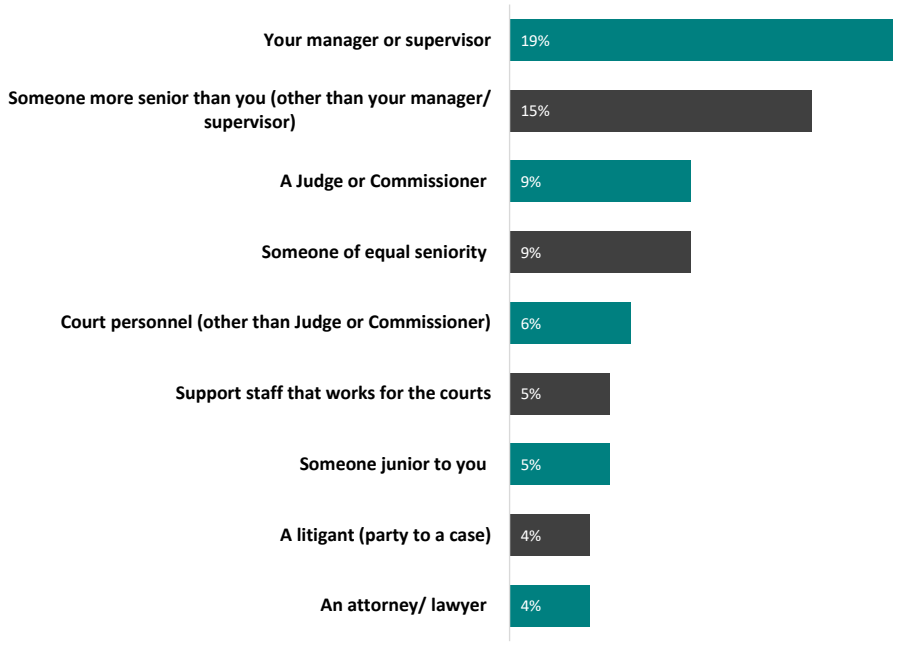
For 44% of respondents who experienced harassment in the past 18 months, the "worst experience" of harassment was not about a single and isolated event, but rather about behaviors that are repeatedly and persistently directed against them by the same source or perpetrator (22%), or it was one in a series of isolated incidents from different sources or perpetrators (22%).

Respondents were also asked about the power relationship between themselves and the perpetrator of the "worst" incident.[27] In many cases, respondents indicated that the perpetrator was a person in a superior position in the organizational hierarchy who could influence their work opportunities such as their supervisor or manager (19%), and/or someone more senior (other than manager or supervisor) (15%). Nine percent (9%) indicated that the perpetrator was a Judge or Commissioner. For 9% of employees, the perpetrator was someone of equal seniority and for 5% the perpetrator was someone junior to them (see Figure 15 and Table 4, Appendix).

Thus, the overall picture is that senior employees are more often among the "bullies". However, the number of colleagues and/or subordinates involved in harassment speak against the view that workplace harassment is primarily a top-down problem.

[27] Respondents were able to check multiple response options to this question.

FIGURE 15: RELATIONSHIP WITH THE HARASSER (n=954)



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The respondents were given an option to provide the main (self-perceived) reason for their "worst" harassment experience. Of all respondents who experienced harassment, 404 respondents took advantage of this opportunity to specify the reason for this experience. From these comments, a number of factors contributing to harassment were identified and grouped into four categories, each corresponding to a different level: 1) individual, 2) interactional, 3) organizational, and 4) societal level (Figure 16). This framework is useful for designing effective interventions for preventing workplace harassment. The factors identified were:

Individual level factors:

1. Supervisor's personality issues
2. Unhappy litigant/client
3. Being a woman
4. Age (younger)
5. Disability, hearing loss
6. Race
7. Personal life circumstance
8. Jealousy, anger, fear

Interactional level factors:

1. Power/Senior position
2. Job insecurity
3. Insecurity of a co-worker
4. Stressful situation
5. Favoritism
6. Miscommunication

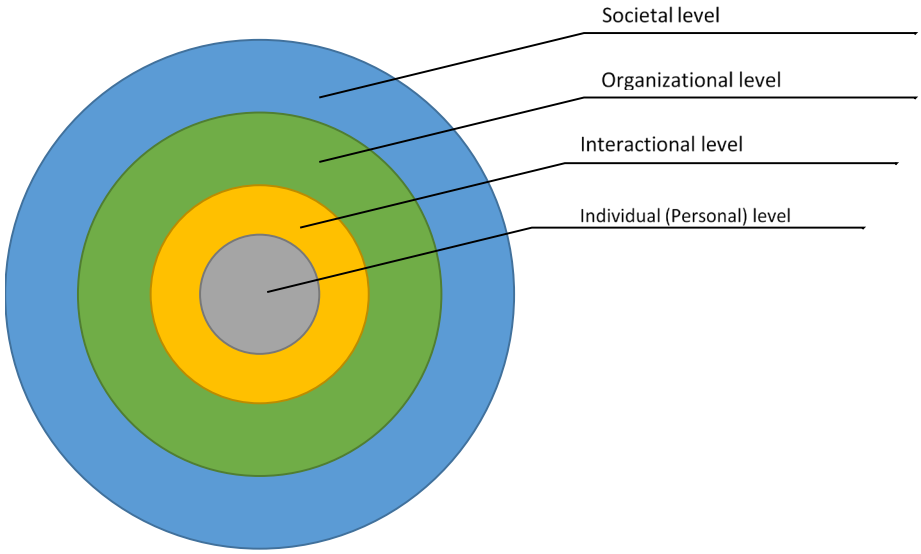
Organizational level factors:

1. Work-related stress
2. Gender bias
3. Organizational homophobia
4. Micromanagement, work pressure
5. Scapegoat
6. Unexperienced management
7. Lack of reinforced policies by administrators and superiors
8. Lack of training of Managers and HR

Societal level factors:

1. Mistrust toward the courts
2. High racial tensions
3. COVID-related

FIGURE 16: LEVELS OF WORKPLACE HARASSMENT



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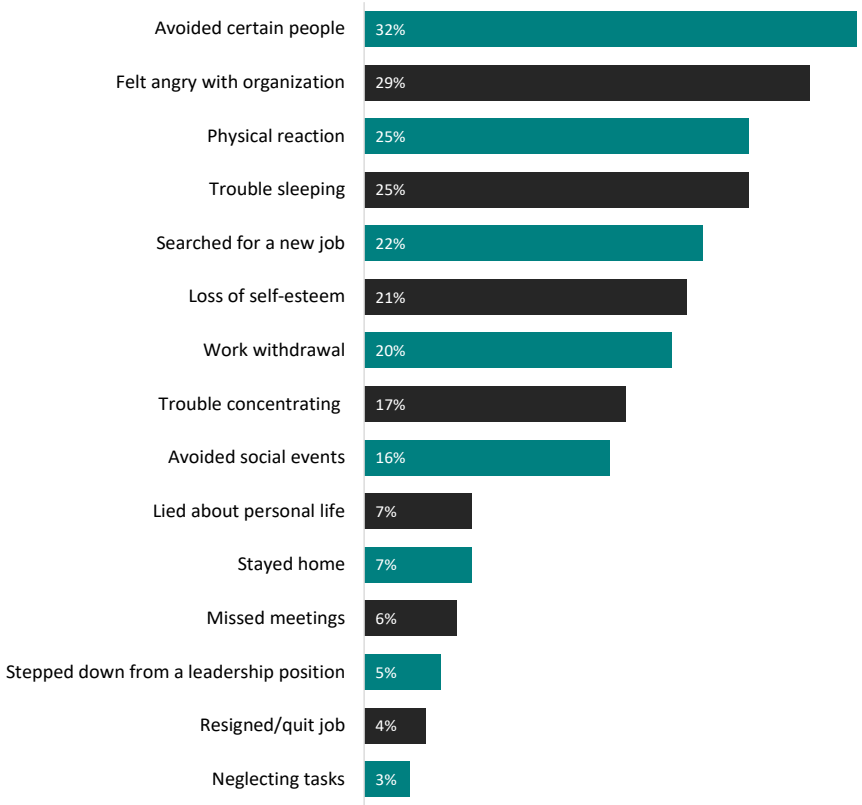
FINDING 7: CONSEQUENCES OF HARASSMENT[28]

In this section, percentages denote the percentage of respondents indicating that response option, among respondents experiencing any workplace harassment in the past 18 months.

Numerous studies have documented links between harassment and psychological and professional well-being. Workplace harassment has been reported as the most pervasive type of social stress, and even as a traumatic event[29]. In order to gauge the outcomes of harassment associated with the highest level of stress, all respondents experiencing harassment were asked to rate a specific list of work-and health-related outcomes on a three-level scale: "Not a problem," "Moderate problem," or "Major problem." Figure 17 shows the percentage of respondents who classified each outcome as "Major problem" (see also Table 5, Appendix).

A substantial number of respondents (32%) reported experiencing major problems with avoiding certain people, feeling angry with the organization (29%), having trouble falling or staying asleep (25%), experiencing a loss of self-esteem (21%), having physical reactions (i.e., headaches, exhaustion, gastric problems, respiratory complaints, musculoskeletal pain, or weight loss/gain) (25%), and avoiding social events at work such as lunch, happy hour, or a holiday party (16%).

FIGURE 17: MAJOR PROBLEMS ASSOCIATED WITH WORKPLACE HARASSMENT



[28] This section was prepared by Jillian Hagerman, DO, MPH student as a part of a Planning, Advocacy and Leadership Skills class (HSERV 572) taught by Dr. Amy Hagopian (Department of Global Health, University of Washington). During this practicum, the students conducted a literature review and, data analysis, and prepared written drafts of findings and visualizations for the Gender and Justice Commission (GJC).

[29] Einarsen, S., Hoel, H., Zapf, D. & Cooper. C.L. (2011). The Concept of Bullying and Harassment at Work: The European Tradition. In S. Einarsen, H. Hoel, Zapf, D, and C.L. Cooper (Eds.) Bullying and Harassment in the Workplace. Developments in Theory, Research, and Practice. Second Edition. CRC Press, Taylor and Francis, Boca Raton, London, New York.

In addition, a sizable share of respondents (20%) who were exposed to workplace harassment in the past 18 months reported having a major problem with work withdrawal (distancing from the work without actually quitting); and 22% with searching for a new job. Seeking fresh employment due to harassment was identified as a major problem by 44% of Black or African American employees and 43% of gender minority employees.

Further, 5% of employees who experienced harassment reported experiencing major problems with stepping down from leadership opportunities to avoid the perpetrator, and 4% said that the major problem for them was that they needed to leave their job (resign or quit) in order to stop the harassment.

Black or African-American and Indigenous employees were more likely to identify stepping down from leadership opportunities in response to harassment as the major problem, compared to their single-race white peers (16% vs. 4%; $\chi 2 = 53.863$, $p < .001$ for Black or African-American and 15% vs. 4%; $\chi 2 = 51.254$, $p < .001$, for Indigenous employees).

Further, Black or African American employees were more likely to report resigning in responses to harassment as the major problem, compared with their white peers (17% vs. 3%; $\chi 2 = 45.114$, $p < .001$).

Men (including transgender men) were more likely than women (including transgender woman) to identify stepping down from leadership opportunities (13% vs. 4%; $\chi 2 = 8.256$, $p = .016$) and lying about personal life (15% vs. 6%; $\chi 2 = 6.179$, $p = .046$) in response to harassment as major problems.

FINDING 8: STEPS EMPLOYEES TAKE WHEN FACED WITH HARASSMENT

One aim of the survey was to find out what employees did when faced with workplace harassment. Respondents were asked whether they sought help; whether, and to what degree they were able to solve their problem(s) with the help they received. Figure 18 shows the percentages of respondents who made efforts to get help and the percentage of those who were able to solve the problem(s). Of all respondents who answered this question, 56% tried to get help. Of those who tried to get help, 65% were able to solve the problem(s), including 9% who obtained a complete resolution of their problem(s). The most commonly cited reasons for not seeking help were fear of repercussions (60%), the status of the perpetrator (57%), lack of confidence in reporting practices (54%), and the belief that incident would be perceived as acceptable by the organization (50%) (See Figure 19).

FIGURE 18: GETTING HELP

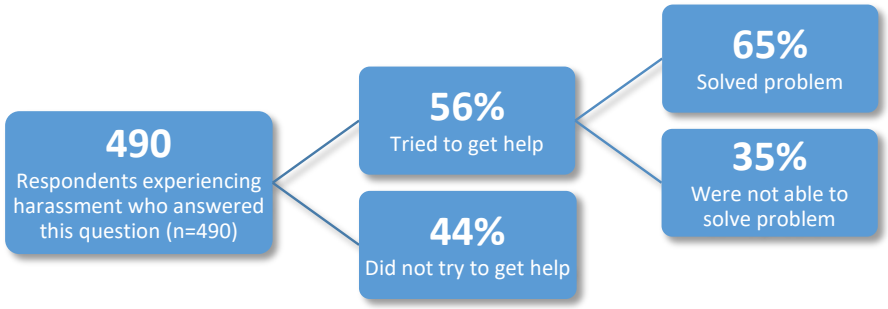


FIGURE 19: REASONS FOR NOT SEEKING HELP (n=198)

FINDING 9: ORGANIZATIONAL FACTORS ASSOCIATED WITH HARASSMENT

In this section, percentages denote the percentage of respondents indicating that response option, among all survey respondents.

The purpose of anti-harassment policies is to emphasize the organization's commitment to providing a workplace free of harassment, describe the responsibilities of the organization, and designate resources for individuals experiencing harassment. To this end, all survey respondents were asked about their awareness and understanding of anti-harassment policies and procedures as well as about their perception of their organization's response to harassment[30]. The descriptive analysis of the responses to these questions are presented in Figures 20 through 23 (see Table 6, Appendix).

Respondents who experienced workplace harassment in the past 18 months and those who did not differed strongly[31], on all questions in this section, in their responses related to awareness of the policy and procedures, as well as the organization's commitment to take steps to protect the safety of employees. The biggest difference between these two groups of respondents was in their level of confidence that their organization would deal with concerns or complaints in a thorough, confidential, and impartial manner (60% of those who experienced harassment vs. 87% of those who did not).

But even on the other items the differences were substantial (and statistically significant). Relative to respondents not experiencing harassment, respondents experiencing harassment were less likely to know whether their organization has an anti-harassment policy (92% of those who did not experience harassment vs. 89% of those who did), and whether their organization conducts harassment trainings (77% vs. 66%). They were also less likely to know their rights and obligations (87% vs. 74%), who is responsible for managing complains (82% vs. 69%), how to help prevent harassment (55% vs. 44%), how to report an incident of workplace harassment (54% vs. 41%), and where to go to get help with workplace harassment (56% vs. 43%) (see Figure 20).

All respondents were asked whether they received written (e.g., brochures, emails) or verbal information (e.g., presentations, training) from anyone in their organization about various aspects of workplace harassment. Once again, we found significant between-group differences (i.e., respondents experiencing harassment vs. not) on all four survey items pertaining to receiving information and/or training (Figure 21). Employees who experienced workplace harassment were significantly less likely than their colleagues who did not experience harassment to remember receiving information about 1) the definitions of workplace harassment (46% vs. 54%); 2) how to report harassment (41% vs. 54%); 3) where to go to get help (43% vs. 56%); and 4) how to prevent workplace harassment (44% vs. 55%).

The responses to the survey items pertaining to the organization's stance on diversity, organizational support and employees' beliefs that organizational actions serve their best interest also significantly differed depending on employees' experience with harassment (see Figure 22).

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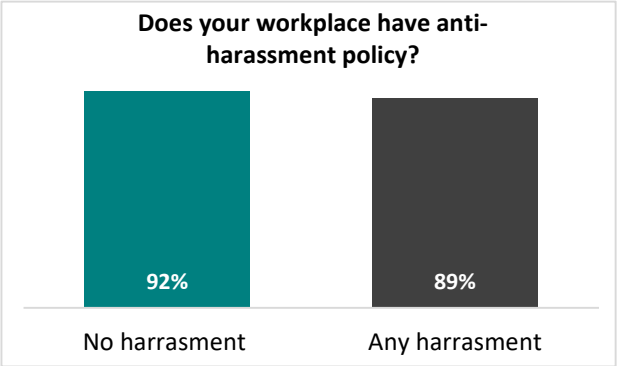
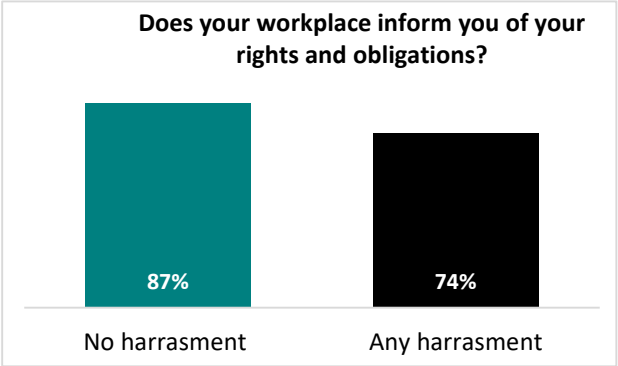
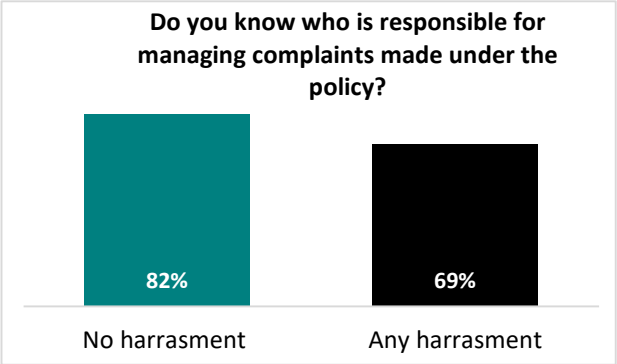
[30] Questions pertaining to institutional policies and procedures were formatted in a yes/no format; while, questions about organizational climate and fairness were scored on a four-point Likert scale ranging from 1 = "Strongly Disagree" to 4 = "Strongly Agree." We compared the percentages of respondents providing 1) affirmative answers to yes/no questions and 2) providing favorable responses (positive scores), based upon the combined sum of the "Strongly agree" and "Moderately agree" response categories. It should be noted, however, that these results are based on cross-sectional measures that do not allow us to interpret relations as cause and effect.

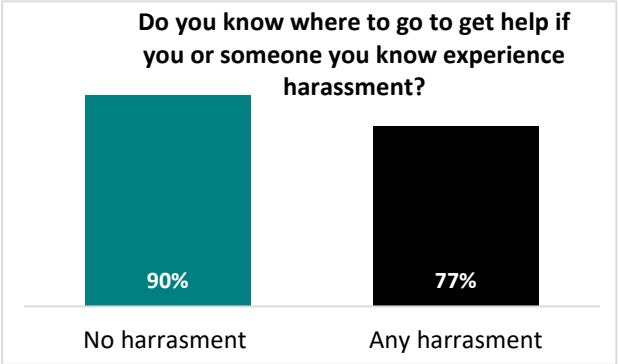
[31] The differences in responses were statistically significant at the 0.05 significance level.

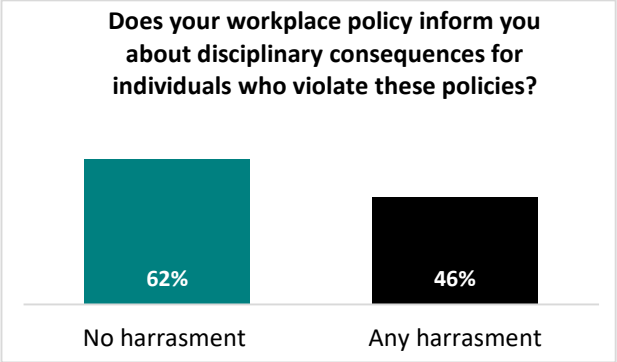
FIGURE 20: AWARENESS AND UNDERSTANDING OF ANTI-HARASSMENT POLICY

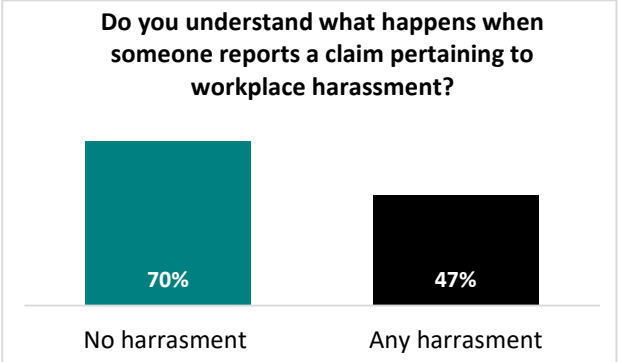












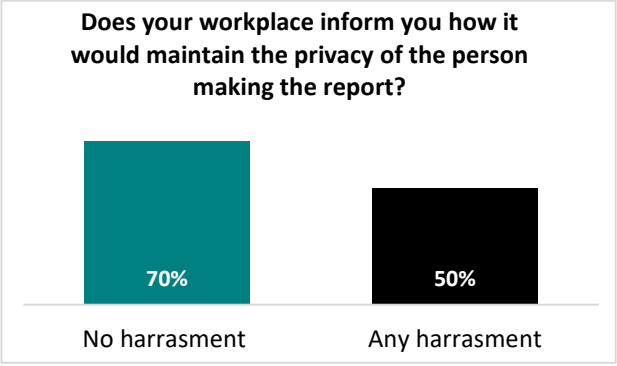


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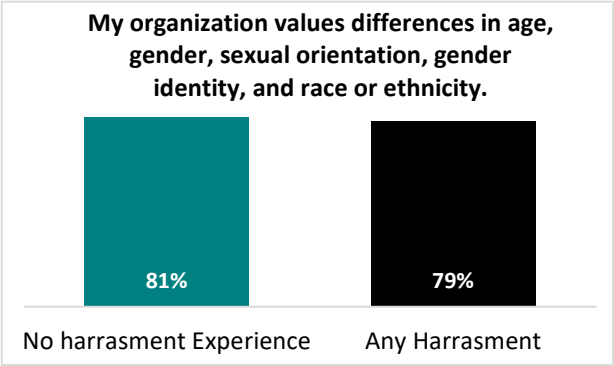
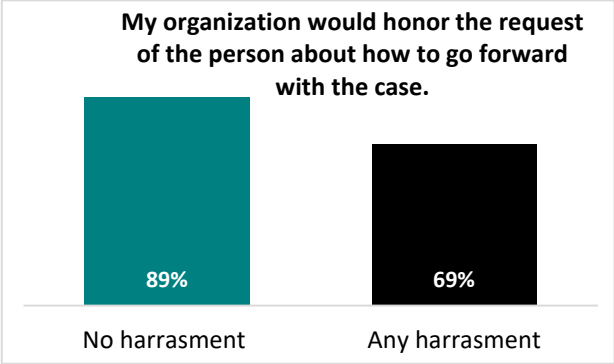
FIGURE 21: RECEIVING INFORMATION OR TRAINING

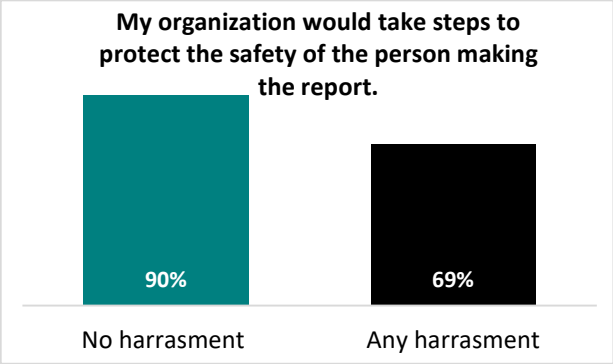
Employees who experienced workplace harassment were significantly less likely than their colleagues who did not experience harassment, to think that their organization values differences in age, gender, sexual orientation, gender identity or expression, and race or ethnicity (79% of those who experienced harassment vs. 81% of those who did not), and that it has a work environment accepting individual differences (76% vs. 90%). They were less likely to believe their organization would take the report of workplace harassment seriously (72% vs. 91%). They were also less likely to agree that their organization would maintain the privacy of the person making the report (65% of those who experienced harassment vs. 89% of those who did not), that their organization would take steps to protect the safety of the person making the report (69% vs. 90%), and that their organization would do its best to honor the request of the person about how to go forward with the case (69% vs. 89%).

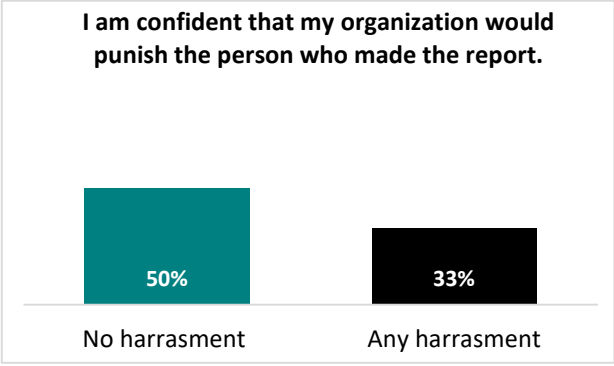
The survey also measured respondents' perceptions of fairness and trust using the following three items: (1) respondents' perception that people like them have the ability to protect themselves and enforce their legal rights; (2) respondents' perception that people like them are treated fairly in their organization; and (3) respondents' perception that the civil legal system can help people like them solve important problems. Across these three questions, we have found significant between-group differences in responses (see Figure 23). Specifically, respondents experiencing harassment were far less likely than their peers who did not experience harassment to agree that people like them have the ability to protect themselves and enforce their legal rights (60% of those who experienced harassment vs. 87% of those who did not); they were less likely to think that people like them are treated fairly in the organization (71% vs. 91%); and they were less likely to feel that the civil legal system can help people like them solve important problems (65% vs. 85%).

FIGURE 22: PERCEIVED DIVERSITY AND ORGANIZATIONAL SUPPORT









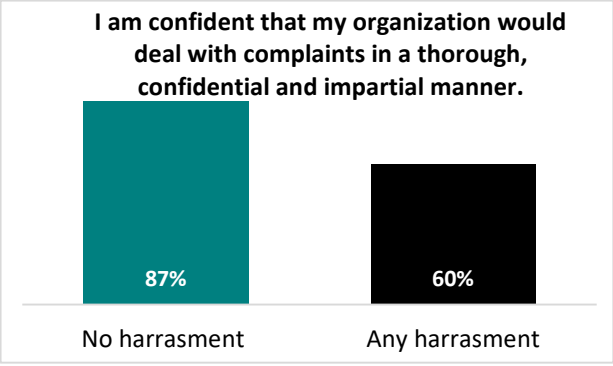


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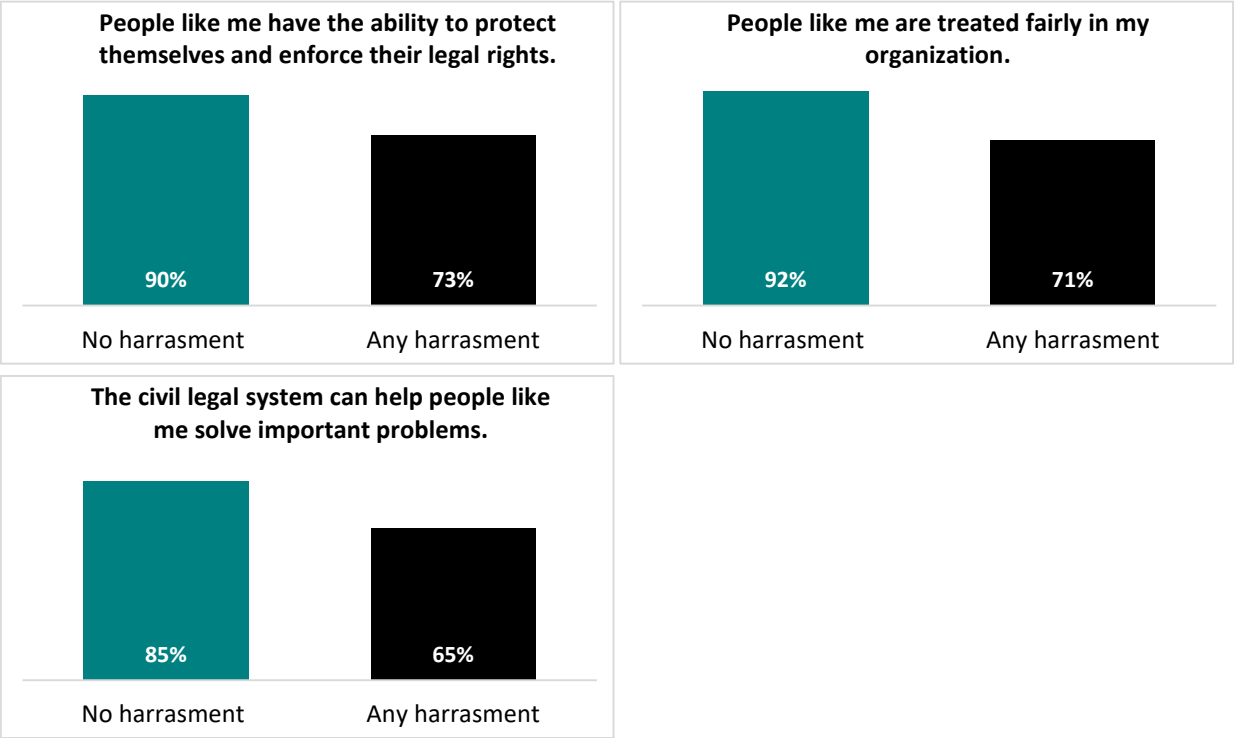
FIGURE 23: PERCEIVED FAIRNESS AND TRUST



Relationship between Workplace and Harassment[32]

Given significant associations between awareness, understanding of anti-harassment policies and procedures, as well as perception of the organizational climate and reported harassment, we investigated whether organizational variables predict the likelihood of harassment using binary logistic regression. Organizational variables selected for this analysis were: (1) *Awareness of policy* (employees' awareness and understanding of anti-harassment policy and procedures); (2) *Materials received* (receiving of written [e.g., brochures, emails] or verbal information [e.g., presentations, training] pertaining to preventing workplace harassment); (3) *Diversity, appreciation, respect* (employees' perceptions of diversity, respect and fair treatment); and (4) *Expectation of response* (employees' confidence that the organization would respond to harassment). These variables were constructed by summing the responses to multiple survey items in those categories (for a detailed list of survey items, see Table 7 in the Appendix).

Table 8 presents the results of binary logistic regression analysis performed to predict whether an employee experienced any workplace harassment in the past 18 months depending on their awareness of policy, materials received, diversity, appreciation, respect, and expectation of response, while controlling for gender, age, education, length of employment, and hours worked per week. We found that awareness of policy and confidence that the organization would respond to harassment, all other conditions being equal, significantly decreased employees' likelihood of harassment (odds ratio

[32] This section was prepared by Ronald Buie, Ph.D/MPH student as a part of a Planning, Advocacy and Leadership Skills class (HSERV 572) taught by Dr. Amy Hagopian (Department of Global Health, University of Washington). During this practicum, the students conducted a literature review and data analysis, and prepared written drafts of findings and visualizations for the Gender and Justice Commission.

= 0.85 for awareness and odds ratio =0.75 for expectation of response). In percentage terms, employees who were more aware of the anti-harassment policy were 15% less likely to experience harassment than their colleagues who were less aware of the policy. Similarly, employees who had higher levels of confidence in their organization's support with respect to harassment were 25% less likely to experience harassment than their colleagues who were less confident in this support.

Receiving written (e.g., brochures, emails) or verbal information (e.g., presentations, training) about various aspects of harassment prevention (i.e., definitions of types of workplace harassment; how to report an incident of workplace harassment; where to go to get help; and how to help prevent workplace harassment) was not useful in predicting workplace harassment. In other words, employees who remembered receiving materials and/training on these topics and those who did not were equally likely to experience workplace harassment. Furthermore, employee's perceptions of the organizational environment (i.e., employees' views of diversity, appreciation, and respect) did not predict employee's chances of experiencing workplace harassment. This means that employees with more positive attitudes and less positive attitudes toward the organizational environment were equally likely to experience workplace harassment in the past 18 months.

FIGURE 24: ORGANIZATIONAL FACTORS RELATED TO HARASSMENT

Because we were surprised by the lack of association of harassment with *diversity, appreciation, and respect* (i.e., employees' perceptions of diversity, respect, and fair treatment), we performed a separate regression on the individual questions that composed this component (Table 9, Appendix). Of the five questions constituting this construct, only the "expectation of fair treatment" was predictive of harassment at a p-value below 0.05. In percentage terms, employees who believed that people like them are treated fairly in the organization were 49% less likely to experience harassment than their colleagues who were less likely to believe in fair treatment.

The factors that increased the likelihood of workplace harassment were the number of hours worked per week and the length of employment. Compared with men, women in our study experienced a higher chance of workplace harassment; and younger employees were at a higher risk for workplace harassment compared to older employees.

Appendix

Table 1: Prevalence of workplace harassment by substantive area and subgroup

	All respondents	White	Non-white	Black	Latinx/Hispanic	Multiracial	Asian	Indigenous	Women	Men	Other gender identity	Heterosexual	Gay or lesbian	Bisexual	Non-heterosexual	Judge or Commissioner	Administrative staff	Court clerk	Superior court clerk	Judicial assistant	Court administrator	Non-court judicial branch employees
Any harassment	57%	59%	58%	57%	59%	66%	44%	82%	62%	48%	57%	57%	73%	84%	76%	51%	56%	65%	49%	61%	57%	54%
Unwanted sexual attention	4%	3%	5%	4%	7%	7%	1%	9%	4%	2%	17%	3%	7%	9%	10%	3%	3%	3%	1%	4%	3%	2%
Gender-based	8%	8%	8%	5%	6%	15%	5%	16%	9%	4%	17%	7%	16%	24%	20%	7%	6%	7%	3%	7%	12%	10%
Sexual orientation-based	16%	15%	18%	15%	23%	25%	13%	26%	17%	14%	13%	14%	36%	42%	39%	10%	11%	17%	19%	7%	18%	12%
Race-based	6%	3%	15%	20%	12%	8%	9%	15%	5%	6%	9%	6%	2%	6%	5%	4%	7%	5%	4%	4%	3%	7%
Work related	56%	56%	57%	56%	56%	65%	44%	81%	59%	44%	52%	55%	67%	82%	71%	50%	55%	63%	43%	55%	54%	50%
# of respondents	1,745	1,116	310	75	107	61	75	55	1,095	318	13	1,391	44	55	121	124	182	335	74	69	108	82
# of problems	6,086	3,947	1,391	326	458	305	206	401	4,393	834	112	4,933	239	342	731	303	562	1,593	182	167	420	331
Average # of problems per capita	3.49	3.54	4.49	4.35	4.28	5.0	2.75	7.29	4.01	2.62	8.6	3.55	5.43	6.22	6.04	2.44	3.09	4.76	2.46	2.42	3.89	4.04

Note1: Those who replied "Other" or "Prefer not to answer" for sexual orientation are excluded from the analyses.
Note 2: Some subgroups are mutually exclusive; while some are not mutually exclusive. For example, 1) white vs. non-white; 2) heterosexual vs. non-heterosexual, 3) women, men, and other gender identity; and 4) respondents with different appointment types are mutually exclusive.
Note 3: The average number of problems was calculated relative to the respondents who reported experiencing at least one incidence of harassment in the past 18 months, not all of the respondents
Note 4: Non-court judicial branch employees include employees of the Administrative Office of the Courts, Office of Civil Legal Aid, Office of Public Defense, and Commission on Judicial Conduct.
Note 5: For the purpose of this report, every race/ethnicity entry – including multiple response entries – is coded for each racial/ethnic category. For example, respondents who self-identified as American Indian, Alaska Native First Nations, or Other Indigenous Group Member (Indigenous) alone (n=14) or in combination with any other race or ethnicity (n=41), were classified as Indigenous.
Note 6: For the purposes of this table "Women" include respondents who marked "woman," "Men" include respondents who marked "man," and "Other gender identity" include respondents who marked "transgender man," "transgender woman," "genderqueer or gender non-conforming," or "questioning."

Table 2: Prevalence of different types of work-related harassment, by gender

Type of work-related harassment	Women	Men	Chi-square ($\chi 2$)	P-value
Being interrupted or talked over	41%	28%	17.965	p<.001
Having your opinions ignored	37%	25%	18.426	p<.001
Being exposed to an unmanageable workload	28%	16%	20.53	p<.001
Someone withholding information that affects your performance	27%	15%	19.26	p<.001
Being shouted at or being the target of spontaneous anger	23%	13%	15.49	p=.004
Being ignored or excluded or facing a hostile reaction when you approach	23%	12%	20.93	p<.001
Being subjected to excessive monitoring of your work	23%	16%	13.633	p=.009
Receiving repeated reminders of your errors or mistakes	22%	13%	19.603	p<.001
Having deadlines which are changed at short notice or no notice	21%	16%	Non-significant	-
Spreading of gossip and rumors about your competence	19%	13%	9.86	p=.043
Being ordered to do work below your level of competence	18%	15%	Non-significant	-
Having key areas of responsibility removed or replaced with more trivial or unpleasant tasks	15%	125	Non-significant	-
Receiving hints or signals from others that you should quit your job	12%	7%	Non-significant	-
Being subjected to intimidating behaviors such as invasion of personal space, shoving, blocking your way	7%	5%	Non-significant	-

Note 1: “Women” includes respondents who marked “woman” or “transgender woman” and “men” includes respondents who marked “man” or “transgender man.”

Table 3: Intersectionality analysis

	All women	White women	Non-white women	Black women	Latinx/Hispanic women	Multiracial women	Asian women	Indigenous women	Heterosexual women	Non-heterosexual women	Non-white, non-heterosexual
Any harassment	62%	61%	63%	64%	61%	71%	48%	85%*	60%	80%*	73%
Unwanted sexual attention	4%	3%	5%	6%	7%	7%	2%	5%	3%	7%	7%
Gender-based	9%	9%	7%	6%	5%	17%	7%	10%	8%	22%*	13%
Sexual orientation-based	16%	16%	19%	14%	26%*	21%	15%	23%	15%	41%*	40%
Race-based	5%	3%	15%*	21%*	11%*	10%*	9%*	13%*	6%	4%	20%
Work related	59%	59%	61%	64%	58%	71%	48%	83%*	58%	79%*	73%
# of respondents	1,096	850	227	52	88	42	54	40	961	81	15
# of problems	4,398	3,257	1,054	239	385	247	153	264	3,719	503	94
Average # of problems per capita	4.01	3.83	4.64	4.60	4.38	5.88	2.83	6.60	3.87	6.21	6.27

Note 1: "Women" includes respondents who marked "woman" or "transgender woman."
Note 2: For the purpose of this report, every entry – including multiple response entries – is coded for each racial category. For example, respondents who self-identified as American Indian, Alaska Native First Nations, or Other Indigenous Group Member (Indigenous) alone (n=14) or in combination with any other race or ethnicity (n=41), were classified as Indigenous.

Table 4: Relationship with a harasser in the "worst" experience of harassment, by subgroup

	All	White	Non-white	Black	Latinx/Hispanic	Multiracial	Asian	Indigenous	Women	Men	Other gender identity	Heterosexual	Gay or lesbian	Bisexual	Non-heterosexual	Judge or Commissioner	Administrative staff	Court clerk	Superior court clerk	Judicial assistant	Court administrator	Non-court judicial branch employees
Manager or supervisor	19%	18%	24%	33%	19%	25%	12%	29%	20%	13%	25%	19%	13%	13%	14%	3%	14%	28%	19%	7%	16%	14%
Someone more senior (other than manager/supervisor)	15%	14%	19%	21%	22%	8%	15%	18%	16%	9%	38%	14%	19%	24%	23%	10%	10%	19%	11%	14%	10%	25%
Someone of equal seniority	9%	10%	9%	12%	11%	13%	12%	11%	10%	9%	13%	9%	22%	13%	17%	6%	6%	12%	11%	7%	3%	16%
Someone junior	5%	6%	7%	9%	8%	5%	-	7%	6%	8%	-	6%	9%	-	5%	5%	5%	6%	6%	5%	7%	2%
Support staff that works for the courts	5%	5%	8%	16%	5%	3%	-	4%	5%	6%	-	4%	13%	11%	10%	2%	5%	5%	-	10%	7%	5%
A Judge or Commissioner	9%	9%	8%	12%	10%	3%	3%	4%	10%	7%	13%	9%	22%	2%	10%	16%	3%	9%	6%	12%	20%	5%
An attorney lawyer	4%	4%	7%	7%	10%	3%	6%	7%	4%	5%	13%	4%	3%	11%	8%	6%	3%	3%	6%	5%	7%	2%
A litigant (party to a case)	4%	4%	6%	5%	3%	13%	9%	9%	4%	5%	13%	4%	9%	7%	8%	8%	-	6%	3%	5%	5%	-
Court personnel (other than Judge or Commissioner)	6%	6%	7%	5%	10%	5%	6%	7%	7%	5%	13%	6%	9%	7%	8%	-	8%	7%	3%	10%	8%	5%
# of respondents	**954**	**542**	**181**	**43**	**63**	**40**	**33**	**45**	**677**	**151**	**8**	**787**	**32**	**46**	**92**	**63**	**101**	**219**	**36**	**42**	**61**	**44**

Note 1: The number of respondents for each subgroup is smaller than in Table 1, because not everyone answered this question.
Note 2: This table reports only those who reported experiencing any workplace harassment at least once in the past 18 months, and those who provided responses for a question asking about a "harasser" in the "WORST" experience of harassment – that is why the size of subgroups can be smaller than the size of the same subgroups in Table 1.
Note 3: For the purpose of this report, every race/ethnicity entry – including multiple response entries – is coded for each racial/ethnic category. For example, respondents who self-identified as American Indian, Alaska Native First Nations, or Other Indigenous Group Member (Indigenous) alone (n=14) or in combination with any other race or ethnicity (n=41), were classified as Indigenous.
Note 4: For the purposes of this table "Women" include respondents who marked "woman," "Men" include respondents who marked "man," and "Other gender identity" include respondents who marked "transgender man," "transgender woman," "genderqueer or gender non-conforming," or "questioning."

Table 5: Consequences of harassment that are classified as major problem

	All	White	Non-white	Black	Latinx/Hispanic	Multiracial	Asian	Indigenous	Women	Men	Other gender identity	Heterosexual	Gay or lesbian	Bisexual	Non-heterosexual	Judge or Commissioner	Administrative staff	Court clerk	Superior Court Clerk	Judicial assistant	Court administrator	Non-court judicial branch employees
Work withdrawal	20%	19%	21%	29%	18%	15%	6%	19%	19%	25%	14%	21%	11%	17%	16%	4%	15%	25%	27%	13%	19%	28%
Missed meetings	6%	6%	7%	17%	6%	5%	13%	7%	6%	9%	29%	7%	0%	10%	7%	0%	4%	10%	14%	0%	6%	12%
Neglecting tasks	3%	1%	5%	13%*	6%	5%	6%	7%*	1%	5%	29%	2%	0%	10%	7%	0%	2%	3%	0%	0%	0%	8%
Felt angry	29%	27%	43%	46%	39%	40%	41%	44%	30%	37%	57%	31%	26%	24%	27%	17%	24%	36%	36%	20%	25%	36%
Stepped down	5%	4%	12%	16%*	3%	5%	6%	15%*	4%	14%	29%	6%	5%	3%	4%	0%	7%	7%	0%	0%	3%	12%
Stayed home	7%	6%	7%	13%*	3%	35%	12%	7%	6%	10%	14%	7%	5%	7%	5%	0%	2%	10%	7%	13%	10%	16%
Searched job	22%	4%	22%	44%*	33%	20%	12%	30%	23%	25%	43%	24%	11%	17%	15%	4%	27%	33%	21%	7%	23%	32%
Avoided events	16%	16%	17%	26%	15%	10%	11%	22%	17%	15%	43%	17%	16%	17%	14%	4%	16%	22%	13%	20%	22%	12%
Lied about life	7%	7%	12%	25%*	9%	15%	12%	11%	6%	15%	43%	8%	11%	14%	11%	0%	2%	10%	7%	13%	10%	16%
Avoided people	32%	32%	40%	50%	33%	45%	28%	44%	33%	37%	57%	33%	32%	31%	32%	4%	38%	45%	47%	31%	22%	32%
Resigned/quit	4%	3%	4%	17%*	6%	-	6%	4%	4%	2%	14%	4%	0%	0%	0%	0%	7%	4%	0%	0%	3%	8%
Trouble sleeping	25%	24%	30%	54%*	12%	30%	12%	37%	19%	25%	43%	26%	21%	14%	21%	4%	28%	33%	27%	25%	28%	21%
Lost self-esteem	21%	21%	26%	38%	15%	20%	11%	41%*	21%	23%	57%	22%	5%	14%	13%	4%	17%	32%	20%	13%	23%	16%
Trouble concentrating	17%	15%	27%	42%*	15%	20%	18%	37%*	17%	20%	57%	18%	5%	14%	13%	4%	15%	23%	27%	19%	19%	16%
Physical reaction	25%	23%	34%	54%*	21%	25%	18%	41%	26%	24%	43%	26%	5%	21%	18%	4%	23%	36%	40%	31%	25%	40%
# of respondents	**474**	**336**	**99**	**24**	**33**	**20**	**17**	**27**	**366**	**50**	**7**	**387**	**19**	**29**	**56**	**23**	**47**	**122**	**15**	**16**	**31**	**25**

Note 1: For the purpose of this report, every entry – including multiple response entries – is coded for each racial category. For example, respondents who self-identified as American Indian, Alaska Native First Nations, or Other Indigenous Group Member (Indigenous) alone (n=14) or in combination with any other race or ethnicity (n=41), were classified as Indigenous.
Note 2: For the purposes of this table "Women" include respondents who marked "woman," "Men" include respondents who marked "man," and "Other gender identity" include respondents who marked "transgender man," "transgender woman," "genderqueer or gender non-conforming," or "questioning."

Table 6: Awareness and understanding of harassment policy

	All	White	Non-white	Black	Latinx/Hispanic	Multiracial	Asian	Indigenous	Women	Men	Other gender identity	Heterosexual	Gay or lesbian	Bisexual	Non-heterosexual	Judge or Commissioner	Administrative staff	Court clerk	Superior Court Clerk	Judicial assistant	Court administrator	Non-court judicial branch employees
Workplace has policy	89%	89%	86%	87%	86%	88%	82%	84%	88%	92%	75%	89%	96%	87%	91%	95%	92%	84%	91%	81%	92%	91%
Know about my rights and obligations	74%	76%	68%	64%	70%	68%	64%	67%	72%	83%	75%	73%	88%	67%	78%	84%	79%	64%	71%	74%	79%	79%
Know who is responsible for managing complains	69%	71%	62%	55%	60%	63%	68%	75%	67%	76%	50%	69%	69%	65%	63%	91%	84%	61%	69%	62%	77%	68%
Policy informs about disciplinary consequences	46%	47%	42%	45%	36%	53%	46%	58%	42%	62%	50%	46%	57%	46%	46%	61%	51%	41%	40%	43%	53%	48%
Know where to get help	77%	78%	73%	71%	76%	73%	82%	75%	75%	85%	50%	77%	79%	76%	73%	87%	89%	73%	74%	79%	77%	77%
Informed about how privacy will be maintained	50%	51%	45%	39%	44%	53%	50%	33%	47%	62%	38%	50%	62%	50%	54%	71%	57%	34%	37%	50%	60%	59%
Understand what happens when someone reports a claim	47%	50%	41%	32%	35%	50%	46%	42%	44%	62%	38%	47%	52%	54%	53%	71%	56%	36%	40%	43%	59%	55%
Harassment training	66%	67%	60%	45%	62%	68%	73%	42%	64%	74%	50%	66%	76%	61%	65%	79%	73%	56%	57%	71%	75%	66%
Know types of harassment	46%	45%	48%	27%	51%	53%	59%	42%	44%	52%	50%	46%	46%	52%	51%	45%	47%	37%	25%	52%	64%	61%
Know how to report harassment	41%	42%	42%	20%	46%	48%	50%	42%	39%	51%	50%	41%	39%	50%	46%	44%	47%	34%	22%	45%	57%	46%
Know where to go to get help	43%	44%	44%	30%	44%	45%	59%	42%	42%	51%	38%	44%	46%	50%	47%	45%	50%	36%	25%	50%	59%	41%
Know how to prevent harassment	44%	46%	42%	28%	46%	43%	50%	42%	43%	53%	38%	44%	43%	48%	50%	42%	48%	36%	28%	55%	59%	59%
# of respondents	**891**	**655**	**181**	**31**	**63**	**40**	**22**	**12**	**591**	**151**	**8**	**739**	**29**	**46**	**89**	**63**	**101**	**218**	**35**	**42**	**61**	**44**

Note 1: For the purpose of this report, every race/ethnicity entry – including multiple response entries – is coded for each racial/ethnic category. For example, respondents who self-identified as American Indian, Alaska Native First Nations, or Other Indigenous Group Member (Indigenous) alone (n=14) or in combination with any other race or ethnicity (n=41), were classified as Indigenous.
Note 2: For the purposes of this table, transgender women and men are coded as "Other gender identity."

Table 7 Parameterization of logistic regression variables of organizational factors

New variable construct	Original variables	Proposed method
Awareness of Harassment Policy	• Does your workplace inform you of your and others' rights and obligations under such policies? • Do you know who is responsible for managing complaints made under the policy or policies? • Does your workplace policy inform you about the range of disciplinary consequences for individuals who violate these policies? • Do you know where to go to get help if you or someone you know experience workplace harassment? • Does your workplace inform you and others about how it would maintain the privacy of the person making the report? • Do you understand/know what happens when someone reports a claim pertaining to workplace harassment or bullying? • Does your workplace conduct training or information sessions relating to workplace harassment?	Convert all variables to 1 = yes, 0 = no or don't know Take the sum of all answers per response, discarding any missing values, resulting in a value between 0-7
Materials received	• The definitions of types of workplace harassment • How to report an incident of workplace harassment • Where to go to get help if you or someone you know experiences workplace harassment • How to help prevent workplace harassment	Convert all variables to 1 = yes, 0 = no or don't know Take the sum of all answers per response, discarding any missing values, resulting in a value between 0 and 4
Diversity, appreciation, respect	• My organization values differences in age, gender, sexual orientation, gender identity or expression, and race or ethnicity • My organization has a work environment that is open and accepts individual differences • People like me have the ability to protect themselves and enforce their legal rights • People like me are treated fairly in my organization • The civil legal system can help people like me solve important problems	For each, convert: Strongly disagree and somewhat disagree to 0, convert somewhat agree and strongly agree to 1. Take sum of all answers per response, discarding any missing values, resulting in a value between 0 and 5.
Expectation of response	• My organization would take the report of workplace harassment seriously • My organization would maintain the privacy of the person making the report • My organization would do its best to honor the request of the person about how to go forward with the case • My organization would take steps to protect the safety of the person making the report • I am confident that my organization would punish the person who made the report • I am confident that my organization would deal with concerns or complaints in a thorough, confidential, and impartial manner	For each, convert: Strongly disagree and somewhat disagree to 0, convert somewhat agree and strongly agree to 1. Take the sum of all answers per response, discarding any missing values, resulting in a value between 0 and 6

Table 8: Results of binary logistic regression, dependent variable: Any harassment

	Model 1			Model 2		
	β	SE	Exp(β)	β	SE	Exp(β)
Awareness about policy	-.157***	.035	.854	-.163***	.037	.850
Materials received	.014	.036	1.014	.022	.038	1.022
Diversity, appreciation, and respect	-.064	.064	.938	-.090	.066	.914
Expectation of response	-.295***	.050	.745	-.242***	.053	.785
Gender				-.384**	.141	.681
Age				-.195**	.069	.823
Education				.032	.043	1.033
Length of employment				.264***	.067	1.302
Hours per week				.370***	.099	1.447
Constant	2,546***	.224	129.63	.746	.678	2.109

Note: B = B Coefficient; SE=Standard Error; Exp(B)= odds ratio; **p < .05; ***p < .001.
Independent variables are all continuous except gender (women vs men). Women" includes respondents who marked "woman" or "transgender woman" and "men" includes respondents who marked "man" or "transgender man."

Description: Table 8 shows the regression results from two different binary logistic regressions which were built in a sequential manner in which every subsequent model included an increased number of independent variables. For each variable, the table shows the coefficient (estimate β), the estimated standard error for the coefficient (SE), and exponentiated coefficient estimate (Exp(β)). A p-value of less than 0.05 indicates that the regression coefficient is statistically significantly different from zero, which would indicate that the variable has a statistically significant effect on the dependent variable. Estimate β is the value for the logistic regression equation for predicting the dependent variable from the independent variable. This estimate tells the amount of increase (or decrease, if the sign of the coefficient is negative) in the predicted log odds of any harassment that would be predicted by a one unit increase (or decrease) in the predictor, holding all other predictors constant. Because these coefficients are in log-odds units, they are difficult to interpret, so they are often converted into odds ratios which are calculated by exponentiation of β coefficient (see Exp(β)).

Interpretation: An odds ratio > 1 indicates that the event (harassment) is more likely to occur as the predictor increases. An odds ratio < 1 indicate that the event (harassment) is less likely to occur as the predictor increases. For example, for each additional unit of increase in awareness about policy, the likelihood of experiencing harassment decreases by about 0.850 times.

Table 9: Results of binary logistic regression testing factors of "diversity appreciation and respect"

	Model 1		
	β	SE	Exp(β)
Awareness about policy	-.160**	.037	.852
Materials received	.024	.038	1.024
Expectation of response	-.241***	.054	.786
Gender	-.373***	.142	.689
Age	-.213**	.070	.808
Education	.032	.043	1.033
Length of employment	.269***	.067	1.308
Hours per week	.362***	.099	1.436
Differences are valued vs. not	.219	.269	1.245
Open environment vs. not	.161	.287	1.175
Ability to protect vs. not	.189	.256	1.208
Fair treatment vs. not	-.659**	.272	.517
Civil legal system can help vs. not	-.275	.191	.760
Constant	.728	.679	2.070

Note: B = B Coefficient; SE=Standard Error; Exp(B)= odds ratio; $^{**}p < .05$; $^{***}p < .001$.
I Independent variables are all continuous except gender (women vs men).
Women" includes respondents who marked "woman" or "transgender woman" and "men" includes respondents who marked "man" or "transgender man."

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Evaluation of Washington State Domestic Violence – Moral Reconation Therapy (DV-MRT) Programs Process and Outcomes

June 30th, 2021

Submitted by:

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Executive Summary

Domestic Violence (DV) is a problematic issue that is often cyclical in nature. As such, significant efforts and resources have been invested to reduce the recurrence of DV offending. These efforts include implementing intervention programs to foster behavioral change in known perpetrators. While there has been a vast amount of research conducted to identify various programs' effectiveness at reducing such recidivism, costs of traditional DV treatment are high and often prohibitive for many justice-involved individuals. In an attempt to counteract the cyclical nature of DV and to address the high costs of DV treatment, the Washington State Supreme Court Gender and Justice Commission called for an evaluation of court-sponsored Domestic Violence – Moral Reconation Therapy (DV-MRT) programs. An important goal of DV-MRT is to provide treatment to DV justice-involved individuals and enhance their moral reasoning, decision-making, and ultimately their behavior in the context of domestic conflict.

DV-MRT is founded on sound treatment principles. It specifically addresses the lack of affordable DV treatment in some jurisdictions by offering DV treatment at a fraction of its usual cost. As such, DV-MRT has the potential to better serve a population of DV justice-involved individuals and to increase public safety by reducing the occurrence of DV recidivism. However, DV-MRT's effectiveness remains to be established through a rigorous research design. To this end, researchers at Washington State University (WSU) completed a multi-phase evaluation project to examine the implementation, process, and outcomes of court-sponsored DV-MRT treatment.

Process Evaluation: The purpose of this research is to provide a deeper understanding of the DV-MRT programs implemented at five courts in Washington State located in King and Snohomish Counties, and review their implementation and operations with court-involved individuals (men and women). To conduct the current process evaluation, WSU researchers undertook the following tasks: 1) review of documents relative to the program; 2) individual interviews of current and graduate DV-MRT program participants; 3) individual interviews with DV-MRT program facilitators; and 4) analysis of short survey data administered to program facilitators.

When examining the implementation and operations, we uncovered four areas of divergent implementation, specifically 1) inconsistent exclusion of individuals charged with a DV offense but not adjudicated; 2) same-sex or mixed-sex treatment group; 3) rules relative to absences and tardiness

and; 4) treatment modalities during COVID-19. As a whole, these areas of divergence do not pose an important implementation fidelity risk, but court-sponsored DV-MRT programs should strive to be as consistent as possible.

Findings from the qualitative data analysis of individual interview transcripts and short surveys revealed several major themes for both program participants and program facilitators. They are summarized as follows:

Program Participants	Program Facilitators
Program Content Facilitators and Peers Program Cost Workbook Program Process DV-MRT During COVID-19	Program Content and Perceived Effectiveness Workload Program Scheduling Workbook DV-MRT During COVID-19

DV-MRT program participants (both current and graduate) highlighted strengths to the existing program, notably its content, the dedication of its facilitators, and the program's low cost, but were critical of the workbook. The facilitators restated these themes, also discussing some additional challenges to their workload due to managing the DV-MRT program. We also found that COVID-19 changed the treatment modalities of court-sponsored DV-MRT programs and presented new challenges (more interruptions and distractions, lower accountability), but also provided opportunities, notably for increased flexibility, that many hoped would remain even post-COVID-19.

Outcome Evaluation: The focus of the outcome evaluation was to examine if DV-MRT was meeting its intended goal of DV reconviction reduction. We utilized a rigorous quasi-experimental design and made use of a historical matched comparison group comprised of individuals who were released in King and Snohomish counties prior to the implementation of court-sponsored DV-MRT. Overall, the findings of the outcome evaluation are positive and indicate that participation in the DV-MRT program appears to reduce the likelihood of Any DV Reconviction (1-year: 8.4% versus 12.5%; 2-year: 14.9% versus 19.0%). This differential pattern of recidivism between study groups demonstrates that the DV-MRT program appears to increase public safety in preventing the reoccurrence of DV crimes in the short-term by court-involved individuals. This makes court-sponsored DV-MRT a promising program considering its much lower costs compared to traditional DV treatment.

Section 1: Introduction

This report is written and submitted by a researcher with Washington State University (WSU) Department of Criminal Justice and Criminology in response to the request for a process and outcome evaluation of the court-sponsored Domestic Violence Moral Reconation Therapy programs (DV-MRT) implemented at various sites in Washington State. This report covers the combined findings from the *process and outcome evaluation* of six DV-MRT programs in Washington State.

As part of the process evaluation, this report examines the practice (i.e., implementation and operations) of court-sponsored DV-MRT programs at five[1] courts of limited jurisdiction in Washington State. Data for the process evaluation were gathered via document review, individual interviews, and short surveys. We specifically recorded experiences with DV-MRT from program participants (both current participants and graduates of the program) and DV-MRT facilitators. Findings from these various sources are combined to produce a general understanding of how DV-MRT is implemented and operates at these sites, both before and during COVID-19. The process evaluation also identifies areas of strengths and of potential improvements in the program's operations, allowing for recommendations of useful modifications going forward. The process evaluation also serves to inform the subsequent outcome study.

For the outcome evaluation, this report seeks to determine whether six court-sponsored DV-MRT programs in Washington State are effective in achieving their goals of DV recidivism reduction among program participants when compared to a similar group of individuals not participating in the program. Quantitative data for the outcome evaluation were compiled by the Administrative Office of the Courts; they received information about DV-MRT program participants from each of the court sites and linked it with criminal history and recidivism data, along with providing similar information

[1] Six courts were reviewed for both the process and outcome evaluation, however, one court failed to respond to requests during the process evaluation. This resulted in the inclusion of only five of the six courts in the process evaluation. All six courts were examined for the outcome evaluation.

about a large pool of comparison subjects. Statistical analyses of these data are conducted to determine if DV-MRT participants had lower reconviction rates for any type of DV-related offenses and for felony DV specifically. This section answers the question "*Does DV-MRT work in reducing DV reconviction?"* by providing evidence about its effectiveness.

Section 2: Program Background

Domestic Violence is a problematic issue. It is estimated that approximately one in four women and one in nine men will experience a type of violence perpetrated by a current or former intimate partner (National Coalition Against Domestic Violence (NCADV)). One response to this issue by the Criminal Justice System was the creation of domestic violence courts and the use of treatment as a legal remedy (Labriola et al., 2008). The most common treatment of domestic violence perpetrators are batterer intervention programs (BIPs). BIPs are education-oriented treatment programs that focus on reducing re-offending through education about accountability, empathy for victims, and non-violent resolution behaviors (GoodTherapy, 2019). A popular BIP utilized in the Criminal Justice System is Moral Reconation Therapy (MRT). MRT is a structured, cognitive behavioral-based program aimed at helping individuals increase their moral judgment and reasoning skills (Little & Robinson, 1988) that can be administered as a stand-alone treatment or along with other existing treatment programs [2] (Moral Reconation Therapy (MRT), n.d.).

MRT Theoretical Background

While MRT draws heavily from various psychological and personality development theories (G. Little & Robinson, 1988), two of the main theories framing MRT are reconation therapy as devised by Wood & Sweet (1972) (Moral Reconation Therapy (MRT), n.d.) and the theory of moral development (Kohlberg, 1976). *Reconation therapy* aims to help individuals learn how to reflect on past behaviors and decisions, as well as to learn how to make better decisions moving forward, with an emphasis on reducing the influence of hedonistic tendencies on individuals' decision-making and behaviors (G. Little & Robinson, 1988), comprising the "cognitive" component. The "moral" component of MRT is based on Lawrence Kohlberg's (1976) *theory of moral development* in which he put forth three levels of morality: preconventional morality, conventional morality, and post-conventional morality. He posits that as individuals grow, morality progresses from self-interested needs to moral judgment based on

[2] MRT advertises the ability of the program to be utilized in combination with other treatment programs but there is a lack of clarification of which programs MRT is effective with.

broader factors, and then finally to a moral judgment based on universal principles of mutual benefits and respect. Relying on these moral development concepts, MRT programs aim to help individuals make a shift from preconventional to conventional morality by helping individuals not only reflect on their decisions, but also increase their moral judgment and reasoning skills. One of the ways in which MRT works to increase moral reasoning is by addressing the underlying roadblocks, like an underdeveloped concept of self and identity, that prevent individuals from reaching a higher level of morality. This in turn is expected to help individuals reduce and/or eliminate criminal involvement and related destructive behaviors.

MRT Empirical Support

MRT programs and their target populations have expanded since the establishment of the first MRT pilot program in 1987 at Shelby County Jail with a group of justice-involved women from the general population (Moral Reconation Therapy (MRT), n.d.). The initial success of the pilot program led to the creation of Correctional Counseling Inc. (CCI), a private company responsible for the creation of MRT training/curriculum materials and facilitation of MRT programs at other sites (Ferguson & Wormith, 2013). While the program's target population were originally those with substance abuse problems only, MRT has been extended to treat other offending populations like court-involved youth and individuals who committed domestic violence offenses (Ferguson & Wormith, 2013; Moral Reconation Therapy (MRT), n.d.).

MRT is an adaptable approach to treating a myriad of behavioral problems among various types of justice-involved individuals and has been posited to reduce recidivism rates (Moral Reconation Therapy (MRT), n.d.). Existing research lends support to the idea that MRT can decrease criminal thinking (Burnette et al., 2004; Little, 2000). Specifically, MRT has been found to reduce criminogenic thinking by reducing hedonistic tendencies among MRT-treated individuals (Burnette et al., 2004, 2005; Little, 2000). In other words, individuals learn how to reduce or overcome impulsive behaviors that may lead them to engage in criminal behavior. Researchers have also found other MRT benefits. Using an array of psychological instruments, findings suggest that MRT can help increase individuals' locus of internal control, showing an increased perception of the control they believe they have over their lives and events (Burnette et al., 2004). MRT has also been associated with increased levels of self-esteem (Burnette et al., 2004, 2005; Little, 2000), increased perceptions of one's life purpose (Burnette et al., 2004; Little, 2000), and increased perceptions of social support (Burnette et al., 2004).

Considering these general positive outcomes, MRT seems well positioned to address risk factors for intimate partner violence and domestic violence, such as anger, hostility, and internalization of negative emotions (Birkley & Eckhardt, 2015; Eckhardt et al., 2008; Stith et al., 2004).

While MRT has been utilized since 1995 as a treatment for domestic violence offending, referred to as DV-MRT, few outcome evaluations studying the effectiveness of MRT in reducing DV recidivism specifically have been published (Little, 2000). In a study with domestic violence perpetrators treated with MRT, Fann & Watson, (1999) found a 64% completion rate for participants. They also found differences in terms of re-arrest rates for domestic violence offenses between program completers and non-completers. Individuals who completed the program had a 7.3% re-arrest rate compared to the 35% re-arrest rate for non-completers (as cited in Little, 2000). In another study of MRT effectiveness, Leonardson, (2000) evaluated general and domestic violence recidivism outcomes among 175-court ordered DV justice-involved individuals over a two-year period. Program participants were divided into three groups: no-show, started/dropped, and completed. At the one-year mark, those who completed the program had lower rates of any new arrest, 29.4% versus 50.6% for no-shows and 60% for those who started but dropped (starters/droppers). For new domestic violence arrests, program completers also had lower rates, 7.8% versus 19% for no-shows and 13.3% starters/droppers. At the two-year mark, those who completed the program had lower rates for new arrests, with completers having a rate of 48.6% versus 58.7% for no-shows and 74.2% for starters/droppers. Similarly, program completers had a new domestic violence arrest rate of 10.8% versus 39.1% for no-shows and 22.6% for starters/droppers. Overall, these two studies suggest that MRT may be an effective strategy in reducing specific-offense recidivism among DV justice-involved individuals.

Whilst MRT appears promising in reducing recidivism rates, more research needs to be done about the outcomes of DV-MRT for justice-involved individuals having committed DV offenses. Of notable concern is that existing research has focused on outcomes only, with little to no research on the program implementation and process. Additionally, existing research lacks the inclusion of control variables or has failed to specify control variables (Little, 2000; Little et al., 1990, 1993) and lacks equivalent and comparable control groups (Burnette et al., 2004; Deschamps, 1998; Little et al., 1990, 1999; Little & Robinson, 1989; Wallace, 2001).

Having studied domestic violence perpetrator treatment extensively in Domestic Violence Work Groups established by 2017 and 2019 legislation, the Gender and Justice Commission selected the

court-sponsored DV-MRT programs implemented and operating at various sites in Washington State for further evaluation. The programs aimed to reduce DV recidivism among justice-involved individuals who had committed such an offense by providing accessible treatment. Under DV-MRT, these individuals are now provided with low-cost treatment services for at least 24 weeks. This report evaluates DV-MRT's implementation, process, and program outcomes at six selected sites[3] in Washington State. It also addresses existing issues in the current literature, specifically by considering program process and building a strong equivalent comparison group.

[3] Six courts in Washington with DV-MRT were included in the outcome evaluation, however, only five courts responded to researcher requests for participation in the process evaluation.

Section 3: Overview DV-MRT program in Washington State

In this section, we present a current portrayal of court-sponsored DV-MRT programs in Washington State. DV-MRT in Washington State does not have an organizing body overseeing all programs offered in courts and is limited to being offered by courts of limited jurisdiction (CLJ); thus, our first step in recruiting programs to participate in the evaluation was compiling an inventory of past and current DV-MRT programs. We used two strategies. The first was to send out a survey to the court administrators and presiding judges of all courts of limited jurisdiction (CLJs) in the state. In this survey we asked participants about DV-MRT programs offered within their courts as well as programs they were aware of in other courts. Of the 246 courts, at least one representative from 134 (54%) responded to the survey. Second, we contacted representatives from the court-sponsored DV-MRT programs that were already known to the Gender and Justice Commission and asked those representatives about other programs of which they were aware.

Counties And Courts With DV-MRT Access

Based on the survey results, we present a list of counties and courts with and without DV-MRT access (see Tables 1 and 2). A map of Washington State highlighting the counties offering DV-MRT referrals is included in Figure 1. Of the 39 counties within Washington[4], 12 counties have courts offering DV-MRT referrals. Table 3 presents the list of all 51 Washington courts with DV-MRT access. Among those courts, the 22 courts listed in the far-left column of Table 3 refer individuals to their own in-court program. In comparison, courts listed in the middle column of Table 3 refer individuals from their jurisdiction to outside programs but do not themselves offer a court-sponsored DV-MRT program. Finally, the courts listed in the far-right column refer individuals to programs provided within their court and to programs outside of the court. A list of court-sponsored DV-MRT programs accepting participants from outside jurisdictions is presented in Table 4.

4 Court response was low with over half not responding to requests for information, which has resulted in programs/counties not being identified and/or included in the following tables.

Figure 1. Counties (And Number Of Courts) With DV-MRT Access

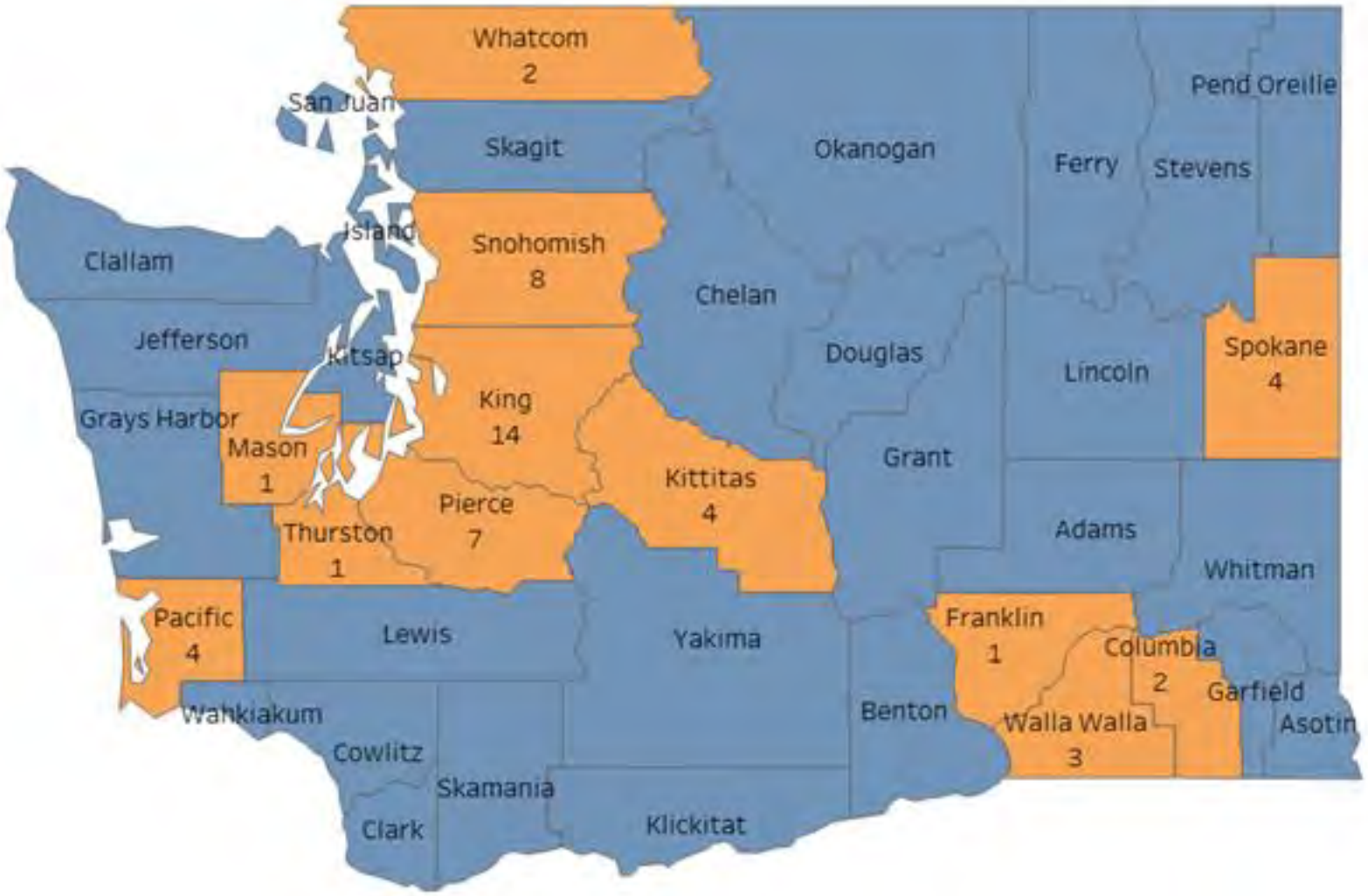


Table 1. Counties And Courts With DV-MRT Access

County	Court(s)
Columbia	Columbia District Court; Dayton Municipal Court
Franklin	Pasco Municipal Court
King	Bellevue Municipal Court; Bothell Municipal Court; Des Moines Municipal Court; Enumclaw Municipal Court; Federal Way Municipal Court; Issaquah Municipal Court; Kent Municipal Court; Kirkland Municipal Court; Maple Valley Municipal Court; Normandy Park Municipal Court; Pacific Municipal Court; Renton Municipal Court; SeaTac Municipal Court; Tukwila Municipal Court
Kittitas	Cle Elum Municipal Court; Lower Kittitas District Court; Roslyn Municipal Court; Upper Kittitas District Court
Mason	Mason District Court
Pacific	Ilwaco Municipal Court; Long Beach Municipal Court; N. Pacific District Court; S. Pacific District Court
Pierce	Bonney Lake Municipal Court; Eatonville Municipal Court; Milton Municipal Court; Pierce District Court**; Puyallup Municipal Court; S. Prairie Municipal Court; Sumner Municipal Court
Snohomish	Cascade District Court; Edmonds Municipal Court; Everett District Court; Everett Municipal Court; Evergreen District Court; Lake Stevens Municipal Court; Marysville Municipal Court; S. Snohomish District Court
Spokane	Airway Heights Municipal Court**; Cheney Municipal Court; Spokane District Court; Spokane Municipal Court
Thurston	Olympia Municipal Court
Walla Walla	College Place Municipal Court; Walla Walla District Court; Walla Walla Municipal Court
Whatcom	Bellingham Municipal Court; Whatcom District Court

** Conflicting survey information due to more than one response per court

Table 2. Counties And Courts Without DV-MRT Access

County	Court(s)
Adams	Ritzville District Court
Chelan	Chelan District Court; Wenatchee Municipal Court
Clallam	Clallam 1 District Court; Clallam 2 District Court; Port Angeles Municipal Court; Sequim Municipal Court
Clark	Battle Ground Municipal Court; Clark District Court
Douglas	Bridgeport Municipal Court; Douglas District Court; E. Wenatchee Municipal Court
Franklin	Connell Municipal Court; Franklin District Court
Grays Harbor	Aberdeen Municipal Court; Elma Municipal Court; Grays Harbor District Court - Dept. 1; Grays Harbor District Court - Dept. 2; Hoquiam Municipal Court; McCleary Municipal Court; Oakville Municipal Court; Ocean Shores Municipal Court; Westport Municipal Court
Island	Coupville Municipal Court; Island District Court; Langley Municipal Court; Oak Harbor Municipal Court
Jefferson	Jefferson District Court; Port Townsend Municipal Court
King	Lake Forest Park Municipal Court; Mercer Island Municipal Court; Newcastle Municipal Court; Seattle Municipal Court
Kitsap	Bremerton Municipal Court; Kitsap District Court; Port Orchard Municipal Court; Poulsbo Municipal Court
Klickitat	Bingen Municipal Court; E. Klickitat District Court; Goldendale Municipal Court; W. Klickitat District Court; White Salmon Municipal Court
Lewis	Centralia Municipal Court; Chehalis Municipal Court; Lewis District Court; Morton Municipal Court; Mossyrock Municipal Court; Napavine Municipal Court; Pe Ell Municipal Court; Toledo Municipal Court; Winlock Municipal Court
Lincoln	Lincoln District Court; Odessa Municipal Court; Reardan Municipal Court; Sprague Municipal Court; Wilbur Municipal Court
Okanogan	Okanogan District Court; Twisp Municipal Court
Pacific	Raymond Municipal Court; South Bend Municipal Court
Pend Oreille	Pend Oreille District Court
Pierce	Buckley Municipal Court; DuPont Municipal Court; Gig Harbor Municipal Court; Lakewood Municipal Court; Roy Municipal Court; Steilacoom Municipal Court; University Place Municipal Court
San Juan	San Juan District Court
Skamania	N. Bonneville Municipal Court; Skamania District Court; Stevenson Municipal Court
Thurston	Tenino Municipal Court
Wahkiakum	Wahkiakum District Court
Whatcom	Everson Nooksack Municipal Court; Ferndale Municipal Court; Lynden Municipal Court
Whitman	Colfax Municipal Court; Union Town Municipal Court; Whitman District Court
Yakima	Sunnyside Municipal Court; Toppenish Municipal Court; Yakima Municipal Court

Table 3. Type Of DV-MRT Referrals In Courts With DV-MRT

In-Court Referrals	Out-of-Court Referrals	Both Types of Referrals
Bonney Lake Municipal Court	Airway Heights Municipal Court***	Cascade District Court
Bothell Municipal Court	Bellingham Municipal Court	Des Moines Municipal Court
Cle Elum Municipal Court	Columbia District Court	Edmonds Municipal Court
College Place Municipal Court	Dayton Municipal Court	Everett Municipal Court
Eatonville Municipal Court	Enumclaw Municipal Court	Evergreen District Court
Kirkland Municipal Court	Federal Way Municipal Court	Normandy Park Municipal Court
Lake Stevens Municipal Court	Issaquah Municipal Court	Puyallup Municipal Court
Lower Kittitas District Court	Kent Municipal Court	S. Snohomish District Court
Marysville Municipal Court	Maple Valley Municipal Court	Tukwila Municipal Court
Mason District Court	Pacific Municipal Court	
Milton Municipal Court	Pierce District Court **	
Olympia Municipal Court	Renton Municipal Court	
Pasco Municipal Court	Spokane District Court	
Roslyn Municipal Court		
S. Prairie Municipal Court		
SeaTac Municipal Court		
Spokane Municipal Court		
Sumner Municipal Court		
Upper Kittitas District Court		
Walla Walla Municipal Court		
Walla Walla District Court		
Whatcom District Court		

** Conflicting survey information due to more than one response per court
*** Court reported past access to DV-MRT program

Table 4. Court-Sponsored DV-MRT Programs Accepting Participants From Outside Jurisdictions

Bonney Lake Municipal	Mason District
Bothell Municipal Court	Normandy Park Municipal Court
Cascade District Court	Roslyn Municipal Court
Cle Elum Municipal Court	S. Prairie Municipal Court
Des Moines Municipal Court	S. Snohomish District Court
Eatonville Municipal Court	SeaTac Municipal Court
Edmonds Municipal Court	Spokane Municipal Court
Everett Municipal Court	Sumner Municipal Court
Evergreen District Court	Tukwila Municipal Court
Kirkland Municipal Court	Upper Kittitas District Court
Lower Kittitas District Court	

Court-Sponsored DV-MRT Programs Included In the Current Evaluation

Through these two efforts described in the introduction of the current section, we identified various DV-MRT programs offered through Courts of Limited Jurisdiction (CLJ) in the state (either currently or historically). Many of the DV-MRT programs were small and/or had not been operating long, and as a result, had enrolled very few participants. We decided against recruiting from nine such programs. Of the fifteen programs we contacted, seven agreed to participate in the evaluation in some capacity. All but one of these programs were located in King or Snohomish County. One program from the east side of the state agreed to participate in the evaluation, but we ultimately decided to exclude it as it was the only program we encountered that was targeted to a specific population (veterans) rather than the general population of individuals charged with a DV offense. In addition, we wanted to avoid introducing potential bias based on geography. Thus, our treatment group consisted of individuals who participated in a court-sponsored DV-MRT program in one of six CLJs in King and Snohomish counties. They are listed in Table 5.

Table 5. List Of Court-Sponsored DV-MRT Programs Included In The Evaluation

Process Evaluation	Outcome Evaluation
Des Moines Municipal Court	Bellevue Municipal Court
Edmonds Municipal Court	Des Moines Municipal Court
Everett Municipal Court	Edmonds Municipal Court
Snohomish District Court	Everett Municipal Court
Tukwila Municipal Court	Snohomish District Court
	Tukwila Municipal Court

Section 4: Program Documents Review

When conducting a qualitative evaluation, a review of program documentation is necessary to gain insight into the program background and operations. This is an important first step as it helps the evaluators understand the full model of the program and the rules that govern it. For the current evaluation, researchers reviewed a series of documents relative to the program including the workbook *Bringing Peace to Relationships*, recruitment flyers detailing program information and the contracts used by the programs. Following is a detailed description of these materials.

DV-MRT Program And Workbook

The program DV-MRT was created by Correctional Counseling Inc.. It is an outpatient and evidence-based program based on cognitive behavioral principles. In the workbook *Bringing Peace to Relationships*[5], DV-MRT has been formatted to address the needs of justice-involved individuals with a history of Domestic Violence perpetration. While the program is not certified as a Washington state-certified Domestic Violence treatment program, courts and probation officers have the ability to refer clients to this program for treatment. One of the main goals of this program is to increase participant accountability while also gaining insight into the motivation behind their DV crimes. As a result of DV-MRT participation, it is expected that participants will gain the ability to identify and confront those tendencies to react violently within relationships in current and future situations.

Program adoption and implementation is facilitated by the Correctional Counseling Inc (CCI). They provide training and a workbook for facilitators as well as the program curriculum and workbook. According to the CCI MRT website, there are no specific educational requirements for facilitators beyond completion of a 32-hour training program in MRT. For Domestic Violence MRT (DV-MRT) facilitators, the training program is comprised of four days consisting of 32 hours of specialized training. The training begins at 8:30 am and ends at 5:00 pm each day, with the exception of the last

[5] The workbook *Bringing Peace to Relationships* currently used is 25 years old. Critiques raised are addressed in Section 5, Themes 5 and 11 under Interview Results.

day that ends at 3:00 pm, facilitators in training are required to complete multiple modules each day in addition to two hours of homework assigned each night. A schedule of modules can be found in Table 6.

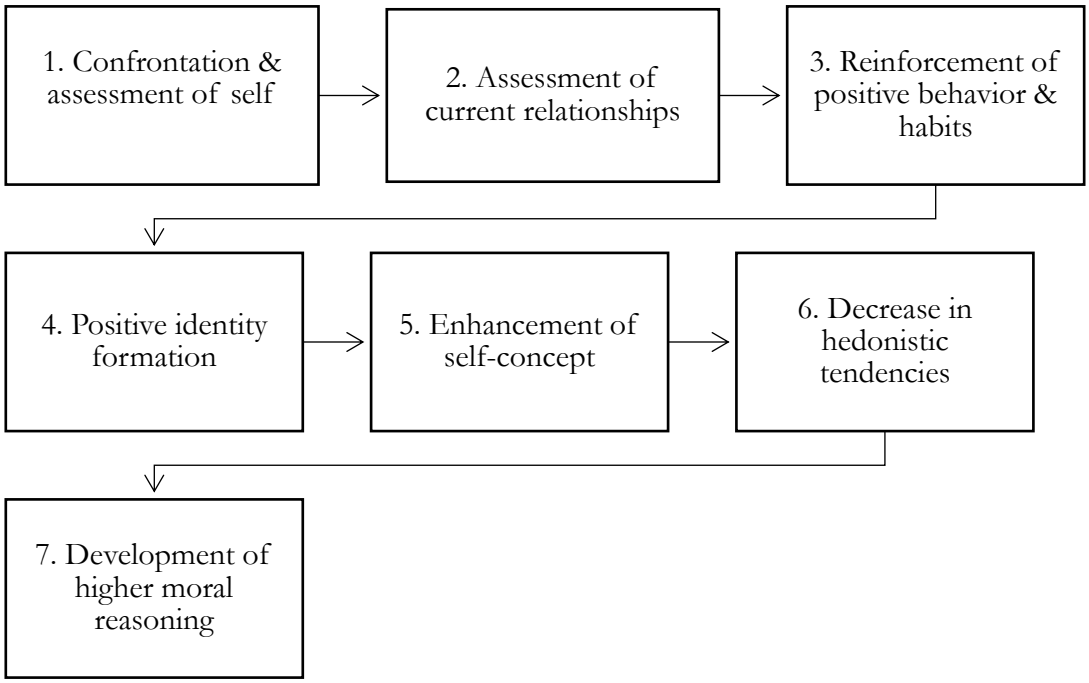
Table 6. Facilitator DV-MRT Certification Training Schedule

Training Day	Module	Length of Time
Day 1	Who Batters?	1.5 hours
	Abuse Cycle	1.75 hours
	Research Finding & Treating Those Who Batter & Treatment Resistant Clients	2 hours
	Characteristics of Cluster B Personality Disorders	1.75 hours
Day 2	Systemic & Consistent Treatment Approaches	1.5 hours
	Chapter 1- Domestic Violence is Not Normal; Chapter 2- Who Batters & Group Process	1.75 hours
	Chapter 3- Honesty & Group Process; Chapter 4- Trust & Group Process	2 hours
	Chapter 5- Client Acceptance; Chapter 6- Client Awareness	1.75 hours
Day 3	Chapter 7- Damaged Relationships; Chapter 8- Anger & Abuse Cycle	1.5 hours
	Chapter 9- Anger & Development of Appropriate Responses	1.75 hours
	Chapter 10- Relationships & Responses to Anger	2 hours
	Chapter 11- Formation of Positive Habits & Behaviors; Chapter 12- Choosing an Identity	1.75 hours
Day 4	Chapter 13- Forming Relationship Goals; Chapter 14- Identifying Values in Relationship to Goals	1.5 hours
	Chapter 15- Making Firm Commitments, Chapter 16- Peaceful Partnership & Equality	1.75 hours
	How to Implement the Cognitive Behavioral Domestic Violence Program: Questions & Answers: Awarding of Certificate of Completion	2.5 hours

During the four days of training, prospective facilitators receive: 1) a copy of the *Bringing Peace to Relationships* workbook, 2) MRT for DV Counselors' Handbook which provides the instructions and guidelines, 3) DV-MRT client exercises, 4) DV articles, 5) copies of Effective Counseling Approaches for Chemical Abusers and Offenders; Understanding & Treating Antisocial Personality Disorder: Criminals, Chemical Abusers, & Batterers; Self-Preservation: Resources & Hints for Crime Victims, Spiritual Reflections, and Crisis Intervention, along with 6) 5 Minute Stress Manager and Imaginary Time Out CD. Completion of training will result in a certificate of attendance/completion along with 3.2 continuing education units from Louisiana State University at Shreveport at an additional cost. The cost of participating in a training online is $610, however, trainings can also be scheduled to be given at the requesting location by contacting CCI at a higher cost.

MRT programs are typically implemented in institutional settings such as prison; this is not the case at the six sites under review, which are all court-ordered and take place at locations outside of the courthouse setting, often being held at probation offices. Program participants typically attend a weekly group session lasting one to two hours. Enrollment is rolling, which allows for the continuous admittance of new participants. As a result, at any given time, a treatment group will comprise members at different stages of the treatment process, including new, advanced, and graduating clients. For example, a new participant will complete the work for the first module, while another participant at a later stage will present the work completed for module 22 in the same group session. Each participant goes through the modules in order (modules 1 through 24) but is exposed to materials covered in latter modules by listening to their peers. Those treated under MRT are required to complete weekly homework assignments from the designated workbook, *Bringing Peace to Relationships*. The provided materials and homework assignments are designed to foster identity formation and moral development using seven components:

Figure 2. MRT Treatment Components



According to the MRT treatment model presented in Figure 2, MRT participants are:

- First required to learn how to confront themselves via a variety of self-assessment exercises.

- Second, participants learn how to assess their existing relationships which are then discussed in individual or group sessions. The goal is to help individuals assess which relationships warrant fostering or termination.

- Third, MRT participants are afforded opportunities that aid in developing and reinforcing positive behaviors and habits, with an emphasis on learning personal responsibility.

- Fourth, individuals learn how to develop a sense of self, specifically their inner selves, and in turn, individuals are encouraged to set goals and devise a plan to achieve those goals.

- Fifth, individuals partake in activities that help develop a healthy self-concept, which simply refers to what they think of themselves.

- Sixth, MRT activities are designed in such a way that delays instant gratification (e.g., engaging in public service work) to reduce hedonistic tendencies.

- Lastly, individuals are tasked with activities that stimulate moral reasoning with the goal being that individuals reach a higher level of morality. This is done in one of two ways. Individuals may be presented with moral dilemmas during group discussion in which they are required to share their opination but also see the situation from the perspective of others in the group. Alternatively, individuals must demonstrate they are being genuine and honest and show effort via continuous participation. Importantly, staff need to see that individuals are holding themselves accountable, to an extent, for their actions, behaviors, and progress. Individuals' progress through the program is contingent on whether MRT-certified staff believe that individuals' work in the group sessions and homework assignments meet the objective criteria outlined in the book.

The DV-MRT workbook *Bringing Peace to Relationships* consists of 24 modules that include weekly activities to be completed by participants. It consists of 16 chapters; some chapters contain multiple modules. The book is framed as a participatory, educational tool to be used along with group discussions, designed to confront participants' beliefs and behaviors especially in regard to power and

control within relationships. The authors posit within the introduction that the program will successfully reduce participant recidivism. Each chapter is comprised of a basic overview of facts and assumptions that are presented to the participant along with group and individual exercises to be completed along with the readings. Exercises marked with a facilitator are meant to be private while those marked with group are meant to be shared within the group setting. Individual focused readings and exercises do not begin until Chapter 7, and with the exception of Chapter 7, each chapter beginning with Chapter 8 consists of a mix of private and group shareable readings and exercises. Chapter 7 is solely for the participant and is meant to remain private.

Progress Through The Program

Each participant can only complete one module per week. Each participant goes through the modules in order they were designed (modules 1 through 24). Therefore, participants are required to attend weekly group meetings for a minimum of 24 weeks (6 months). According to the DV-MRT creators, while completion of the program could occur at 24 weeks minimum, the program may take longer.

Participants are required to maintain the original workbook assigned to them at the beginning of the program, as their participation completion checklist requiring facilitator signature is kept at the front of the workbook. Loss of the workbook will result in a required replacement at the participant's expense. Failure to bring workbook to the group meeting will result in the participant being unable to complete that weeks' module.

All participants are expected to complete and submit the assigned module work to the group coordinator prior to the beginning of the weekly meeting. Attendance and workbook completion is tracked with a sign-on sheet, which requires the facilitator confirmation through signature confirming participant attendance and submission. Upon review, the facilitator will determine if the module completion is satisfactory or unsatisfactory. Participants are then given the opportunity to resubmit their module work for consideration or move onto the next module.

The number of attempts allowed is dependent on the specific group location. For Tukwila, Snohomish County, and Edmonds, participants are allowed a maximum 3 attempts to complete each module. Failure to successfully complete the module in 3 attempts may result in a court referral for non-compliance. Des Moines and Everett do not specify their attempts policy in documentation provided

to evaluators. Successful completion as determined by the coordinator is required to move onto the next module.

DV-MRT Contract

As one of the goals of DV-MRT is to increase accountability, all participants are required to sign a contract at the onset. Generally, the DV-MRT program contracts dictate the number of absences a participant can have and provide a set list of rules and behaviors that program participants must follow. The following rules apply:

- Substance-free: Participants cannot be under the influence of alcohol, drugs, or non-prescribed medication while participating in group treatment.

- Attendance: Weekly attendance is mandatory with participants expected to arrive on time prior to the beginning of the session with all course materials in their possession and completed, ready to share. It is the program recommendation that group meetings last 1 hour 45 minutes in duration. In the unforeseen event in which an absence from the session is necessary, the contract requires all program participants to notify the facilitator in writing or by call of their expected absence. Failure to notify the facilitator will result in an unexcused absence. Excessive absences, both excused and unexcused, will result in participant sanctions. Criteria for unexcused determination is dependent on the individual program. Des Moines only allows 1 unexcused absence only and that after 2 absences, requires participants to restart the modules from Chapter 1. Edmonds, Snohomish County, and Tukwila allow for a maximum of 3 absences both unexcused and excused. After 3 absences, participants will automatically be referred back to court for non-compliance.

- Tardiness: Late arrival to group could also affect participant attendance. Edmonds has a zero-tolerance policy for late arrival. Participants who are late will automatically be sent home and have that counted as an absence. Des Moines also has a strict attendance policy. Group session doors are be locked 5 minutes after the group starts. Failure to be in the room and present work to facilitator before that time will result in non-participation and an absence. Tukwila breaks down arrival penalties into three

categories. If participants arrive within 15 minutes of the group session beginning, they will be allowed to participate and get full credit for that session. If they are 15-30 minutes late, they will get credit for attendance only but will not be allowed to participate. Participants who are 30 minutes or more late will get no credit for class and will have it result in an absence. No information is provided for Snohomish County regarding their late arrival policy.

- Confidentiality: All group work is confidential. While it is acceptable that participants share their individual progress with their immediate support system, all participants are expected to keep other participants' progress and group discussions private.

Participation in DV-MRT is voluntary in the sense that participants may opt not to participate. However, the program is court-ordered via conditions imposed at sentencing. If the potential participant opts against completing DV-MRT, they are referred back to the court for an alternative sentence. To be referred to the DV-MRT program for treatment, a referral request must be completed by the court. The referral request occurs during the sentencing phase for a domestic violence conviction. A referral request can also be made after sentencing for domestic violence or a related domestic violence act, specifically when failure to comply with sentencing requirements has occurred. The referral is then assigned to a DV-MRT probation officer who contacts potential participants to schedule a screening interview.

Screening interviews are scheduled shortly after the court date or release from custody. Upon approval, a notification letter is sent to both the participant and the court advising of the start date[6]. Non-approval results in the individual being sent back to court and a new court hearing being scheduled. Periodic progress reports are provided to the court and failure to complete the DV-MRT will result in a referral back to the court for a show cause hearing. Successful completion of the DV-

[6] Participants have raised concerns about delays before program start date and waitlists. Refer to Section 5 - Theme 6 for more insight.

MRT program will result in a certificate of completion, which is provided to the court and participant for their records.

Cost

Costs associated with DV-MRT participation range from $100-$200 depending on the location[7]. DV-MRT participation at Tukwila costs $100, it costs $200 at Snohomish County, and it costs $100 for in-court referrals (i.e., the court ordering DV-MRT is also sponsoring the DV-MRT program attended) or $125 for out of court referrals (i.e., the court ordering DV-MRT is different from the court-sponsored DV-MRT program attended) at Edmonds and Des Moines. If a participant loses or damages the workbook requiring replacement, there is a $25-$35 fee per each replacement. Transportation is also not provided to participants.

[7] In interviews, DV-MRT participants have commented that the full cost of DV-MRT is comparable to the cost of one session with a private provider.

Section 5: Process Evaluation: Survey and Focus Group Results

As part of the process evaluation, WSU researchers completed two main tasks. First, we reviewed the implementation of the DV-MRT programs at the sites that agreed to participate. For this purpose, we examined the characteristics of the population served at various sites and the process of each program. This was done to determine concordance between the design of the program model and its actual implementation, with respect to the target population eligibility criteria. We also wanted to learn basic information about the status of program participants and their progress in the program.

Second, we conducted individual interviews with DV-MRT program participants (both men and women[8]), at both the pre- and post-completion phases, during fall and winter 2021. We conducted additional interviews with program facilitators from 3 sites and administered a short survey to facilitators at additional sites when they could not be interviewed. Conducting a process evaluation during a pandemic proved to be a difficult task. It required multiple emails and follow-ups that went unanswered. The data collection strategy -originally planned as multiple focus group interviews and an in-depth survey- had to be adapted to offer more flexibility to participants, specifically to be able to do it at a convenient time. Whilst most participants were at home, they reported added responsibilities in these settings, which made it impractical to organize focus group interviews requiring synchronizing the schedules of 8-10 individuals. Instead, researchers organized individual interviews lasting between 20 and 30 minutes and the length of the survey administered to facilitators was reduced to less than 10 minutes.

This methodology allowed us to gather information regarding aspects of the program that were positive and challenging both for program participants at various stages of the program and at various sites, and for program facilitators from various sites. All interviews were conducted by a WSU researcher trained in research methodology and evaluation approaches. Each participant was informed

[8] The source of information about participants' sex were administrative records. Participants could not self-identify according to their preferred gender identity. This constitutes an important limitation because it imposes a dichotomous scope to the analysis (i.e., male and female only) and excludes various gender identities.

that the interview process was voluntary and confidential, and consented to their voice being recorded. Two research participants (one program participant and one facilitator) asked not to be recorded. In those cases, copious notes were taken to capture their experience. The interviews for both program participants and facilitators had similar open-ended questions: they focused on key topics such as personal experience with the DV-MRT program, positive aspects of the program, and areas recommended for improvement or change. Interviews averaged approximately a half hour. Audio recordings of interviews were transcribed for qualitative data analysis.

Program Implementation

The first component of the process evaluation was to determine concordance between the design and the implementation of the program model, specifically considering the set of criteria regarding target population size and conditions for eligibility. The program textbook specifies that the program is appropriate for perpetrators of domestic violence and that the designated treatment settings is open-ended groups with ongoing enrollment, so that new program participants can join a group at any stage. A treatment group therefore comprises participants at various stages of completion of the program, in which more senior members can provide peer support to more junior members. These criteria were all consistently applied in the programs reviewed and there are no fidelity concerns. Some sites added a geographical location requirement, as was previously illustrated in the section on DV-MRT in Washington State. We could not establish why these rules differ but hypothesize that this is probably explained by the need for effective use of limited therapeutic resources at some sites.

Next, we present four areas that were identified as areas in which various sites had implemented the DV-MRT program differently: eligibility criteria, mixed-sex or same-sex treatment groups, program rules about timeliness and absences, and modalities of treatment during COVID-19.

Eligibility Criteria

One area of uncertain implementation relates to verification of eligibility for potential program participants at each site. When we examined the quantitative data descriptively, it became apparent that a small number of DV-MRT participants had not been adjudicated for a DV-related offense prior to starting, and in some cases, completing treatment. The reasons why that might be the case became apparent that not all sites were precluding non-adjudicated individuals with a DV charge from participating. It is unclear whether these different eligibility criteria impact the patterns noted and

discussed in the rest of this evaluation, both qualitative and quantitative, considering their small numbers, but they should be noted.

> "Our rule is that the court must have authorized the person to enroll in DV-MRT (vs. ordering a batterer's program). When clients call to enroll, we look up their court docket (using JIS [9]or JABS[10]) and check it to make sure that DV-MRT was ordered/authorized. If we cannot find something in the docket, we contact the probation officer or the attorney to make sure that DV-MRT is allowed. ... We have had a couple people who have participated on their own, not because they were ordered to. We have also had people who sign up before they are ordered to do so, typically when they are in the pre-trial stage of their case. We allow them to do so, especially since our waiting list is so long. However, before we let them enroll, we follow the same process and verify that the court actually authorized our program."
>
> "There is no formal verification or screening process. I think the attorneys working on the case determine if someone is eligible or not with the help of the DV Coordinator who knows a lot about the case as well. In regards to referrals coming from other courts, they call me to ask about the program and I do a quick screen myself over the phone. I make sure they:
>
> 1) can read and write in either English or Spanish - enough to get through the program;
>
> 2) have the ability to at least pay for the book;
>
> 3) have access to either a smart phone or computer with a camera and;
>
> 4) are able to attend to one of the … groups we currently run.
>
> If they lack any one of these, I either work with them or refer them back to their attorney or another program."

[9] JIS is the acronym for Judicial Information System.

[10] JABS is the acronym for Judicial Access Brower System.

Male and Female DV-MRT Programs[11]

First, some sites implemented treatment group comprising only program participants of the same sex (all males or all females) whilst others allowed groups with participants of both sexes. Concretely, mixed groups were the results of practical considerations, with a facilitator noting it was how their program operated because there were not enough females to maintain a full group going considering the rolling enrollment format of DV-MRT.

> "We've never had enough females to make an all female group. ... So right now we're just incorporating them with the males."

This can be an area of concern, as some research demonstrates that treatment is not gender neutral. One facilitator noted that mixed groups might be particularly problematic for female participants as many of them might have experienced past trauma at the hands of men, which could potentially hinder the benefits of DV-MRT in such group. Another facilitator conveyed having made the decision not to offer treatment to women considering their low numbers and a desire to exercise caution towards possible deleterious effects. Another facilitator noted that their site had moved from mixed groups to distinct same-sex groups for males and females; this experience had opened their eyes about the changing nature of female participants' contributions to group, which the same-sex settings allowing more space for processing of prior trauma as victims of violence.

> "At first we had women … we just had them in our regular group. We haven't really had any problems with that but what I have found now is that the women are telling so much more of their backgrounds and their stories that they had originally. We didn't realize that because they were doing their assignments, they seemed to be open at our meetings but what they weren't telling was how much they suffered at the hands of men in their lives and they weren't telling that with the men in the group. So it was something that I thought was successful with the men group when

[11] Participants could not self-identify their preferred gender identity. This limitation of the data imposes a dichotomous scope to our analysis. Empirical research generally indicates that IPV is differentially experienced by individuals based on their gender identity (Ansara & Hindin, 2010; Cho et al., 2020; Langenderfer-Magruder et al., 2016), especially when considering gender in interaction with sexual orientation (Goldberg & Meyer, 2013; Graham et al., 2017; Walters et al., 2013).

> we were doing it, but now I realize that we were really, we were really shortchanging those women."

Enforcement of Rules about Timeliness and Absences

A third area of implementation difference is noted specifically relative to the enforcement of the rules discussed in the prior section reviewing program documents, specifically those relative to attending group on time and absenteeism.

> "I know some facilitators are very strict on the 'you have to be on time otherwise I won't let you in. You're five minutes late, I'm not gonna let you or you missed two groups, you're discharged', something like that, which I understand everybody is a little bit different and they can make their own rules, but with me I've been a little bit more tolerant. I came from a social work background. I understand the struggle, especially when it was back in person, the whole bus thing. I understood all that. Now with the capability of being anywhere … listening in, I'm a little more strict on that but with absences as long as they communicate with me … so I give them a little bit more leeway but I think you need to have both a passion and just like an understanding that this is a six-month program. If I were to do a six-month program and you wanted me to be there every week, I'm gonna miss a few weeks. So I have to be understanding about that, you know, that they're human."
>
> "One of the things we were not being real consistent with was if somebody missed a module or missed a week because they had a really good excuse, I was letting them make up the module the next week and somebody else was "Nope! They're absent, they're absent. They're not making it up."

Treatment Modalities During COVID-19

The fourth area of implementation difference is noted specifically in the context of COVID-19 in which modality of treatment differed. Specifically, the nature of what "remote" DV-MRT treatment meant varied by sites. Some sites opted for teleconferencing treatment in which participants had to check in by phone. They did so for accessibility reasons to ensure program participants were able to continue progressing through the program steps. Noted drawbacks to this approach were a belief about decreased program effectiveness, explained by a facilitator as their lack of ability to evaluate any nonverbal communications by participants, rendering difficult the evaluation of whether the "work" was completed.

> "One of the things we haven't been consistent with in COVID-19, and part of the reason is our judge is pretty insistent about it, we really wanted to be accepting of clients regardless of whether they had a computer or not, so we allowed call in and

> not be on cameras, but we talked to other agencies who were "absolutely not, we will not allow anyone to be without being on camera" and our judge was pretty adamant that people could call in without being on camera… We're not going to go against somebody because they just don't have the technology. … I recognize all the voices, I know who they are. We get good participation, but of course, there's certain [participants], I'd like to see their module … so I am not really sure if we are doing people a disservice by being more inclusive. That's something we've been struggling with for a few months."

Other sites opted instead for video call options, in which participants were required to participate on a system in which they were seen and heard (video and audio). This option was selected because it was thought to more closely preserve the integrity of the program and ensure alignment with the group accountability model that is core to the DV-MRT program. A facilitator noted how this option had also increased flexibility and eased program participation, giving the example of a woman participant who had been able to complete a module a few days after giving birth while still in the hospital. Drawbacks from this approach are interruptions from the participants' environment are more likely to interrupt the flow of the entire group since they can be seen by everyone. While those changes in treatment modalities were dictated by the reality of COVID-19, their possible impact on therapeutic outcomes should be kept in mind and remain to be investigated in the future.

Interview Results

Findings from the qualitative data analysis of individual interview transcripts reveal important themes for both program participants and facilitators. They are summarized in Table 7 and presented in more details in the following subsections of the report.

Table 7. Themes From Individual Interviews

Program Participants	Program Facilitators
Program Content Facilitators and Peers Program Cost Workbook Program Process DV-MRT During COVID-19	Program Content and Perceived Effectiveness Workload Program Scheduling Workbook DV-MRT During COVID-19

Results of Individual Interviews with Program Participants: Overall, participants talked positively about the program and its low cost. They rated its content, the facilitators and peers as important components. However, they did note some difficulties relative to the workbook, the wait

time to access the program, and some challenges in completing the program while maintaining stable employment due to scheduling of programmatic activities. Finally, they also discussed opportunities and challenges that arose during COVID-19. What follows is a description of each of the themes and subthemes, with quotes from participants to support our interpretations. We have transcribed participants' quotes verbatim to fully represent their patterns of speech.

Theme 1: Program Content.

As part of the qualitative program participant interviews, we asked them to discuss the nature of their personal experience with the DV-MRT program, and their answers emphasized important aspects of the program content and its perceived effectiveness.

> " It is useful with people that have anger issues"
>
> "I view that illustration phenomenal because you get a chance to talk about ... y'know give a testimony on what happened in the... in those portions of those years and also get to see where if you didn't make those same choices and decisions where you could have been at "
>
> "I love it so far."
>
> "It definitely created a healthier environment at home"
>
> "It's very good practical information and I guess it gets you to look at things a lot of different perspectives"
>
> "I feel I have gotten more out of this program then I have in the several years that I have been seeing my one on one counselor"
>
> "I find that the things, the coping mechanisms, the way to communicate and talk has spilled over into my … life"
>
> "Uh you know… Quite honestly, I love it. I wasn't skeptical of it um coming into it. I knew that I needed help um so I was very open to anything that came through the program um but it has been… it has far exceeded anything that I expected."

Next, we highlight two important aspects of the program content, specifically its facilitators and the peer format as important components of the DV-MRT program.

Theme 2: Program Facilitators.

The individual interviews conducted highlighted the importance of the facilitators' role in the DV-MRT program. Significantly, no specific question was asked about the facilitators in the qualitative interviews, yet they emerged as a consistent and positive theme among participants at both the pre- and post-release phases.

> "Having a good person to organize it is definitely an important factor."
>
> "[Facilitator's name] is phenomenal."
>
> "[Facilitator's name], I think is [their] name, [facilitator's name]... [They] was really solid. [They] um really dove into the program with both feet and was really um a strong advocate and uh non-judgmental and [he/she]'s a probation officer. I don't know what you know about the administrators of the program but um if there aren't other guys like [them], there needs to be."
>
> "Some of this has to do with the person who gives instruction. Obviously, my instructor was [facilitator's name] and [they] made it very practical… you gotta have to have somebody like [facilitator's name] who's comfortable in front leading a group of very diverse... the the.. your clientele is a very diverse group of people and [facilitator's name] was somebody who was comfortable in that environment and that made a big difference."
>
> "[Facilitator's name]is a very easy going … and [they] kinda just allows us to just say and express things without umm you know [he/she]will ask questions in places and kinda challenge people to a degree…"
>
> "The main the organizer of the course was [facilitator's name]?, [they] was really, really good, made us feel comfortable."

Theme 3: Peers.

The individual interviews conducted also discussed the importance of their peers in the DV-MRT program. This is another area in which no specific question was directly asked about peers, yet consistently emerged as an important component of the program content.

> "Being able to discuss this… you know… with other people who are going through similar challenges um… makes you not feel alone or isolated. Umm It gives you the opportunity of being able to hear umm you know different levels of people may not have had worser situations than you so um… you could be able to be a leader and let them know like you don't want get this far into it or some people have been

a little further than you so your like you know you can kinda… see things on both sides of the fence. That's not where I want to end up so this the steps I need to do in order not to end up that far."

"The one thing that really stood out to me when I started was knowing that I wasn't alone."

"Good group of people."

"I like how personal it is and that you get personal attention through other peers in the program and the counsellor."

Theme 4: Cost Of Program.

While the program textbook specifies that all costs for the program should be borne by program participants, one of the stated goals of the implementation of DV-MRT in Washington State is affordability. Specifically, because of the low costs associated with enrollment and completion in DV-MRT in contrast to the cost of a private treatment provider, it was hoped that low-income clients would be better served, leading to their pro-social reintegration. This is a final area of satisfaction that generally emerged from the individual interviews.

"The cost of the program of the program was very affordable."

"I was actually blown away because I think when I looked into other programs, it was almost like $50 per class um and at that rate, I am financially burdened right now so I probably only did like 4 or 5 classes you know for like $200 or I would only did… uh let me see.. two classes for that price that I paid to join with you guys, that would only took me two classes with somebody else.. another program and then I would have to stop but I get the benefit of doing 24 classes for that same basically $100 range instead of paying over $200 or $50 per class and then having to drop out because I couldn't pay or afford."

" It was extremely cost effective I mean um compared to any other um recovery or treatment related services. It was the most valuable dollar for donuts."

"It's low cost… It's not really financially difficult to get in and complete the program."

"I would say that's one of the positives is it is very accessible. They don't say this is going to cost you $600 and you got to do it. The only thing I had to spend money on I think was the book and I don't remember but I don't remember it being very expensive. The money thing that I saw was for 25-40% of the group depending on what point in time you look at the group, financially, they are having a tough time getting bus money to get to the class."

> "Umm to me it's a bargain, an absolute throw away bargain."

Most participants interviewed were satisfied with the costs of the program, but a few minority opinions should be noted. Specifically, two participants noted that the DV-MRT program was only affordable if a participant was employed, and that unemployment status would render the cost prohibitive. Another participant also noted that the program should be free altogether.

Theme 5: Workbook.

Another theme for interview participants was their concerns about some aspects of the workbook *Bringing peace to relationships*. As presented earlier, many participants expressed satisfaction with the content of the program, which they identified as meaningful due to the facilitator's role. However, an area of consistent dissatisfaction was the workbook in which this content was presented. They noted that the book that was developed more than 25 years ago and that it focused exclusively on men victimizing women, to the exclusion of violence perpetrated by women or to the same-sex nature of the intimate relationships of some program participants[12]. Generally, participants noted how some examples were narrow and a little silly, feeling that this was not representative of the challenges in their own relationships or in the relationships of other group members.

> "There are silly little stories within the book that are kind of cheesy and not really relatable."
>
> "If you follow the book, they have got all kinda funny little rules that the people who wrote the book came up with and I understand that it was originally designed for an inmate population so they wanted to put some parameters that were sort of harsh in it. To me, any implementation of these harsh sorta non... there were rules that didn't have anything to do with the outcome, they were more administrative, some of this kind of stuff seems kinda silly."
>
> "I think 70% of it is really on target and 30% of it is going in the wrong direction… it's a little outdated."

[12] It was reported by facilitators that some program participants had victimized their same-sex partner and were receiving DV-MRT treatment. It is unknown how frequently that was the case.

> "Nearly all the phrasing and all the terminology in the book is male-on-female centric umm which I actually find fairly offensive umm just because I mean there's women in the group as well. Umm you know so to be overly prescriptive like that granted it was written at a time when things were less aware so I kinda get it but as the world shifts you know we should be dealing with a little bit more."

Theme 6: Program Process.

Participants also expressed concerns with their ability to meaningfully participate and ultimately graduate from the program given the difficulty of program participation while employed, in a way that they perceived was exacerbated by the process of the DV-MRT program. Next, we explore various areas of dissatisfaction, including program wait list and full groups, program length, and difficulties in reconciling work and participating in DV-MRT.

a) *Wait List***.** A few participants noted their frustration at having to wait for an available spot at a DV-MRT program before they could satisfy this probation requirement.

> "It was the lead time waiting to get into the class. I think it was a 6 month wait or something. … and you have all these other things going on, the ball is kinda rolling in the wrong direction umm you know one is pretty desperate for a solution and if that solution is going to be MRT for that person, I think it would be beneficial for them not to have to wait 6 months before they receive that help."

b) *Group Size and Rate of Progress***.** Other participants remarked on the difficulty of progress in therapeutic groups comprising a high number of participants.

> "A lot of times there would be 20 plus students in a class which I don't think it was intended for one instructor trying to work through the book in a class with over twenty kids... Every extra person is makes it just that more difficult for that lessons of the day to be understood thoroughly and uh a good enough discussion around it so that you really feel like you've thoroughly covered today's subject matter."

c) *Program Length***.** A minority number of participants also reported that the program was too long to complete.

> "For me, it was long and drawn out. Umm… the fact that it was umm dispensed over the course of such a long calendar, that umm I noticed for me, it was kind of you know umm it wasn't uh potent as maybe it could have been if it was more of an intensive program maybe a couple times a week or longer sessions towards a 9

> or 10-month ordeal. I noticed also a lot of my classmates um they kinda lost interest and dropped out at some point and came back."

However, it should be noted that most participants did not believe this was the case, insisting in fact that hard therapeutic work required a significant time investment and that they understood why the program was designed the way it is.

> "An hour and half once a week you know plus whatever time it takes outside of that to go through the lesson… that's table scraps. If I can't make time for that then I'm doing something wrong."
>
> "I feel it [length of program] was about right."

d) *Program Schedule***.** A much more common theme captures a concern of program participants over the scheduling of the DV-MRT sessions, which fall during working hours, with no weekend or evening options. Many participants noted how this added complexity to their re-entry, specifically in maintaining employment and managing the lost income.

> "My class was started at, I believe, 4:30... It was either 4 or 4:30 on Wednesday afternoons… Well that's a terrible time to be. … And now you got people coming from a pretty good, um pretty large geographical area that are trying to get there in rush hour traffic so that's very disruptive to the group."
>
> "Let's say you know for example.. someone working at jiffy lube or some factory or something like that where they have to be on the clock at this time, … for them to be able take that amount of time on a given day, that's got to be insanely expensive for them."

Theme 7: DV-MRT During COVID-19.

During the qualitative interviews, participants were asked about the programmatic changes that happened during COVID-19 and the stay-at-home orders, which resulted in changes of modalities in DV-MRT; for some sites, that meant a switch to voice DV-MRT over the phone, while for others it meant a switch to Zoom. Participants identified a number of drawbacks and advantages to those changes. Positive changes included increased flexibility. Negative changes comprised interruptions and disruptions to treatment, lower accountability, and technological challenges. These subthemes are presented in more detail next.

a) *Increased Flexibility***.** Considering the challenges identified by program participants with the process of the DV-MRT program, most saw the increased flexibility in treatment modality as a positive change during COVID-19. Many expressed that they hope such flexibility will remain in the future, as it facilitates program participation and graduation.

> " I would say because my lack of transportation right now, umm I think that this is a phenomenal way of making it more tangible for you to make people appear umm every week umm and things of that nature so on the transportation piece because of COVID-19 and my lack of transportation, even if it wasn't COVID-19, I think I would struggle because of my lack of transportation to be able to get there and you know stuff like that on time or maybe just get there period."
>
> "I love the fact that it is on Zoom for that purpose because it makes it easier to get too."
>
> "Just the travel of it alone… umm I know that I would have spent probably three plus hours in just driving time to and from the meeting let alone the hour and half of the meeting itself so that would have been pretty much like I would have had to wipe that day off of my calendar so that by itself is a huge savings."
>
> "I thought Zoom was great. Actually we should really be using it. It's a lot easier for a lot of people."

b) *Increased Interruptions and Distractions***.** A first drawback that the participants discussed is a higher number of interruption and distractions following the change in treatment modality. Specifically, because participants are no longer outside their home environment, this context is much more likely to infringe upon treatment time. Many participants told stories of such interruptions, sometimes with laughter and sometimes with irritation.

> "There is a lot of other distractions of you being at home umm in the comfort of your home."

c) *Decreased Accountability***.** Most participants recognized that a drawback of the treatment modality change that occurred due to COVID-19 resulted in lower levels of engagement with the program materials and overall level of accountability.

> "When you're able to step outside the box out of your comfort zone, you're able to really grow a lot more and be more engaged … For some people who are new to doing zoom... umm it [in-person treatment] would take them out of their comfort zone and stretch their umm ability to learn and grow and challenge them a lot more."

> "If they don't have the direct accountability of being in front of someone, then they're not putting their whole heart into it."
>
> "I mean with Zoom you have the face-to-face but it's not the same."
>
> "Just the lack of interpersonal… not interpersonal, but just being able to be there live and present."

d) *Technological Challenges***.** A final drawback identified through the qualitative interviews relates to some technological challenges faced by program participants. A few participants expressed concern over the quality of their internet connection, which they believed made it harder for them to progress through the program at times because they had trouble following along. This was a minority concern that was raised infrequently.

Results of Interviews and Survey with DV-MRT Facilitators: The interviews conducted with program facilitators offered a complementary perspective to that of program participants in terms of experience with the DV-MRT program. The results we present next highlight a number of shared themes about the topics covered in the prior section, but also illuminate new nuances that are better explained in the words of those responsible for implementing and running the day-to-day activities of these programs. In the sections that follow, these themes and their subthemes are detailed and supported with quotes. As for program participants, we present facilitators' quotes verbatim to accurately represent their meaning.

Theme 8: Program Content and Perceived Effectiveness.

As part of the qualitative interviews with program facilitators, we asked about the positive aspects of the DV-MRT program, specifically to discuss their experience with the program as facilitators. Their answers emphasized important aspects of the program content, and specifically that it put the workload on program participants and that it seems to foster a level of cognitive transformation for many program participants. This led facilitators to state they believed the program was effective in transforming behaviors.

> "I've been in probation for [number of years removed] and I've had lots of DV cases and clients. … I've never experiences clients coming in and telling me how much they learned in their DV class or what they got out of it. It was always just sort of 'I went to my class' sort of thing. … What I found with DV-MRT is that although almost everyone talks about how much they hate coming at the beginning

there is like a point where all the sudden it changes and then they start telling everybody else that's new to stick with it, that all of a sudden they're going to start getting it, it will start making sense, when I first started I was angry too… you're going to recognize what you need to change and all of us as facilitators just sit there and are like "did that just happened?". It surprises us but it's really consistent. … So that's what I really love about it is for me the last 5 years I've seen so many DV offenders change behavior and change what they recognize. … they screw up again and will come back and say I've got a new offense, this is what I should have done, and they are recognizing they messed up instead of arguing about it saying "it wasn't my fault, it was this", they say '[facilitator name], I should have done a time out, I should have walked away and this is what happened' but they are at least recognizing the behavior."

"What I like about it is that, so we're not counselors … The only thing we are doing there is 'hey it's your turn', 'does anybody has any questions', and just kind of to keep order and stuff like that. What I like about it is that they are doing all the work themselves so it's very interesting to see humm especially the ones that are against the program, that are you know week 1, 2 3 they're, they're just doing the bare minimum to get by and it's interesting to see… and everybody is a little different, they're at different stages throughout the program but you hear a lot 'ah ah' moments and that's what I like about the program, that's what keeps me wanting to continue to do it because you can see the progression, almost week by week. It's motivating how it happens."

"But so towards the middle of the book I see most of them, reaching that point where they are getting it."

"You get to almost live with them throughout those six months and you get to see, you know, what's really going on in their day-to-day lives, and some are really going through a hard time and then they go through this lesson and they say 'this lesson really helped me out, especially this week when I was going through this … I maybe could have violated the no contact order and this could have been very ugly but I didn't because of this'. A lot of those instances you get to hear and you're saying 'wow … it's working, they're not recidivating'."

Additional written comments submitted by program facilitators in answer to the survey question about the biggest strength of the DV-MRT program reiterated some of the same points. Keep in mind that the question only asked for a short answer, which might explain the brevity of some answers.

"Participants identifying abusive behaviors themselves."

"The insights it incrementally offers to students as they complete the assignments and the life-changing tools that they obtain by making a few attainable behavioral adjustments discussed in the course materials."

> "Giving clients the tools to discover a need for behavior change on their own, without lectures or guilt."

The positive aspects of the program emphasized in these quotes are further illuminated by the result, in the supplemental short survey administered, that all facilitator respondents believed the program to be effective and that the program contributed to the overall success.

Theme 9: Workload.

During interviews with program facilitators, we asked about balancing the task of facilitating and managing the DV-MRT program with their other professional duties. Their answers indicated an additional burden in workload, coming not from facilitating group itself, but instead in managing the administrative tasks related to the program.

> "It is definitely an added workload. And doing things like status reports, I have so many. Now all the phone calls come to me. So like those 100 and some people that are on the wait list, I've answered all of those calls, I talked to all of those people and I am writing letters and sending them off to their attorneys and to their courts. And then I am following up when they call where they are. … I could really use a clerk. … I've got so many other things that I need to do. … It's just time consuming. It's not that I mind talking to people, it's just, it's busy work."
>
> "Not necessarily the classes … but I think the phone calls and the progress reports and the payments, and then they make the payments to the wrong place and just a lot of the troubleshooting that goes wrong with it takes a lot of time. People call in to ask questions about it, attorneys call so I think if I had a little bit more help, cause I do all of that myself, so maybe if I had another person from the court help me with that, that would be easier on me."

The added workload is also apparent in the supplemental short survey administered, in which 80% of all facilitators who responded indicated that their workload increased as a result of the DV-MRT program. However, all respondents still reported that the amount of work they had to accomplish for the DV-MRT program was reasonable.

Theme 10: Program Scheduling.

The program facilitators also highlighted the scheduling of DV-MRT group sessions when it was in person as another possible area of improvement, especially considering the reality of public

transportation in their geographical areas, and the resulting difficulties in be on time for program participants.

> "Back then we weren't allowed to work past our closing time … I don't know what happened with the union or something like that, we got stuck back to working 7:30 to 4:30 Monday through Friday and that… now being online it's a little easier to get people because they can do it on their lunch break, you know, some people are in their car while they are doing it, but I think just having access to, not everybody had that capability of doing it. Maybe if we were to offer one of our classes late in the evening for those folks that, you know, that can't be there."
>
> "When it was in person we had a lot of straggling people because of the bus and the rides."

Theme 11: Workbook.

One of the most recurrent area of improvements identified by the program facilitators relates to the content of the program. They critiqued the workbook's organization and its targets (and exclusions). They specifically echo the comments of program participants about the workbook being outdated[13].

> "For the program itself, the workbook is really outdated and it's not organized in a way that makes sense for clients. There's 16 chapters but 24 modules. So they do one module per week. But almost everybody, and it doesn't matter how many times you tell them, they all try to do the entire chapter every week. That's just how their brain works. … There are some clip arts … and a lot of our clients get really put off by some of the clip arts. In particular in Module 16, there's a picture of a policeman pointing at them and we have found that it offends a lot of them. They just do not like that at all. … It's very threatening. We have a seen a lot of, especially our guys who have been in prison, who have been in gangs, it's just a very authoritative angry type of outlook and they don't like it. … It really needs to be updated. … It's not accepting of same-sex relationships, or it does not acknowledge them, and it's very male-versus-female instead of being more generic. So like in my women's class we are constantly changing the language, and when we know we have same-sex partners, we're trying to say, we're trying to verbally change it without making it awkward, so I feel like the book just need to be updated."

[13] Critiques of the workbook being outdated can also be found under Section 5 - Theme 5.

> "The negative feedback that I've gotten is from people that feel it's a little outdated I think for the times. It's geared to the average White male , I think. And with Seattle here, we have people from a lot of different background and races, and same-sex people, females, so it's really not ?? towards those other populations so sometimes you know, in reading some of this stuff, they might get triggered a little bit or they may …. So I have to, you know, assist them through that phase of where I tell them to just get what you get out of it and to just not look too much into it. So it's a little outdated and it's not for every body and we're trying to do the best we can with it."

Additional written comments submitted by program facilitators in answer to the survey question about the most important way in which the DV-MRT program could be improved, also concerned the program workbook and its apparent lack of tailoring to some populations that are currently being served by the program.

> "Update the book, make it suitable for women and LGBT members."
>
> "The book needs to be updated so that it is not directed to just inmates and to only the male gender."
>
> "If the book was gender neutral. Right now the book is geared towards men who abuse. We use the same book to facilitate the women's group."
>
> "The workbook needs to be updated for clarity and to better reflect current times."

Theme 12: DV-MRT During COVID-19.

The nature of the programmatic changes needed to be implemented rapidly in response to the COVID-19 pandemic and subsequent stay-at-home order have been previously discussed in the current report's chapter on DV-MRT in Washington State and earlier on the chapter in the section on implementation. In the current section, we focus not on the nature on the changes themselves but on the resulting programmatic conditions identified by the facilitators, some of which were seen positively and others as challenges for program facilitators. Positive changes included increased flexibility. Areas of increased challenge comprised interruptions and disruptions, slower pace of group resulting in a need for smaller groups, and difficulties in fostering traditional treatment conditions due to lessened participation and peer relationship and accountability. These subthemes are presented in more detail next.

a) *Increased Flexibility***.** All the facilitators interviewed considered the increased flexibility resulting from the change in treatment modality as a positive change resulting from Covid-19 and expressed their hope that it would continue going forward.

> "There's a lot of positives because like I said we have people from all over Washington now. We're one of the ones that take people and females and three times a week and stuff so that opens up the door to a lot more people, it's convenient, everybody is on time, for the most part, when it was in person we had a lot of straggling people because of the bus and the rides, something, so most people are on time. … If it was up to me, once it's all over, I would think we might have like one class in person and maybe two online."
>
> "[Going forward] I would kind of like the option, honestly, to have virtual group. We've had some people that have been out of state or people that, we've had one gal appear for group, in the hospital, she had a baby the day before. She was in her hospital bed on zoom, doing her class. They came in, they are releasing her from the hospital. She participated in the entire session while they were wheeling her out of the hospital. … and then she is in the car on Zoom, still participating. And I was like "Oh my God' She would have missed weeks of group" if she had to be in person but she literally participated from her hospital bed. … I kind of hope they are gonna allow for circumstances to continue to participate virtually."

b) *Increased Interruptions and Distractions***.** The facilitators also noted that DV-MRT treatment in a time of COVID-19 meant a number of interruption and distractions in the home environments of program participants.

> "And we do notice that people end up multitasking. So like in my women's group, they're taking care of their kids because they're at home. … We got one woman, she works for [company name], puts together [company product] and she literally sits there with her camera putting the [company product] together while she is going through the class."
>
> "I do have one that, he has ADHD. So it's very hard for him to sit for an hour and a half. So I see him doing sit ups and push ups. I just turn his camera off. This is distracting to the group."

c) *Difficulties in Fostering Traditional Treatment Conditions***.** Three of the program facilitators expressed concerns over some ways in which the new treatment modalities may lack fidelity from the way they were designed and intended by the program creators. For example, concerns over lesser levels of participation during treatment, fewer interactions and accountability with peers and facilitators, were mentioned.

> "And they're not as expressive so when it was live in person I think we had a lot more feedback, there was a a lot of dialogue. Now everybody is almost shy to speak up. … A majority of them are a little shy to speak up on camera I think. I think they just want to class rolling to finish on time or maybe they feel weird about speaking. I don't know what it is."
>
> "The negative side that I have seen it that it's harder for people to get to know one another, cause they're not physically, they're not talking before group, after group, getting rides with each other, things like that."

Summary

A process evaluation is useful to document the implementation and operations of a program. In this section of the evaluation, we uncovered four areas of divergent implementation, specifically 1) inconsistent exclusion of individuals charged with a DV offense but not adjudicated; 2) combined male-female treatment groups or treatment groups separated by sex; 3) rules relative to absences and tardiness and; 4) treatment modalities during COVID-19. As a whole, these areas of divergence do not pose an important implementation fidelity risk, but court-sponsored DV-MRT programs should strive to be as consistent as possible in light of prior research demonstrating that treatment outcomes emerge more strongly in programs implemented with fidelity (Durlak & DuPre, 2008). Additionally, interviews with program participants (both current and graduate) highlighted strengths to the existing program, notably its content, the dedication of facilitators, and its low cost, but were critical of the outdated workbook. The facilitators echoed these themes, also discussing some additional challenges to their workload due to managing the DV-MRT program. COVID-19 changed the treatment modalities of court-sponsored DV-MRT programs and presented new challenges (more interruptions and distractions, lower accountability), but also provided opportunities, notably for increased flexibility, that many hoped would remain even post-COVID-19.

Section 6: Outcome Evaluation

Outcome evaluations allow evaluators to determine if an intervention or program improves outcomes of interest for the participants in a program compared to comparable subjects who do not go through the program. In the prior section, we presented results from individual interviews that indicated that both participants and program facilitators perceived the DV-MRT program as effective. However, answering the question about program effectiveness requires a specific methodological approach. In the current section of the report, we first identify the key questions we sought to answer regarding the program effectiveness and describe the methodological design and statistical analyses we implemented to answer these questions. Finally, the results section provides evidence to determine whether the DV-MRT program was effective in achieving its goal of reducing DV-recidivism. For this purpose, we compared program participants to equivalent individuals who did not participate in the program. We also investigate the association of outcomes in specific strata of participants.

Research Question

There are multiple goals to the DV-MRT program, as documented in the second and fourth sections of the current report, including enhancement of moral reasoning, decision making, and more precisely, behaviors in the context of domestic conflict. The adoption of the court-sponsored DV-MRT programs ultimately aims to reduce the often cyclical and recidivistic nature of DV offending, by seeking DV-recidivism reduction in program participants. The definition of DV-recidivism adopted for the purpose of the current evaluation is: any DV-related conviction received after a case was filed for a prior DV offense and the individual started DV-MRT treatment (if in the treatment group) or the case was adjudicated (if in the comparison group). Based on this goal, the core focus of the outcome evaluation was determining if DV-MRT participants are less likely to be reconvicted for a DV-offense than a matched comparison group. The general research question examined was:

> *Do DV-MRT participants display a reduced likelihood for DV reconviction than comparison subjects at 1-year and 2-year follow-up?*

We specifically examined two types of reconvictions:

1) *Any DV Reconviction* includes both misdemeanor and felony reconviction for a case that was flagged[14] as DV;
2) *Felony DV Reconviction* includes only reconviction for a felony case that was flagged as DV.

Specifically, it was hypothesized as part of the program model that DV-MRT program participants who completed the program would have lower DV-recidivism rates than comparable subjects who did not receive the program. This hypothesis was tested using robust methods to isolate the program impact and analyze the distinctions between program participants and a comparison group. Next a description of the study design is provided, including: the sampling procedure and study groups, measures, and matching technique used to ensure the comparability of the groups.

Study Design

We used a retrospective quasi-experimental design to study the impact of DV-MRT program across DV-recidivism outcomes contrasted between a first group comprising program participants and a second comparison group created from historical justice-involved individuals. A randomized and/or prospective study was not feasible because the DV-MRT program was implemented in many courts in Washington State before the start of the current evaluative work, and with the goal of fulfilling the treatment needs of as many justice-involved individuals meeting the eligibility criteria.

Study Groups

Two study groups were created, which comprised first a group of DV-MRT program participants and second a group of comparison subjects that were also charged with a DV offense. The first group was comprised of DV-MRT participants, both who completed and did not complete the program (due to dropping out or not being done at the end of the evaluation follow-up), and amounted to a total of 631 subjects. The subjects within the first group were participants of DV-MRT intervention programs

[14] The prosecutor or city attorney of the case makes the determination whether each charge meets the DV criteria. After further inquiries, it was determined that this measure has validity and is updated to reflect court findings about the case.

located in King and Snohomish counties. The subjects were primarily male (89 percent) and were on average 38 years of ages at the time of the study. A majority of the subjects were reported to be White (45.5 percent), followed by Black (27.5 percent), LatinX (15.4%)and Asian/Pacific Islander (9.8 percent). Subjects who identified as American Indian/Alaskan Native comprised the smallest portion of the DV-MRT group (1.8 percent). The second group of analysis comprised comparison subjects. We created a historical comparison group comprising comparable individuals with a DV charge. Considering the discovery that many other court sites ordered and/or offered DV-MRT, all with different programmatic start dates, it was decided that a historical comparison group from the two larger counties offering DV-MRT was the safest option to ensure that possible members of the comparison group had not received the treatment. This extended sample frame allowed for a larger population of potential study subjects to which DV-MRT participants could be matched and compared (n = 15,736). All potential comparisons subjects were included in the pool if they met the following criteria: sex, age, and race were reported as well as having a DV offense. Once the pool of potential comparable subjects was constituted, we proceeded with propensity score modeling (a procedure we described more later on this section) to select from this pool only those participants that were similar to DV-MRT program participants on key demographics, qualifying offense severity, criminal history, and child maltreatment indicator variables. The size of this reduced comparison group amounted to a total of 407 subjects.

Measures

To conduct the propensity score matching procedure, we used items measuring four domains: 1- key demographics, 2- qualifying offense severity, 3- criminal history, and 4- child maltreatment indicator variables. These domains were selected because they would include members in the comparison groups that closely resemble program participants on the risk factors addressed by the program, in addition to matching them on key demographic characteristics.

Under the first domain, the specific demographic characteristics used were sex, race, and age, all collected through administrative records[15]. With regard to second domain about qualifying offense, we considered its severity (classified by a number ranging from 1 to 142, as determined by the Washington State Institute for Public Policy). For ease of interpretation, readers should note that higher numbers reflect offenses that are more serious in nature. In the third domain considered (criminal history), offenses committed prior to the qualifying case were identified and classified based on six categories: Public Order violations, Drug Law Violations, Misdemeanor offenses involving property, Misdemeanor offenses involving a person, Felony offenses involving property, and Felony offenses involving a person. The numbers of each category of offenses the subject had prior to the qualifying case was then imputed under the correct category. Subjects who did not have a prior criminal offense had a 0 imputed in each category. Finally, two variables were utilized to capture indications of the participants' maltreatment as a child. First was a binary indicator of a dependency filing history (coded 0= no record; 1= record of dependency filing), to represent subjects who were abandoned, abused or neglected as children, or without parent, guardian, or custodian capable of adequately caring for them which resulted in a court filing. Second was a binary indicator of a Becca petition filing history (coded 0= no record; 1= record of Becca petition filing). In Washington State, Becca petitions include At-Risk Youth petitions (filed by parents seeking assistance when they believe their children are out of control or in danger), Child In Need of Services petitions (filed by either parent or child seeking temporary placement to give time for reconciliation) and truancy petitions.

Several measures were collected to serve as dependent variables to examine the study questions identified previously. As per the program model, DV recidivism was operationalized as DV reconviction. Two types of reconvictions were collected, including *Any DV Reconviction and Felony DV Reconviction*. Reconviction was assessed for each subject as a dichotomous measure (No/Yes) to

[15] There are limitations to these data. For sex, analyses are limited to the dichotomous options of male or female and remove the possibility for a participant to self-identify their preferred gender identity. For race, it also classifies each participant in a unique category, which can be reductive as it might ignore part of their racial and ethnic identity, or group diverse populations together, such as is the case with existing categories of Asian/Pacific Islander and American Indian/Alaskan Native.

capture the occurrence of each type of recidivism after participation in the DV-MRT program started, or after adjudication for a DV offense for the comparison group. Because subjects were adjudicated at different dates, we did not have a standardized follow-up length. For program participants, we utilized program start date and end of analysis period (December 31st, 2020) or recidivism event date to compute a continuous measure of *Time at Risk* for DV-MRT. For comparison subjects, we measured the number of days spent after adjudication for the qualifying offense until either the end of the analysis period or until a recidivism event occurred.

Matching Procedure: Propensity Score Modeling (PSM)

Although a randomized design would have been best to eliminate biases stemming from group selection, ethical considerations along with feasibility restrictions prevented the utilization of this gold standard of research to analyze the DV-MRT program outcomes. Instead, a quasi-experimental[16] study design was utilized to collect a sizable pool of eligible historical comparison group subjects. However, retrospective designs commonly have unanticipated selection bias issues, which could prevent our ability to isolate the impact of DV-MRT. Propensity Score Modeling (PSM) is a technique that can be used to correct for selection bias in observational studies. Briefly, PSM entails the creation of a propensity score, which is used to match participants from the treatment condition to participants from the control condition. This matching process creates balance between treated and untreated participants, and it reduces selection bias. As such, it simulates a randomized design, and typically returns a comparison group that is similar to the treatment group on many key characteristics (Guo & Fraser, 2010; Rosenbaum & Rubin, 1983, 1985).

[16] The goal of a quasi-experimental design is to establish causation (i.e., that a program causes the behavioral changes observed in program participants) in the absence of random assignment to the treatment condition. In the case under study, assignment to DV-MRT is decided by a judge, instead of following a random statistical pattern. In this context, a quasi-experimental approach identifies a comparison group that is as close as possible to the treatment group, without having received the treatment, in order to determine what the behavioral outcomes would have been if the program were not implemented.

We created one PSM match, matching treatment program participants (T group) to eligible subjects from our historical comparison (HC) group pool members. Subjects were matched on all 13 available items[17], creating a match.

The procedure begins by assessing the differences between the two groups on the 13 items. Bivariate comparisons are completed and significant differences between groups are assessed. Standardized Differences (STD) tests were also completed, where a standardized absolute bias equal to or greater than 20 percent was used as an indication of imbalance (Rosenbaum & Rubin, 1985). Finally, a backwards, stepwise binary logistic regression was used to eliminate items that were not found to be significant at the multivariate level. Using a somewhat liberal alpha, those item comparisons indicating at least a marginal significance ($p<0.1$) pre-match were included in the PSM. It should be noted that only cases with complete data on the selected predictor items were included in the matching procedure. This process reduced the T group size from 631 to 407.

The propensity score modeling routine was completed with a one-to-one, greedy matching procedure, utilizing a selection caliper (less than 0.05 of a standard deviation unit). A total of 407 HC subjects were selected and matched to the T group for a total sample size of 814. Summary statistics of post-match results are also provided in Table 8.

The matched groups were then used to examine the study questions. Specifically, nine of the 13 items used differed significantly ($p<.05$) and three items differed substantially ($|STD|>20$) when comparing the HC to the T group. Furthermore, the global estimate of group differences used, the Area Under the Curve (AUC) statistic, indicated that the items used in the match were substantial predictors of group assignment (AUC=0.675), which is a moderate effect size (Rice & Harris, 2005). Following the match, zero items were found to be significantly, or substantially, different between the groups and the global measure indicated negligible-to-small differences between the groups (AUC = 0.534). In lay

[17] Items used to match: Sex, Race, Age, Prior Public Order, Prior Drug Law Violations, Prior Misdemeanors Property, Prior Misdemeanors Person, Prior Felonies Property, Prior Felonies Person, Qualifying Offense Severity Score, Prior DV Treatment, Any Maltreatment Dependency Filing, and Any Maltreatment Becca Filing.

terms, what these results indicate is that we were able to find comparison subjects that are very close in their characteristics to the DV-MRT participants, in that there were no more significant differences between the two groups after the matching procedure.

Overall, the findings of both matching procedures indicated high quality matches between the subject in the T group and the HC group match. Based on these analyses, we proceeded to examine recidivism outcomes using the matched groups. This means that all unmatched subjects from the HC group are no longer considered in the remaining analyses.

Table 8. Propensity Score Modeling And Sample Descriptives

Predictors	Pre-Matching					Post-Matching				
	N	T Group	N	HC Group		N	T Group	N	HC Group	
		Mean		Mean	STD		Mean		Mean	STD
Male	631	0.8821***	15736	0.7329	0.4619***	407	0.8821	407	0.9017	-0.0609
White	606	0.4570***	15372	0.6179	-0.3231***	407	0.4570	407	0.4521	0.0099
Age	423	34.3543*	15736	35.5892	-0.1138*	407	34.3543	407	34.8374	-0.0445
Prior Criminal History										
Public Order	631	0.6486***	15736	0.9014	-0.1775**	407	0.6486	407	0.6413	0.0052
Drug Law Violations	631	0.3342**	15736	0.4436	-0.1331*	407	0.3342	407	0.3784	-0.0538
Misdemeanor: Property	631	0.6486***	15736	0.8617	-0.1294**	407	0.6486	407	0.6732	-0.0149
Misdemeanor: Person	631	0.7494	15736	0.8892	-0.0965	407	0.7494	407	0.8649	-0.0797
Felony: Property	631	0.2703***	15736	0.3701	-0.1303**	407	0.2703	407	0.2948	-0.0321
Felony: Person	631	0.1966	15736	0.1998	-0.0058	407	0.1966	407	0.2138	-0.0304
Qualifying Offense Severity Score	423	62.7150***	15736	56.8862	0.7269***	407	62.7150	407	61.8673	0.1057
Received Prior DV Treatment	631	0.7248***	15736	0.6670	0.1295***	407	0.7248	407	0.7150	0.0220
Child Maltreatment										
Dependency Filing	631	0.0565	15736	0.0474	0.0394	407	0.0565	407	0.0713	-0.0638
Becca Filing	631	0.1327	15736	0.1558	-0.0682	407	0.1327	407	0.1327	0.0000
AUC	.675					.534				

*** $p \leq 001$; ** $p \leq .01$; * $p \leq .05$

Analysis Plan

Following the PSM procedure, statistical analyses were calculated to answer the study research question: *was the DV-MRT group less likely to be reconvicted for a DV offense than the comparison group?* We examined differences between these two groups on the two types of conviction outcomes identified previously (*Any DV Reconviction* and *Felony DV Reconviction*) at two points in times (1 year and 2 years), using cross-tabulations and chi-square tests[18]. When significant differences between the treatment and comparison groups are detected, we also present odds ratio in text to give further meaning to the results. We also conducted semi-parametric Cox proportional hazards regression models[19] in order to study the association of groups (i.e., DV-MRT treatment or comparison) with time to recidivism to examine group trends across the supervision follow-up period. By incorporating time-to-event information, our approach is more powerful than simply examining the occurrence of recidivism. We focus not only on whether reconviction occurs, but also examines when it occurs during the follow-up period, to deepen our understanding of the pattern of recidivism in time. As a final step, we examined recidivistic outcomes by sex and race, along with program completion, using cross-tabulations and chi-square tests, to examine the program effectiveness in different strata of program participants.

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[18] Cross-tabulations and chi-square analyses are used to determine whether there is a significant association between two categorical variables. First, a cross tabulation displays the frequency of data based on two categorical variables. In the evaluation study, it displayed the frequency of recidivism by participation or not to a DV-MRT program. The joint frequency data is further analyzed with the chi-square statistic to evaluate whether participation in a DV-MRT program was associated with recidivism or absence of recidivism.

[19] Cox proportional hazards regression is used to investigate the effect of variables on the time a specified event takes to happen. In the evaluation conducted, it specifically considered the role of participation in a DV-MRT program on time-to-recidivism. Specifically, the analysis identifies the risk or probability of recidivism, given that the participant has not recidivated for a specific length of time.

Outcome Evaluation Results

Any DV Reconviction

Results generally indicate that DV-MRT is effective in reducing DV-related recidivism for Any Reconviction (including both misdemeanor and felony). Figure 3 visually represents those differences. To correctly interpret this chart, it is important for readers to first note the scale of the y-axis, and second to also refer to Table 9 to identify whether the noted differences are statistically significant. Specifically, we find that in contrast to the comparison group, DV-MRT participants have reduced levels of Any DV Reconviction at 1 year follow-up; the results were right at statistical significance (p = .051). Odds ratio calculations indicate that DV-MRT program participants are 57% more likely to be successful for Any DV Reconviction (i.e., not have experienced a recidivistic event) at the one-year mark compared to individuals in the comparison group. After 2 years, the difference between the two groups is not statistically significant anymore (p = .130), indicating that the program impact might be most notable during and in the immediate aftermath of participation.

Figure 3. Percent Of Any Reconviction By Treatment And Comparison Groups At 2 Time Points

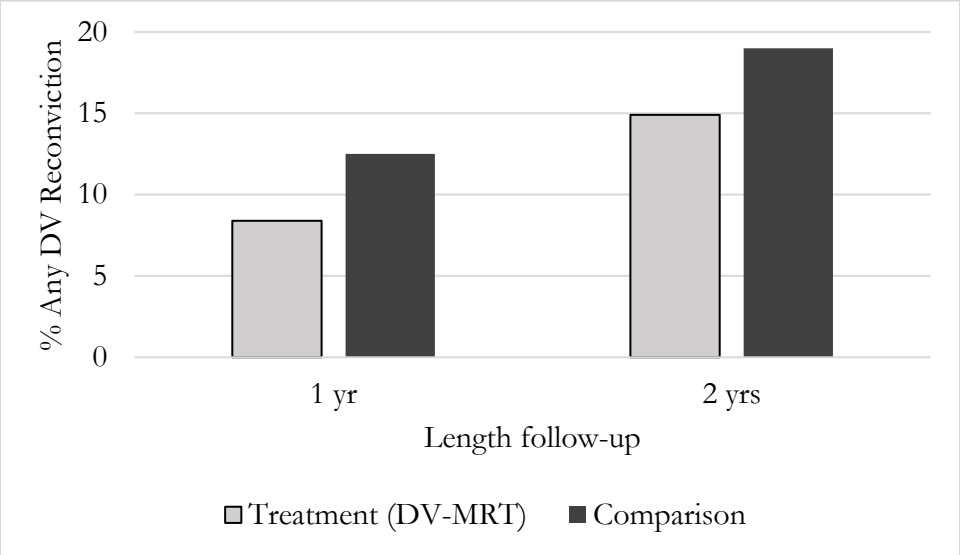

Table 9. Chi-Square Analyses: Any DV Reconviction By Treatment And Comparison Groups

	Sample size	Treatment group (DV-MRT)	Comparison group	χ^2	p-value
1 yr	814	8.4%	12.5%	3.795	.051
2 yrs	782	14.9%	19.0%	2.293	.130

To also account for the impact of time on reconviction risk, we present the results of Cox regression analysis to examine possible differences in the hazard rates (i.e., risk of Any DV Reconviction) of the treatment DV-MRT and comparison groups. The results indicated hazard differences between the two groups did not reach statistical significance for Any DV Reconviction ($\chi 2 = 2.447$; $p = .118$). The regression results are presented in Table 10. Regression coefficient (β value) should be interpreted as follow: 1) it identifies the risk of Any DV Reconviction occurring for the DV-MRT treatment group; and 2) a positive coefficient indicates higher risk of reconviction and negative coefficient indicates a lower risk of reconviction. In the case under review, results indicate that the DV-MRT treatment group had lower hazard rates than the comparison group. Specifically, their risk of reconviction for any type of DV was 22.3% lower, controlling for the effects of time. Hazard risks by group are graphed in Figure 4 to ease interpretation and visually represent the lower recidivism risk for DV-MRT, keeping in mind that the results did not reach statistical significance.

Table 10. Cox Regression Coefficient By Treatment Group For Any DV Reconviction Model

	β	exp β	SE	*p*-value
Treatment DV-MRT group	-.253	0.777	.162	.119

Figure 4. Hazard Function – Any DV Reconviction By DV-MRT Treatment And Comparison Groups

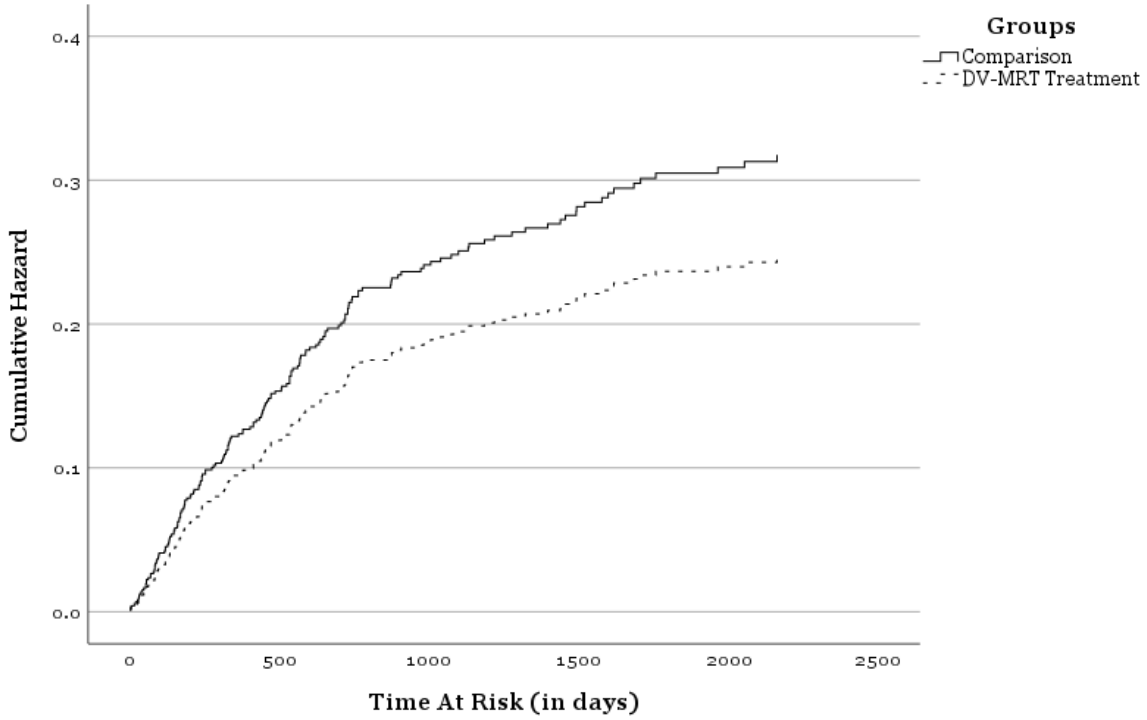

Figure Note: Time at risk in days extrapolated over the follow-up period based on the value of β coefficient

Felony DV Reconviction

Results do not support the effectiveness of DV-MRT to reduce Felony DV Reconviction. The differences are visually represented in Figure 5, which should be examined in conjunction to Table 11. Specifically, we find no significant difference between the comparison group and DV-MRT participants after 1 year and 2 years follow-up. In the absence of a significant association between treatment status and felony recidivistic outcomes, we did not proceed with the Cox regression analysis.

Figure 5. Percent Of Felony DV Reconviction By Treatment And Comparison Groups At 2 time points

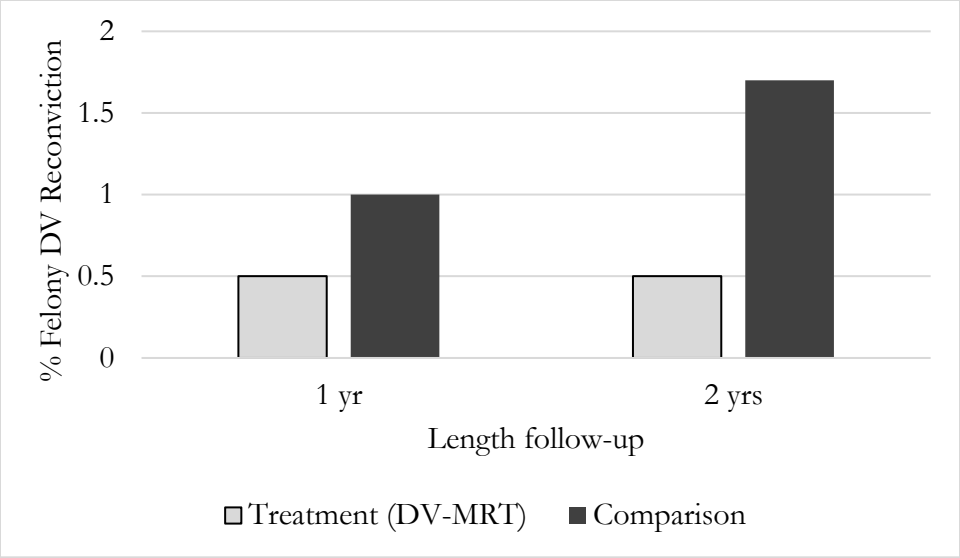

Table 11. Chi-Square Analyses: Felony DV Reconviction By Treatment And Comparison Group

	Sample size	Treatment group (DV-MRT)	Comparison group	χ^2	p-value
1 yr	814	0.5%	1.0%	0.672	.412
2 yrs	782	0.5%	1.7%	2.439	.118

Subgroup Analyses

In a second step of the outcome evaluation, we wanted to investigate whether DV-MRT treatment was as effective in different subpopulations of program participants. Prior limitations about the measures of sex and race should be kept in mind; they are discussed more at length in Footnote 15. In addition, we note the lack of consideration of sexuality and type of romantic relationships. Overall, the goal of subgroup analyses is to identify patterns of DV-MRT effectiveness for different subpopulations. Due to limited sample size (e.g., females), inability to consider more meaningful subgroups (e.g., race and ethnicity) or absence of relevant factors from measures administratively collected (e.g., sexuality), issues of generalizability plague these analyses. These results should therefore not be taken as the final answers on this topic but the beginning; their usefulness reside in the identification of areas of future research to further determine how DV programs can best serve diverse segments of the population.

Sex

The first stratum investigated is sex. This was informed by prior findings of the process evaluation discussing the lack of workbook inclusivity for female-perpetrated DV. Inconsistent practices between the DV-MRT programs studied related to the treatment provided to females also explain our interest. Specifically, one site denies DV-MRT treatment to females, another includes them in treatment group comprising both males and female participants, and a different site offers a female-only DV-MRT treatment group.

Visual results are presented in Figure 6 and statistical results in Table 12. We observe that male participants experienced the outcome of interest from program participant and had lower recidivistic outcomes for Any DV Reconviction (1 yr: 8.6% versus 13.1%; 2 yrs: 14.8% versus 20.2%). This finding is not replicated for female DV-MRT participants. Specifically, we find that DV-MRT females and comparison females are not different in their rate of Any DV Reconviction (1 yr: 6.3% versus 7.5%; 2 yrs: 6.3% versus 7.5%). The DV reconviction rate of females appeared to be much lower than for males in general, with or without participation in DV-MRT treatment. Based on the limited sample[20] of females studied, they do not appear to receive the same recidivism reduction benefits from DV-MRT as male participants. However, the small size of the female sample cautions against making a definitive conclusion about the effectiveness of DV-MRT for females based on these results alone. Additional research involving bigger samples is needed before we can make reliable conclusions about treatment effects for females.

[20] A total of 88 females were studied. Half were in the DV-MRT treatment group (n = 44) and half in the comparison group (n = 44).

Figure 6. Percent Of Any DV Reconviction For Females And Males By Treatment And Comparison Groups At 2 Time Points

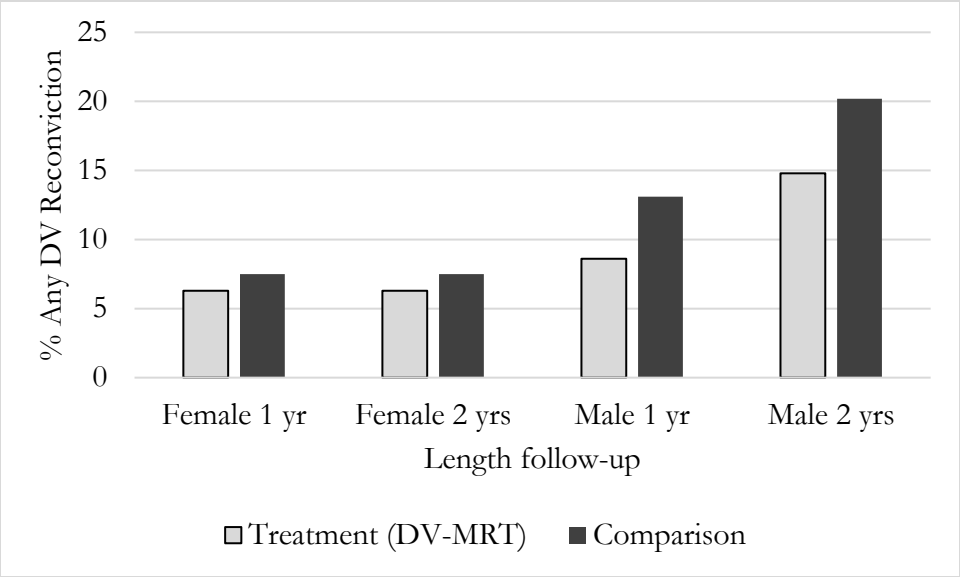

Table 12. Chi-Square Analyses: Any DV Reconviction For Females And Males By Treatment And Comparison Groups

		Treatment group (DV-MRT)	Comparison group	χ^2	p-value
Female	1 yr	6.3%	7.5%	.054	.817
	2 yrs	6.3%	7.5%	.054	.817
Male	1 yr	8.6%	13.1%	3.696	.055
	2 yrs	14.8%	20.2%	3.667	.056

Race

Patterns about race and effectiveness of DV-MRT treatment are presented in Figure 7 and Table 13. We observe that DV-MRT Black, Indigenous, and People of Color participants[21] experienced the

[21] For analytical purposes, all Black, Indigenous, and People of Color were combined in the same category. There are important limitations to this approach, including the lack of recognition about the differential experiences with DV-MRT programs for individual with varied racial and ethnic groups. The possible nuanced impact of the programs are lost in the current analysis.

outcome of interest and had lower recidivistic outcomes for Any DV Reconviction compared to matched Black, Indigenous, and People of Color comparison subjects who did not receive DV-MRT treatment (1 yr: 8.1% versus 14.3%; 2 yrs: 14.5% versus 22.4%). This finding is not replicated for White DV-MRT participants. While there are differences for White participants compared to White comparisons (1 yr: 8.6% versus 10.3%; 2 yrs: 12.9% versus 14.7%), their magnitude is smaller and does not reach statistical significance. This appears to indicate that DV-MRT treatment appears particularly effective for POC participants. At this point, we are reticent to speculate about possible implications and would note the absence of an important control variable (i.e., socioeconomic status). Its inclusion would further illuminate the noted association, especially given that one of the stated goal of DV-MRT is to expand financial accessibility of DV treatment. Importantly, we caution against the use of these results to impose further criminal justice sanctioning (including additional treatment) to groups that are already overrepresented in the criminal justice system. This needs to be researched more in the future.

Figure 7. Percent Of Any DV Reconviction By Race By Treatment and Comparison Groups At 2 Time Points

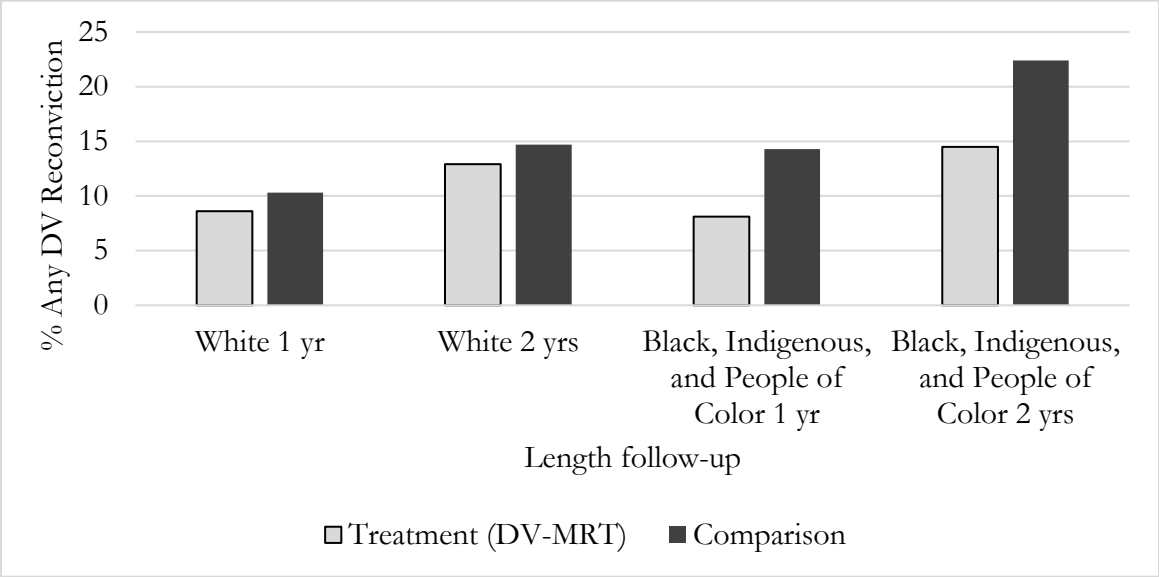

Table 13. Chi-Square Analyses: Any DV Reconviction By Race By Treatment And Comparison Groups

		Treatment group (DV-MRT)	Comparison group	χ^2	p-value
White	1 yr	8.6%	10.3%	0.321	.571
	2 yrs	12.9%	14.7%	0.244	.621
POC	1 yr	8.1%	14.3%	4.277	.039
	2 yrs	14.5%	22.4%	4.649	.031

Program Completion

Lastly, we considered the impact of program completion on recidivistic outcomes for DV-MRT participants. As presented in Figure 8 and Table 14, DV-MRT program participants who completed the program experienced much better outcomes compared to those who did not. At the one-year mark, only 5.2% of the completers had recidivated with Any DV Reconviction, compared to 18.2% of the participants who did not complete. At the two-year marks, the difference is still markedly different: 10.1% versus 25.3%. While interesting, we note a possible time ordering issue in that it is unclear whether a recidivistic event might result in the termination from the program. Still, investigating factors that promote success in the program appears to be a worthy line of inquiry for the future.

Figure 8. Percent Of Any DV Reconviction By Program Completion Status At 2 Time Points

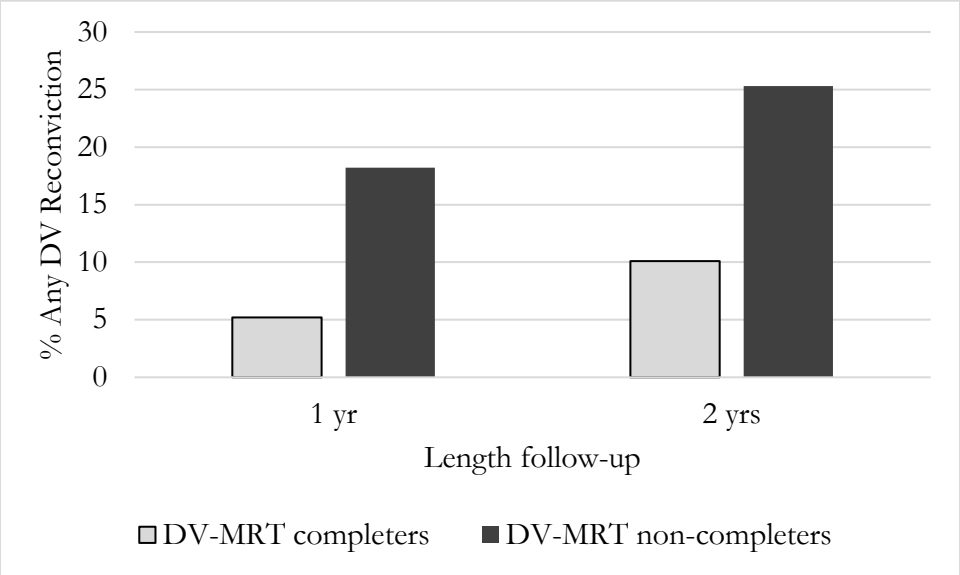

Table 14. Chi-Square Analyses: Any DV Reconviction By Program Completion Status

	Completers	Non-completers	χ^2	p-value
1 yr	5.2%	18.2%	16.505	.001
2 yrs	10.1%	25.3%	14.563	.001

Summary

Overall, the findings of the outcome evaluation, conducted after obtaining a robust comparison sample, indicate that participation in the DV-MRT program appears to reduce the likelihood of Any DV Reconviction at 1-year follow-up. Specifically, the program impact is more marked in the first year for Any DV Reconviction but appears to weaken over time for any DV Reconviction. No program impact was noted for Felony DV Reconviction.

This differential pattern of reconviction between study groups demonstrates that the DV-MRT program appears effective in preventing the reoccurrence of DV crimes in the short-term by court-involved individuals. This makes court-sponsored DV-MRT a promising program considering its much lower costs compared to traditional DV treatment. However, follow-up length was limited, and it will be important to include longer follow-up of DV-MRT in the future to see if such positive impact is maintained over time. Further consideration of program effectiveness patterns relative to sex and race should also be investigated to provide a better understanding of its nuanced impact in various subpopulations, along with factors that are associated with DV-MRT program completion.

Section 7: Conclusion and Recommendations

As a program, DV-MRT holds a lot of promise. Firstly, it provides treatment based on therapeutic principles aimed at increasing moral reasoning and quality of decision making and ultimately change behavior in the context of domestic conflict. Secondly, it addresses a critical practical matter that often impedes criminal desistance for DV justice-involved individuals: the lack of affordable DV treatment. Prior to the current evaluation work, DV-MRT's effectiveness remained to be established through a rigorous research design. This was the task undertaken with the present evaluation.

Specifically, the current study examined the effectiveness of six court-sponsored DV-MRT programs in Washington State, including their process (i.e., implementation and operations), and evaluated their achievement of their stated goal of decreasing DV reconvictions. The current evaluation work was conducted in the specific and challenging context of COVID-19. The evaluators, facilitators and most of the program participants spent an inordinate amount of time at home in the last year. Every aspect of the evaluation was conducted remotely, without any site visits or in-person contact. There are limitations that arose from this context: a more intellectual understanding of the program and its operations without observational backing; difficulties in recruiting and engaging with various key individuals at some sites due to impersonal remote contact; and scheduling difficulties due to convergence of familial and work life at home for all individuals involved in the evaluation. There were also deep and novel insight generated about the DV-MRT program and its delivery in this context; these ideas inform the recommendations we identify.

Results generally indicated a number of strengths to the DV-MRT program, including its content and cost, and the quality of the facilitators' work. Importantly, the quantitative analysis indicates a short-term reduction in DV reconviction for DV-MRT program participants compared to a rigorously matched comparison group. The court-sponsored DV-MRT programs studied appear to increase public safety in preventing the reoccurrence of Any DV crimes committed by court-involved individuals. This is notable considering that the follow-up period includes the year 2020 marked by Washington State's Covid-19 stay-at-home order; such measures were associated with DV cases (Boserup et al., 2020; Moreira & da Costa, 2020). As such, this makes court-sponsored DV-MRT a promising program, especially in light of its much lower costs compared to traditional DV treatment. It may be worth continuing and expanding court-sponsored DV-MRT programs in Washington State.

The following are some recommendations arising from the current evaluative results that might be useful as the program continues its activities and/or expands in the future.

1) Urge Correctional Counseling, Inc. (CCI) to update the program workbook.

One of the most unequivocal themes emerging from the interviews conducted related to the outdated nature of the workbook. All program participants and facilitators indicated a desire for these materials to be revised in order to be more inclusive of the various contexts in which DV occurs, including same-sex relationships and female-perpetrated DV. The DV-MRT program content is proprietary to CCI and it is outside of the scope of our purview as evaluators or to the program facilitators to identify the nature of such changes and implement them. We recommend that the Gender and Justice Commission shares the current results and recommendations with CCI in the hope that it propels them in improving what was undividedly identified as the most significant area to target for improvement. Alternatively, it is also possible to instead specify the types of materials (i.e., gender responsive and inclusive of same-sex relationships) needed for a court to refer an individual to a specific program.

2) Offer extended times and modes of program delivery, including remote options, and evaluate their effectiveness

Both program participants and facilitators discussed difficulties in program access when its delivery required face-to-face contact, which is problematic considering the limited availability of DV-MRT in most Washington State jurisdictions (see Figure 1). The geographical context of the courts studied entailed challenges for many participants in getting to the treatment sites via existing public transportation options and arriving on time, especially if working a full-time job. COVID-19 "forced" remote delivery, which many saw in a positive light due to the increased flexibility it provided and recommended that such extended modes of delivery, including remote access, remain even post-COVID-19. In addition, remote options could allow program participants to attend DV-MRT at a different court location at a more advantageous time for them considering their work schedule. That being said, drawbacks to remote delivery were also identified, including increased interruptions and distractions, and difficulties in generating the same level of participant engagement and foster therapeutic treatment conditions. As such, we strongly recommend evaluating the treatment effectiveness of these different delivery modes.

3) Offer additional administrative support to existing court-sponsored DV-MRT programs.

The DV-MRT program facilitators surveyed and/or interviewed all indicated an increase in their workload after undertaking this role. They specifically discussed an increased in administrative tasks and client management that takes up time. Additional resources to lighten this load would help.

4) Continue researching DV-MRT's effectiveness, specifically with better measures of key concepts, larger samples and longer follow-up periods for participants' recidivistic outcomes, to examine treatment effectiveness for subgroups using intersectional lenses.

Measures of sex, race and ethnicity that are administratively compiled have important limitations due to their imposed dichotomous nature. This erases the true diversity of program participants' self-identified gender identity and racial and ethnic identity. Other factors are simply absent from administrative records (sexuality and type of relationships). If anything, results to the current evaluation are a call for "better" and "more" research about DV-MRT. By "better" research, we recommend using more nuanced measures of these important factors. Such analysis will yield insight about the DV-MRT program's effectiveness in various subpopulations such as female and Black, Indigenous, and People of Color participants. We also recommend "more" research on the topic, specifically through larger samples to bolster generalizability and longer follow-up periods. Considering the short time period in which the DV-MRT programs studied were implemented and evaluated, there are a number of limitations to the current study findings. A follow-up period of 2 years is in line with the DV literature, but a longer period would allow to better measure permanent behavioral change in program participants and comparison subjects. This would serve to increase confidence in our conclusions as many program effects diminish over time, which seems to be what the results indicate. Ultimately, better insight can be generated about the nuanced impact of the DV-MRT programs through an intersectional approach, in which subgroups are examined by considering their combined experience with the program considering the combination of their gender identity, racial and ethnic identities, sexuality, and other relevant factors. This will allow to understand *for whom* the program works and in *what context*, illuminating the mechanism/s explaining the program effects.

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Incarceration of Women in Washington State: Multi-Year Analysis of Felony Data

October 2020

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Incarceration of Women in Washington State:
Multi-Year Analysis of Felony Data

October 2020

Summary

The number of women in prison in Washington has grown consistently in recent decades, yet our scientific knowledge about women in prison remains very limited. Both the total number of incarcerated people and the per capita incarceration rate have decreased for men in Washington over the past 10 years, but steadily increased for women. Information about the overall racial composition and sentences of people in our prisons is released annually, but because women are still a minority of people both sentenced and held in Washington prisons each year, any trends specific to women are drowned out by the data of men.

Washington State cannot begin to create policy and address the unique needs of women in prison without first understanding who we are incarcerating in women's prisons, and why we are incarcerating them. This study is a first look at those questions, using existing data collected by the Caseload Forecast Council (CFC), and analyzed for the first time in a gender-disaggregated way, to better understand the demographics and sentences of the women Washington is sending to prison. The study is preliminary and focuses on only one part of the larger criminal legal system. It provides a descriptive analysis of incarceration of women in Washington State, with a particular focus on racial disparities, to begin to close the information gap and as a foundation for future inquiry and research.

Data

We analyzed CFC data from fiscal years 2019, 2010, and 2000, focusing on Washington's four largest counties. These data were a strong choice for this pilot project, but because they were not collected specifically to examine our research questions, they also have some limitations. The greatest of these is the way that CFC collects and codes information on race and ethnicity, most likely resulting in Hispanic/Latinx people being undercounted in CFC data. Because CFC race/ethnicity categories do not map perfectly onto those in the Census data we used comparatively, our comparisons provide only a first look at potential racial disproportionality in the conviction and sentencing of women in Washington.[1] Additionally, although gender is more complicated than a male-female binary, the data collected by CFC only has the two categories and does not distinguish within those two categories between trans and cisgender men and women. It is also important to note that because CFC data are collected at the time of sentencing, we are not able to identify the precise point(s) in the legal process (e.g., arrest, charging, conviction, sentencing) at which disproportionalities occurred.

[1] We did not include Latinx/Hispanic people in these comparisons because of the major differences between data sources in how people are categorized as Latinx/Hispanic. While we did not conduct racial/ethnic disproportionality analyses for Latinx/Hispanic individuals because CFC data is not comparable to Census data for this population, we did provide statistics describing the total number and percentages of Latinx/Hispanic individuals in the dataset in Tables 1-13, with the understanding that these numbers are likely an undercount.

Results

Gender comparisons. Far more men than women were convicted of felonies and sentenced over the past 20 years in all counties and offense categories. These proportions were typically 80% men to 20% women, with a slight increase for women over time. Counties differed somewhat in the proportions of women and men convicted and sentenced overall, with King County in 2019 the lowest at 13% women and Benton-Franklin in 2000 the highest at 24% women. Proportions of women and men convicted and sentenced were substantially different across offense categories. In all years, women were convicted and sentenced in relatively higher proportions (typically 23 to 30%) in Drug, Property, and particularly Fraud categories.

Disproportionate impact on Black and Native American women by county. We found statistically significant differences indicating racial disproportionality in Washington's conviction and sentencing of women in all the counties we examined, across all time points. Black and Native American women bore the brunt of the disproportionality we documented. Across counties, Black women were typically convicted and sentenced at two or three times the rate we would expect based on their proportion of each county's population. In some counties, in some fiscal years, they were convicted and sentenced at rates up to eight times higher. Native American women, across counties, often made up two to four times as large a proportion of the convicted and sentenced population as they did of the general population of each county.

Disproportionate impact on Black and Native American women by offense category. We also found statistically significant differences indicating racial disproportionality in Washington's conviction and sentencing of women in most of the offense categories we examined, with one notable counter-example. In 2019 data in the drug offense category, Black women were convicted and sentenced in roughly the proportion we would expect based on their representation in the general population of the state. Across offense categories, Black women were typically convicted and sentenced at two or three times the rate we would expect based on their proportion of the state's population. This imbalance was especially pronounced in the violent offense category. Native American women, across offense categories, often made up two to four times as large a proportion of the convicted and sentenced population as they did of the general population of the state.

Discussion and Recommendations

This preliminary study documented racial disproportionality in data on Washington's conviction and sentencing of women over the past 20 years. Encouragingly, this disparity did improve somewhat between 2000 and the present, indicating a small positive trend. However, the consequences of earlier years' high disproportionality are currently being felt by women who may still be in prison right now, and by their communities.

This study takes the first steps on a journey toward Washington State knowing what it needs to know to create policy that addresses the needs of incarcerated women. This pilot research also suggests some next steps, detailed in our recommendations regarding both improvements in data collection and additional analyses and research.

Background

The United States has the highest incarceration rate of any country in the world. Only 5% of the world's female population lives in the US, but the US accounts for 30% of the world's incarcerated women.[2, 3] Women are the fastest-growing segment of the US incarcerated population; state prison populations for women have grown at more than twice the rate of men over the past 40 years.[4]

In Washington, both the total number of incarcerated people and the per capita incarceration rate have been decreasing for men over the past 10 years, but steadily increasing for women.[5] Washington State's women's prisons have been over capacity for years,[6] contributing to decreased access to programming and negatively affecting health, safety, and conditions of confinement.[7]

Black, Indigenous, and women of color are disproportionately affected by all aspects of the criminal legal system. The incarceration rate nationally is twice as high for Black women compared to white women, and Hispanic women are 1.2 times more likely to be incarcerated compared to white women.[8] While less data is available about the experiences of Indigenous women, the Lakota Law People's Project estimates that Native women are incarcerated at six times the rate of white women.[9]

In addition, prisons have historically been designed by men, with cis-male incarcerated populations in mind. Relatively little consideration has been given to designing incarceration systems for women, transgender, and gender non-binary people. This is often apparent in the living conditions, risk assessment systems, disciplinary practices, programming, physical and mental health care, and other aspects of women's carceral facilities. For example, investigations have found a lack of adequate staff for trauma treatment programs for women, and insufficient training on the needs of pregnant individuals and access to feminine hygiene products.[10]

Very little is known about what has driven the dramatic rise in the incarceration of women in Washington prisons in recent years. Further, very little research has been done in Washington to

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[2] https://www.prisonpolicy.org/global/women/2018.html

[3] Note on gender language: A proportion of the people incarcerated in women's facilities do not identify as women, e.g., they may be non-binary or transgender. In this report, in the interest of brevity, we use the terms "female" and "women" interchangeably to refer to people incarcerated in facilities designated for female individuals.

[4] https://www.prisonpolicy.org/reports/women_overtime.html

[5] Bureau of Justice Statistics, National Prisoner Statistics Program, 2018

[6] Early releases and home monitoring options due to COVID-19 have recently put both women's prisons within capacity levels. The most current capacity numbers are a departure from the trends of the last ten years and it is unknown if current numbers will continue.
https://www.doc.wa.gov/docs/publications/reports/400-RE002.pdf

[7] Office of the Corrections Ombuds (OCO) Survey of Incarcerated Women, Olympia, WA: Office of Corrections Ombuds, February 2020
. https://oco.wa.gov/sites/default/files/Women%20Survey%20with%20DOC%20Response%20Final_0.pdf

[8] https://www.sentencingproject.org/publications/incarcerated-women-and-girls/

[9] https://www.lakotalaw.org/resources/native-lives-matter

[10] "Women in Prison: Seeking Justice Behind Bars," United States Commission on Civil Rights, February 2020, https://www.usccr.gov/pubs/2020/02-26-Women-in-Prison.pdf

examine who demographically is in our women's prisons and what crimes they are being sent to prison for. Existing data reports tabulate the number of women sent to prison each year[11] and in prison at any given time.[12] No existing analysis, however, details the racial breakdown of women in prison or specifics about their sentences, even though both the courts and Department of Corrections collect these data. While information about the overall racial composition and sentences of people in our prisons is released each year, because women still comprise a minority of people both sentenced and held in Washington prisons each year – roughly 20%[13] and 7%[14] respectively – any trends specific to women are drowned out by the data of men. Existing analyses of overall trends in our prisons that appear gender neutral and that fail to address different populations of women (e.g., Black, Native, Latinx) thus instead report on trends in the majority of the prison population, which is overwhelmingly people in male prisons.

As a state, Washington cannot begin to create policy and address the unique needs of women in prison without first understanding who we are incarcerating in women's prisons, and why we are incarcerating them. This study is a first look at those questions, using existing data collected by Caseload Forecast Council analyzed for the first time in a gender-disaggregated way to better understand the demographics and sentences of the women Washington is sending to prison.

Research Questions

The purpose of this research project was to provide a preliminary descriptive analysis of incarceration of women in Washington State, with a particular focus on racial disparities, to begin to close the information gap and as a foundation for future and inquiry and research. It addresses five research questions.

1. How many women, compared to men, and from what race-ethnicities, were convicted of felonies[15] and sentenced in Washington State in fiscal years 2019, 2010, and 2000? (Table 1)
2. How many women, from what race-ethnicities, were convicted of felonies and sentenced in each of the four largest counties (King, Pierce, Snohomish, and Spokane), and in two additional areas of focus[16] (Yakima County and the Benton-Franklin county dyad)? How does this compare to men? (Tables 2-4)

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[11] "Adult Felony Sentencing Data," Washington State Caseload Forecast Council, https://www.cfc.wa.gov/CriminalJustice_ADU_SEN.htm

[12] "Fact Card," Department of Corrections Washington State, https://www.doc.wa.gov/information/data/analytics.htm

[13] "Adult Felony Sentencing Data," Washington State Caseload Forecast Council, https://www.cfc.wa.gov/CriminalJustice_ADU_SEN.htm

[14] "Fact Card," Department of Corrections Washington State, https://www.doc.wa.gov/information/data/analytics.htm

[15] Note on the term "convicted and sentenced": This pilot study used existing data collected on individuals who had been charged with, convicted of, and sentenced on felonies. Details on the data appear later in the report.

[16] Yakima and Benton-Franklin are areas of focus because when we initially crafted these research questions, we wanted to include counties with substantial Latinx populations so that we could examine disproportionality

3. How many women, from what race-ethnicities, were convicted and sentenced in each felony offense category? How does this compare to men? (Tables 5-7)
4. Were Black, Indigenous, and women of color convicted and sentenced disproportionally in each county and each fiscal year examined? (Tables 8-13)
5. Were Black, Indigenous, and women of color convicted and sentenced disproportionally within each offense category and in each fiscal year examined? (Tables 14-16)

Data

Very little is known scientifically about incarcerated women in Washington State. Reports describing incarcerated people overall are available (e.g., the Caseload Forecast Council's annual *Statistical Summary of Adult Felony Sentencing*), but no analyses that look at the intersection of gender and race and use Washington-specific data currently exist. A study of incarcerated women is therefore needed as the first step in understanding and responding to factors contributing to the growth of this population in our state.

Strengths and Limitations of Caseload Forecast Council Data

This pilot project used existing data from the Washington State Caseload Forecast Council (CFC) as a first step toward understanding the demographic breakdown of women convicted of felonies and sentenced in our state, and what they are incarcerated for, as well as identifying any potential racial/ethnic disparities. These CFC data have many strengths that influenced us to use them for this work. First, they are a frugal choice for a pilot project, being collected and cleaned by the agency, which makes them freely available to researchers. Second, they provide continuity over time, having been collected in a usable format each fiscal year since 2000. Third, they include much useful information, such as which felonies individuals were convicted of, the county they were convicted and sentenced in, and their demographics, including gender and race/ethnicity. Fourth, they include all individuals convicted of felonies and sentenced, whether they are incarcerated in jail or in prison.

However, CFC data were not collected specifically to examine the project's research questions. Five limitations of these data are that (1) cases represent individuals at the time they are sentenced, so do not provide details on their experiences during arrest, charging, conviction, or incarceration; (2) cases represent individuals sentenced to felonies, so cannot shed light on those serving time only for misdemeanors; and (3) information about cases' gender (male/men and female/women) is based on the gender reported in CFC data, and likely includes a proportion of individuals whose gender identity does not align with that of the facility where they are incarcerated (e.g., a transgender man who is incarcerated in a women's prison or jail). Finally, (4) it is not clear whether information on race and ethnicity is self-reported by defendants or reported by other parties (e.g., prosecuting attorneys) based on their perceptions, and (5)

based on ethnicity. Unfortunately, due to the limitations of the dataset (detailed in the Data section) that we discovered after analyses were underway, we were ultimately not able to do so.

information on race and ethnicity is provided by the CFC in only six categories, with race and ethnicity merged into one variable with some inconsistencies in coding.

Race and Ethnicity in CFC Data

This categorization of race and ethnicity deserves special attention, since understanding who is grouped where is critical context for understanding the results that follow, including their limitations. The datasets CFC provides to researchers categorize individuals as Asian American, Black or African American, Hispanic, Native American, white, and unknown (a very small group). After the project was underway, Dr. Masters and Sierra Rotakhina, MPH, Gender Justice Study Project Manager, were able to investigate the CFC's data sources and processes in conversations with their staff, and learned of several key challenges, detailed below.

The first key challenge is that sentencing data comes to the CFC in different forms from different counties. The Washington State Supreme Court approves pattern Felony Judgment and Sentencing (J&S) forms, which collect data on race (e.g., white, Black) and ethnicity (i.e., Hispanic/Latinx) separately and provide more racial categories than the six used by CFC (e.g., Pacific Islander, multiracial). But using the pattern J&S forms is not required, and many counties provide data using their own forms, each slightly different in how it obtains race information. Some of these forms apparently do not provide checkboxes, but require that race be written in, creating room for many inconsistencies. CFC reported trying to reconcile data on the J&S form with State Patrol and Administrative Office of the Courts data, but defaulting to the J&S form if there was a conflict between the datasets.

The second key challenge is that, because data provided to CFC comes in so many different forms, their staff does some re-categorizing of race to produce one dataset consistently over time. Three outcomes of this re-categorizing may affect group counts and proportions in CFC data. The first of these is ethnicity. Per CFC staff, most counties are leaving the ethnicity data field blank, so CFC recodes Hispanic as a race if it is marked. People are only coded as Hispanic if race is left blank, is marked as unknown, or if "Hispanic" or "Latino" is written in under race. If a form says "white" and "Hispanic," the person will be coded as white. If it says "Black" and "Hispanic," they will be coded as Black. If it is blank for race or "unknown" for race, and "Hispanic" for ethnicity, then the person will also be coded as Hispanic. This method clearly results in Hispanic/Latinx people being undercounted in CFC data, and in other race categories being slightly inflated, but not in a way that can be quantified.[17] It is perhaps the biggest limitation of using CFC data for this project.[18]

This report highlights the limitation of the data for Hispanic/Latinx individuals throughout. In addition, while the CFC dataset uses the term "Hispanic," it is not clear if every county uses

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[17] This coding methodology likely compounds the existing limitations of Latinx data, as research indicates that there is a "data gap" for Latinx populations already as a result of the way the data is collected. This data gap for Latinx justice system-involved youth was recently highlighted in Sonja Diaz et al. The Latinx Data Gap in the Youth Justice System. (2020). Available at lppi-thelatinxdatagap-2020.pdf.

[18] Regarding the limitations of CFC data, please note two things. First, that Gender Justice Study staff and co-chairs continue their conversation with CFC staff and leadership about ways to remediate these problems. Second, that we make recommendations for future improvements in data collection and management in the Recommendations section of this report.

"Hispanic" on their forms or if other terms such as Latino, Latina, or Latinx are used to collect these data in some counties. These terms are all socially constructed and have their own limitations.[19] The term "Hispanic," for example, is rooted in a history of Spanish "colonialism, slavery, [and] genocide… across the Americas."[20] The term "Latinx" is used to "signify diversity in gender identity and expression [and] is used by a wide range of individuals and organizations,"[21] however a 2019 Pew Research Center survey found that only 3% of the survey respondents who identified as Hispanic or Latino reported using the term "Latinx" to describe themselves.[22] This Pew survey highlights a lack of consensus around the best term(s) to use. This also emphasizes the complexity and limitations of terms that have been used as identifiers for such varied meanings as shared Spanish colonial histories, fluency in the Spanish language, geographic ancestry, ethnicity and/or race.[23] This technical report uses the term "Hispanic/Latinx" throughout when referring to CFC data in an attempt to accurately represent the data as it is presented in the dataset, while also trying to use the broadest language possible to capture the various terms that may be used in the J&S forms across Washington.

Another outcome of re-categorizing is the potential loss of some groups, most notably people who identify as Native Hawaiian or Other Pacific Islander. CFC staff informed us that they very rarely get forms with this racial category marked, raising the possibility that this group is being lost at data collection. If people who mark "Native Hawaiian or Other Pacific Islander" are re-categorized into the Asian American group (as occurs in some other contexts), a slight inflation in this group is likely, or these people may then fall into the small "Unknown" race group. In any case, this type of loss or re-coding removes the possibility of examining differences in sentencing between Pacific Islanders and Asian Americans. Counts for Native American populations may also be an underestimate. This is because CFC data includes only offenses prosecuted and sentenced in state courts, and not offenses prosecuted and sentenced in Tribal courts. Without seeing numbers combined from Tribal and State courts it is impossible to see the full picture of the impact of incarceration on Tribal communities.

Finally, regarding race categories beyond Asian American, Black, Native American, and white, CFC staff report not seeing many forms with "multiracial" checked or with multiple race boxes checked (e.g. "Asian" and "white"). Though they see the "multiracial" box on some forms, such as the pattern J&S forms, according to their accounting to our research team to date, it has rarely been checked. When a form does identify an individual as multiracial, the CFC codes them as "unknown" due to the very small numbers. This seems inconsistent with Office of Financial Management estimates that 388,239 people identified as two or more races in 2020 in

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[19] Carlos E. Santos. The History, Struggles, and Potential of the Term Latinx. National Latinx Psychological Association. VOL 4 – ISSUE 2. (2017).

[20] Robyn Schelenz and Nicole Freeling, University of California Newsroom. (2019). Available at https://www.universityofcalifornia.edu/news/whats-in-a-name-how-concepts-hispanic-and-latino-identity-emerged.

[21] Carlos E. Santos. The History, Struggles, and Potential of the Term Latinx. National Latinx Psychological Association. VOL 4 – ISSUE 2 at page 11. (2017).

[22] Luis Noe-Bustamante, Lauren Mora, and Mark Hugo Lopez. About One-in-Four U.S. Hispanics Have Heard of Latinx, but Just 3% Use It. Pew Research Center. (2020). Available at Latinx Used by Just 3% of U.S. Hispanics. About One-in-Four Have Heard of It. | Pew Research Center.

[23] Carlos E. Santos. The History, Struggles, and Potential of the Term Latinx. National Latinx Psychological Association. VOL 4 – ISSUE 2 at page 11. (2017).

Washington State, higher than the estimated Black-identifying population of 317,832.[24] If very few forms are arriving at CFC with multiracial or multiple race boxes checked, this suggests a further problem at the point of data collection.

Census Data as Comparison

The US Census occurs every ten years, so we used information from their smaller annual American Community Survey for 2019 comparisons, and Census data for 2010 and 2000 for those years. For this pilot project, we obtained proportions for Washington State overall and for included counties from censusviewer.com. Census racial categories are not a perfect match for CFC categories for all the reasons detailed above. Thus, our comparisons provide only a first look at potential racial disproportionality in the conviction and sentencing of women in Washington.

Analytic Approach

Data Preparation

After obtaining data from CFC, Dr. Masters prepared separate analysis files for women's and men's data, one file for each fiscal year. If cases were sentenced on more than one offense, she categorized them under the highest level offense to produce data files containing unique individual cases. She combined data from Benton and Franklin counties, using weighted averages when appropriate to account for the difference in these areas' populations.

To produce substantively meaningful and statistically comparable offense categories, members of the research team (Dr. William Vesneski, JD and Elizabeth Hendren, JD) created six categories based on offenses in the data. These categories (detailed in the report's appendix) were based on those used by Prison Policy Initiative for their "Whole Pie" reports on incarceration in the US, with some adjustments. For example, due to the significant number of women sentenced in fraud cases, they were broken out as a separate category. Dr. Masters then coded all cases into these categories and analyzed the data using SPSS software, standard in the social sciences.

Disproportionality Analyses

Chi-square (χ^2) is a non-parametric test used to determine whether two distributions of a categorical variable differ from one another in a statistically significant way.

Racial/ethnic disproportionality. We used chi-square to test the statistical significance of differences in the distribution of racial/ethnic groups between CFC data on women and Census data. Our rationale for this method arises from our theoretical stance on race, and is based on the assumption that people of any racial or ethnic group are equally likely to commit offenses as

[24] Office of Financial Management Estimates of April 1 population by age, sex, race and Hispanic origin: Age, sex, race and Hispanic origin data tables (state 2010-2019). Available at https://ofm.wa.gov/washington-data-research/population-demographics/population-estimates/estimates-april-1-population-age-sex-race-and-hispanic-origin.

people of any other. If this is so, and conviction is not racially disproportionate, we would expect to see proportions of convicted and sentenced women (CFC data) across racial groups that were similar to those we saw in the state population overall, or in a specific county (Census data).

We did not include Latinx/Hispanic people in these comparisons because of the major differences between data sources in how people are categorized as Latinx/Hispanic.[25] On Census surveys, race (e.g., Black or African American, white) and ethnicity (i.e., Hispanic/Latinx) are two separate categories, whereas in CFC data, race and ethnicity are combined into one category.

To prepare to conduct our chi-square tests, we followed these steps. First, we computed expected counts, if each race was proportionally represented, for each offense category or county. We did this by using that year's CFC count of people in each of the four included racial/ethnic groups in that offense category or county, then extrapolating a "Census count" that represented Census data proportions of these groups in a population of the CFC count's size. Next, we used these expected values for comparison to actual CFC values in chi-square tests for each county or offense category in each year's data.

This approach has several limitations as a test of racial disproportionality in women's sentencing. First, conducting multiple chi-square tests risks detecting statistical significance when it is not present, also known as Type I error. Second, people may have been mis-categorized in CFC race/ethnicity data, that is, included in a group that does not reflect their own identity or the social position that relevant others (e.g. police officers, court personnel) might perceive them as occupying. Finally, CFC and Census categories (as described above) are not perfectly comparable. However, this method for using existing data to examine the disproportionality question provides a first look. The picture it provides is not yet perfectly in focus, but is certainly an improvement over no picture, and can inform future research.

Gender disproportionality. We did not conduct statistical disproportionality tests comparing the proportions of men and women convicted and sentenced to their proportions in the population. Good statistical practice does not support carrying out such a test without an empirical or theoretical rationale. Our racial disproportionality analyses are based on the assumption that people of any racial or ethnic group are equally likely to commit offenses as people of any other. Because this theoretical perspective does not translate to assuming that men and women are equally likely to commit offenses, we chose to carry out the descriptive and comparative analyses of men's and women's data we report here, but not test the statistical significance of the differences in proportions.

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[25] While we did not conduct racial/ethnic disproportionality analyses for Latinx/Hispanic individuals because CFC data is not comparable to Census data for this population, we did provide statistics describing the total number and percentages of Latinx/Hispanic individuals in the dataset in Tables 1-13. It is important to note that these numbers are likely an undercount as CFC data codes an individual as Latinx/Hispanic only if the J&S form indicates in the race field that the person is Latinx/Hispanic or if the form indicates in the ethnicity field that the person is Latinx/Hispanic AND their race is marked as unknown.

Gender Comparison in Washington State Felony Conviction and Sentencing

Research questions answered by these results:

1. ***How many women, compared to men, and from what race-ethnicities, were convicted of felonies and sentenced in Washington State in fiscal years 2019, 2010, and 2000? (Table 1)***
2. ***How many women, from what race-ethnicities, were convicted of felonies and sentenced in each of the four largest counties (King, Pierce, Snohomish, and Spokane) and in two additional areas of focus (Yakima County and the Benton-Franklin county dyad)? How does this compare to men? (Tables 2-4)***
3. ***How many women, from what race-ethnicities, were convicted and sentenced in each felony offense category? How does this compare to men? (Tables 5-7)***

Summary of Gender Comparison Results

Far more men than women were convicted of felonies and sentenced over the past 20 years in all counties and offense categories. These proportions were typically 80% men to 20% women, with a slight increase for women over time, from women making up 19% of sentences state-wide in 2000 and 2010 and 21% in 2019. Since men and women each make up approximately 50% of the population (both state-wide and by county), men clearly make up a disproportionately higher proportion of convicted and sentenced people than women do, relative to their proportion of the population.[26]

Counties differed somewhat in the proportions of women and men convicted and sentenced, with King County in 2019 the lowest at 13% women and Benton-Franklin in 2000 the highest at 24% women. Proportions of women and men convicted and sentenced were substantially different across offense categories. In all years, women were convicted and sentenced in relatively higher proportions in Drug, Property, and particularly Fraud categories. Women typically comprised 23 to 30% of people convicted and sentenced in these offense categories, with a high of 44% of those convicted and sentenced in Fraud in 2000. In contrast, women made up lower proportions of people convicted of Violent offenses (from 12 to 14%) and much lower proportions of those convicted of Sex offenses (never more than 3%).

[26] This difference in proportions, between "men in the population" at 50% and "men sentenced in CFC data" at 80%, is large and would certainly be statistically significant if it were tested. However, good statistical practice does not support carrying out such a test without an empirical or theoretical rationale about whether men's proportion of the population "should" be similar to their proportion of sentenced individuals.

Table 1

Number of convicted and sentenced men and women by racial/ethnic group in Caseload Forecast Council (CFC) data for Washington State in fiscal years 2019, 2010, and 2000

	2019			**2010**			**2000**	
	Men	Women		Men	Women		Men	Women
Asian American	613	136		507	87		475	95
Black	2,648	404		2,905	449		3,381	781
Hispanic/Latinx*	1,680	231		1,425	134		1,986	211
Native American	541	221		474	182		486	164
White	13,715	3,973		13,102	3,406		13,862	3,559
Unknown**	64	29		25	10		9	2
Total by gender	19,261	4,994		18,438	4,268		20,199	4,812
Total convicted and sentenced individuals	24,255			22,706			25,011	
Proportion of total convicted and sentenced individuals	79%	21%		81%	19%		81%	19%

* Hispanic/Latinx figures are likely an undercount due to CFC coding methodology and should be interpreted with caution.

** The “unknown” race/ethnicity category rarely makes up more than a negligible proportion of sentenced individuals in CFC data.

Tables 2-4

Distribution of racial/ethnic groups (within gender and county) among convicted and sentenced men and women in CFC data for selected Washington State counties

Table 2: Fiscal Year 2019

	King		Pierce		Snohomish		Spokane		Yakima		Benton-Franklin*	
	Men	Women	Men	Women	Men	Women	Men	Women	Men	Women	Men	Women
Asian American	7%	8%	7%	7%	3%	2%	2%	1.5%	>1%	2%	1%	1%
Black	34%	29%	28%	19%	9%	9%	11%	6%	6%	4%	7%	3%
Hispanic/Latinx**	2%	2%	7%	4%	3%	<1%	1%	1%	49%	31%	21%	10%
Native American	1%	4%	2%	4%	2%	1%	5%	7%	4%	8%	1%	1%
White	56%	57%	56%	65%	83%	88%	81%	84%	41%	55%	69%	80%
Unknown	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	1%	5%
Total count by gender	2,526	385	2,554	573	1,610	438	2,231	529	990	245	940	233
Total convicted and sentenced individuals by county	2,884		3,127		2,048		2,760		1,235		1,173	
Proportion of total convicted and sentenced individuals	87%	13%	82%	18%	79%	21%	81%	19%	80%	20%	80%	20%

* In combining proportions across Benton and Franklin counties, we used weighted averages to account for the difference between the two counties' populations.

** Hispanic/Latinx figures are likely an undercount due to CFC coding methodology and should be interpreted with caution.

Table 3: Fiscal year 2010

	King		Pierce		Snohomish		Spokane		Yakima		Benton-Franklin*	
	Men	Women	Men	Women	Men	Women	Men	Women	Men	Women	Men	Women
Asian American	6%	4%	5%	4%	3%	2%	1%	1%	<1%	0.5%	1%	1%
Black	36%	28%	29%	20%	12%	11%	11%	8%	5%	2%	5%	4%
Hispanic/Latinx**	1%	1%	2%	1%	2%	0%	1%	1%	46%	26%	17%	7%
Native American	1%	2%	3%	5%	2%	3%	3%	6%	6%	8.5%	<1%	3%
White	55%	65%	61%	70%	81%	84%	84%	84%	43%	63%	77%	84%
Unknown	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%
Total count by gender	3,043	454	3,098	823	1,150	265	1,685	396	1,009	220	844	208
Total convicted and sentenced individuals by county	3,497		3,921		1,415		2,081		1,229		1,052	
Proportion of total convicted and sentenced individuals	87%	13%	79%	21%	81%	19%	81%	19%	82%	18%	80%	20%

* In combining proportions across Benton and Franklin counties, we used weighted averages to account for the difference between the two counties' populations.

** Hispanic/Latinx figures are likely an undercount due to CFC coding methodology and should be interpreted with caution.

Table 4: Fiscal year 2000

	King		Pierce		Snohomish		Spokane		Yakima		Benton-Franklin*	
	Men	Women	Men	Women	Men	Women	Men	Women	Men	Women	Men	Women
Asian American	5%	4%	2%	2%	2%	1%	1%	1%	<1%	1%	<1%	1%
Black	37%	41%	23%	23%	10%	8%	15%	8%	3%	3%	6%	8%
Hispanic/Latinx**	7%	2%	5%	1%	4%	1%	2%	1%	45%	28%	22%	12%
Native American	2%	2%	2%	3%	2%	3%	3%	7%	6%	13%	<1%	2%
White	49%	51%	68%	71%	82%	87%	79%	83%	46%	55%	71%	77%
Unknown	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%
Total count by gender	4,742	988	3,568	944	1,315	310	1,229	230	990	227	807	254
Total convicted and sentenced individuals by county	5,730		4,512		1,625		1,459		1,217		1,061	
Proportion of total convicted and sentenced individuals	83%	17%	79%	21%	81%	19%	84%	16%	81%	19%	76%	24%

* In combining proportions across Benton and Franklin counties, we used weighted averages to account for the difference between the two counties' populations.

** Hispanic/Latinx figures are likely an undercount due to CFC coding methodology and should be interpreted with caution.

Tables 5-7

Distribution of racial/ethnic groups (within gender and offense category), by category of offense, among convicted and sentenced men and women in Washington State CFC data

NOTE: Because this pilot study focuses on women's incarceration, we based these offense categories on the offenses women were currently (in 2019 data) being most commonly convicted of and sentenced on, then categorized men's offenses in the same way to facilitate comparison. Doing so results in more men's offenses – though still a small proportion – falling into the "other" category. The following proportions fell into the "other" category by year and gender:

- In 2019, 0.1% of women's offenses and 2.5% of men's
- In 2010, 1.8% of women's offenses and 4.4% of men's
- In 2000, 11.9% of women's offenses and 20% of men's

"Other" offenses are not included in these tables; more details are available on request.

Table 5: Fiscal year 2019

	Violent		Drug		Property		Fraud		Sex		Public Order	
	Men	Women	Men	Women	Men	Women	Men	Women	Men	Women	Men	Women
Asian American	4%	3%	2%	2%	3%	3%	3%	4%	3%	6%	3%	4%
Black	19%	14%	10%	5%	13%	9%	12%	7%	13%	10%	18%	11%
Hispanic/Latinx*	11%	6%	10%	4%	7%	5%	7%	5%	9%	3%	10%	4%
Native American	3%	6%	2%	4%	3%	5%	2%	3%	3%	<1%	3%	5%
White	62%	70%	76%	85%	74%	78%	76%	81%	71%	78%	66%	76%
Unknown	<1%	1%	<1%	<1%	<1%	<1%	<1%	<1%	1%	3%	<1%	<1%
Total count by gender	2,838	468	4,513	1,680	5,204	1,575	1,785	714	1,038	32	3,394	520
Total convicted and sentenced individuals by county	3,306		6,193		6,779		2,499		1,070		3,914	
Proportion of total convicted and sentenced individuals	86%	14%	73%	27%	77%	23%	71%	29%	97%	3%	87%	13%

* Hispanic/Latinx figures are likely an undercount due to CFC coding methodology and should be interpreted with caution.

Table 6: Fiscal year 2010

	Violent		Drug		Property		Fraud		Sex		Public Order	
	Men	Women	Men	Women	Men	Women	Men	Women	Men	Women	Men	Women
Asian American	3%	3%	2%	1%	3%	3%	3%	2%	2%	12%	3%	1%
Black	18%	18%	15%	8%	14%	10%	16%	11%	12%	12%	19%	13%
Hispanic/Latinx*	9%	3%	9%	3%	6%	3%	7%	4%	7%	0%	8%	3%
Native American	3%	6%	2%	4%	3%	5%	2%	3%	3%	0%	3%	6%
White	67%	70%	71%	84%	74%	79%	71%	80%	75%	73%	67%	77%
Unknown	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	3%	<1%	<1%
Total count by gender	2,819	358	4,293	1,329	5,308	1,472	1,562	678	981	34	2,671	319
Total convicted and sentenced individuals by county	3,177		5,622		6,780		2,240		1,015		2,990	
Proportion of total convicted and sentenced individuals	88%	12%	76%	24%	78%	22%	70%	30%	97%	3%	89%	11%

* Hispanic/Latinx figures are likely an undercount due to CFC coding methodology and should be interpreted with caution.

Table 7: Fiscal year 2000

	Violent		Drug		Property		Fraud		Sex		Public Order	
	Men	Women	Men	Women	Men	Women	Men	Women	Men	Women	Men	Women
Asian American	4%	4%	2%	1%	2%	3%	4%	1%	1%	0%	2%	1%
Black	19%	27%	15%	13%	13%	14%	12%	17%	10%	0%	16%	14%
Hispanic/Latinx*	12%	3%	9%	3%	7%	6%	6%	4%	11%	0%	8%	5%
Native American	3%	6%	2%	3%	2%	4%	1%	2%	2%	11%	3%	3%
White	62%	60%	72%	80%	75%	73%	77%	76%	76%	88%	71%	77%
Unknown	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%
Total count by gender	2,303	295	4,866	1,620	4,896	1,205	1,057	814	379	9	2,595	294
Total convicted and sentenced individuals by county	2,598		6,486		6,101		1,871		388		2,889	
Proportion of total convicted and sentenced individuals	87%	13%	75%	25%	80%	20%	56%	44%	98%	2%	90%	10%

* Hispanic/Latinx figures are likely an undercount due to CFC coding methodology and should be interpreted with caution.

Racial/Ethnic Distribution of Convicted and Sentenced Women by County

Research question:

4. ***Were Black, Indigenous, and women of color convicted and sentenced disproportionally in each county and each fiscal year examined? (Tables 8-13)***

Summary of Disproportionality Results by County

We found statistically significant differences indicating racial disproportionality in Washington's conviction and sentencing of women in all of the six counties we examined, across all three time points. This was a robust finding in data from all years and locations except for the Benton-Franklin county area in 2019.

Black and Native American women bore the brunt of the disproportionality we documented. Across counties, Black women were typically convicted and sentenced at two or three times the rate we would expect based on their proportion of each county's population. In some counties, in some fiscal years, they were convicted and sentenced at rates up to eight times higher. Native American women, across counties, often made up two to four times as large a proportion of the convicted and sentenced population as they did of the general population of each county.

Across counties and time points, white women were typically convicted and sentenced in roughly the same or somewhat lower proportion as their representation in the general population. In general, a lower proportion of Asian American women were convicted and sentenced than in their representation in the general population.[27]

[27] Due to the limitations of the data used in this pilot study (and detailed in the Data section of this report), findings on Asian Americans may mask disparities experienced by subpopulations (e.g., Native Hawaiians or Pacific Islanders) who have been aggregated into the Asian American category.

Tables 8-13

Distribution of racial and ethnic groups among convicted and sentenced women in Caseload Forecast Council (CFC) data, compared to US Census data, for selected Washington counties

NOTE: Due to the data limitations described in detail earlier in this report, we present data on Hispanic/Latinx women descriptively only in Tables 8-13. Census data is not directly comparable to CFC data for this group due to differences in coding, so we were not able to include this group in statistical difference testing for disproportionality.

Table 8: King County

	2019		**2010**		**2000**	
	Census	CFC (n = 385)	Census	CFC (n = 454)	Census	CFC (n = 988)
Asian American	19%	8%	15%	4%	11%	4%
Black	7%	29%	6%	28%	5%	41%
Hispanic/Latinx*	–	2%	–	1%	–	2%
Native American	1%	4%	0.8%	2%	0.9%	2%
White	66%	57%	69%	65%	76%	51%

Statistical significance of differences:

Proportions of women across racial categories were significantly different in King County CFC data than in county Census data in all three tested years. In 2019 $\chi^2 = 315$, df 3, $p < 0.001$; in 2010 $\chi^2 = 375$, df 3, $p < 0.001$; and in 2000 $\chi^2 = 2524$, df 3, $p < 0.001$.

* Hispanic/Latinx figures are likely an undercount due to CFC coding methodology and should be interpreted with caution.

In King County in fiscal year (FY) 2019, the proportion of Black women convicted and sentenced was four times higher than their proportion in the general population according to Census data. The same was true of Native American women. White women were convicted and sentenced in roughly the same proportion as their representation in the general population, and a lower proportion of Asian American women were convicted and sentenced than in theirs.

In FY 2010 this disproportionality's scale was similar for Black women (6% of the King County general population compared to 28% of convicted and sentenced women). Disproportionality was present but less pronounced in 2010 for Native American women, who were convicted and sentenced at about twice the rate of their representation in the population (2% compared to 0.8%). White women were again convicted and sentenced in roughly the same

proportion as their representation in the general population, and a lower proportion of Asian American women were convicted and sentenced than in theirs.

Racial disproportionality in conviction and sentencing was even more pronounced in FY 2000, with a proportion of Black women convicted and sentenced that was eight times larger than their proportion of the county's population (41% compared to 5%). In this fiscal year, only about two-thirds as many white women were convicted sentenced as would be expected based on their Census proportions.

Table 9: Pierce County

	2019		**2010**		**2000**	
	Census	CFC (n = 573)	Census	CFC (n = 823)	Census	CFC (n = 944)
Asian American	7%	7%	6%	4%	5%	2%
Black	8%	19%	7%	20%	7%	23%
Hispanic/Latinx*	–	4%	–	1%	–	1%
Native American	1.8%	4%	1.4%	5%	1.4%	3%
White	75%	65%	74%	70%	78%	71%

Statistical significance of differences:

Proportions of women across racial categories were significantly different in Pierce County CFC data than in county Census data in all three tested years. In 2019 $\chi^2 = 103$, df 3, $p < 0.001$; in 2010 $\chi^2 = 330$, df 3, $p < 0.001$; and in 2000 $\chi^2 = 2524$, df 3, $p < 0.001$.

* Hispanic/Latinx figures are likely an undercount due to CFC coding methodology and should be interpreted with caution.

In Pierce County in FY 2019, the proportion of Black women convicted and sentenced was over twice as high as their proportion in the general population according to Census data. The same was true of Native American women. White women and Asian American were convicted and sentenced in roughly the same proportions as their representation in the general population.

In FY 2010 this disproportionality's scale was larger for Black women, who were convicted and sentenced at approximately three times the rate of their proportion of the county's population (20% compared to 7%). Disproportionality was also present in 2010 for Native American women, who were convicted and sentenced at about three times the rate of their representation in the population. White women were again convicted and sentenced in roughly the same proportion as their representation in the general population, and a very slightly lower proportion of Asian American women were convicted and sentenced than in theirs.

Patterns of racial disproportionality in conviction and sentencing were similar in FY 2000, with a proportion of Black women convicted and sentenced that was roughly three times larger than their proportion of the county's population (23% compared to 7%). Native American women were convicted and sentenced approximately twice the rate of their proportion of the county's population.

Table 10: Snohomish County

	2019		**2010**		**2000**	
	Census	CFC (n = 438)	Census	CFC (n = 265)	Census	CFC (n = 310)
Asian American	12%	2%	9%	2%	6%	1%
Black	4%	9%	3%	11%	2%	8%
Hispanic/Latinx*	–	<1%	–	0%	–	1%
Native American	1.6%	1%	1.4%	3%	1.4%	3%
White	78%	88%	78%	84%	86%	87%

Statistical significance of differences:

Proportions of women across racial categories were significantly different in Snohomish County CFC data than in county Census data in all three tested years. In 2019 $\chi^2 = 67$, df 3, $p < 0.001$; in 2010 $\chi^2 = 66$, df 3, $p < 0.001$; and in 2000 $\chi^2 = 62$, df 3, $p < 0.001$.

* Hispanic/Latinx figures are likely an undercount due to CFC coding methodology and should be interpreted with caution.

In Snohomish County in FY 2019, the proportion of Black women convicted and sentenced was twice as large as their proportion in the general population according to Census data. For Native American women, no large scale disproportionality was evident in the data. White women were convicted and sentenced in a slightly lower proportion than their representation in the general population, and Asian American women in a much lower proportion (2% compared to 12%) than in theirs.

In FY 2010 this disproportionality's scale was greater for Black women, with a proportion convicted and sentenced nearly four times as large as their proportion of the general population. Disproportionality was also present in 2010 for Native American women, who were convicted and sentenced at about twice the rate of their representation in the population. White women were convicted and sentenced in roughly the same proportion as their representation in the general population, and a lower proportion of Asian American women were convicted and sentenced than in theirs.

Racial disproportionality in conviction and sentencing was similar in FY 2000, with a proportion of Black women convicted and sentenced that was four times larger than their

proportion of the county's population. Native American women were again convicted and sentenced at about twice the rate of their representation in the county's population. White women were convicted and sentenced in roughly the same proportion as their representation in the general population, and a lower proportion of Asian American women were convicted and sentenced than in theirs.

Table 11: Spokane County

	2019		2010		2000	
	Census	CFC (n = 529)	Census	CFC (n = 396)	Census	CFC (n = 230)
Asian American	2.4%	1.5%	2%	1%	2%	1%
Black	2%	6%	2%	8%	2%	8%
Hispanic/Latinx	–	1%	–	1%	–	1%
Native American	1.8%	7%	1.6%	6%	1.4%	7%
White	89%	84%	89%	84%	91%	83%

Statistical significance of differences:

Proportions of women across racial categories were significantly different in Spokane County CFC data than in county Census data in all three tested years. In 2019 $\chi^2 = 143$, df 3, $p < 0.001$; in 2010 $\chi^2 = 84$, df 3, $p < 0.001$; and in 2000 $\chi^2 = 2524$, df 3, $p < 0.001$.

* Hispanic/Latinx figures are likely an undercount due to CFC coding methodology and should be interpreted with caution.

In Spokane County in FY 2019, the proportion of Black women convicted and sentenced was three times higher than their proportion in the general population according to Census data. Approximately the same was true of Native American women. White women were convicted and sentenced in roughly the same proportion as their representation in the general population, as were Asian American women.

Racial disproportionality in conviction and sentencing was even more pronounced in FY 2010, with a proportion of Black women convicted and sentenced that was four times larger than their proportion of the county's population. Native American women were again convicted and sentenced at about three times the rate of their representation in the population (6% compared to 1.6%). Similarly, white women were convicted and sentenced in roughly the same proportion as their representation in the general population, and a lower proportion of Asian American women were convicted and sentenced than in the general population.

In FY 2000, the proportion of Black women convicted and sentenced was again four times larger than their proportion of the county's population (8% compared to 2%). Disproportionate conviction and sentencing affected Native American women even more in 2000 as their

convicted and sentenced proportion (7%) was five times more than their proportion of the county (1.4%). In this fiscal year, slightly fewer white and Asian American women were convicted and sentenced than would be expected based on their Census proportions.

Table 12: Yakima County

	2019		2010		2000	
	Census	CFC (n = 245)	Census	CFC (n = 220)	Census	CFC (n = 227)
Asian American	1.6%	2%	1%	0.5%	1%	1%
Black	1.5%	4%	1%	2%	1%	3%
Hispanic/Latinx	–	31%	–	26%	–	28%
Native American	6.5%	8%	4.3%	8.5%	4.5%	13%
White	87%	55%	64%	63%	66%	55%

Statistical significance of differences:

Proportions of women across racial categories were significantly different in Yakima County CFC data than in county Census data in all three tested years. In 2019 $\chi^2 = 22$, df 3, $p < 0.001$; in 2010 $\chi^2 = 11$, df 3, $p < 0.05$; and in 2000 $\chi^2 = 47$, df 3, $p < 0.001$.

* Hispanic/Latinx figures are likely an undercount due to CFC coding methodology and should be interpreted with caution.

In Yakima County in FY 2019, the proportion of Black women convicted sentenced was two and a half times higher than their proportion in the general population according to Census data. Native American women were convicted and sentenced at a slightly higher rate than would be expected based on their proportion of the county's population. White women were convicted and sentenced in a considerably lower proportion (55%) than their representation in the population (87%). Asian American women were convicted and sentenced in roughly the same proportion as their representation in the population.

Racial disproportionality in conviction and sentencing was also present in FY 2010, with proportions of Black and Native American women convicted and sentenced that were twice as large as their respective proportions of the county's population. White and Asian American women were convicted and sentenced in roughly the same proportions as their respective representation in the population.

In FY 2000, the proportion of Black women convicted and sentenced was three times larger than their proportion of the county's population. Disproportionate sentencing affected Native American women even more in 2000 as their convicted and sentenced proportion (13%) was nearly three times more than their proportion of the county (4.5%). In this fiscal year, about the

same proportions of white and Asian American women were convicted and sentenced as would be expected based on their Census proportions.

Table 13: Benton and Franklin Counties combined

	2019		2010		2000	
	Census	CFC (n = 233)	Census	CFC (n = 208)	Census	CFC (n = 254)
Asian American	3%	1%	2.4%	1%	2%	1%
Black	2%	3%	1.5%	4%	1.3%	8%
Hispanic/Latinx*	–	10%	–	7%	–	12%
Native American	1.4%	1%	0.8%	3%	0.8%	2%
White	90%	80%	76%	84%	80%	77%
Unknown**	–	5%	–	–	–	–

Statistical significance of differences:

Proportions of women across racial categories were significantly different in Benton and Franklin Counties combined CFC data than in these counties' Census data in two of three tested years. In 2019, $\chi^2 = 4$, df 3, $p = 0.26$, indicating no statistically significant difference. In 2010 $\chi^2 = 17$, df 3, $p < 0.01$; and in 2000 $\chi^2 = 75$, df 3, $p < 0.001$.

Weighted averages:

In combining proportions across Benton and Franklin counties, we used weighted averages to account for the difference between the two counties' populations.

* Hispanic/Latinx figures are likely an undercount due to CFC coding methodology and should be interpreted with caution.

** The "unknown" category appears in CFC data from all counties, but only in Benton and Franklin counties in FY 2019 does it make up more than a negligible (i.e., > 0.5%) proportion of sentenced women.

In Benton and Franklin Counties combined in FY 2019, testing indicates no statistically significant racial disproportionality in conviction and sentencing. Proportions of people in each racial category are roughly similar in CFC data and in Census data.

In FY 2010, the proportion of Black women convicted and sentenced was two and a half times higher than their proportion in the general population according to Census data. Native American women were convicted and sentenced at three times the rate as would be expected based on their proportion of the county's population. Unusually, white women were convicted and sentenced in a proportion (84%) slightly larger than their proportion of the population

(76%). In this fiscal year, fewer Asian American women were convicted and sentenced than would be expected based on their Census proportions.

Racial disproportionality in conviction and sentencing was also present in FY 2000. Proportions of Black and Native American women convicted and sentenced were over four times as large, and twice as large, as their respective proportions of the county's population. Fewer white and Asian American women were convicted and sentenced than would be expected based on their Census proportions.

Racial/Ethnic Distribution of Convicted and Sentenced Women by Offense Category

Research question:

5. ***Were Black, Indigenous, and women of color convicted and sentenced disproportionally within each offense category and in each fiscal year examined? (Tables 14-16)***

Summary of Disproportionality Results by Offense Category

We found statistically significant differences indicating racial disproportionality in Washington's conviction and sentencing of women in most of the offense categories we examined. This was a robust finding with one notable counter-example. In 2019 data in the drug offense category, Black women were convicted and sentenced in roughly the proportion we would expect based on their representation in the general population of the state.

Black and Native American women bore the brunt of the disproportionality we documented. Across offense categories, Black women were typically convicted and sentenced at two or three times the rate we would expect based on their proportion of the state's population. This imbalance was especially pronounced in the violent offense category, where in 2000 nine times as many Black women were convicted and sentenced as their Census proportion would predict. Native American women, across offense categories, often made up two to four times as large a proportion of the convicted and sentenced population as they did of the general population of the state.

For violent offenses, white women were convicted and sentenced in a lower proportion than their representation in the general population across all three timepoints we examined. For drug offenses, they were convicted and sentenced in a higher proportion in two out of three years. A lower proportion of Asian American women were convicted and sentenced than their representation in the general population across nearly all offense categories.

Table 14: Distribution of racial groups among convicted and sentenced women in Caseload Forecast Council (CFC) data, compared to Washington State Census data, for selected offense categories, FY 2019

	Asian American		Black		Native American		White	
	Census	CFC	Census	CFC	Census	CFC	Census	CFC
Violent (n = 433)	9%	3%	4%	15%	2%	6%	79%	70%
Drug (n = 1607)	9%	2%	4%	5%	2%	4%	79%	85%
Property (n = 1484)	9%	3%	4%	9%	2%	5%	79%	78%
Fraud (n = 677)	9%	4%	4%	7%	2%	3%	79%	81%
Public Order (n = 498)	9%	4%	4%	11%	2%	5%	79%	76%

Statistical significance of differences:

Proportions of women across racial categories were significantly different in CFC data than in Washington State Census data in all offense categories. Violent $\chi^2 = 190$, df 3, $p < 0.001$; Drug $\chi^2 = 136$, df 3, $p < 0.001$; Property $\chi^2 = 226$, df 3, $p < 0.001$; Fraud $\chi^2 = 45$, df 3, $p < 0.001$; and Public Order $\chi^2 = 106$, df 3, $p < 0.001$.

The differences in proportions of women in each racial category in Census compared to CFC data varied depending on offense category in fiscal year (FY) 2019. In most offense categories, Black women made up a higher proportion of convicted and sentenced women than would be expected based on their proportion in the general population (e.g., approximately four times as many women in this group were convicted of violent offenses and sentenced [15%] as their Census proportion of 4%). Public order offenses were another category in which Black women were convicted and sentenced at particularly high rates (11%) compared to their representation in Census data. A notable exception to this pattern was drug offenses, where proportions were roughly similar (4% vs. 5%).

This disproportionality was also evident for Native American women, particularly in violent, property, and public order offenses. A lower proportion of Asian American women were convicted and sentenced than their representation in the general population across all offense categories. This was also true of white women for violent offenses. In the drug and fraud offense categories, white women were convicted and sentenced at slightly higher rates than would be expected based on their proportion of the general population, and in the property and public order offense categories, roughly similar rates to their representation in Census data.

Table 15: Distribution of racial groups among convicted and sentenced women in Caseload Forecast Council (CFC) data, compared to Washington State Census data, for selected offense categories, FY 2010

	Asian American		Black		Native American		White	
	Census	CFC	Census	CFC	Census	CFC	Census	CFC
Violent (n = 347)	7%	3%	4%	18%	1.5%	6%	77%	70%
Drug (n = 1291)	7%	1%	4%	8%	1.5%	4%	77%	84%
Property (n = 1420)	7%	3%	4%	10%	1.5%	5%	77%	79%
Fraud (n = 646)	7%	2%	4%	11%	1.5%	3%	77%	80%
Public Order (n = 309)	7%	1%	4%	13%	1.5%	6%	77%	77%

Statistical significance of differences:

Proportions of women across racial categories were significantly different in CFC data than in Washington State Census data in all offense categories. Violent $\chi^2 = 230$, df 3, $p < 0.001$; Drug $\chi^2 = 155$, df 3, $p < 0.001$; Property $\chi^2 = 244$, df 3, $p < 0.001$; Fraud $\chi^2 = 108$, df 3, $p < 0.001$; and Public Order $\chi^2 = 104$, df 3, $p < 0.001$.

Findings for FY 2010 were similar overall to those for FY 2019 with several notable exceptions. The differences in proportions of women in each racial category in Census compared to CFC data again varied depending on offense category. In most offense categories, Black women made up a higher proportion of convicted and sentenced women than would be expected based on their proportion in the general population (e.g., approximately five times as many women in this group were convicted of violent offenses and sentenced (18%) as their Census proportion of 4%). However, unlike in 2019, the drug offenses exception to this pattern was not apparent in 2010.

This disproportionality was also evident for Native American women, particularly in violent, property, and public order offenses. In the violent and public order offense categories, these women were convicted and sentenced in proportions four times greater (6% vs. 1.5%) than their proportions of Census data. Again, a lower proportion of Asian American women were convicted and sentenced than their representation in the general population across all offense categories. This was also true of white women for violent offenses. In the drug offense category, white women were convicted and sentenced at slightly higher rates than would be expected based on their proportion of the general population, and in the property, fraud, and public order offense categories, roughly similar rates to their representation in Census data.

Table 16: Distribution of racial groups among convicted and sentenced women in Caseload Forecast Council (CFC) data, compared to Washington State Census data, for selected offense categories, FY 2000

	Asian American		Black		Native American		White	
	Census	CFC	Census	CFC	Census	CFC	Census	CFC
Violent (n = 287)	5%	4%	3%	27%	1.6%	6%	82%	60%
Drug (n = 1573)	5%	1%	3%	13%	1.6%	3%	82%	80%
Property (n = 1138)	5%	3%	3%	14%	1.6%	4%	82%	73%
Fraud (n = 781)	5%	1%	3%	17%	1.6%	2%	82%	76%
Public Order (n = 280)	5%	1%	3%	14%	1.6%	3%	82%	77%
Statistical significance of differences: Proportions of women across racial categories were significantly different in CFC data than in Washington State Census data in all offense categories. Violent $\chi^2 = 546$, df 3, $p < 0.001$; Drug $\chi^2 = 526$, df 3, $p < 0.001$; Property $\chi^2 = 577$, df 3, $p < 0.001$; Fraud $\chi^2 = 528$, df 3, $p < 0.001$; and Public Order $\chi^2 = 143$, df 3, $p < 0.001$.								

Taken together, findings for FY 2000 were similar overall to those for FY 2010. The differences in proportions of women in each racial category in Census compared to CFC data again varied depending on offense category. In all offense categories, Black women made up a higher proportion of convicted and sentenced women than would be expected based on their proportion in the general population. This disproportionality was especially pronounced in the violent offense category, where nine times as many Black women were convicted and sentenced (27%) as their Census proportion of 3%. The drug offenses exception present in 2019 was not apparent in 2000, indeed, the proportion of Black women in CFC data (13%) was over four times larger than their proportion in the Census (3%).

This disproportionality was also evident for Native American women, particularly in violent and public order offenses, whereas their representation in the fraud offense category (2%) was approximately proportional to that in Census data (1.6%). A lower proportion of Asian American women were convicted and sentenced than their representation in the general population across all categories except violent offenses, where proportions were approximately equivalent. In the drug offense category, white women were present at roughly similar rates to their representation in Census data, but in all other categories, they were convicted and sentenced at slightly lower rates than would be expected based on their proportion of the general population.

Discussion

This study began filling the gap in what is known about Washington State's incarcerated women using available data. Overall, women made up a lower proportion of people convicted of felonies and sentenced than men; this proportion increased from 19% in FY 2000 to 21% in 2019. Women were more likely to be convicted of Fraud, Property, and Drug offenses and sentenced than Violent, Public Order, or Sex offenses, but men made up the majority of people convicted and sentenced in all offense categories.

Focusing on women, we found statistically significant differences indicating racial disproportionality among women convicted and sentenced in Washington in all of the six regions we examined, and nearly all of the offense categories, across all three time points. Black and Native American women bore the brunt of this disproportionality. Racial disproportionality in conviction and sentencing did improve somewhat between 2000 and 2019. However, the consequences of earlier years' high disproportionality are currently being felt by women who may still be in prison right now, and by their communities.

It is important to note that because the data this study used was collected at the time of sentencing, we are not able to identify the point(s) in the legal process (e.g., arrest, charging, conviction, sentencing) at which these disproportionalities occurred. For example, Black women could have been arrested, charged with crimes, or convicted of them more often than white women in equivalent situations and produced similar results. Judges make sentencing decisions constrained by the crime charged, the crime of conviction, the standard sentence range for each crime, and the grounds for exceptional sentences above and below the range that the legislature and the courts have recognized. Thus, what this report summarizes is less "disproportionality in sentencing" and more "disproportionality at the time of sentencing."

The study's other major limitation is that the existing data we analyzed may mis-categorize some people in terms of race/ethnicity. The mis-categorized group represents a minority of all cases analyzed, but cannot be quantified further. This use of existing data to examine questions of disproportionality at the time of sentencing provides a picture that is not perfectly in focus. Nonetheless, this picture does show the overall shape of the conviction and sentencing disproportionality problem in Washington.

Ultimately, looking at which women are in prison requires looking at who is convicted and sentenced, as we did here, and also at other factors that affect how long people remain in prison. CFC data do not provide information about events during incarceration that may affect length of prison stay.

For Washington State to begin creating policy that addresses the needs of incarcerated women, we must understand who is in women's prisons and why we are incarcerating them. This study takes the first steps on that journey. This pilot research also indicates some next steps, detailed in our recommendations below.

Recommendations

The study team has some recommendations and suggestions regarding both improvements in data collection and additional analyses and research.

Data recommendations

- We recommend that the CFC begin using the race/ethnicity categories from the J&S forms, in a manner that allows for the use of multiple racial categories to specify the details of multiracial-identifying individuals' identities, and with race and Hispanic/Latinx ethnicity separated into two variables in their datasets.
- We suggest that all counties collaborate in efforts to standardize data collection on J&S forms across the state, including using best practices for data collection such as ensuring individuals are able to self-identify their race and ethnicity.
- We recommend that the courts and CFC explore the possibility of collecting data markers for socio-economic status (SES), such as the highest level of education of the individual's primary parent (an easy-to-collect piece of information that serves as a proxy for individuals' SES in adult life), or whether the person qualified for a public defender.
- We recommend that the courts and CFC explore data markers for genders that do not fit within the male or female binary so individuals are able to self-identify their gender.
- We recommend that the Department of Corrections support research aimed at understanding the intersection of gender and race. This could be done by streamlining researchers' access to data on incarcerated individuals that is broken out by both gender and race, or by doing analyses like this in their own publications.

Additional analyses and suggested research directions

- We suggest identifying alternative data sources that could allow for disproportionality analyses, similar to those we did here, for Hispanic/Latinx people.
- We recommend additional research, including qualitative research using facts and circumstances if appropriate, to further examine:
    - the disproportionality for Black women with violent crimes.
    - causes of disproportionality in drug conviction and sentencing.
    - the nature and antecedents of the relatively high levels of fraud felony convictions among women.
- More research is needed specifically on Indigenous women, given the racial disproportionality and the almost complete lack of national research. This research should be led by Indigenous researchers.
- We suggest additional research using Department of Corrections data on factors that affect the length of time women spend in prison, for example:

- the extent that infractions increase length of stay in prison as well as at work release/community corrections.
- the extent that risk classification increases length of stay in prison.

- We recommend additional research on court-related factors related to length of time served, for example:
  - concurrent versus consecutive sentences.
  - the use of enhancements and their effects on length of sentences.
- We also suggest research to begin identifying the sources of the disparities found in this report. This work could examine:
  - Sentencing: by determining where within the standard range, or outside the standard range, judges are sentencing criminal defendants of different races/ethnicities/genders; and upon what factors the judges are basing those decisions.
  - Charging and plea offers: by determining how county prosecutors charge or offer pleas to defendants of different races/ethnicities/genders for similar conduct. We acknowledge the challenges involved in determining the facts for such research, but it would make a major contribution to understanding and addressing the disproportionalities identified here.

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Appendix

Offense Categorization

To produce substantively meaningful and statistically comparable offense categories, members of the research team (Dr. William Vesneski, JD and Elizabeth Hendren, JD) created six categories based on offenses in the data. These categories were based on those used by Prison Policy Initiative for their "Whole Pie" reports on incarceration in the US. Offenses in each category are listed alphabetically.

Violent

ASSAULT 1 (POST 7/1/90)
ASSAULT 2 (POST 7/1/88)
ASSAULT 3 (POST 7/1/88)
ASSAULT OF A CHILD 2
ASSAULT OF A CHILD 3
CRIMINAL MISTREATMENT 2
CRIMINAL MISTREATMENT 2 (POST 06/07/06)
CUSTODIAL ASSAULT (POST 7/89)
CYBERSTALKING
DRIVE-BY-SHOOTING (POST 6/30/97)
HIT AND RUN - DEATH (POST 7/21/01)
HIT AND RUN - INJURY (POST 6/7/00)
KIDNAPPING 1
KIDNAPPING 2
MANSLAUGHTER 1 (POST 7/26/97)
MANSLAUGHTER 2 (POST 7/26/97)
MURDER 1 (7/1/90-7/24/99)
MURDER 1 (POST 7/24/99)
MURDER 2 (POST 7/24/99)
STALKING (POST 6/30/00)
VEHICULAR ASSAULT DISREGARD SAFETY (POST 7/21/01)
VEHICULAR ASSAULT DISREGARD SAFETY (POST 7/21/01)
VEHICULAR ASSAULT UNDER INFL/RECKLESS (POST 7/21/01)
VEHICULAR HOMICIDE - DISREGARD SAFETY OF OTHERS (POST 6/5/96)
VEHICULAR HOMICIDE - DRUNK (LEV 11. POST 06/07/2012)
VEHICULAR HOMICIDE - RECKLESS MANNER (POST 6/5/96)
VIOLATION OF FOREIGN PROTECTION ORDER

Drug

DEL MATERIAL IN LIEU OF CONTROLLED SUBSTANCE (POST 7/89) - 1ST OFF
DEL POS W/I METH - 1ST OFFENSE (POST 6/30/98)
DEL POS W/I METH - 2ND OFFENSE (POST 6/30/98)
DEL POS W/I METH - SCHOOL ZONE (POST 6/30/98)

ENDANGERMENT WITH A CONTROLLED SUBSTANCE
FORGED PRESCRIP - VUCSA - 1ST OFFENSE
MAINTAIN PLACE FOR DRUGS - 1ST OFFENSE (POST 7/24/99)
MFG DEL POS W/I HER (POST 6/30/02) (L7)
MFG DEL POS W/I HER COC - SCHOOL ZONE (POST 6/30/02) (L7)
MFG DEL POS W/I HER COC - SUBSEQ (POST 6/30/02) (L7)
MFG DEL POS W/I IMITATION CONTROLLED SUBSTANCE (POST 7/89)
MFG DEL POS W/I MARIJUANA - 1ST OFFENSE
MFG DEL POS W/I MARIJUANA - CORRECTIONAL FACILITY
MFG DEL POS W/I SCH I/II NARC OR FLUNT SUBSEQ
MFG DEL POS W/I SCH I/II NARC OR FLUNT-1ST OFF
POSS OF CONTROL SUBSTANCE - BY PRISONERS
POSS OF CONTROL SUBSTANCE - OTHER, EXCEPT PCP, IN COR FAC
POSS OF CONTROL SUBSTANCE - OTHER, EXCEPT PCP/FLUNIT
POSS OF CONTROL SUBSTANCE - SCHEDULE I/II IN COR FAC
POSS OF CONTROL SUBSTANCE - SCHEDULE I/II OR FLUNIT
USE BUILDING FOR DRUGS (POST 7/24/99)

Property

ARSON 1
ARSON 2
BURGLARY 1
BURGLARY 2 (NONDWELLING - POST 7/90)
MALICIOUS INJURY TO RAILROAD PROPERTY (POST 7/24/99)
ORGANIZED RETAIL THEFT 1
ORGANIZED RETAIL THEFT 2
POSSESSION OF STOLEN MAIL
POSSESSION OF STOLEN PROPERTY 1
POSSESSION OF STOLEN PROPERTY 2
POSSESSION OF STOLEN VEHICLE
RECEIVING OR GRANTING UNLAWFUL COMPENSATION
RECKLESS BURNING 1
RESIDENTIAL BURGLARY (POST 7/90)
RETAIL THEFT WITH EXTENUATING CIRCUMSTANCES 1
RETAIL THEFT WITH EXTENUATING CIRCUMSTANCES 2
RETAIL THEFT WITH EXTENUATING CIRCUMSTANCES 3
ROBBERY 1
ROBBERY 2
TAKING MOTOR VEHICLE WITHOUT PERMISSION 2 (POST 6/12/02)
THEFT 1
THEFT 2
THEFT FROM A VULNERABLE ADULT 1
THEFT FROM A VULNERABLE ADULT 2
THEFT OF A FIREARM (POST 7/22/95)
THEFT OF MOTOR VEHICLE
THEFT OF RENTAL OR LEASED PROPERTY ($250-$1,500)

THEFT OF RENTAL OR LEASED PROPERTY (<$1,500)
THEFT W/ INTENT RESELL 1
THEFT W/ INTENT RESELL 2
TRAFFICKING IN STOLEN PROPERTY 1
TRAFFICKING IN STOLEN PROPERTY 2
VEHICLE PROWL 1
VEHICLE PROWL 2 (3RD OR SUBS - POST 2013)

Fraud

CRIMINAL IMPERSONATION 1
DEFRAUDING A PUBLIC UTILITY 1
DEFRAUDING A PUBLIC UTILITY 2
DEFRAUDING INNKEEPER, OVER $75
FALSE VERIFICATION FOR WELFARE
FOOD STAMPS - TRAFFICKING
FORGERY
IDENTITY THEFT 1 (POST 7/21/01)
IDENTITY THEFT 2 (POST 7/21/01)
ILLEGAL TRANSFER OF MOTOR VEHICLE CERTIFICATE
INSURANCE FRAUD - FALSE CLAIMS
MAIL THEFT
MEDICAID FRAUD
MONEY LAUNDERING
MORTGAGE FRAUD
OBTAIN SIGNATURE BY DECEPTION
PERJURY 1
PERJURY 2
POSSESS READ CAPTURE INFO ON OTHER'S ID
THEFT 1 - WELFARE FRAUD
THEFT 2 - WELFARE FRAUD
UNLAWFUL FACTORING CREDIT/PAY CARD TRANSACTION-1ST
UNLAWFUL ISSUANCE OF CHECKS OR DRAFTS
UNLAWFUL POSSESSION OF A PERSONAL IDENTIFICATION DEVICE
UNLAWFUL POSSESSION OF FICTITIOUS IDENTIFICATION
UNLAWFUL POSSESSION OF PAYMENT INSTRUMENTS
UNLAWFUL PRODUCTION OF PAYMENT INSTRUMENTS

Sex

CHILD MOLEST 1 <18 (POST 8/31/01)
CHILD MOLEST 1 >17 (POST 8/31/01) (.712)
CHILD MOLEST 2 (POST 7/90)
CHILD MOLEST 3 (POST 7/90)
COMMER SEX ABUSE A MINOR - PROMOTE (POST 06/10/2010)
COMMUNICATION WITH A MINOR (POST 7/86)
FAILURE TO REGISTER AS SEX OFFENDER - POST 7/24/99

FAILURE TO REGISTER AS SEX OFFENDER 2+ (POST 06/07/06)
FAILURE TO REGISTER AS SEX OFFENDER 3+ (POST 06/10/2010)
INDECENT EXPOSURE (PRE 7/25/99)
LURING OF MINOR OR DEVELOPMENTAL DISABILITY PERSON
POSS OF DEPICTION OF MINOR 1ST DEGREE (POST 06/07/06)
PROMOTING PROSTITUTION 2
RAPE OF A CHILD 2 >17 (POST 8/31/01) (.712)
RAPE OF A CHILD 3 (POST 7/90)

Public Order

ATTEMPTING TO ELUDE PURSUING POLICE VEHICLE
BAIL JUMP WITH CLASS A (POST 7/89)
BAIL JUMP WITH CLASS B OR C (POST 7/89)
CRIMINAL MISCHIEF (previously RIOT)
CUSTODIAL INTERFERENCE 1
DELIVERY OF FIREARM BY DEALER TO INELIGIBLE PERSON
DELIVERY OF FIREARM TO INELIGIBLE PERSON
DISARMING A LAW ENFORCEMENT OR CORRECTIONAL OFFICER
DRIVING UNDER THE INFLUENCE (FELONY) (06/09/2016-07/22/2017)
DRIVING UNDER THE INFLUENCE (FELONY) (POST 07/23/2017)
ESCAPE 1
ESCAPE 2
ESCAPE 3
ESCAPE FROM COMMUNITY CUSTODY (POST 6/11/92)
FAILURE TO REGISTER AS KIDNAPPER - POST 7/24/99
HARASSMENT
INTIMIDATING A WITNESS
INTRODUCING CONTRABAND 2
LEADING ORGANIZED CRIME
MALICIOUS HARASSMENT
MALICIOUS MISCHIEF 1
MALICIOUS MISCHIEF 2
MALICIOUS PROSECUTION
POSS OF A STOLEN FIREARM
RENDERING CRIMINAL ASSISTANCE 1 (POST 07/01/2010)
TAMPERING WITH A WITNESS
TELEPHONE HARASSMENT (POST 7/24/99)
UNLAWFUL POSSESSION OF FIREARM 1
UNLAWFUL POSSESSION OF FIREARM 2
UNLAWFUL WRECKING VEHICLES WITHOUT LICENSE SUBS

2021: HOW GENDER AND RACE AFFECT JUSTICE NOW

WASHINGTON COURTS
ADMINISTRATIVE OFFICE OF THE COURTS

GENDER AND JUSTICE COMMISSION

Promoting Gender Equality in the Justice System

Evaluation Report: On-Site Childcare Programs in County Courthouses & Their Effect on Access to the Justice System

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Terms

Access to justice: the ability to attend court business.

Court business: participating in any role in a process or proceeding conducted in a courthouse on behalf of oneself or another person, including but not limited to meeting with attorney, arraignment, probation meeting, jury duty, meeting with a domestic violence advocate, court facilitator, visiting someone at the Spokane county jail.

Court staff: an employee who works within the justice system in any capacity, this may include judges, bailiffs, attorneys, domestic violence advocates, Family Court Facilitators, and Family Law Information Center Facilitators.

Cross-sectional surveys: provides a point-in-time collection of information.[1]

Equity (in the justice system): making intentional actions to improve access and representation of those who have historically been marginalized in the justice system.

Gender bias: judgment based on preconceived notions of gender identity or gender roles.

Gender disparity: inequity related to one's gender identity, see definition below.

Gender identity: "one's internal sense of being male, female, neither of these, both, or other gender(s). Everyone has a gender identity."[2]

Key informant interview: a form of qualitative data that asks specific questions to people with first and second-hand experience with the topic of interest.

Logic model: a visual representation of the assumed causal relationships between resources and activities to the outputs and outcomes of a program or organization.

Mixed methods: the use of both qualitative and quantitative data to answer an evaluation question.[3]

On-site childcare program: free childcare provided by the Children's Home Society of Washington inside or near the superior court building/s in Kent and Spokane.

Outreach: information regarding the availability and accessibility of court childcare from either promotional material, such as posters or pamphlets, or court staff, provided to adults looking for childcare so they may conduct court business.

Parent/guardian: parent(s) and legal guardian(s) of children using the court provided childcare programs in Kent and Spokane.

Positionality: the relationship the evaluator has in social and political context of the evaluation which can influence how questions are constructed, data collected, analyzed, and interpreted.[4]

Qualitative data: observational or interview (narrative) information.[3]

Quantitative data: numerical or statistical information.[3]

Acronyms

CHSW - Children's Home Society of Washington

COPHP - Community Oriented Public Health Practice

CWR - Children's Waiting Room (Spokane)

Positionality Statement

As an outside group of graduate students working on this evaluation project, we recognize the importance of stating our positionality as evaluators. We understand that our privilege to access the education and resources required to conduct this evaluation places us in a position of power and influence very different than the population Children's Home Society of Washington's on-site childcare programs serve. For this reason, we must take careful responsibility to accurately represent the experiences of parents/guardians throughout this evaluation while respecting their privacy.

We are a group of eight students that come from various racial and economic backgrounds. None of us have used the on-site childcare program and we have not lived or been engaged deeply in either of the cities of Kent or Spokane.

We recognize we are evaluating these programs from an 'outsider' perspective, making it imperative to acknowledge our prejudices, explicit and implicit biases to listen, uphold, and support the community stakeholders of these on-site childcare programs throughout the data collection, analysis, and discussion process.

EXECUTIVE SUMMARY

Introduction and Overview

The Washington State Supreme Court Gender and Justice Commission has requested an evaluation to analyze the process and outcomes of providing childcare for parents/guardians in the justice system as a measure towards gaining gender justice and equitable access by examining The Children's Waiting Room in Spokane and The Jon and Bobbe Bridge Childcare Center at the Maleng Regional Justice Center in Kent. These two free on-site childcare programs run by Children's Home Society of Washington serve the parents and guardians of children between 1-12 years old who are attending court business at the Kent Superior Court or any Spokane Court. The objective of this evaluation was to collect and analyze quantitative and qualitative data in an attempt to better understand some of the processes and outcomes associated with providing free childcare for parents/guardians as a measure towards more equitable access to the courts.

Primary Evaluation Question

Are the on-site childcare programs, at the Children's Waiting Room in Spokane, Washington and the Jon and Bobbe Bridge Drop-In Childcare Center at the Maleng Regional Justice Center in Kent, Washington, enabling access to court business?

Methods

We conducted a convergent mixed-methods evaluation using both retrospective and cross-sectional data, with quantitative and qualitative data collected simultaneously. Cross-sectional data were collected on-site in Kent and Spokane between February 10-27, 2020 through semi-structured key informant interviews, as well as parent/guardian surveys and program registration forms. We obtained historical data from the CHSW database that consisted of quantitative data related to use during 2019. Our three primary populations of interest to answer our research questions were 1) parents/guardians with court business who use the on-site childcare programs, 2) parents/guardians with court business who do not use the childcare programs, and 3) and childcare program staff. In addition, our team engaged legal professionals, resource providers, advocates, and other court staff who regularly interact with our populations of interest.

Results

A total of 79 parents/guardians used the Children's Home Society of Washington's on-site childcare programs in Kent (n=43) and Spokane (n=36) between February 10- 27, 2020. A large majority of these users identified as women (83%) and nearly all reported their preferred language to be English. Additionally, a greater proportion of these participants identified as white (62%) compared to those who identified as Hispanic/Latinx (16%), multiracial (16%), and Black (5%). Program data obtained for the year 2019 revealed that both programs serve approximately five children per day and about 111 children per month. However,

during the summer months, the programs receive a considerably higher volume of visitors than other times of the year. During the period of data collection, nearly 60% of on-site childcare program users said they learned about the childcare program(s) from a sign or poster in the courts or from someone who works within the courts.

Through surveys and key informant interviews, parents/guardians attending to court business identified the following barriers to accessing the on-site childcare programs:

1. **Childcare Program Restrictions** - age, program capacity, children with special needs
2. **Childcare Program Operations** - operating hours (lunch hour closure), registration process, location
3. **Negative Perception** - unfamiliar with childcare room and childcare staff
4. **Cultural Barriers** - language, food, customs

However, more than 90% of parents/guardians agreed or strongly agreed that the on-site childcare programs improved their ability to access court services. The aspects of the programs that parents/guardians and other court staff said improved their access to the courts include positive relationships with program staff, no associated cost, convenience, security, and an improved court experience (that some associated with less stress and/or an improved ability to focus on their business).

Recommendations

For the Washington State Supreme Court Gender and Justice Commission

1. Partner with county and state-level initiatives to identify potential funding opportunities, allies, and strategies to increase access to the justice system for parents from marginalized/underrepresented backgrounds.
2. Initiate efforts to support the Children's Home Society of Washington in conducting further research on why various populations are not coming to the courts to attend to court business.

For the Children's Home Society of Washington

1. Tailor current, and develop new, outreach strategies promoting the childcare programs to reach parents/guardians who are accessing the courts and the historically underrepresented populations in the justice system that are not accessing the courts.
2. Foster relationships and build trust among current users and underrepresented populations in the justice system, including communities that are not accessing court services.
3. Assess and adapt new operational strategies to increase the reliability of the childcare programs and promote use.

INTRODUCTION

Background

In the United States, the criminal justice system collects a substantial amount of funding from the fines and fees associated with the criminalization of low-level offenses, which disproportionately affect the poor (especially persons of color)[5] and perpetuate mass incarceration, poverty, and inequality.[6] For example, in Washington State, failure to appear for a jury summons is a misdemeanor offense. Yet, an estimated one-third of all jury summons are undeliverable nationally, and a report by the Washington Jury Commission identifies economic reasons and dependent care as two of the primary reasons for non-response.[7] Furthermore, race, ethnicity and socioeconomic status are closely related,[8] and "African Americans, Native Americans, and Latinxs are more likely to be economically disadvantaged, have unstable employment, experience more family disruptions, and have more residential mobility."[9] The current criminal justice system places a disproportionate burden on low-income persons of color when they are summoned to serve on a jury, due to the inequitable costs associated with taking time away from work and/or accessing suitable childcare. Though data are only available on the burden on low income people to access jury summons, it is reasonable to assume they experience similar challenges when accessing other court services. This includes low-income persons summoned to provide testimony as a witness, survivors of domestic violence, persons who have been victims of a crime, persons charged with a crime, persons on probation, and persons accompanying friends or family members to court to provide support.

Persons convicted of low-level misdemeanor offenses are routinely punished with fines, fees, jail time (and the loss of employment), and/or the suspension of their driver's license,[10] and such penalties typically necessitate a need for continued engagement with court and legal services. This creates a cycle in which low-income individuals are criminalized for their inability to access the courts and/or legal services and then are continuously punished with compounding legal and financial penalties that accumulate over time. This phenomena is described by a 2018 report on extreme poverty and human rights in the United States by the United Nations' Special Rapporteur on Extreme Poverty, Philip Alston, who concludes that "fines and fees are piled up so that low-level infractions become immensely burdensome, a process that only affects the poorest members of society… In many cities and counties, the criminal justice system is effectively a system for keeping the poor in poverty while generating revenue."[11]

Free childcare located within the courts is one proposed solution to foster more equitable representation and access to court services. There are currently two such facilities operating in Washington State, in Kent (see Figure 1)[12] and Spokane, and a 2018 survey administered by the Spokane facility revealed that 90% of its users believed that the childcare service improved their access to Spokane County Court. Additionally, in the same survey, a majority of childcare users would not have had a safe place for their children in the absence of the free childcare service.[13] However, while these programs were established to improve the efficiency of the courts, as well as provide children a safe place away from potentially traumatic or harmful experiences while their parents/guardians are involved in the court system, their association with access to the courts is largely unknown. Accordingly, at the request of the Washington State Supreme Court Gender and Justice Commission, this evaluation collected and analyzed quantitative and qualitative data in an attempt to better understand some of the processes and outcomes associated with providing free childcare for parents/guardians in the justice system as a measure towards more equitable access to services and representation within the courts.

Figure 1. The Jon and Bobbe Bridge Childcare Center at the Maleng Regional Justice Center in Kent.

Washington State Supreme Court Gender and Justice Commission

The Washington State Supreme Court Gender and Justice Commission (Commission) was formed in 1994 after the Washington State Task Force on Gender and Justice in the Courts published a report that identified gender bias within Washington State's court system.[14,15] Specifically, the Commission was established to monitor and support the implementation of recommendations intended to promote gender equality in the law and justice system via education, coordination, grant management, program and project development, and oversight.[14]

In 2016, the Commission identified the need for an updated report reflective of the current legislative climate regarding gender bias and is now conducting a study focused on 27 priorities relative to the extent and nature of gender bias in the courts today.[15] The study will analyze existing evidence, identify areas that lack research and evidence, and propose, implement and evaluate pilot projects that address bias.[15] The study

will also examine how gender and intersecting identities like race, immigration status, language, age, and sexual orientation impacts opportunity, barriers, and outcomes in the judicial system.[15]

Children's Home Society of Washington, Existing Childcare Programs, and Demographics

The Washington-based non-profit organization, Children's Home Society of Washington (CHSW), operates two existing on-site childcare programs at courts in Kent and Spokane.[16, 17] CHSW has been in operation for over 100 years, providing housing for children and serves nearly 30,000 children ages 1-12 years and their families with adoption, early learning, and family support and advocacy services across the state.[17–19]

The on-site childcare programs have three specific objectives: 1) shield children from traumatic experiences in court, 2) provide a safe place for children while their parents/guardians attend to court business, and 3) improve the efficiency of courthouse services.[13]

Existing Childcare Programs

KENT: THE JON AND BOBBE BRIDGE CHILDCARE CENTER AT THE MALENG REGIONAL JUSTICE CENTER

In 1997, CHSW opened the Jon and Bobbe Bridge Childcare Center at the Maleng Regional Justice Center in Kent.[16] In 2020, due to complications from the COVID-19 pandemic, the Jon and Bobbe Bridge Childcare Center closed until a new non-profit childcare provider could be secured to reopen. The on-site childcare program was free for families, though a $5 donation was suggested.[16] The childcare program did not receive public funding and relied on private donations from superior court jurors who donate their per diem compensation in support of the program, donations from families who use the childcare program, and other private contributions.[16] Families/guardians with children between the ages of 1-12 years utilized the childcare program on a first-come first-served basis while they conduct business in the court. Children of jurors also used the facility, but were limited to two children for two days.[16,20] Up to 12 total children could have been accommodated at one time and the center cared for more than 125 children every month.[16]

SPOKANE: THE CHILDREN'S WAITING ROOM

The Spokane County Domestic Violence Consortium opened the Children's Waiting Room in 1997 in collaboration with many Spokane County departments and two community-based nonprofit organizations. Since 2007, the Children's Home Society of Washington has operated The Children's Waiting Room.[13,17,21] The

childcare program is in a county-owned building near the Spokane County Courthouse and Spokane County provides yearly funding, which amounted to $77,700, in 2019.[13,17,21] Private donations also help supplement the program's needs. [13,17,21]

Residents of Spokane County with children between the ages of 1-12 years can access the childcare program for free on a first-come first-served basis while they conduct business at the court.[17,21] Children of jurors can also use the facility depending on availability, and up to eight children can be supervised at one time.[22] The center cares for about 1,200 children annually.[13]

Table 1: Capacity for The Two Childcare Programs

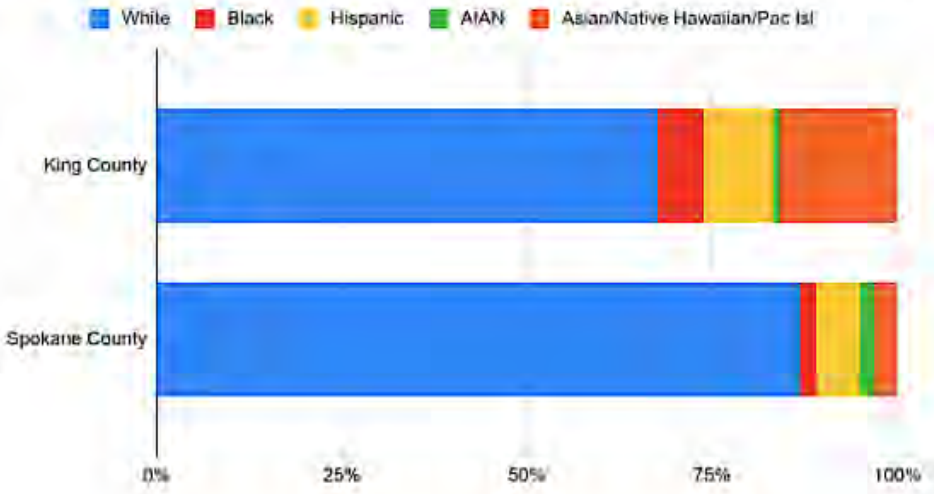
	Jon and Bobbe Bridge Childcare Center	The Children's Waiting Room
Year Established	1997	1997
Capacity*	12	8
Monthly use (approx.)	125	120

*Depends on the age of children in attendance. Toddlers have a smaller teacher/child ratio than older children

County Demographics

The two superior courts located in Kent and Spokane serve the populations of King County and Spokane county, respectively. The residents in these two counties are different according to the demographic data. Spokane County is the fourth most populous county in Washington State, with an estimated 492,530 total people (2016).[23] Spokane County is less racially diverse than the rest of the state, overwhelmingly white, and comprised primarily of US born US citizens as seen in Figure 2 below.[23] However, the median income is lower than the state's average income and about 16% of the population lives at or below 100% of the federal poverty level.[23] Among all households with children under 18 years old in Spokane County, about 36% are

Figure 2. King County (2018) and Spokane County (2017) Race/Ethnicity Demographics [23,24]



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households with only one adult present.[23]

In King County, where the Kent childcare is located, the population is more diverse (see Figure 2), as 28% of the population speaks a language other than English at home, and 11.4% of the population has limited English language proficiency.[24] While the median household income in King County is significantly higher than the state average, approximately 9.3% of households live at or below 100% of the federal poverty level.[25] King County is also the most populous county in the state of Washington with more than two-million people.[26]

Costs of Childcare by County

The two counties are also very different regarding the average cost of childcare in each county and the median costs of childcare relative to each county's median household income. In King County for example, the average cost per month for childcare is almost double the cost in Spokane across all ages and settings. Generally, childcare costs are higher for younger children and care is more expensive at a center than in the home. In 2017, the median monthly childcare cost for an infant in King County was $1,499 at a childcare center and $1,083 for home-based care,[8] while in Spokane, families could expect to pay $849 per month for an infant at a childcare center and $650 per month for home based care.[23,27] Yet, in terms of affordability, Child Care Aware of Washington concludes that Spokane County is actually a less affordable county to obtain childcare because the county's median income is significantly lower than both King County and the state average.[27]

Theory Based Evaluation

Theories explain the causal assumptions of how an intervention or activity will influence a desired outcome. In other words, "what causes what."[28] When developing our evaluation plan, we started by mapping out the problem and how it was being solved to understand the theory of the program and the intended outcomes. This process can manifest as a series of "if, then…." statements. For example, the courts may have thought after the initial Gender and Justice Task Force report that "*if* we provided childcare at the courts, *then* more parents (women) could access the court, and *if* more women access the court, *then* we can improve jury representation (or other court services disproportionately affected by gender bias)." The Children's Home Society of Washington explained their theory of starting the on-site childcare programs as "*if* we provide childcare, *then* kids won't be exposed to traumatic experiences in court (relating to parental/family issues), and *if* kids are not exposed to trauma, *then* their wellbeing can be protected." This series of *if-then* statements make up the backbone of the logic model listed below, along with the inputs and outputs to clarify what we are measuring in our evaluation. The logic model integrates the objectives of both the CHSW

and the Gender Justice Commission and outlines how the childcare program functions to achieve both the short to long-term outcome goals.

Logic Model (Figure 3)

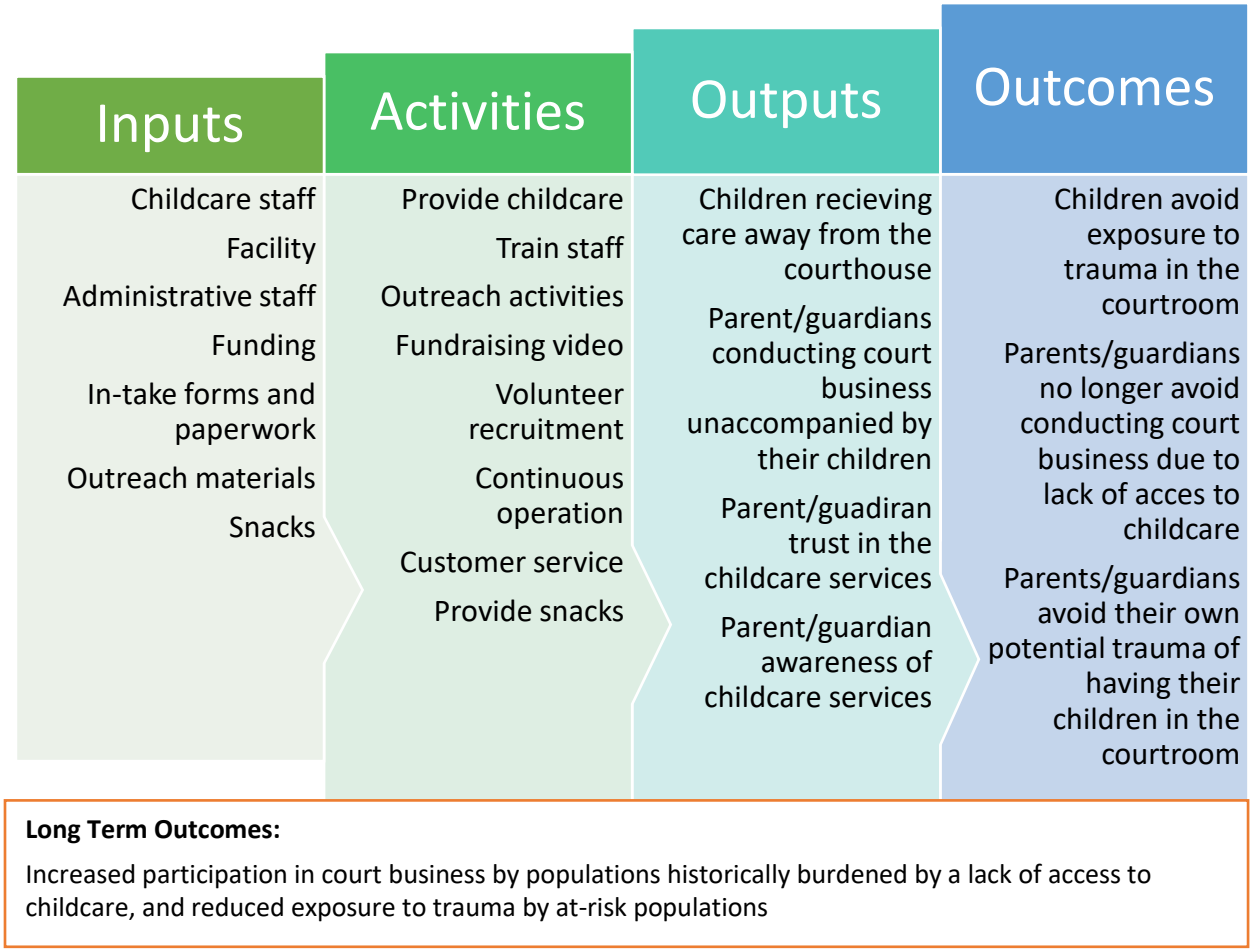


Figure 3 This logic model presents the relationships between the inputs, activities, outputs, and outcome goals of the on-site childcare programs. The model focuses on how a program functions and integrates the short to long-term outcome goals. In order to evaluate if on-site childcare programs provide access to court business, it is imperative to understand how the program operates to better understand the right questions to ask, and whom to ask.

Evaluation Objectives

This evaluation assessed whether on-site childcare programs, at the Spokane County Courthouse and the Maleng Regional Justice Center, enable access to court business among parents/guardians. While the Gender and Justice Commission is expressly interested in combating gender-based disparities related to inequitable representation and access to the justice system in Washington State, this evaluation primarily offers descriptive information about who is using the childcare, how much the childcare is being used, and the court

business the parents/guardians are accessing. This initial information can guide and inform future evaluations the Commission deems important based on our findings.

Evaluation Questions

Primary Evaluation Question

Are the on-site childcare programs, at the Children's Waiting Room in Spokane, Washington and the Jon and Bobbe Bridge Drop-In Childcare Center at the Maleng Regional Justice Center in Kent, Washington, enabling access to court business?

Sub-evaluation Questions

1. How have the Kent and Spokane court-provided childcare programs been sharing information about available childcare services to parents/guardians of children 1 - 12 years old?
2. How have parents/guardians of children 1 - 12 years old been learning about the childcare programs provided at the Kent and Spokane courts?
3. What are the demographics of parents/guardians of children 1 - 12 years old who have used the court-provided childcare programs in Kent and Spokane?
4. What are the utilization patterns of the Kent and Spokane court-provided childcare programs over the course of a day, week, and year?
    a. Are there times (of day, week, or year) that are consistently at a higher or lower volume (measured by number of children and length of time at the childcare center)?
5. Which types of court business are being accessed by parents/guardians of children 1 - 12 years old using the court-provided childcare centers at the Kent and Spokane courts?
6. Do barriers to accessing the childcare programs prevent parents/guardians from conducting court business?
    a. What barriers exist for parents/guardians when accessing the childcare programs?
7. How do parents/guardians who use the court-provided childcare programs at the Kent and Spokane courts indicate the childcare affected their ability to attend to their court business?

See Appendix A to see how our evaluation questions relate to our indicators and populations of interest.

METHODS

Study Design

We conducted a convergent mixed-methods evaluation using both retrospective and cross-sectional data. This means that we collected both quantitative and qualitative data simultaneously. We collected cross-sectional data on-site in Kent and Spokane between February 10-27, 2020. In other words, we collected all new data during a specific period of time. Additionally, we obtained retrospective, or historical, data from the Children's Home Society of Washington's database that consisted of quantitative data related to the use of both on-site child-care programs in Kent and Spokane during the year 2019. The combination of qualitative and quantitative data contributed to a rich understanding of who uses the two court-based childcare programs, whether parents/guardians perceive that access to the childcare programs improves their ability to conduct business at the courts, and perceptions of the childcare programs by both users and non-users. Our team used the available data to:

- Make comparisons between users of the childcare programs at and between the two childcare programs
- Determine whether some populations are affected differently than others regarding improvement in access to court business

ETHICAL CONSIDERATIONS

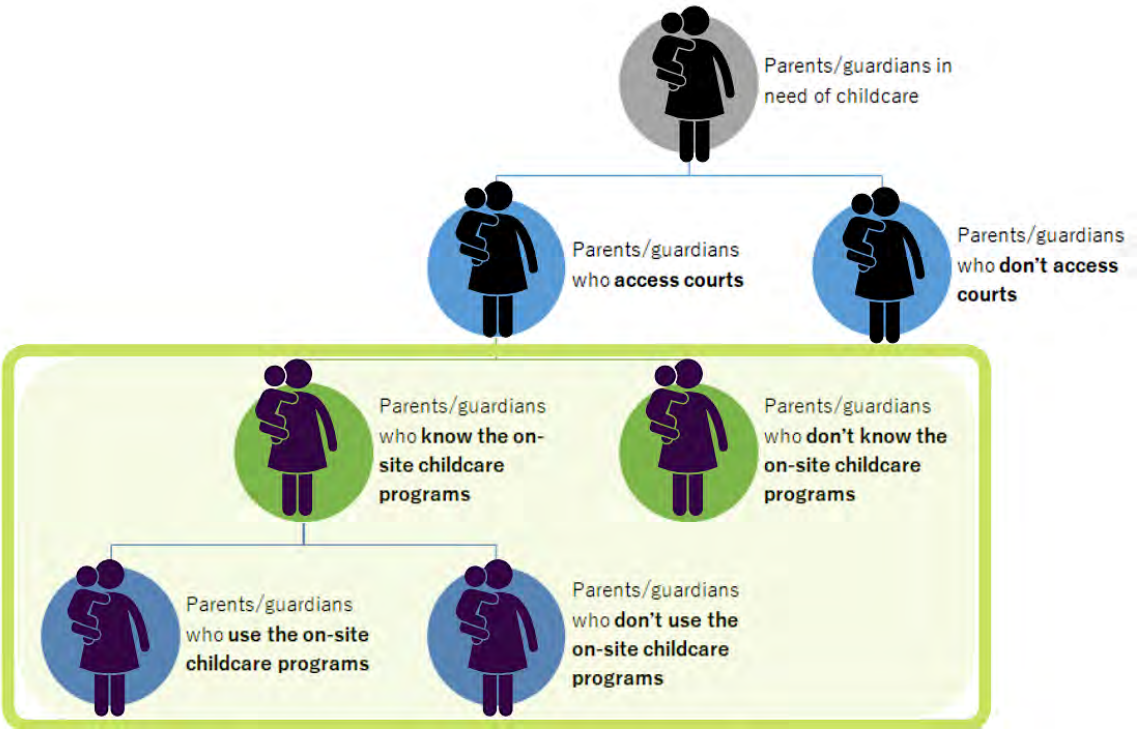
The Federal Government defines research as a "systematic investigation, including research development, testing, and/or evaluation, that is intended to develop or contribute to generalizable knowledge." Although this evaluation may be considered a systematic investigation, our intention was never to create generalizable knowledge and results should not be considered applicable to a larger population beyond the two sites of data collection. Therefore, this evaluation is not considered research and did not warrant review by the University of Washington's Human Subjects Division. Rather, the intent of this evaluation is to inform both the Gender Justice Commission and CSHW about whether the two court-based childcare programs in Kent and Spokane currently enable access to court services and to recommend how they might do so in the future.

Populations of Interest

We engaged three primary populations of interest to answer our research questions, including: 1) parents/guardians with court business who use the on-site childcare programs 2) parents/guardians with court business who do not use the childcare programs, and 3) childcare program staff. Our team also

engaged legal professionals, resource providers, advocates, and other court staff who regularly interact with our populations of interest. Figure 4 provides a visual representation of our populations of interest.

Figure 4. Segmentation of Our Populations of Interest



SAMPLING STRATEGY

We relied on a convenience sample of parents/guardians who use and don't use the childcare programs during a defined period of data collection (February 10-27, 2020). We also worked with childcare program staff and other stakeholders who introduced our team to courthouse staff, legal professionals, and advocates who were willing to participate in interviews. Finally, we limited sampling to members of each population of interest who met all inclusion criteria.

INCLUSION/EXCLUSION CRITERIA

We required *parent/guardian* participants to meet the following inclusion criteria:

- Have a child between the ages of 1-12 years old with them
- Attending to court business at the Kent Superior Court or any Spokane Court
- Willing and able to fill out a childcare program registration form and/or survey in English or Spanish, or conduct an interview in English

We excluded parents/guardians who did not meet all of the inclusion criteria from the sample population.

We required *courthouse staff, legal professionals, and advocates* to meet the following inclusion criteria:

- Employee of the court, or provide services to, parents/guardians who conduct business at the Kent or Spokane Superior Court
- Willing and able to conduct an interview in English
- Aware of the on-site childcare program at their respective court location

We excluded courthouse staff, legal professionals, and advocates who did not meet the inclusion criteria from the sample population.

We required *childcare program staff* to meet the following inclusion criteria:

- Children's Home Society of Washington (CHSW) employee or volunteer at the Maleng Regional Justice Center in Kent or The Children's Waiting Room in Spokane
- Willing and able to conduct an interview in English

We excluded childcare program staff who did not meet the inclusion criteria from the sample population.

Data Sources and Methods

We utilized several data collection methods, including surveys, interviews, observations, and childcare program attendance databases to gather both quantitative and qualitative data.

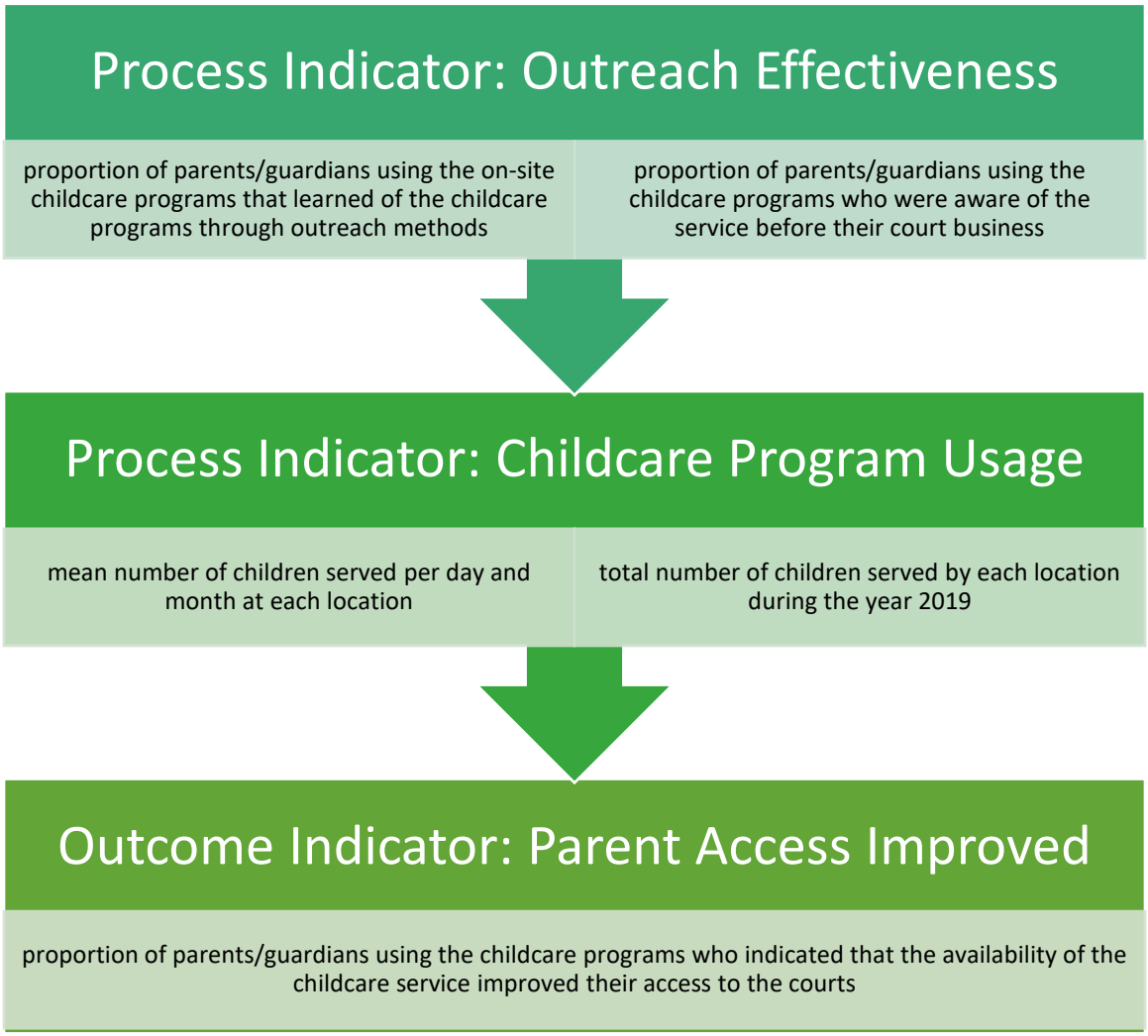
INDICATORS

Indicators are measurable information used to determine if a program is being implemented as intended and/or achieving a specific goal.[29] Process indicators measure direct outputs produced by the program and its activities, while outcome indicators measure the effects of a program and its activities over a short or intermediate amount of time (and can be a product of the process indicators).

We chose the process indicators for this project based on our understanding of how parents/guardians access the on-site childcare programs (Figure 5). First, parents/guardians must be aware of the program's existence through some form of program promotion or outreach. Awareness of the childcare program(s) may then influence or affect the parent/guardian decision-making process about whether or not to attend court based on their childcare needs. So, if parents/guardians with limited access to the courts because of unmet childcare needs are aware of the childcare programs, then theoretically, more parents/guardians will use the programs. After we have measured if the program is working as intended, we can determine if the program is

producing the desired effect: that parents and guardians indicate that access to free, on-site childcare within the courts facilitates access to court services and/or business. We will measure this with our primary outcome indicator: a survey question that asks parents/guardians if use of the on-site childcare programs improves their access to court services or their ability to conduct court business.

Figure 5. Process and Outcome Indicators for this Evaluation



QUANTITATIVE METHODS

We collected quantitative data from two primary locations: The Jon and Bobbe Bridge Drop-In Childcare Center in Kent and the Children's Waiting Room in Spokane. We collected data from both on-site childcare programs primarily through the use of a modified version of the childcare programs' existing registration

form and by administering a parent/guardian survey. A more in-depth description of the tools and resources we utilized to obtain qualitative data is below:

Registration Forms

All parents/guardians who utilize the on-site childcare programs in both Kent and Spokane must fill out a registration form. Our team modified and standardized CHSW's registration forms to collect additional demographic information, such as parent/guardian race and/or ethnicity, age, preferred language, and gender. We also used the registration forms to identify how parents/guardians learned about the court-based childcare service. See Appendix B and C for examples of the updated registration forms for Kent and Spokane, respectively. After the first and third weeks of data collection we collected the completed registration forms to enter the data and return them to the childcare programs.

Parent/Guardian Surveys

In addition to the registration form, childcare staff asked every parent/guardian who utilized one of the two on-site childcare programs during the data collection period to complete a short survey when they returned from their court business. The survey included several questions to answer on a five-point Likert Scale, and was available to complete both in- person and online (see Appendix D for paper version of survey). Survey questions asked about: how the childcare programs affect access to the courts, whether parents/guardians perceive the childcare programs to be safe, and whether the absence of the childcare programs would have required children to accompany their parents/guardians during court business or proceedings. We trained all childcare program staff and advocates to administer the surveys in a consistent manner. After the first and third weeks of data collection we collected the completed surveys.

CHSW Database

Both on-site childcare programs retain the registration forms completed by parents/guardians who use the childcare programs for several years. This data is entered into an electronic database, through which we obtained one year (2019) of data. Variables included in this data, and which we utilized in our analysis, included: all unique visits to the Jon and Bobbe Bridge Drop-In Childcare Center in Kent and the Children's Waiting Room in Spokane during 2019, the length of each visit in minutes, and the time of day for each visit (morning or afternoon). The data did not include identifying information.

QUALITATIVE METHODS

We collected qualitative data from four primary locations: The Jon and Bobbe Bridge Drop-In Childcare Center and the Maleng Regional Justice Center in Kent, and the Children's Waiting Room and Spokane

Superior Court in Spokane. At each of these four locations, we collected data using semi-structured key informant interviews.

Key Informant Interviews

We conducted semi-structured interviews with key informants, which included: both parents/guardians who used and did not use the on-site childcare programs in Kent and Spokane, childcare program staff in Kent and Spokane, and other court staff, legal professionals, and service providers (such as domestic violence advocates, attorneys, security guards, and process servers) who regularly interact with parents/guardians who do not use the childcare programs. We had childcare staff members from both locations inform parents/guardians who were using the childcare programs about the evaluation project and invite them to participate in a 10-minute interview (for which they would receive a $10 Safeway gift card for their time). When a parent/guardian expressed an interest in participating in an interview, childcare staff would alert a member of our team, who would then conduct the interview in the childcare program's office. The evaluation team also approached parents/guardians accompanied by children in both court buildings (and not using the childcare) to see if they were willing to participate in a 10-minute interview about childcare, for which they could also receive a $10 Safeway gift card. We were particularly mindful of the likely stress experienced by parents/guardians with children at court and kept all interviews to 10 minutes or less to minimize any potential burden on their time. Interviews followed an interview guide developed by our team and we recorded the interviews with permission of each interviewee. We transcribed all recorded interviews using a professional transcription service (Rev) and took additional steps (such as the way in which interviews were named and electronically organized) to protect each interviewee's identity.

See Appendix E for the full list of interview questions.

Interviews with parents/guardians who use the on-site childcare programs asked about:

- How parents/guardians are learning about the childcare programs, if the information shared about the childcare programs is appropriate relative to their needs, when they first learned about the childcare programs, and how the childcare programs affect their ability to access the courts.

Interviews with parents/guardians who do not use the on-site childcare programs asked about:

- If they were previously aware of the on-site childcare programs, reasons for choosing not to use the childcare program (if they knew it was available), and how their experience at court may have been different if they were previously aware of the on-site childcare programs.

Interviews with court staff, legal professionals, and service providers asked about:

- Perceptions of how information about the childcare programs are shared with parents/guardians with children between the ages 1-12, how the childcare programs communicate with other offices and resource providers within the court, and anecdotal reasons that parents/guardians choose to use or not use the childcare programs.

Interviews with childcare program staff asked about:

- How parents/guardians are notified that the on-site childcare programs are available, how the childcare programs work with other court services or organizations to promote the childcare programs, and perceptions about what parents like and dislike about the childcare programs.

Data Analysis Plan

We collected and analyzed quantitative and qualitative data independently. After the initial analyses, we conducted a secondary analysis to identify how the two types of data compared, contrasted, and complemented each other. A description of the specific ways in which we analyzed quantitative and qualitative data is below.

QUANTITATIVE ANALYSIS

We performed a descriptive analysis of selected demographic characteristics of the parents/guardians who utilize the childcare programs in Kent and Spokane. Demographic variables of interest included: parent/guardian age, race/ethnicity, gender, and preferred language. We analyzed these data by performing cross tabulations of each characteristic by childcare program location. In addition to descriptive analyses, we also performed statistical analyses to identify statistically significant differences in survey question responses by childcare program location. We conducted these analyses with z-tests. Furthermore, we also assessed whether there were statistically significant differences in the way that survey questions were answered among all participants at both childcare programs based on parent/guardian gender and their race/ethnicity. We also conducted these analyses with z-tests which allowed us to examine whether members of a particular gender or race/ethnicity were more likely to agree or strongly agree that the court-based childcare programs enabled access to court business than members of another group. We used t-tests to calculate whether there were statistically significant differences in the number of children served per day and per month during 2019.

Evaluation questions, and sub-questions, that we attempted to answer using quantitative methods include:

- How have parents/guardians of children 1 – 12 years old been learning about the childcare programs provided at the Kent and Spokane courts?

- What are the demographics of parents/guardians of children 1 – 12 years old who have used the court-based childcare programs in Kent and Spokane?
- What are the utilization patterns of the Kent and Spokane court-based childcare programs over the course of a day, week, and year?
- Which types of court business are being accessed by parents/guardians of children 1 – 12 years old using the court-based childcare centers at the Kent and Spokane courts?
- How do parents/guardians who use the court-based childcare programs at the Kent and Spokane courts indicate the childcare affected their ability to attend to their court business?

QUALITATIVE ANALYSIS

We analyzed qualitative data using content analysis to describe and interpret common themes, and their relationship to each evaluation question, across key informant interviews. We transcribed all the interviews and coded each one using a deductive approach informed by an a priori codebook (see Appendix F) that we developed in relation to our interview and evaluation questions. To support intercoder agreement or consistency, a team of seven coders all coded the same two interview transcripts and then compared, contrasted, and discussed their coding selections and rationale until we reached a high degree of shared understanding. We added codes not originally included in the a priori codebook, but that emerged in discussions between coders, to the codebook as needed. Dedoose software supported both the coding and analysis processes. Analysis was conducted within the context of each evaluation question by: exporting a spreadsheet from Dedoose with all excepts containing the codes relative to each evaluation question, sorting coded excerpts according to interview type/population and location, identifying the codes most commonly (and sometimes least commonly) cited in interviews of the same type/population (not total frequency of each code but total number of interviews in which each code appeared), and identifying themes based on the most prevalent codes and context of coded excerpts relative to interview type/population and location, and the relevant evaluation question(s).

Evaluation questions, and sub-questions, that we attempted to answer using qualitative methods include:

- How have the Kent and Spokane court-based childcare programs been sharing information about available childcare services to parents/guardians of children 1 - 12 years old?
- How have parents/guardians of children 1 - 12 years old been learning about the childcare programs provided at the Kent and Spokane courts?
- What barriers exist for parents/guardians when accessing the childcare programs?
- How do parents/guardians who use the court-based childcare programs at the Kent and Spokane courts indicate the childcare affected their ability to attend to their court business?

RESULTS

DEMOGRAPHICS

PARENTS/GUARDIANS WHO USED THE ON-SITE CHILDCARE PROGRAM BETWEEN FEBRUARY 10-27, 2020

A total of 79 parents/guardians used the on-site childcare programs at the Kent (n=43) and Spokane (n=36) sites between February 10- 27. Table 1 outlines the characteristics of each site and the total between both sites. The majority of program users identified as female (83%) and the average age was 35 years old (SD + 9.2). Overall, most parents/guardians who used the childcare programs identified as white (61%) with Spokane having a higher proportion of white identified users (70%) compared to Kent (54%). Ninety-nine percent of program users during this time-period indicated their primary language is English. Multiracial was selected by 15.8% of parent/guardians, of which 58% were Hispanic/Latinx.

Table 1: Characteristics of parents/guardians who used on-site childcare between February 10 - 27, 2020

	Kent n = 43	***Spokane*** n = 36	***Total*** n=79
Parent/Guardian Characteristics	Mean (SD)	Mean (SD)	Mean (SD)
Age	35.9 (10.7)	33.4 (6.8)	34.8 (9.2)
# of Children	1.4 (0.8)	1.4 (0.6)	1.4 (.7)
	Total (%)	Total (%)	Total (%)
Gender			
Female	35 (87.5)	23 (76.7)	58 (82.9)
Male	4 (10.0)	7 (23.3)	11 (15.7)
Non-binary	1 (2.5)	0	1 (1.4)
Race/Ethnicity*			
Hispanic/Latinx	4 (9.3)	3 (9.1)	7 (9.2)
Black	4 (9.3)	0	4 (5.3)
White	23 (53.5)	23 (69.7)	46 (60.5)
Hawaiian/Pacific Islander	1 (2.3)	1 (3.0)	2 (2.6)
American Indian/ Alaska Native	1 (2.3)	2 (6.1)	3 (4.0)
Asian	1 (2.3)	0	1 (1.3)
Multiracial	8 (18.6)	4 (12.1)	12 (15.8)
Other	1 (2.3)	0	1 (1.3)
Primary Language*			
English	41 (97.6)	31 (100)	72 (98.6)
Spanish	1 (2.4)	0	1 (1.4)

**missing data from parents/guardians. Percentages exclude missing data*

PARENTS/GUARDIANS WHO PARTICIPATED IN THE SURVEY

We had 37 parents and guardians complete the childcare program evaluation survey with more participants at Kent (n=23) than Spokane (n=14), making a response rate of 46.8%. The average age of survey participants was approximately 34 years old (SD + 8.4) and the majority of participants identified as female (81%). A greater proportion of participants identified as white (62%) compared to those who identified as Hispanic/Latinx (16%), multiracial (16%), and Black (5%). All survey participants indicated English as their preferred language. Eighty-

three percent of survey participants had known about the childcare programs before their current visit to the court and seventy-six percent had previously used the childcare program at least one time. Among survey participants, the top two reasons for attending court was to see a domestic violence (DV) advocate (39%) or another unspecified reason (39%).

PARENTS/GUARDIANS WHO PARTICIPATED IN AN INTERVIEW

Eleven parents and guardians participated in an interview with more participants at Kent (n=9) than Spokane (n=2). The average age of interview participants was approximately 34 years old (SD $\pm$ 3.1) and the majority of participants identified as female (82%). A greater proportion of participants identified as white (36%) compared to those who identified as Hispanic/Latinx (27%), multiracial (18%), Black (9%), and Hawaiian/Pacific Islander (9%). Approximately three quarters of interview participants indicated English as their preferred language with the rest identifying Spanish as their preferred language.

HOW PARENTS/GUARDIANS LEARN ABOUT THE ON-SITE CHILDCARE PROGRAMS

The majority of parents/guardians learned about the childcare programs from court staff (34%) followed by a sign or poster (24%). Word-of-mouth accounted for 13%, which included learning about the childcare program direct from a family member, friend, or other person outside of court staff. Table 2 shows the breakdown of how parents/guardians learned about the on-site childcare programs. Approximately 82% of the parents/guardians who used the childcare were aware of the childcare programs before they

Table 2: How and when parents/guardians learned about the on-site childcare programs

	Kent n = 43	***Spokane*** n = 36	***Total*** n=79
Communication Channels*	Number (%)	Number (%)	Number (%)
Court website	2 (4.7)	2 (5.6)	4 (5.1)
Childcare website	0	3 (8.3)	3 (3.8)
Sign/poster	12 (27.9)	7 (19.4)	19 (24.1)
Court staff	18 (41.9)	9 (25)	27 (34.2)
Brochure	NA	1 (2.8)	1 (1.3)
Word-of-mouth	5 (11.6)	5 (13.9)	10 (12.7)
Multiple	3 (7.0)	3 (9.4)	6 (7.6)
Other	3 (7.0)	2 (5.5)	5 (6.3)
Prior awareness of childcare before current court visit*	Number (%)	Number (%)	Number (%)
Yes	25 (69.4)	23 (100.0)	48 (81.4)
No	11 (30.6)	0	11 (18.6)

** Some parents/guardians did not fully complete the registration form resulting in missing data. Percentages excluded missing data.*
NA: not applicable – Kent does not use a brochure

came to their current court visit, however, this is reflective of these parents/guardians previously using the childcare and using it on multiple occasions.

"I've been coming to court. I've been to court several times before, so it's always just part of the process."

- Parent/guardian in Kent

The childcare staff indicated that their primary way of letting parents/guardians know about the on-site childcare was through signage. Most outreach about the program happens at court when parents arrive with a child and learn of the on-site childcare program from a sign or court staff, like a domestic violence advocate or judge.

"I think for the first time they probably don't know about it until they get here. I know I have had experiences where I've had folks in a courtroom conducting a pre-trial calendar or something and I've had folks there with little kids and I've told them about it that if they wanted to go take their kids there, that's fine."

- Kent Family Law Information Center staff

PATTERN OF USE OF ON-SITE CHILDCARE PROGRAMS

In 2019, the CHSW on-site childcare programs served a total of 2,666 children at both the Kent and Spokane sites. When looking at the combined utilization rates from both sites, the daily average was 5 (SD $\pm$ 1.5) children per day and 111 (SD $\pm$ 34.7) children per month. Again, when looking at both sites combined, the average length of stay for each child is about 90 (SD $\pm$ 49.4) minutes. Table 3 provides details on the pattern of use. There is no statistically significant difference in children per day or month between the locations. A greater proportion of children visit both centers in the afternoon (56%) (Chart 1). In 2019, volume was the highest at both locations during the summer months of July and August with August having the greatest number of children (177-178) making up 14% of the year's visits (Chart 2). February had the lowest volumes for 2019 with 63 children visiting the Kent location and 56 visiting the Spokane location.

Table 3: Pattern of use at on-site childcare programs (2019)

	Kent n = 1,378	***Spokane*** n = 1,288	***Total*** n = 2,666	
Pattern of Use	Mean (SD)	Mean (SD)	Mean (SD)	*p-value*
# Children/day	5.4 (1.5)	5.1 (1.5)	5.3 (1.5)	0.6
# Children/month	114.8 (34.6)	107.3 (35.9)	111.1 (34.7)	0.6
Length of visit (minutes)	93.7 (48.4)	89.0 (49.8)	91.4 (49.4)	

COURT BUSINESS ACCESSED BY PARENTS/GUARDIANS

The most commonly accessed court business was domestic violence advocates (referred to as DV advocate in Table 4) and custody hearings, accounting for 45% of court business among the parents/guardian during the data collection period (Table 4). Fifty-two percent of parents/guardians using the Kent childcare accessed domestic violence advocates and custody hearings, whereas only 14% of parents/guardians using the Spokane childcare center accessed these same services. The majority of parents/guardians in Spokane were seeing a court facilitator (43%) or marked "other" (43%). Court business specified as "other" included business like trial, protection order, case and bond hearing. Thirty-nine of the respondents (49.4%) skipped the type of court business on the registration and survey forms, significantly lowering our sample size. We received feedback from one childcare staff person who thought parents were misinterpreting the questions due to poor formatting which lead to parents/guardians only filling one of the two questions about court type and reason for court visit.

Table 4: Court business attended by parents/guardians using On-site childcare programs between February 10-27, 2020

	Kent n = 33	***Spokane*** n = 7	***Total*** n = 40
Reason for Court Visit	Number (%)	Number (%)	Number (%)
DV advocate	7 (21.2)	1 (14.3)	8 (20.0)
Probation	0	0	0
Dependency	3 (9.1)	0	3 (7.5)
Custody	10 (30.3)	0	10 (25.0)
Sentencing	0	0	0
Arraignment	2 (6.1)	0	2 (5.0)
Public Defender	0	0	0
Court Facilitator	0	3 (42.9)	3 (7.5)
Jury Duty	0	0	0
ARY/CHINS	0	0	0
Other	11 (33.3)	3 (42.9)	14 (35.0)

** Some parents/guardians did not fully complete the registration form resulting in missing data. Percentages excluded missing data.*

BARRIERS TO ACCESSING THE ON-SITE CHILDCARE PROGRAMS

During interviews parents/guardians, court staff and childcare program staff identified several barriers when accessing the childcare program. Barriers can be sorted into four broad categories with operations and perception being:

1. **Childcare Program Operations** - operating hours, registration process and location
2. **Negative Perception** - unfamiliar with childcare room and childcare staff
3. **Childcare Program Restrictions** - age, program capacity and children with special needs
4. **Cultural Barriers** - language, food and customs

All barrier categories were talked about in both the Kent and Spokane childcare program locations with no notable differences between the two locations, except one: The Children's Waiting Room being located in a separate building from other court services was noted by courts staff, judges, YWCA Advocate and CWR childcare staff as a significant barrier to accessing the childcare program. Location of the Kent childcare program was not a notable barrier.

CHILDCARE PROGRAM OPERATIONS

The childcare hours of operation were identified as a barrier consistently across all populations, including parents/guardians, court staff, and childcare staff. At both childcare program locations operating hours do not extend before or after court hours and are closed mid-day from 12:00 - 1:15 PM. This closure conflicts with a regularly scheduled, mandatory seminar put on by Family Court for parents/guardians who are involved in a child custody case.[30]

"Your mind's kind of wondering when you'd have to be to court at nine and you've been told that you have to pick your children up at 11:40. I think that's the only thing I was kind of concerned about."

– Parent/guardian at Kent

NEGATIVE PERCEPTIONS OF THE CHILDCARE

Parents/guardians indicated they were nervous about leaving their child in a place that is not visible, which confirms the perception of domestic violence advocates, judges and other court staff who expressed this as well. Due to tight safety measures, parents/guardians are not allowed in the childcare space if other children are present.

"I've worked [with] a lot of people and they're concerned about leaving their child with a stranger. Their offenders are often times in the buildings, so they're worried about how safe that is really. They like to have eyes on [their child]."

– Kent Family Law Information Center Staff

CHILDCARE PROGRAM RESTRICTIONS

Parents/guardians identified the age restriction of not accepting children under the age of one as a barrier. Court and childcare staff perceived a larger number of program restrictions, including child age restrictions, childcare program capacity and children with special needs as barriers.

CULTURAL BARRIERS

Cultural concerns were perceived by court staff as a reason for parents/guardians not wanting to leave their child in a childcare center they were unfamiliar with. A Spanish speaking parents/guardian expressed interest and need for a childcare staff that could speak Spanish. Concern about the food being served was expressed by another parent/guardian.

"I think its fear of the unknown to a certain degree. I think in certain cultures I think there is a hesitation with leaving your kids with someone that you don't know".

– Kent Family Law Information Center staff

ABILITY TO ACCESS COURT BUSINESS

Based on the interview data, specific aspects of the childcare itself supported parents/guardians to use the childcare, which then enhanced their ability to access their court business. Not having their child with them in court also improved the quality of their court experience.

- **Quality childcare staff -** many parents commented that the staff were friendly and welcoming, knew how to comfort their child and were experienced providers.
- **No cost -** providing the childcare service free of charge enabled many parents/guardians to use it.
- **Convenience -** drop off process was fast, location inside court made it easy (Kent site).
- **Security -** many parents/guardians, especially those going to court for custody, were concerned about the safety of their child. When they saw the security measures taken at the childcare, this made them feel comfortable leaving their child to attend to their court business.
- **Improved court experience** - improved ability to focus in court, reduced stress and less distraction for court staff.

"It was really simple. It only took like five minutes to get her in and I felt comfortable leaving her here."

- Parent/Guardian in Kent

Parents/guardians indicated in the survey how the on-site childcare affected their court visit. Survey respondents could choose whether they strongly agree, agree, neutral, disagree or strongly disagree with the following statements:

1. I would have had a safe place for my child to be today if there were no on-site childcare
2. I would have had to bring my child with me to the courtroom today if there were no on-site childcare
3. The on-site childcare program has improved my ability to access court business

After combining responses from both program locations, forty percent of parents/guardians indicated that they did not have another safe place for their child had there not been an on-site childcare at the court. Over 75% of parents/guardians would have had to bring their child with them to court. And more than ninety percent of parents/guardians agreed that the on-site childcare program improved their ability to access court services (Chart 3, 4, 5).

Chart 3: I would have had a safe place for my child if there were no on-site childcare

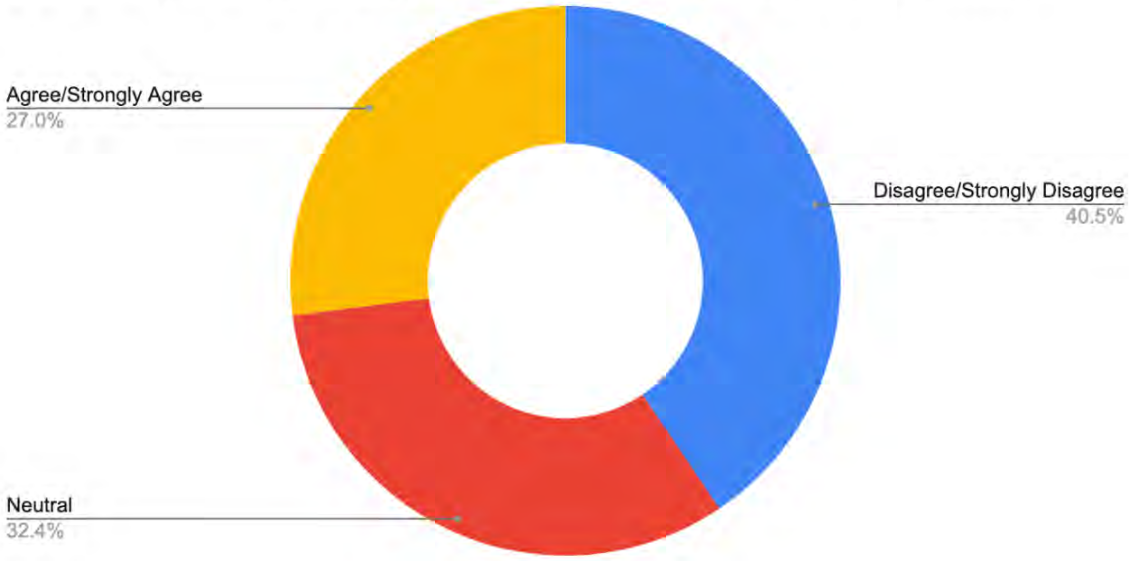
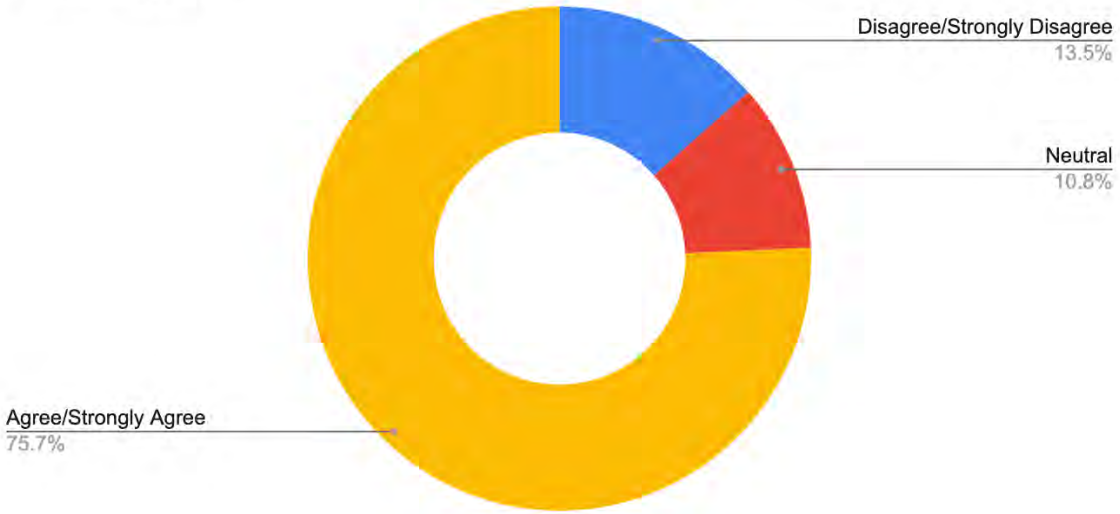
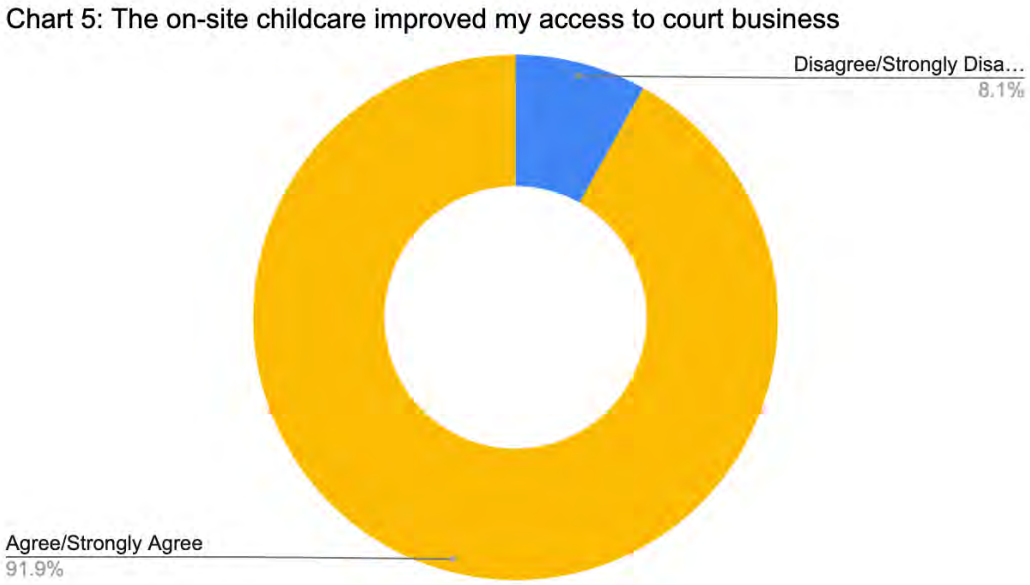


Chart 4: I would have had to bring my child with me to the courtroom if there were no on-site childcare



1190



After disaggregating the responses to the survey question about improved access to court business by gender, significantly more female identified respondents stated they strongly agree or agree the childcare program improved their access to court business (see Table 5). Women were statistically more likely to report that the court-based childcare improved their access to court business (p<.05).

Table 5: Improved access to court business, disaggregated by gender

	Female n = 29	***Male*** n = 7	
	Total (%)	Total (%)	p-value
Parent agrees on-site childcare Improved their access to court business	28 (96.6)	5 (71.4)	0.03*

*Indicates statistically significant difference (p ≤ .05)

DISCUSSION

Our findings indicate that the Children's Home Society of Washington's two court-based childcare programs, in Kent and Spokane, have quite a lot in common. For example, both locations served a comparable number of children per day and month in 2019. And while the population of King County is nearly four-times larger than Spokane County, the Jon and Bobbe Bridge Drop-In Childcare Center in Kent only served about 90 more children than the Children's Waiting Room in Spokane over the same year. However, this might be because

the Maleng Regional Justice Center (which houses the Jon and Bobbe Bridge Drop-In Childcare Center) only serves south King County. In contrast, the Children's Waiting Room located on the Spokane County campus serves all of Spokane County. The average visit length was also very similar at both locations in 2019, at about 90 minutes per child, while July and August were the busiest months of the year. Perhaps this reflects the fact that schools are closed for summer during these two months. Additionally, afternoons were busier than mornings, which could be due to the time of day during which children are typically released from school. February, September, November and December were the months with the lowest volumes.

In both locations, the self-identified races and ethnicities of childcare program users (during a limited period of data collection) were relatively close to the larger, overall demographics of each county. However, we would like to bring attention to a few notable discrepancies. In Kent, Asians were underrepresented relative to the demographics of King County, while in Spokane, none of the parents or guardians who utilized the Children's Waiting Room during the collection period identified as Black or African American. This finding holds significance because people of color, particularly African Americans, are overrepresented in the criminal justice system relative to national demographics[9] and are underrepresented on juries.[31] As mentioned in the introduction, African Americans and people of color face numerous social and economic barriers that impede their ability to access the courts, which can lead to continued, long-term engagement with the justice system and perpetuate social inequalities. Our findings here reveal an opportunity to expand current outreach efforts to reach populations who may not already be accessing the courts due to unmet childcare needs.

This finding is especially important because, while more than 80% of surveyed childcare program users indicated they were aware of the programs before their day at court, 76% of surveyed users reported utilizing the childcare programs at least one or more previous times. These results make it nearly impossible to determine how often parents/guardians are learning of the on-site childcare programs in advance of their court business and before using one of the childcare programs for the first time. The implication is that if most people learn of the on-site childcare programs after they have already accessed the courts, then persons not already accessing the courts are not benefitting from the service, which, if they knew about, might help them to access the courts. This idea appears to be supported by nearly 60% of childcare program users during our data collection period saying they learned about the service from a sign, poster, or staff member within the courts. Finally, only one parent/guardian at the Kent location indicated a primary language other than English, but 28% of King county's population speaks a language other than English at home.[32] This result could be reflective of how the on-site childcare programs are being promoted to the public and highlights the potential need for information to be disseminated in multiple languages.

Women comprised a vast majority of all on-site childcare program users and accounted for nearly 83% of all childcare program users during the data collection period. Almost half of all childcare users who completed a survey reported they were at court to meet with a domestic violence advocate or attend to a custody-related matter, which suggests that the on-site childcare programs are meeting a critical need for survivors of domestic violence. Additionally, it suggests that working closely with domestic violence advocates and strengthening relationships with community-based organizations that serve survivors, might help ensure more members of vulnerable populations are aware of the programs and can access the services they need. Notably, women were significantly more likely than men to agree or strongly agree that their access to court services was improved by their use of one of the on-site childcare programs.

Our findings make it clear that the parents and guardians who utilize the on-site childcare programs overwhelmingly agree that the service makes it easier for them to access court services and/or conduct court business. Two of the factors most cited by parents and guardians and positively associated with improved access to the courts, were the interactions and relationships between parents/guardians and childcare program staff and the programs' convenience of use. While our interviews with persons who work in the courts and/or provide advocacy and related services suggested that parents/guardians use the on-site childcare programs primarily because the childcare is free, this was not reflected nearly as often in our interactions with parents/guardians who had utilized the service. Yet, we know that the costs of childcare can be prohibitively expensive, so the fact that CHSW's childcare programs are provided at no cost is critically important. For instance, in both King and Spokane Counties, it is estimated that the median cost of childcare for an infant and a preschooler (at a childcare center) is equivalent to 38% of median household income.[33] In contrast, according to the U.S. Department of Health and Human Services, childcare is considered affordable if it costs families no more than seven percent of their income.[34] In speaking with parents/guardians who have utilized the on-site childcare, it was also revealed that some aspects of the programs, such as hours of operation, age restrictions and physical location of the facilities, make the programs difficult to use and/or add stress to their experience at court. Some parents/guardians also indicated a reluctance to leave their children with strangers or expressed doubt as to whether their cultural needs would be accommodated.

RECOMMENDATIONS

FOR THE WASHINGTON STATE SUPREME COURT GENDER AND JUSTICE COMMISSION

Recommendation 1

Partner with county and state-level initiatives to identify potential funding opportunities, allies, and strategies to increase access to the justice system for parents/guardians from marginalized/underrepresented backgrounds.

Partnering with local agencies and organizations already working on criminal justice reform could help the Commission and the childcare programs expand their ability to meet the specific needs of populations who lack access to court services. Partnerships could also bring in additional resources to expand current outreach efforts and services to reach a more diverse population. For example, King County's 2016-2022 Equity and Social Justice Strategic Plan's "pro-equity policy agenda" includes a section dedicated to justice system reforms ***and specifically mentions strategies to improve access to the courts***. Currently, the plan does not include on-site childcare as a means to increase court access, however we found in the published literature and from parents in our evaluation, that childcare should be considered as a strategy to increase access to the court system.

Recommendation 2

Initiate efforts to support the Children's Home Society of Washington in conducting further research on why various populations are not coming to the courts to attend court business.

We advise that in these efforts, the Commission and CHSW identify the reasons why specific populations do not access the courts, understand who is most affected by these issues and how they affect communities differently, and seek to explain how and why such reasons exist so the program can better serve these populations. We believe this report has provided a foundation to continue this work with more resources and time allotted. While this work can take on a multifaceted approach, one option is to continue using the surveys and registration forms and conduct ongoing monitoring and evaluation as part of the program. We recommend these answers inform and/or refine the way that CHSW promotes the on-site childcare programs to reach potential users from populations known to access the courts less frequently. Finally, as we address

in our limitations, our results reflect a greater amount of perspectives from the civil side of the court system and more work can be done to investigate the perspectives of parents/guardians who are involved in the criminal side.

FOR THE CHILDREN'S HOME SOCIETY OF WASHINGTON

Recommendation 1

Tailor current, and develop new, outreach strategies promoting the childcare programs to reach parents/guardians who are accessing the courts and the historically underrepresented populations in the justice system that are not accessing the courts.

Some strategies we believe are within the immediate scope of CHSW are:

Sub-recommendation 1(a)

*Increase knowledge and awareness of the on-site childcare to parents/guardians through avenues **outside** of the courthouses by:*

- Sending information about the childcare program with materials sent or given by Family Court, Family Law Information staff, domestic violence advocates, staff involved in child custody hearings, etc. (recommendation from a parent/guardian)
- Work with each superior court to add information on jury summons about the on-site childcare including how to reserve a spot
- Build relationships with partner organizations, such as the YWCA, CONSEJO, Refugee Women's Alliance, API Chaya, etc. (especially those serving domestic violence survivors and marginalized communities) to spread the word about the childcare service
- Provide brochure/signs in the top five languages used in the Kent and Spokane Courthouses; Interpreter Services can help with these efforts

We believe this is important because promoting the court-based childcare programs solely within the courts does not facilitate improved access to court services if most persons are learning about the childcare programs after they have already accessed the courts.

Sub-recommendation 1(b)

*Increase knowledge and awareness of the on-site childcare to parents/guardians through avenues **within** the courthouses by improving signage at each courthouse to better call attention to the on-site childcare program.*

- Strategically locate the signage advertising the on-site childcare programs (at entrances or outside of the courthouse)
- Ensuring that offices within the court have adequate signage and brochures (in various languages) to post or provide parents/guardians
- Provide brochure/signs in the top five languages used in the Kent and Spokane Courthouses; Interpreter Services can help with these efforts

Recommendation 2

Foster relationships and build trust among current users and underrepresented populations in the justice system, including communities that are not accessing court services.

Insight from parents/guardians (who used the program), domestic violence advocates, judges and other court staff suggest that some parents/guardians who are not using the programs have uncertainty about using the program due to mistrust of the justice system and feeling fearful of leaving their children in a place where they cannot see them. However, we heard from parents and guardians who do use the childcare program that they have positive relationships with staff and feel comfortable using the service, which shows childcare staff are doing a great job at building rapport with parents/guardians. Still, to remedy some of this uncertainty, we recommend the following actions:

- Include testimonials in outreach materials that speak to parent/guardian's positive experiences with the childcare programs
- Identify trusted resources and service providers who serve low-income and communities of color in King and Spokane Counties to promote the childcare program in ways that work best for their community
- Hold open houses for court staff, such as domestic violence advocates, Family Court staff, public defenders, bailiffs and external organizations that serve parents/guardians to tour the childcare locations to learn more, so they can confidently promote the program and ease parent/guardian concerns

Recommendation 3

Assess and adapt new operational strategies to increase the reliability of the childcare programs and promote use.

One barrier recognized by parents/guardians in Kent and Spokane is a lack of reliability of the on-site childcare service. To encourage continuous operation and increase trust in the programs' reliability, we suggest the following:

- Consider patterns of use to inform childcare staffing needs – increase staffing during school breaks and afternoons when use is notably higher thereby reducing the potential for rejecting new children due to capacity
- Stagger lunch hour breaks among the staff so that the on-site childcare programs remain open during courthouse business hours
- In Spokane, cross-train other Children's Home Society of WA employees to become "floaters" and reduce the likelihood of closure due to staffing issues
- Consider alternative registration processes to minimize paperwork and time for repeat users and reduce the need for parents/guardians to fill out registration forms multiple times in a short period

LIMITATIONS

We must acknowledge the various limitations of this evaluation, including geographical and time constraints, as well as how we went about conducting this evaluation compared to the best practice of research and evaluation. The following describes the limitations of this project.

GEOGRAPHICAL AND TIME CONSTRAINTS

Overall, we had 10 weeks to plan and implement this evaluation. We also had approximately three weeks to collect data via registration forms and surveys and only a few days to conduct interviews. Since each location was outside the Seattle area and Spokane is located hundreds of miles away, our time at each site was restricted. Furthermore, the limited time at each location inhibited our ability to interview a high volume of parents and guardians to participate in our evaluation and network with various staff at each justice center.

SAMPLING STRATEGY

Due to our sampling strategy as well as time and resource constraints, our sample is not representative of the parents/guardians who use the on-site childcare programs or access the courthouse. We were limited to almost exclusively cross-sectional data collected during a relatively short period and only collected data from persons who are proficient in English or Spanish, with all interviews conducted in English. Considering the diversity of courthouse attendees in each county, this is a significant limitation and excluded the perspectives of parents/guardians who may have otherwise been willing to complete a survey and/or participate in an interview. Also, we did not talk to the parents/guardians who seemed nervous, stressed out, or in a hurry, which naturally biased our sample to parents/guardians who had more time and seemed less stressed. Lastly, we were unable to collect survey data from parents and guardians who did not use the court child program as we were unable to create and disseminate a specific survey for this population. In sampling court staff for interviews, we relied on snowball sampling, which resulted in interviewing more court staff on the civil side rather than the criminal side of the court system. This sampling strategy among court staff limited the opportunity to gain valuable perspective from those who work with parents/guardians on the criminal side of the court.

DATA COLLECTION

Our team developed each question added to the registration form and survey, as well as the questions in the interview guide based on our logic model. We did not have the capacity to pilot test any of the material to ensure clarity, which limits the validity of our data collection materials. For example, the question on the registration form and survey asking participants about their primary language did not adequately capture the participants preferred language or language spoken at home due the way the question was worded. Finally, we did not have full control over the data collection process as we made various modifications to accommodate participants at each site. For example, we slightly modified questions to provide clarification and conducted some interviews with multiple people at one time. There is also the potential for recall bias from survey and interview participants.

DATA ANALYSIS

The low statistical power of our sample size may indicate that on-site childcare programs do not affect enabling access to the courts even though such an effect may exist. Furthermore, since we were unable to interview parents/guardians who did not come to court, we are not able to conclude why parents/guardians do not attend court business. There is also a chance that when we compare quantitative data across childcare programs or demographic characteristics that a statistically significant difference or differences will

exist by chance. That is, the differences we may observe between childcare program sites, or between demographic characteristics, may be attributable to differences in the sample populations themselves. This threat also applies to data collected from key informant interviews. For qualitative analysis, we only could do one round of coding while simultaneously learning the process. We also acknowledge that while the input we received from key informant interviews was extremely valuable, there are limitations to these responses since they are perceptions of the parent/guardian experience.

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APPENDIX A – RESEARCH QUESTIONS CHART

Research Question	Indicator	Data Source	Target Population
How have the Kent and Spokane court-based childcare programs been sharing information about available childcare services to parents/guardians of children 1 - 12 years old?	Classification of outreach modes Utilization Rates	Interview with childcare staff regarding outreach In-take Forms	☐Access the courts ☒Know about the childcare ☒Use the childcare ☒Do NOT use the childcare

How have parents/guardians of children 1 - 12 years old been learning about the childcare programs provided at the Kent and Spokane courts?	% parents/guardians who knew about the childcare programs before the day of their court business	Parent/guardian surveys	☒Access the courts ☒Know about the childcare ☒Use the childcare ☐Do NOT use the childcare
Do barriers to accessing the childcare programs prevent parents/guardians from conducting court business?	% parents/guardians who felt the court-based childcare program met their expectations for safety for their child to be while attending to court business	Interviews	☒Access the courts ☒Know about the childcare ☐Use the childcare ☒Do NOT use the childcare
How do parents/guardians who use the court-based childcare programs at the Kent and Spokane courts indicate the childcare affected their ability to attend to their court business?	% parents/guardians who indicate their access to the courts was improved because they were able to utilize the childcare programs	Surveys Interviews	☒Access the courts ☒Know about the childcare ☒Use the childcare ☐Do NOT use the childcare

APPENDIX B – REGISTRATION FORM SPOKANE

REGISTRATION FORM

CHILDREN'S WAITING ROOM

721 N Jefferson, Room #101 • Spokane, WA 99260 • (509) 477-6815

PARENT/GUARDIAN INFORMATION *(Please print clearly)*

First Name	*Last Name*	*Today's Date*

Address	*City*	*State*	*Zip Code*
( )	( )		
Primary Phone	*Alternate Phone*		

Parent/Guardian Age: _____ **Gender:** ❑ **F** ❑ **M** ❑ **Non-Binary** ❑ **Trans F** ❑ **Trans M** ❑ **Other**

Race/Ethnicity (Mark all that apply)

❑ Hispanic/Latino
❑ African, African American, or Black
❑ White or Caucasian
❑ Hawaiian Native or Pacific Islander
❑ American Indian or Alaska Native
❑ Asian (not Pacific Islander)
❑ Other: _____

Parent/Guardian Primary Language: ❑ English ❑ Spanish ❑ Other: _____

How did you learn about the Children's Waiting Room: ❑ court website ❑ Children's waiting room website
❑ poster ❑ court staff ❑ brochure ❑ sign ❑ word of mouth
❑ other (please specify):_____

Did you know about the Children's Waiting Room before you arrived at court today? Y / N

YOUR DESTINATION TODAY: ❑ Superior Court ❑ District Court ❑ Municipal Court ❑ Juvenile Court ***Room Number***: _____
Name of attorney_____ ***Name of who you are visiting***_____

❑ DV Advocate ❑ Probation ❑ Spokane County Jail ***Name of who you are visiting***: _____
❑ Public Defenders ❑ Court Facilitator ❑ Jury Duty ❑ Other: _____

CHILD INFORMATION *(Please print clearly)*

CHILD #1

First name: _____ **Last name:** _____ **DOB:** _____ **Gender** ❑ M ❑ F

Race/Ethnicity (Mark all that apply)

❑ Hispanic/Latino
❑ African, African American, or Black
❑ Asian (not Pacific Islander)
❑ Hawaiian Native or Pacific Islander
❑ American Indian or Alaska Native
❑ White or Caucasian
❑ Other: _____

What is your relationship to this child? _____
Any allergies/chronic illnesses? ❑ No ❑ Yes: _____
Any medications? ❑ No ❑ Yes: _____
Are immunizations current? ❑ No ❑ Yes
What else would you like us to know about your child? _____
_____
Primary Language: ❑ English ❑ Spanish ❑ Other: _____
❑ Limited English/Non-English speaking

CHILD #2 **First name:** _____ **Last name:** _____ **DOB:** _____ **Gender** ❑ M ❑ F

Race/Ethnicity (Mark all that apply)

- ❑ Hispanic/Latino
- ❑ African, African-American, or Black
- ❑ Asian (not Pacific Islander)
- ❑ Hawaiian Native or Pacific Islander
- ❑ American Indian or Alaska Native
- ❑ White or Caucasian
- ❑ Other: _____

What is your relationship to this child? _____

Any allergies/chronic illnesses? ❑ No ❑ Yes: _____

Any medications? ❑ No ❑ Yes: _____

Are immunizations current? ❑ No ❑ Yes

What else would you like us to know about your child? _____

_____

Primary Language: ❑ English ❑ Spanish ❑ Other: _____

❑ Limited English/Non-English speaking

CHILD #3 **First name:** _____ **Last name:** _____ **DOB:** _____ **Gender** ❑ M ❑ F

Race/Ethnicity (Mark all that apply)

- ❑ Hispanic/Latino
- ❑ African, African-American, or Black
- ❑ Asian (not Pacific Islander)
- ❑ Hawaiian Native or Pacific Islander
- ❑ American Indian or Alaska Native
- ❑ White or Caucasian
- ❑ Other: _____

What is your relationship to this child? _____

Any allergies/chronic illnesses? ❑ No ❑ Yes: _____

Any medications? ❑ No ❑ Yes: _____

Are immunizations current? ❑ No ❑ Yes

What else would you like us to know about your child? _____

_____

Primary Language: ❑ English ❑ Spanish ❑ Other: _____

❑ Limited English/Non-English speaking

Staff Only: **AM** **PM**

EMERGENCY CONTACTS -In the event of an emergency, on either my part or that of the Children's Waiting Room, I hereby authorize information and/or my children to be released by Children's Home Society of Washington (CHSW) staff to the following person(s). This release concerns myself and any child(ren) in the care of the CHSW of whom I am the parent or legal guardian. ***Please Note: Staff will require Identification before discharging children to these person(s)****

#1

First Name | *Last Name* | *Relationship*

City | *Primary Phone Number* | *Alternate Phone Number*

#2

First Name | *Last Name* | *Relationship*

City | *Primary Phone Number* | *Alternate Phone Number*

AUTHORIZATION AND CONSENT

I give permission for the Children's Waiting Room (CWR), operated by CHSW to care for the above-named child(ren) of whom I am the parent or legal guardian. **I understand and agree to the following**:

- **HOURS & PICKUP** – The CWR closes daily for lunch from 12-1:00, and for the day at 5:00 p.m. If my above-named child(ren) is not picked up before closure hours and CHSW staff are unable to contact either myself or my emergency contacts, the Division of Child and Family Services and/or Law Enforcement may be contacted.
- **MEDICAL EMERGENCY TRANSPORT & TREATMENT** - In the event of a medical emergency, CHSW staff will make all reasonable efforts to contact me and/or my emergency contacts. If I cannot be reached, and it is urgently necessary, I consent to have my child(ren) transported by ambulance to the nearest emergency center. Further, I consent to medical treatment and procedures to be performed by a licensed physician or hospital when deemed immediately necessary and advisable by the physician or hospital to safeguard the health of my child(ren).
- **FIRST AID/CPR** - In a medical emergency, I authorize emergency medical treatment, to include First Aid and/or CPR (Cardiopulmonary Resuscitation), be given to my child(ren) by a qualified CHSW staff or medical professional.
- **MANDATED REPORTERS** - Staff are required by law to report any suspected child abuse or neglect to the appropriate authorities. Whenever possible, CHSW staff will first discuss any concerns with me so that a co-report can be made.

_____ _____

Parent/Guardian Signature *Date*

_____ _____

Staff Signature *Date*

	Time In	*Parent Initials*	*Staff Initials*	***Time Out***	*Authorized Signature*	*Staff Initials*
AM		*Signed above*	*Signed above*			
PM						

Last Revision: 2/20
Original filed with CHSW Site Supervisor. Retain for 1 year after annual contract ends

APPENDIX C – REGISTRATION FORM KENT

REGISTRATION FORM
JON AND BOBBE BRIDGE DROP-IN CHILDCARE CENTER
401 4th Ave N • Kent, WA 98032 • (253) 854-5625

AM **PM**

Confirmed Pick-up
Donation
Wrist Band

PARENT/GUARDIAN INFORMATION *(Please print clearly)*

First Name	*Last Name*	*Today's Date*

Address	*City*	*State*	*Zip Code*
( )	( )		
Primary Phone	*Alternate Phone*		

Parent/Guardian Age: _____ **Gender:** ❑ **F** ❑ **M** ❑ **Non-Binary** ❑ **Trans F** ❑ **Trans M** ❑ **Other**

Race/Ethnicity (Mark all that apply)

❑ Hispanic/Latino
❑ African, African-American, or Black
❑ White or Caucasian
❑ Hawaiian Native or Pacific Islander
❑ American Indian or Alaska Native
❑ Asian (not Pacific Islander)
❑ Other: _____

Parent/Guardian Primary Language: ❑ English ❑ Spanish ❑ Other: _____

How did you learn about this onsite childcare center: ❑ court website ❑ Children's waiting room website ❑ poster ❑ court staff ❑ brochure ❑ sign ❑ word of mouth ❑ other (please specify):_____

Did you know about the onsite childcare before you arrived at court today? Y / N

YOUR DESTINATION TODAY: ❑ Superior Court ❑ District Court ❑ Municipal Court ❑ Juvenile Court ***Room Number***: _____

Name of party (if not self): _____ ***Name of attorney***: _____

What is your court related business:

❑ DV Advocate ❑ Probation ❑ Dependency ❑ Custody ❑ Sentencing ❑ Arraignment
❑ Public Defenders ❑ Court Facilitator ❑ Jury Duty ❑ ARY/CHINS ❑ Other: _____

CHILD INFORMATION *(Please print clearly)*

CHILD #1 **First name:** _____ **Last name:** _____ **DOB:** _____ **Gender** ❑ M ❑ F

Race/Ethnicity (Mark all that apply)

❑ Hispanic/Latino
❑ African, African-American, or Black
❑ Asian (not Pacific Islander)
❑ Hawaiian Native or Pacific Islander
❑ American Indian or Alaska Native
❑ White or Caucasian
❑ Other: _____

What is your relationship to this child? _____
Any allergies/chronic illnesses? ❑ No ❑ Yes: _____
Any medications? ❑ No ❑ Yes: _____
Are immunizations current? ❑ No ❑ Yes
What else would you like us to know about your child? _____
_____
Primary Language: ❑ English ❑ Spanish ❑ Other: _____
❑ Limited English/Non-English speaking

CHILD #2 **First name:** _____ **Last name:** _____ **DOB:** _____ **Gender** ❑ M ❑ F

Race/Ethnicity (Mark all that apply)

❑ Hispanic/Latino
❑ African, African-American, or Black
❑ Asian (not Pacific Islander)
❑ Hawaiian Native or Pacific Islander
_____
❑ American Indian or Alaska Native
❑ White or Caucasian
❑ Other: _____

What is your relationship to this child? _____
Any allergies/chronic illnesses? ❑ No ❑ Yes: _____
Any medications? ❑ No ❑ Yes: _____
Are immunizations current? ❑ No ❑ Yes
What else would you like us to know about your child?
_____
_____
Primary Language: ❑ English ❑ Spanish ❑ Other: _____
❑ Limited English/Non-English speaking

CHILD #3 **First name:** _____ **Last name:** _____ **DOB:** _____ **Gender** ❑ M ❑ F

Race/Ethnicity (Mark all that apply)

❑ Hispanic/Latino
❑ African, African American, or Black
❑ Asian (not Pacific Islander)
❑ Hawaiian Native or Pacific Islander
❑ American Indian or Alaska Native
❑ White or Caucasian
❑ Other:_____

What is your relationship to this child? _____
Any allergies/chronic illnesses? ❑ No ❑ Yes: _____
Any medications? ❑ No ❑ Yes: _____
Are immunizations current? ❑ No ❑ Yes
What else would you like us to know about your child? _____
_____
Primary Language: ❑ English ❑ Spanish ❑ Other: _____
❑ Limited English/Non-English speaking

Staff Only: **AM** **PM**

EMERGENCY CONTACTS -In the event of an emergency, on either my part or that of the Jon and Bobbe Bridge Childcare Center, I hereby authorize information and/or my children to be released by Children's Home Society of Washington (CHSW) staff to the following person(s). This release concerns myself and any child(ren) in the care of the CHSW of whom I am the parent or legal guardian. ***Please Note: Staff will require Identification before discharging children to these person(s)****

#1

First Name	*Last Name*	*Relationship*
City	*Primary Phone Number*	*Alternate Phone Number*

#2

First Name	*Last Name*	*Relationship*
City	*Primary Phone Number*	*Alternate Phone Number*

AUTHORIZATION AND CONSENT

I give permission for the Jon and Bobbe Bridge Childcare Center, operated by CHSW to care for the above-named child(ren) of whom I am the parent or legal guardian. **I understand and agree to the following**:

- **HOURS & PICKUP** – The childcare center closes daily for lunch from 11:50-1:15, and for the day at 4:15 p.m. If my above-named child(ren) is not picked up before closure hours and CHSW staff are unable to contact either myself or my emergency contacts, the Division of Child and Family Services and/or Law Enforcement may be contacted.
- **MEDICAL EMERGENCY TRANSPORT & TREATMENT** - In the event of a medical emergency, CHSW staff will make all reasonable efforts to contact me and/or my emergency contacts. If I cannot be reached, and it is urgently necessary, I consent to have my child(ren) transported by ambulance to the nearest emergency center. Further, I consent to medical treatment and procedures to be performed by a licensed physician or hospital when deemed immediately necessary and advisable by the physician or hospital to safeguard the health of my child(ren).
- **FIRST AID/CPR** - In a medical emergency, I authorize emergency medical treatment, to include First Aid and/or CPR (Cardiopulmonary Resuscitation), be given to my child(ren) by a qualified CHSW staff or medical professional.
- **MANDATED REPORTERS** - Staff are required by law to report any suspected child abuse or neglect to the appropriate authorities. Whenever possible, CHSW staff will first discuss any concerns with me so that a co-report can be made.

Date of Last Doctor Visit_____ Name of Child's Physician_____

_____ _____

Parent/Guardian Signature *Date*

_____ _____

Staff Signature *Date*

	Time In	*Parent Initials*	*Staff Initials*	***Time Out***	*Authorized Signature*	*Staff Initials*
AM		*Signed above*	*Signed above*			
PM						

Last Revision: 2/20
Original filed with CHSW Site Supervisor. Retain for 1 year after annual contract ends

APPENDIX D – PARENT/GUARDIAN SURVEY

The follow example of the parent/guardian survey is specifically for Kent, but the questions are the same for both locations with the only difference being the heading.

JON AND BOBBE BRIDGE DROP-IN CHILDCARE CENTER

CONSUMER SURVEY

*This survey is **voluntary** and **anonymous**. Your responses will not be tied directly to you and will not affect your ability to access the drop-in childcare center. The information you provide will help us to improve our services.*

Today's date: _____

Parent/Guardian Age: _____ **Gender:** ❑ **F** ❑ **M** ❑ **Non-Binary** ❑ **Trans F** ❑ **Trans M** ❑ **Other**

Race/Ethnicity (Mark all that apply)

❑ Hispanic/Latino
❑ African, African-American, or Black
❑ White or Caucasian
❑ Other: _____
❑ Hawaiian Native or Pacific Islander
❑ American Indian or Alaska Native
❑ Asian (not Pacific Islander)

Primary Language: ❑ English ❑ Spanish ❑ Other: _____

Number of children you brought to the childcare center today: _____

1. Did you know about the onsite childcare program before you arrived at court today? Y / N

2. How many times have you used the onsite childcare before today? ❑ None ❑ 1-2 times ❑ 3-4 times ❑ 5 or more

3. For which of the following reasons are you using the childcare center today?

❑ Court (Specify): ❑ Superior ❑ Municipal ❑ District ❑ Juvenile
❑ Domestic Violence Advocate ❑ Probation ❑ Court Facilitator ❑ Dependency
❑ Public Defenders Office ❑ Arraignment ❑ Custody ❑ Meeting with Attorney
❑ Sentencing ❑ Jury Duty ❑ ARY/CHINS ❑Other (Specify):_____

Please check the box that best describes your response to the following statements

	Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
4. If there were no childcare center, I would have had a safe place for my child to be today.	❑	❑	❑	❑	❑

1209

5. If there were no childcare center, I would have had to bring my child with me to the courtroom today.	❑	❑	❑	❑	❑
6. The drop in childcare center has improved my ability to access services on the Maleng Regional Justice Center Campus.	❑	❑	❑	❑	❑

7. Were there any things that made it difficult to use the childcare center?

8. Were there any things that made it easy to use the childcare center?

APPENDIX E – INTERVIEW QUESTIONS

Interview Questions
Population: Parents and Guardians who USE the childcare center 1. How did you learn about the childcare service? a. Do you have suggestions on how to get the word out about the childcare that would best meet your needs? b. How could the information that you received about the childcare program be improved to better meet your needs? 2. How did the childcare center make your experience at the court easier or more difficult? 3. How would your experience at court have been different if the childcare program was not available? 4. What makes it easy or hard to use the childcare center? 5. Anything else you would like to share about your experience using the childcare center?
Population: Parents and Guardians who ATTEND court, but who DO NOT USE the childcare center 1. Did you know about the childcare center before you came to court today? a. Knew about the childcare center, but did not use it: i. What are some reasons you did not use the childcare center while at the court? ii. What would make it more likely for you to use the childcare program in the future? iii. In what ways might the childcare center not meet your needs? b. Did not know about the childcare center: . If you knew about it, would you have used it? What are some reasons why or why not?

i. How do you think the childcare program should share information so that more parents/guardians know that the service is available before they come to court? ii. How do you think your experience at court would have been different if you had known about the childcare program?
Population: Court staff: DV advocates, prosecutors, FLIC staff, security guards, process servers 1. What do you think are the most common ways that parents/guardians learn about the childcare centers? 2. How do you, or your office, share information about the childcare center to court attendees with children? 3. What are some reasons parents/guardians like using the childcare center? 4. What are some reasons parents/guardians say they do not use the childcare center? 5. Do you have suggestions on how the childcare could be more useful to parents/guardians with children?
Population: Childcare Program Staff 1. How do you try to inform parents and guardians that the childcare program/center is available? 2. How do you share information with other court services or organizations to promote the childcare program? 3. Have you heard from parents what makes it easy or hard to use the childcare program/center?
Population: Community Partner Organization 1. Tell me a little about your organization and your relationship/work with Kent Court? 2. Do you know about the childcare program at the Kent court? 3. Do you tell families you work with that this childcare is available if they need to access the courts? 4. What are ways that you think will be most effective for getting the word out about the childcare service to your community? 5. Is there anything else you want to share to inform the childcare how they can best serve your community?

APPENDIX F – CODEBOOK

Code	Sub-code	Description
Question 1: How have the Kent and Spokane court-based childcare programs been sharing information about available childcare services to parents/guardians of children 1 - 12 years old?		
Promotion/Communication Strategy	*Technique, strategy, and/or materials to promote a product or service*	
	Brochure	Small card or trifold paper

	Childcare program website	Online platform specifically for the childcare program
	Justice center website	Online platform specifically for the justice center that includes information on the childcare program
	Mailing	Flyer, card, or informational letter sent by mail
	Email	Message sent by email address
	Text	Text message by cell phone
	Word of mouth	Verbally from another person
	Sign	Poster or flyer on a wall, or name of childcare program on a directory
Question 2: How have parents/guardians of children 1 - 12 years old been learning about the childcare programs provided at the Kent and Spokane courts?		
Parent/Guardian Awareness		*How and when parents/guardians are learning about court-based childcare programs*
	Brochure	Small card or trifold paper
	Website	Online platform
	Mailing	Flyer, card, or informational letter sent by mail
	Email	Message sent by email address
	Text	Text message by cell phone
	Interpersonal interaction Sub-codes: • Court staff • Childcare staff • Family/friend	Verbally from another person

	• External organization	
	Sign	Poster or flyer on a wall, or name of childcare program on a directory
	Prior knowledge	Parent/guardian knew about the childcare program before the day of their court business
	Day of court knowledge	Parent/guardian learned about the childcare program on the day of their court business
Question 3: What barriers exist for parents/guardians when accessing the childcare programs? Do barriers to accessing the childcare programs prevent parents/guardians from conducting court business?		
Childcare barrier		*Factors and unmet needs identified by parents/guardians, and/or persons who work with them, that make it difficult to access the court-based childcare programs*
	Location • Lines • Security • Separate building	The physical location of the childcare program
	Registration process	Sign in process for parents/guardians to admit their children into the program
	Sign out process	Process to release their child from the program
	Age restriction	Child is outside the 1-12 age restriction for each program
	Child has special needs	Child has needs the staff at the childcare program may not or cannot meet
	Child illness	At the time the parent/guardian needed to access the childcare program the child had an illness that did not allow them to enter the program
	Hours of operation	The time the childcare program opens and closes

	Lunch hour closure	Closure of childcare program between 12:00-1:00 pm
	Conflict with court hours	Closure of the childcare program is before/right at the closure time of the courthouse
	Language	Services at the childcare program are not in the parent/guardian's primary language
	Negative perception	Parents/guardians view the childcare program in a negative way that prevents them from using it. Mistrust of childcare program/staff
	CPS (Child Protective Services)	Parent/guardian fears being reported to Child Protective Services
	Childcare capacity	The childcare program is full and not able to accept another child
Question 4: How do parents/guardians who use the court-based childcare programs at the Kent and Spokane courts indicate the childcare affected their ability to attend to their court business?		
Enable access		*Reasons/elements of the childcare programs identified by parents/guardians, and/or those who work with them, that enable access to/make it easier to conduct court business*
	Stress Relief	Parents/guardians felt relief/ the absence of worry regarding needing to take care of their children and court business.
	Easier to do business	Parents/guardians felt it was easier to conduct court business with their children at the childcare program.
	Freedom	Parents/guardians had increased freedom to conduct court business.
	Focused	Parents/guardians were able to focus on their court business and not be preoccupied by their children
	Security	Parents/guardians felt a sense of security knowing their children were safe as they conducted court business.

	Convenience	The childcare program was convenient to use, therefore enabling parent/guardian to conduct court business
	No cost	The childcare program being free to use enabled parents/guardians to utilize the program and conduct court business
	Positive staff relationships	Parents/guardians express a sense of positivity towards childcare program staff enabling them to use the program and conduct court business
	Trust	Parents/guardians trust the childcare program staff to watch their children enabling them to use the program and conduct court business
	Language	The childcare program's services are offered in the parent/guardian's primary language enabling utilization and conducting court business

Executive Summary

University of Washington - Community-Oriented Public Health Practice - Section B

PRIMARY EVALUATION QUESTION | **Are the on-site childcare programs in the state of Washington enabling access to court business?**

INTRODUCTION AND OVERVIEW

The Washington State Supreme Court Gender and Justice Commission is conducting a study focusing on 27 priorities related to the extent and nature of gender bias in the courts today. As part of the grant funding, the Commission requested an evaluation to analyze the process and outcomes of providing childcare for parents/guardians in the justice system as a measure towards gaining gender justice and equitable access to justice through a specific look at The Children's Waiting Room (CWR) in Spokane and The Jon and Bobbe Bridge Childcare Center at the Maleng Regional Justice Center in Kent.

Children's Home Society of Washington (CHSW) is a non-profit organization that offers various services for 30,000 children ages 1-12 and their families annually. CHSW is contracted with the counties to run The Children's Waiting Room in Spokane and the Jon and Bobbe Bridge Childcare Center at the Maleng Regional Justice Center in Kent. Free childcare located within the courts is one proposed solution to foster more equitable representation and access to court services. Each court-based childcare program serves parents of children 1-12 years who are attending to court business at the Kent superior court or any Spokane court. While these programs were established to support parents/guardians and children, as well as improve the efficiency of the courts, their association with access to the courts required evaluation. This evaluation collected and analyzed quantitative and qualitative data in an attempt to better understand some of the processes and outcomes associated with providing free childcare for parents/guardians in the justice system as a measure towards more equitable access and representation to court services.

EVALUATION QUESTIONS

Primary Evaluation Question

Are the on-site childcare programs, at the Children's Waiting Room in Spokane, Washington and the Jon and Bobbe Bridge Drop-In Childcare Center at the Maleng Regional Justice Center in Kent, Washington, enabling access to court business?

Sub-Evaluation Questions

1. How have the Kent and Spokane court-based childcare programs been sharing information about available childcare services to parents/guardians of children 1-12 years old?
2. How have parents/guardians of children 1-12 years old been learning about the childcare programs provided at the Kent and Spokane courts?
3. What are the demographics of parents/guardians of children 1-12 years old who have used the court-based childcare programs in Kent and Spokane?
4. What are the utilization patterns of the Kent and Spokane court-based childcare programs over the course of a day, week, and year? Are there times (of day, week, or year) that are consistently at a higher or lower volume (measured by number of children and length of time at the childcare center)
5. Which types of court business are being accessed by parents/guardians of children 1-12 years old using the court-based childcare centers at the Kent and Spokane courts?
6. Do barriers accessing the childcare programs prevent parents/guardians from conducting court business? What barriers exist for parents/guardians when accessing the childcare programs?
7. How do parents/guardians who use the court-based childcare programs at the Kent and Spokane courts indicate the childcare affected their ability to attend to their court business?

METHODS

We conducted a convergent mixed-methods evaluation using both retrospective and cross-sectional data, with quantitative and qualitative data collected simultaneously. Cross-sectional data were collected on-site in Kent and Spokane between February 10-27, 2020 through qualitative semi-structured key informant interviews, as well as parent/guardian surveys and registration forms. Historical data were obtained from the CHSW database and consisted of quantitative data related to 2019 use. The combination of qualitative and quantitative data contributed to a rich understanding of who uses the court-based childcare programs, whether parents/guardians perceive access to the childcare programs as improving their ability to conduct court business, as well as perceptions of the childcare programs by users and non-users. Our primary populations of interest to answer our research questions were 1) parents/guardians with court business who use the on-site childcare programs, 2) parents/guardians with court business who do not use the childcare programs, and 3) childcare program staff. We relied on a convenience sample of parents/guardians of children ages 1-12 attending to court business who use and don't use the childcare programs during our February 10-27, 2020 period of data collection. In addition, our team engaged childcare program staff, legal professionals, resource providers, advocates, and other court staff who interact with our populations of interest and were willing to participate in interviews.

RESULTS

37 parents/guardians completed the evaluation survey. The top reasons for attending court were to see a DV advocate (39%) or for another unspecified reason (39%). 11 parents/guardians participated in an interview. The majority learned about the childcare programs from court staff (34%) or by a sign/poster (24%). Word-of-mouth accounted for 13%, which included learning from a family member, friend, or other (non-court staff) person. Most childcare program outreach happens when parent/guardian and child arrive and learn of on-site childcare from a sign or court staff, like a DV advocate or judge.

Barriers to accessing the on-site childcare programs:

Childcare Program Restrictions

age, program capacity, children with special needs

Negative Perception

unfamiliar with childcare room and childcare staff

Cultural Barriers

language, food, customs

Childcare Program Operations

hours (lunch hour closure), registration process, location

"I had to attend the family law orientation and the child care is not open during the time of the FLO seminar... literally the only time they're not open... so, I was excited about, 'Oh, they have childcare' and, then, when I looked it up... I was like, 'Oh, this is actually right in the middle of when they're not open... that doesn't help me [or other parents] at all'..." -Kent parent/guardian

Enablers to accessing court business, as a result of childcare programs:

Quality Childcare Staff: Staff were friendly, welcoming, comforting, experienced providers.

"I feel like the staff is very knowledgeable about children." -Kent parent/guardian

No Cost: Providing childcare service free of charge enabled many parents/guardians to use it.

"[Without the Children's Waiting Room], I would have had to bring her in there with me." -Spokane parent/guardian

Convenience: Drop off process was fast. Location inside the court made it easy (Kent site).

It's just a quick drop in, sign in, give them names, and then head out and get to where I need to. It's not a huge hassle." -Spokane parent/guardian

Security: Many parents/guardians, especially those going to court for custody, were concerned about their child's safety. The security measures taken at the childcare made them comfortable to leave their child there.

"The staff made me feel comfortable leaving my daughter with them with everything being confidential and only I can pick her up or who I write down to get her. Very secure." -Kent parent/guardian

Improved Court Experience: Interviewees reported an improved ability to focus in court, reduced stress, and less distraction for court staff.

"It's made it easier knowing that I don't have to take my little ones into a courthouse when they can just sit and be here because, in the courtroom, they probably wouldn't be very quiet and it's nice knowing that I can focus on what I need to focus on and not have to worry about them... it's nice knowing they can... be preoccupied and not have to worry and be scared that mom's not right there. They focus on fun stuff... [Without the CWR], I would've had to take the kids with me..." -Spokane parent/guardian

Parents/guardians indicated in the survey how the on-site childcare affect their court visit. 40 percent of parents/guardians indicated that they did not have another safe place for their child had there not been an on-site childcare at the court. Over 75 percent of parents/guardians would have had to bring their child with them to court. And, **more than 90 percent of parents/guardians agreed that the on-site childcare program improved their ability to access court services.**

DISCUSSION AND CONCLUSIONS

- Our findings reveal an opportunity to expand current outreach efforts in order to reach those who may not be accessing the courts due to unmet childcare needs.
- Speaking with parents/guardians who have utilized one of the on-site childcare programs revealed that some aspects of the programs, such as hours of operation, age restrictions, and physical location of the childcare facilities, make the on-site childcare programs difficult to use and/or add stress to their experience at court. Some parents/guardians also indicated a reluctance to leave their children with strangers or expressed doubt as to whether their cultural needs would be accommodated.
- Our findings make it clear that the **parents/guardians who utilize the on-site childcare programs overwhelmingly agree that the service makes it easier for them to access court services and/or conduct court business**. Two of the factors most cited by parents/guardians, and positively associated with improved access to the courts, were the interactions and relationships between parents/guardians and childcare program staff and the childcare programs' convenience of use.

RECOMMENDATIONS

Recommendations for the Washington State Supreme Court Gender and Justice Commission

1. Partner with county and state-level initiatives to identify potential funding opportunities, allies, and strategies to increase access to the justice system for parents from marginalized/underrepresented backgrounds.
2. Initiate efforts to support the Children's Home Society of Washington in conducting further research on why various populations are not coming to the courts to attend to court business.

Recommendations for the Children's Home Society of Washington

1. Tailor current, and develop new, outreach strategies promoting the childcare programs to reach parents/guardians who are accessing the courts and the historically underrepresented populations in the justice system that are not accessing the courts.
   a. Increase knowledge and awareness of the on-site childcare to parents/guardians through avenues outside of the courthouses.
   b. Increase knowledge and awareness of the on-site childcare to parents/guardians through avenues within the courthouses by improving signage at each courthouse to better call attention to the on-site childcare program.
2. Foster relationships and build trust among current users and underrepresented populations in the justice system, including communities not accessing court services.
3. Assess and adapt new operational strategies to increase the reliability of the childcare programs and promote use.

2021: HOW GENDER AND RACE AFFECT JUSTICE NOW

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Jury Diversity: A Survey of Washington State Trial Courts Analysis of Court Demographic Data Collection and Juror Accommodations

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Jury Diversity: A Survey of Washington State Trial Courts
Analysis of Court Demographic Data Collection and Juror Accommodations

June 10, 2021

A Report by Rhaelynn Givens, and Emilie Maddison
University of Washington

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Jury Diversity: A Survey of Washington State Trial Courts Analysis of Court Demographic Data Collection and Juror Accommodations

A Report by Rhaelynn Givens, and Emilie Maddison
University of Washington
June 10, 2021

Introduction

Having representative and diverse juries promotes fairness in the jury system.[1] An impartial jury pulled from a fair cross-section of the community is a right guaranteed by the sixth and fourteenth amendments and further established in *Taylor v. Louisiana* and the Jury Selection Service Act (JSSA).[2–5] However, research points to underrepresentation in jury pools of Black, Indigenous, and People of Color (BIPOC), and in particular Black, Indigenous, and other Women of Color.[6]

There are several steps in the juror selection process.[7] At each of these stages, there is potential for biases, under-sampling, and inequitable barriers that ultimately explain the lack of diversity in jury pools and juries.[6]

Text box 1. The Juror Selection Process

1. Master jury lists must be created from lists of eligible citizens
2. Jury summons must be sent
3. Citizens must then respond to those summonses
4. Citizens then present themselves to court
5. Peremptory challenges and for-cause excusals remove potential jurors from the jury pool
6. The final jury is then selected by the judge and attorneys

Underrepresentation is problematic at a national and state level. A recent study by Peter Collins and Brooke Gialopsos evaluated jury pools from 33 courts in Washington State.[*,6] Data were collected from people who presented for jury service over a one-year period. The study found that underrepresentation of American Indians/Alaska Natives, as well as Asian, Black, and Hispanic people exists in Washington.[6]

When looking at the intersection of gender and race, underrepresentation of Black, Indigenous and other Women of Color was also reported.[6] These findings show disparities between white and BIPOC juror pool representation, which was determined by comparing survey results to population data from the American Community Survey from each jurisdiction.[6] Empirical data demonstrates underrepresentation of Black, Indigenous, and People of Color in all but one of 33 courts, with representation ratios of just 0.48, 0.52, and 0.58 for Asian, American Indian/Alaska Native, and Black/African American people respectively.[6] A 1.00

[*] "Collection and analysis of these data was done through a partnership between the researchers, the Washington State Supreme Court Minority and Justice and Gender and Justice Commissions, and the Washington Pattern Instructions (WPI) Committee."

represents a representative ratio, while ratios less than 1 indicate underrepresentation and ratios greater than 1 indicate overrepresentation. Women in general are not underrepresented in jury pools; however, Black, Indigenous and other Women of Color are underrepresented. It is unknown how the Lesbian, Gay, Bisexual, Transgender, Queer, and Others (LGBTQ+) community is represented in these pools, since there were limited population-level statistics detailed enough to properly evaluate the question.[6]

The ability to achieve representative juries is complicated by several factors, starting with the way master jury lists are created using official records (e.g., driver licenses, voter registrations), which represent incomplete subsets of the jury-eligible population.[8] In addition, peremptory challenges have the potential to perpetuate racism, sexism and other biases. The size of juries vary which has been put forth as a problem for maintaining representativeness.[1] Finally, demographic data on selected and potential jurors is not collected systematically across courts.[1] The only way to determine if a jury has been pulled from a fair cross-section of the community is to compare the jury pool to the census records (or similar population data) of the specific community.[9,10]

There are several proposed solutions to underrepresentation in juries and jury pools, including structural changes to how master jury lists are created, efforts to reduce barriers to responding to jury summons and participating in jury service, and outreach to communities on the importance of civic participation. More technical solutions include jural districting or similar sampling algorithms, which could oversample specific populations for jury summons in order to improve the composition of the jury pool.[11]

In Washington State, courts pull potential jurors from a wide range of sources, including voter registration lists, DMV records, and state ID card holders. Also, the state's expansive voter registration laws mean the jury pool Washington courts can pull from is large, and by proxy, hopefully more representative.[12] However, pulling from only these sources still exclude those citizens who do not participate in any of those systems, which leads to disproportionate representation.[13]

In comparison to Washington State, New York State is the only state that requires the collection of demographic data for jury pools: this was established through the Jury Pool Fair Representation Act of 2009-2010.[14] Its purpose is to determine if jury pools match a fair cross-section of the community. People who present for jury service are provided with an information card with demographic questions on gender identity, sexual orientation, race, ethnicity, and employment category. The courts then produce annual reports based on their findings.[14]

The lack of demographic information available at each stage of jury selection—from jury summons to impaneled juries—makes it difficult to determine if representative juries are actually being formed. Jury representativeness is a key issue for ensuring a fair trial. Evidence shows diverse juries consider more facts, make fewer errors, and discuss racism more often than all-white juries.[6,15] One way to evaluate if representative juries are being formed is to compare jury pools to the larger population of each community.[9,10] While capturing demographic data is necessary to measure jury representation, understanding the barriers to service and what courts

can do to accommodate jurors is also key to improving representative juries that are a fair cross section of the community.

The Jury Diversity Survey is part of the Gender Justice Study, which is a multi-year project examining impacts of gender bias and how that affects access to justice.[16] Both the survey and the Gender Justice Study are examples of work the Washington State Supreme Court Gender and Justice Commission does to ensure gender equality for all in Washington Courts (see text box 2).

The intent of the Jury Diversity Survey is to collect primary data about the type of demographic data collected and accommodations offered to jurors in Washington Trial Courts, and the barriers courts experience in collecting demographic data and providing accommodations. The key findings from the Jury Diversity Survey are presented in this technical report.

Text box 2. The mission of the Gender and Justice Commission[17]

The mission of the Gender and Justice Commission is to identify concerns and make recommendations regarding the equal treatment of all parties, attorneys, and court employees in the State courts, and to promote gender equality through researching, recommending, and supporting the implementation of best practices; providing educational programs that enhance equal treatment of all parties; and serving as a liaison between the courts and other organizations in working toward communities free of bias.

Methods

The Survey

The survey was designed to evaluate what kind of demographic data Washington Trial courts collect, what accommodations they typically provide, and what barriers they encounter in collecting data and providing accommodations. It was designed through a collaborative process between experts in the courts and social science researchers. The research team shared a draft of the survey tool with representatives from the various trial court levels and the County Clerks' Offices to gather feedback on the tool and the survey dissemination plan.

The survey was distributed via SurveyMonkey to Court Administrators, Jury Administrators, and Superior Court Clerks in 209 courts.[†] The survey was open for three weeks in April of 2021. Of the 209 courts who received the survey, 85 responses were recorded from 76 courts,[‡] representing 35 of the 39 Washington counties. The proportion of courts who

[†] We estimated the number of total courts that received the survey using lists available from the Washington Courts website. Only courts with websites were counted from the Superior, District and Municipal courts. Juvenile courts, courts specifying family/mediation services, and court directory listings designated for probation services were excluded as they did not receive the survey.

[‡] Although there were 85 initial responses, only 76 courts are represented since some courts had multiple respondents. For the purpose of calculating the total number of courts that responded to the

responded to the survey is 36%. Respondents were asked to identify their court name and select one of four options: “my court currently collects demographic data,” “my court does not collect demographic data,” “my court historically collected demographic data but does not anymore,” or “I’m not sure if my court collects demographic data.” After the initial selection, the survey led respondents through the appropriate set of questions relative to what selection they indicated for their court’s demographic data collection status. The survey asked each respondent who indicated their court does collect data (or has historically collected data) to report on demographic variables their court collects at each stage of the jury selection process.[§] In this survey, the demographic variables of interest included Gender or Sex; Age or Year of Birth, Race or Ethnicity, and Occupation. If respondents indicated their courts do not currently collect data, they were asked to name barriers to collecting this data.

Respondents were also asked to identify accommodations commonly made for jurors and barriers to service for a variety of populations: breastfeeding people, pregnant people, non-binary and transgender people, and people with disabilities. We also asked about barriers to service for “women, women of color, parents, or other underrepresented groups.” In addition, we asked about barriers that courts themselves experience in making juror accommodations, and how courts alert jurors to the types of accommodations courts typically make.

Table 1. Number of Responses by Court Jurisdiction and Number of Courts Represented in Analysis. *This table shows the breakdown of total respondents by jurisdiction, as well as the total number of courts represented in the data analysis.*

Number of Respondents by Court Jurisdiction				
Municipal	District	Superior	Superior Court Clerk	Total Responses
27	17	25	13	82
Number of Courts Represented in Responses				
76	Responses from Superior Courts and Superior Court Clerks’ Offices affiliated with the same court were counted once for the purpose of calculating the total number of courts who responded to the survey.			

survey and the response rate, respondents from a Superior Court and its affiliated Superior Courts Clerk’s Office were counted only once.

[§] There are six stages in the jury selection process: summons sent, summons response, excusal for hardship, excusal by peremptory challenge, excusal for cause, and impaneled juries.

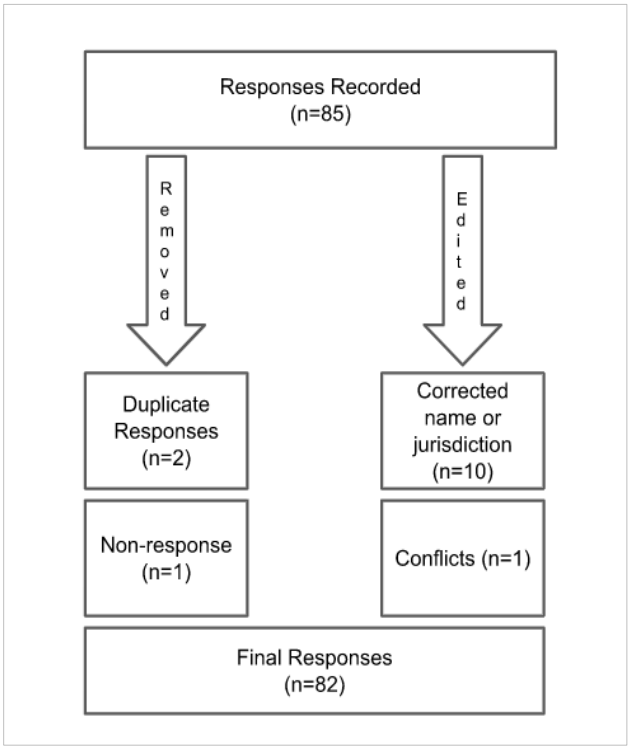


Figure 1. Decision Tree for Exclusions and Inclusions of Survey Responses

Data cleaning and coding

Figure 1 shows 85 responses were recorded using SurveyMonkey and provided for review. The data was reviewed in Microsoft Excel for duplicates,[**] unclear court names and jurisdictions, and inconsistencies in respondents' answers. Duplicate responses and responses with no information were removed, and court names and jurisdictions were clarified by consulting with the survey administrator. There was only one conflict found, where respondents from a Superior Court and the affiliated Superior Court Clerk's Office answered differently (yes and no) to whether they had a standard juror questionnaire. The questionnaire was uploaded with the survey response; thus, the conflict was resolved. There are 82 responses included in the analysis. Two researchers analyzed survey responses separately and collaborated throughout the process to ensure consistency. Researcher (RG) was responsible for the demographic data collection section while researcher (EM) was responsible for the accommodations section. They used Microsoft Excel and the statistical analysis program R version 4.0 to analyze and report findings. Both researchers coded qualitative open-ended response questions, then grouped similar responses by theme.

Part 1 Analysis/Results: Demographic Data

Demographic Data Collection Status

The proportion of survey respondents reporting data collection status is shown in Figure 2. Of the 82 respondents, 54% (n=44) indicated they do not collect data; 26% (n=21) indicated they do; 18% (n=15) reported they were not sure, and 2% (n=2) historically collected data but do not anymore. In trying to understand why courts are not collecting data, the survey asked respondents to identify barriers that prevent courts from doing so. Of the 82 respondents, 49% (n=40) indicated their courts also do not collect information on excusals for juror hardships. This is represented in Figure 3.

[**] Duplicates are when the same person responded more than once.

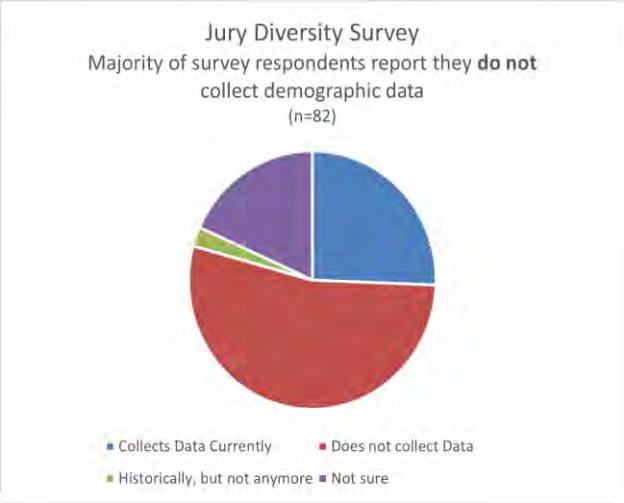


Figure 2. Majority of respondents indicate their courts to not collect data

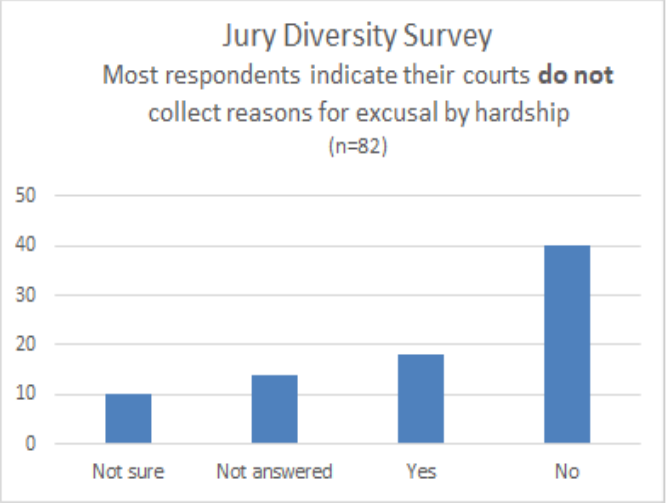


Figure 3. Respondents indicate their courts do not collect reasons for excusal by hardship

Demographic data collection occurs most often in the response phase of the juror selection process. While there are a number of courts collecting different demographic variables, “Age or Year of Birth” and “Occupation” are the variables collected most often across all stages of the juror selection process (Figure 4). Although the survey asked about historic data collection, there were only two respondents who indicated their courts had historically collected demographic data but no longer do. The demographic variables collected by these courts were consistent with the variables tracked by courts currently collecting data. Although the variables were consistent with the courts that do collect data, the stage at which these variables were collected differed. One court in the historic respondent category only reported collecting data on impaneled jurors, which is inconsistent with data collection efforts reported by other courts at each stage. Of the 21 courts currently collecting data, 76% (n=16) collected demographic information at the response stage. Only five courts collected data at every stage of the juror selection process.

Demographic Data and Gender Variables

Of the 21 courts currently collecting data, only one court indicated they include non-binary and transgender as options for Gender or Sex.

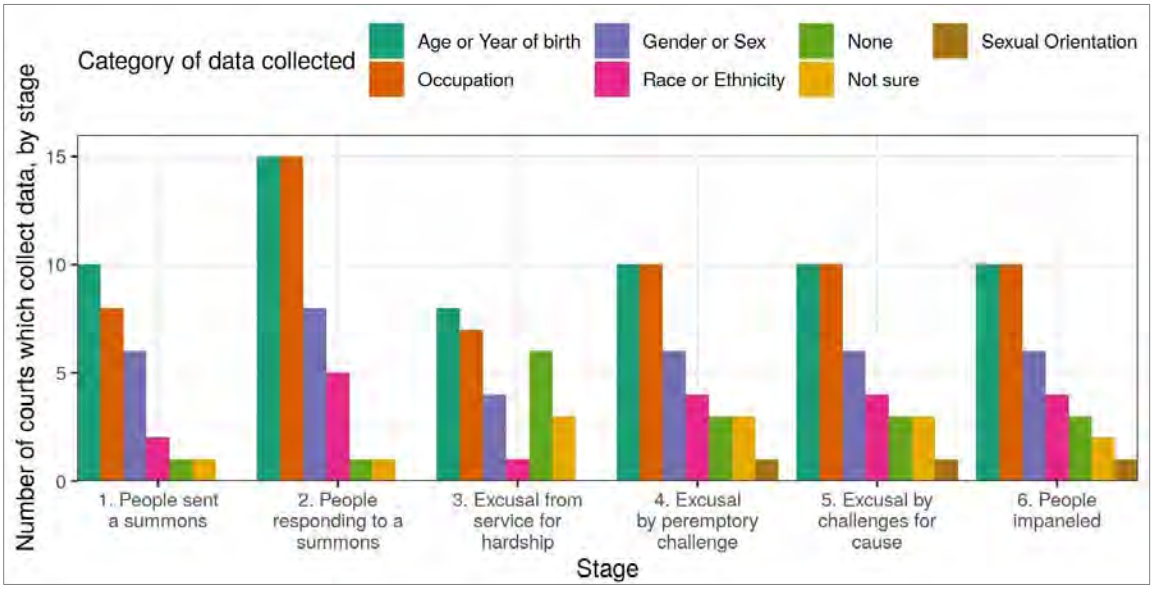


Figure 4. Courts collecting demographic data in the jury selection process (n=21). *The category "none" is included in this figure to show courts actively identifying that they do not collect the demographic variables listed. Non-responses are not pictured.*

Data Storage

Respondents whose courts currently collect data (n=21) were asked to identify how data is stored and when data collection began. 62% (n=13) of respondents who indicated their courts collect data stated collection began before 2020, but did not recall the exact date. Some courts did report specific time periods for storing data, but 62% (n=13) did not know how long the data are stored. Time periods for data storage were represented by four categories: 0-6 months, 6 months-1 year, more than 1 year, and unknown. Two courts indicated they store data for more than 1 year, and one of those courts stores data indefinitely. Respondents were also asked to identify data storage methods. These methods were also represented by four categories: paper only, electronic only, both paper and electronic, and unknown.

Table 2. Data collection storage methods

Storage Method	Number of Respondents (n=21)
Paper only	6
Electronic only	5
Paper and Electronic	2
Unknown	8

Table 2 shows the frequencies of different data collection storage methods. Of the five courts who collect data in all phases of the juror selection process, as reported previously, there were no consistent storage-method patterns identified: two respondents indicated their courts used paper storage methods, one used electronic storage methods, one used a mix of both electronic and paper, and one was not able to be determined from the open-ended response.

Barriers to Collecting Demographic Data

The 54% (n=44) of respondents indicating their courts do not collect data were asked to identify barriers for why they do not collect this information. A few respondents reported more than one barrier. The percentages are representative of the number of times the barriers were reported across all respondents (n=49). The two barriers respondents most commonly reported in collecting demographic data were 1) available resources and 2) compliance. The resource category was defined broadly and included respondents' references to time, available staff, available funding, and limited technology. Compliance refers to responses indicating there was no compulsory requirement to collect data, or responses noting it was not important.

From the resource category the most cited reason for not collecting demographic data was available staff and time. Figure 5 represents the barriers indicated by respondents and are reported by category (e.g. resources, compliance, no barriers, other, unknown and did not respond). Although Resources and Compliance represent the most commonly reported barriers, responses categorized as "other" revealed barriers of interest which, in a larger sample, might occur more frequently. Two such barriers are juror resistance and a juror's privacy preference. In another response classified as "other," a municipal court reported their larger, county court supplies jurors; therefore, they do not participate in data collection.

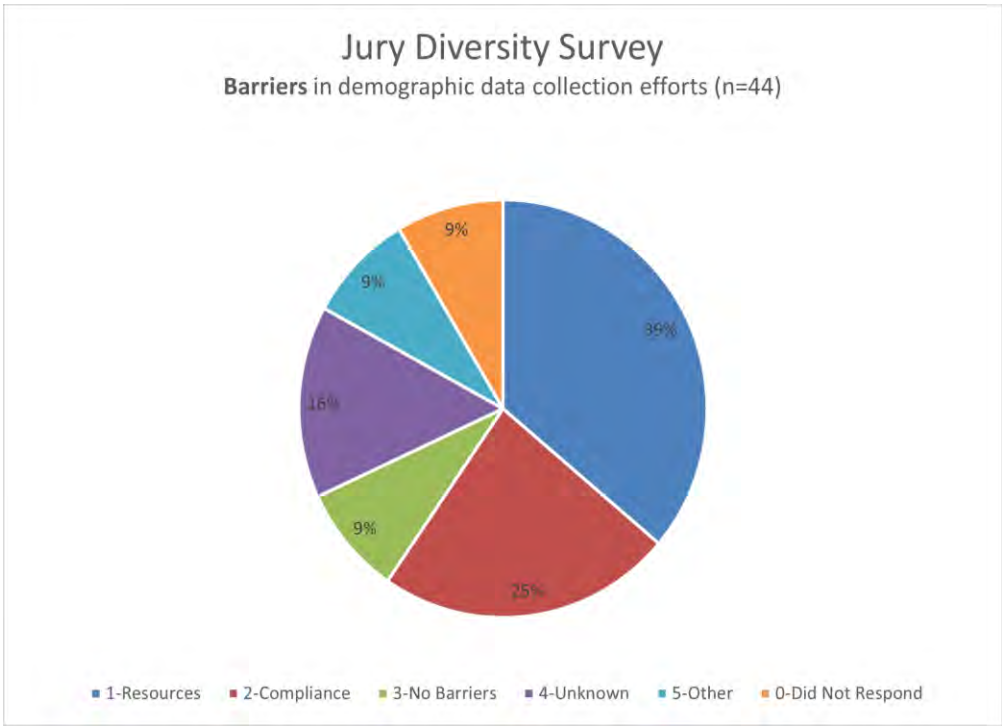


Figure 5. Survey respondents and barriers reported to collecting demographic data

Historical Data Collection

Although the survey asked about historic data collection at each stage of the jury process, only two respondents indicated they historically collected data, but no longer do. Given the limited response size, findings from this category are inconclusive. The two respondents indicated different reasons. One respondent reported stopping data collection because of discontinued trials due to COVID-19, which suggests that this court might begin collecting data again when jury trials resume. The other respondent reported stopping data collection because of lack of staffing and available resources. Barriers reported by the second court are consistent with barriers reported by courts that are not collecting data. Understanding historical data collection and reasons for stopping will inform recommendations for future data collection efforts. The current sample size, however, is insufficient to do so.

Part II Analysis/Results: Accommodations

Accommodations

For all the questions on accommodations, the overarching theme of the responses was that courts would fulfill any juror requests that were feasible. However, these questions used open-ended responses. Therefore, the frequency of responses should not be interpreted as the actual frequency with which these accommodations are provided, only the frequency with which respondents thought of each accommodation in their response.

56% of respondents (n=46) report making accommodations for pregnant jurors. Of those, the most commonly mentioned accommodations made for pregnancy were additional breaks (n=15, 33%), excusal from jury service (n=11, 24%), rescheduled jury service (n=8, 17%), and additional bathroom breaks (n=5, 11%) (see Figure 6). 20% (n=16) said they were not sure if they provided, and 7% (n=6) said they did not provide accommodations for pregnant jurors. 17% (n=14) did not respond to the question.

For breast-feeding jurors, 49% of respondents (n=40) report making accommodations. Respondents predominantly mentioned lactation rooms (n=27, 68%), with three respondents (8%) also mentioning providing refrigeration space. 20% mentioned additional breaks (n=8), 18% mentioned excusing jury service (n=7), and 10% mentioned rescheduling jury service (n=4) (see Figure 7). 22% (n=18) responded “I’m not sure”, 12% (n=10) responded that they did not provide accommodations, and 18% (n=15) did not respond to the question.

Courts generally do not provide childcare services. 71% (n=58) of respondents reported their court does not provide any accommodations for childcare; only 5% (n=4) reported making accommodations for jurors with childcare needs: two (50%) reported excusal, one (25%) reported rescheduling, and one (25%) reported providing walk-in daycare.

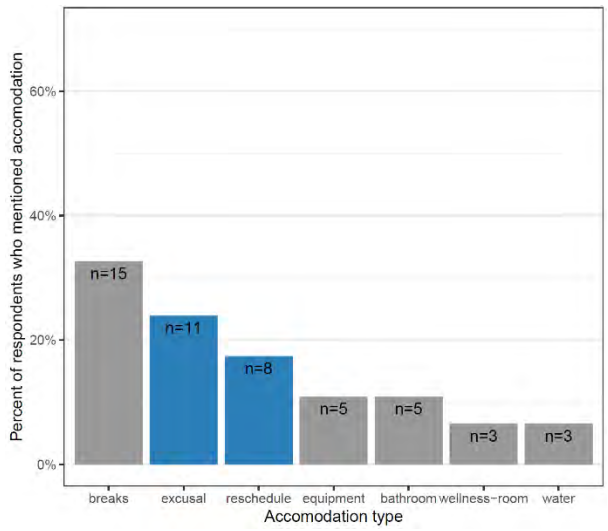


Figure 6. Top accommodations made for pregnancy (n=50). *Accommodations described by at least 5% of respondents.*

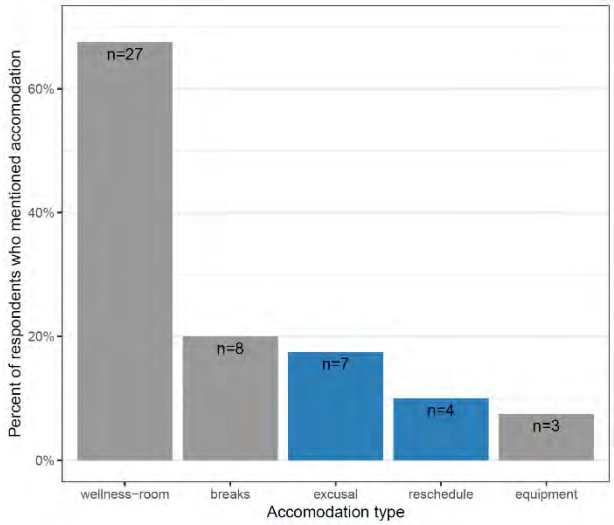


Figure 7. Top accommodations made for breastfeeding (n=49). *Accommodations described by at least 5% of respondents.*

The highest number of respondents (n=58, 71%) report making accommodations for disabilities compared to the previous questions; 9% responded “I’m not sure” (n=7) and 21% (n=17) did not respond. No court responded that they did not accommodate jurors with disabilities. This is not surprising, since discrimination against jurors based on disability violates the Americans with Disabilities Act (the ADA). The overwhelming majority of respondents describe assisted listening devices as one accommodation courts make (n=40, 69%). 52% of respondents (n=30) also describe physical access accommodations, such as ramps and elevators. 24% of respondents (n=14) mention ASL interpreters or text transcribers. Only a few respondents mention excusal as an accommodation for jurors with disabilities (n=4, 7%), compared to the higher rates of excusal for pregnant or breast-feeding jurors (24% and 18%, respectively).

32% of respondents (n=26) report taking steps to remove barriers for jurors whose gender identity is non-binary or who are transgender. 85% of respondents (n=22) describe offering single-stall or gender-neutral bathrooms, and 31% (n=8) describe using forms with gender-neutral language or forms that do not ask the person’s gender. Only one respondent (4%) noted that they ask for jurors’ preferred pronouns. One respondent (4%) mentioned that the historic building the court occupies cannot accommodate family or gender-neutral bathrooms. In contrast to other questions in the survey, this one provided examples of accommodations. The question reads, “*Does your court take steps to reduce barriers for jurors whose gender identity is non-binary or who are transgender (for example, gender neutral or family restrooms, forms that include options other than male and female, etc.)?”* Other questions did not provide those kinds of examples, which may have influenced the responses provided.

Table 2. Kinds of accommodations available to jurors in Washington courts. *This is not a comprehensive list of all accommodations that can be made for jurors, only a sample of the kinds of accommodations that have historically been made, based on open-ended responses to the Jury Diversity Survey.*

Reason for accommodation	**Type of accommodation**
I'm pregnant	- Additional bathroom breaks - Additional, or longer, breaks - Allowed to stand in the jury box - Allowed to sit out-of-order in the jury box - An ergonomic chair can be provided in the jury box - A footrest/backrest can be provided in the jury box - Snacks and water allowed in the jury box - Rescheduling or excusing jury service, if necessary - *Other accommodations as requested*
I'm breastfeeding	- Additional, or longer, breaks - A lactation room or other private room for pumping - Refrigeration for breastmilk - Rescheduling or excusing jury service, if necessary - *Other accommodations as requested*
I am the primary caregiver for a child	- Childcare is available to jurors - Rescheduling or excusing jury service, if necessary - *Other accommodations as requested*
I have a disability	- Additional, or longer, breaks - Assisted listening devices - Realtime transcription (CART) - ASL interpreters - Note-takers - Visual or reading assistance - Personal assistance - Service animals are allowed in court - Wheelchair accommodations - Wheelchair-accessible bathrooms - Elevators - An ergonomic chair can be provided in the jury box - A footrest/backrest can be provided in the jury box - A bariatric chair can be provided in the jury box - Allowed to stand and stretch in the jury box - Disabled parking is available - *Other accommodations as requested*
I have other needs	- Family bathrooms/gender-neutral bathrooms are available - Transportation vouchers are available - We reimburse mileage to and from the court - We try to dismiss jurors by 5pm - *Other accommodations as requested*

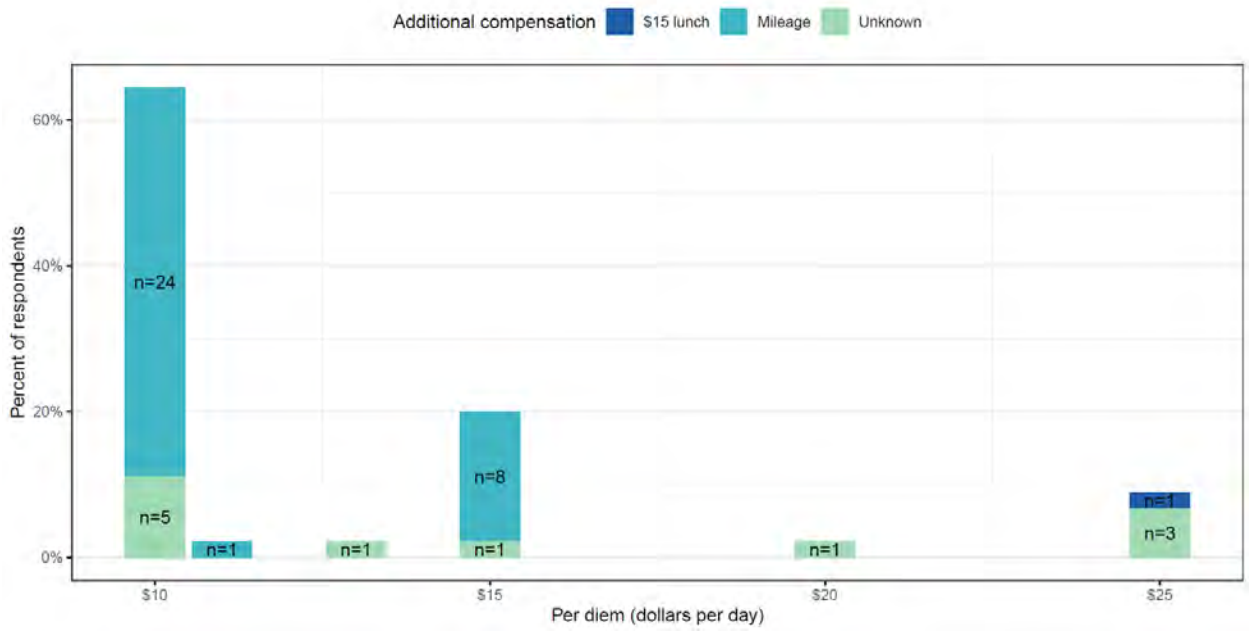
Women, Women of Color, Parents, and Other Underrepresented Groups

We also asked about barriers specific to "women, women of color, parents, or any other underrepresented group." The majority of respondents mentioned childcare (n=32, 50%), followed by financial burdens such as lost income (n=21, 40%). 11% (n=6) mentioned the English-language requirement is also a barrier. 9% of respondents (n=5) reported a mix of either 1) they believe there are no barriers or do not know what barriers these groups would experience 2) believe all jurors were treated equally and without discrimination.

Regarding additional steps courts take to reach these populations, 36% (n=16/44) stated that they take no particular steps to address barriers to jury service for women, women of color, parents, or other underrepresented groups, although another 14% (n=6) of respondents said they would make accommodations as necessary. 7% (n=3) stated that they treat everyone equally and with respect. One court (2%) mentioned doing community outreach, especially outreach to youth to encourage jury service.

Juror Pay

Figure 8. The frequency of per diem rates for jurors, with additional compensation (n=45). *The survey did not ask specifically about mileage or lunch reimbursement, but respondents described these in their open-ended responses. The 'unknown' category represents those responses that mention only juror pay, without additional compensation.*



Courts pay between $10-25 per day of jury service, and sometimes reimburse mileage as well. Of the 45 respondents (55%) who provided per diem rates, 64% of them (n=29) reported paying $10 per day, 24% (n=11) reported paying between $11-15 per day, 2% (n=1) reported paying $20 per day, and 9% (n=4) reported paying $25 per day. The highest per diem is $25 per day plus $15 for lunch. 33 of the 45 (73%) respondents mention reimbursing mileage.

Since the survey did not specifically ask about them, mileage reimbursement and paid lunch may be more prevalent than this. If jurors were paid the Washington State minimum wage ($13.69), the per-diem would be at least $109.52, which would require a 5-to-10-fold increase in court budgets for juror pay.

Barriers for Courts

The two biggest barriers respondents reported their courts face in making accommodations for jurors center on questions of resources and building access. Of the 20 respondents that described barriers, 35% (n=7) mentioned a lack of money, staffing, or time to make accommodations. 20% of respondents (n=4) described limitations to the physical court building, often in relation to historic facilities making it difficult to accommodate individuals with physical disabilities. One respondent (5%) mentioned that a lack of childcare leads to mothers being excused, one (5%) mentioned that the court building is unable to provide gender-neutral bathrooms, and one (5%) mentioned a lack of ASL interpreters. Two different courts (10%) mentioned that they have difficulty obtaining enough jurors for trials.

The overwhelming majority of survey respondents gave answers that suggest accommodations are juror-led—that is to say, no specific information about possible accommodations is provided to potential jurors—it is instead the job of the potential juror to request accommodations. Only 14 respondents answered this question. Of those, 43% (n=6) responded that jurors can contact jury coordinators, court administrators, or court managers with requests for accommodations. 29% (n=4) mentioned that information is provided on their website. 21% (n=3) mentioned that written notice is given on the actual jury summons. These responses, and the large number of non-responses, suggest that systems are not in place to advertise the kinds of accommodations courts routinely make for jurors.

Discussion

Demographic Data Collection

Most respondents indicated their courts do not collect demographic data, or that they did not know whether they did. Some courts echoed what literature points to, reminding us there is no formal compulsory requirement to collect demographic data.[10] Courts are, however, required to produce data demonstrating satisfactory evidence that a fair cross-section violation has not occurred in the event of a challenge.[10] It is therefore not surprising that the findings from the Jury Diversity Survey point to variation among courts in data collection methods, demographic variables, and storage methods.

To improve jury diversity, courts need to be able to measure demographic information about potential jurors. If those who are seated as jurors are not representative of the population, we jeopardize the rights of those being served by a trial of their peers. There are several recommendations researchers in this field have made, including standardizing the ways data is collected, and re-evaluating ways by which jury pools are formed.[10,11] As referenced earlier, there is a lack of juror representation from Black, Indigenous, and People of color, in

Washington State jury pools.[6] However, this Washington-specific research was limited to jury pools, so there is a lack of data about other stages of the jury selection process.

This Jury Diversity Survey provides information about which courts are currently collecting demographic information. This information is a valuable first step in being able to analyze jury representativeness at each stage of the jury selection process. If the lack of consistency between courts in demographic data collection persists, underrepresentation is also likely to persist. Demographic data collection is a way to measure the problem, but the barriers preventing diversity in jury pools and final juries must be addressed so resources can be appropriately and equitably distributed.

Accommodations and Barriers to Service

Generally, respondents said they would make any accommodations they could for jurors in their courts. There was a wide range of answers to the kinds of accommodations provided, although the overarching sentiment was that if the court was able to make a requested accommodation, they would.

However, questions about the steps courts take to address specific underrepresented groups, steps to inform jurors of potential accommodations, and barriers the courts themselves experience, suggest that courts are not taking an active role in ensuring jurors are provided with the accommodations they need to make jury service more feasible. It is generally the juror's responsibility to request accommodations, which makes sense, since each individual has different needs. However, if jurors are not aware they can request accommodations, they may be hesitant to respond to a jury summons.

One recommendation would be to improve communications to potential jurors about how they can request accommodations and about the specific kinds of accommodations courts typically make, so that jurors are better informed before advocating for themselves. Since many people who are called for jury service have not participated in a jury before, and likely do not have experience in the court system, they are navigating a new environment with limited information about the court's capacity to accommodate their needs. Table 4 provides an example of information that could be provided to potential jurors to alert them to common accommodations that Washington courts make.

Limitations

This survey was conducted in April 2021, and distributed to 209 courts, 76 of which responded. While this is a reasonable response rate for this kind of survey, and encompasses 35 out of 39 counties, it still does not capture a large portion of the courts in Washington state, especially courts operating at the municipal level. The court-level response rate is also an estimate based on courts that have websites. We do not believe this is a meaningful limitation and are confident that most courts operating in Washington have websites. It should be noted for future surveys.

In addition, the frequency of empty responses, and of “I’m not sure” responses, suggest the survey did not fully capture court behavior with regards to collecting demographic information and making accommodations for jurors.

However, the write-in response nature of many questions allowed respondents to express a variety of responses to our questions, giving us a broad but surface level understanding of the topic. The frequency of responses reported here should not be interpreted as representative of all Washington Trial Courts. Future surveys could use the data collected here to refine survey questions, allowing us to capture a more complete picture of individual court behaviors.

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Appendix A: Categorical definitions

Category	Description (according to respondents)		Category	Description (according to respondents)
Breaks	*Jurors are provided longer, or more frequent breaks*		Childcare (barrier)	*Jurors need to take care of children*
Excusal	*Jurors are excused from jury service*		Financial (barrier - jurors)	*Jurors cite loss of income or financial burdens*
Rescheduling	*Jurors are rescheduled for a later date*		Financial (barrier - courts)	*Time, staffing, or money constraints*
Equipment	*Jurors are provided with chairs, backrests, footrests etc. in the juror box*		English	*Jurors do not speak English*
Bathroom	*Jurors are provided additional bathroom breaks*		None	*Respondent said there were no barriers*
Wellness-room	*Jurors have access to a private room*		Transport	*Jurors have issues with transportation to court*
Water	*Jurors are allowed to bring water into the jury box*		Respect	*Respondent said the court treats jurors with respect*
Hearing	*Jurors are provided with assisted listening devices*		Resources	*Courts have other resource constraints*
Access	*Jurors have access to the building through ramps or elevators, etc.*		Building-access	*Courts have issues with building access accommodations*
Interpreter	*Jurors are provided with an ASL interpreter*		Unknown	*The respondent did not know of any barriers or accommodations*
Assistance	*Jurors are provided with personal, visual, or reading assistance*		Quorum	*The court has problems reaching a quorum of jurors*

Appendix B: Questionnaire

Draft Jury Service Data Survey Questions

Survey Recipients: AOC's list serv of jury and court administrators

SECTION 1

1. What is your first and last name?

2. Which court do you work for?

3. Please indicate whether your court currently collects, has historically collected, or has never collected demographic data on jurors/potential jurors (e.g. gender or sex, sexual orientation, race or ethnicity, age or year of birth, occupation).

- My court currently collects demographic data. [*skip to section 2*]
- My court has historically collected demographic data, but no longer collects these data. *[skip to section 3]*
- No, my court has never collected demographic data. [*skip to section 4]*
- I'm not sure *[skip to section 5]*

SECTION 2 [if "My court currently collects demographic data" to Q3 skip to SECTION 2]

4. Please indicate the type of demographic data your court currently collects for each of the following groups of people (For each item, please mark the appropriate column):

	Gender or sex	Sexual Orientation	Race or ethnicity	Age or year of birth	Occupation	None	Not Sure
People sent a jury summons	☐	☐	☐	☐	☐	☐	☐
People responding to the summons	☐	☐	☐	☐	☐	☐	☐
People excused from jury service for hardship	☐	☐	☐	☐	☐	☐	☐
People excused using peremptory challenges	☐	☐	☐	☐	☐	☐	☐

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People excused based on challenges for cause	☐	☐	☐	☐	☐	☐	☐ ☐
People impaneled	☐	☐	☐	☐	☐	☐	

5. Does your court currently collect any demographic data for jurors/potential jurors other than those just listed (gender or sex, sexual orientation, race or ethnicity, age or year of birth, occupation)?

- Yes. Please list the other information collected: _____
- No
- I'm not sure

6. If your court currently collects data on gender or sex of jurors/potential jurors, does your court include the following options as possible responses? *[If your court does not collect data on gender or sex, skip this question]*

	Yes	No	Not sure
Non-binary	☐	☐	☐
Transgender	☐	☐	☐

7. When did you begin collecting these data on potential jurors?

8. In what format are the data, how are the data stored, and for how long?

SECTION 3 [if "My court has historically collected demographic data, but no longer collects these data." to Q3 skip to SECTION 3]

9. Please indicate the type of demographic data your court historically collected for each of the following groups of people (For each item, please mark the appropriate column):

	Gender or sex	Sexual Orientation	Race or ethnicity	Age or year of birth	Occupation	None	Not Sure
People sent a jury summons	☐	☐	☐	☐	☐	☐	☐ ☐ ☐ ☐ ☐ ☐
People responding to the summons	☐	☐	☐	☐	☐	☐	

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People excused from jury service for hardship	☐	☐	☐	☐	☐	☐	
People excused using peremptory challenges	☐	☐	☐	☐	☐	☐	
People excused based on challenges for cause	☐	☐	☐	☐	☐	☐	
People impaneled	☐	☐	☐	☐	☐	☐	

10. Did your court historically collect any demographic data for jurors/potential jurors other than those just listed (gender or sex, sexual orientation, race or ethnicity, age or year of birth, occupation)?

- Yes. Please list the other information collected: _____
- No
- I'm not sure

11.If your court historically collected data on gender or sex of jurors/potential jurors, did your court include the following options as possible responses? *[If your court never collected data on gender or sex, skip this question]*

	Yes	No	Not sure
Non-binary	☐	☐	☐
Transgender	☐	☐	☐

12. When did you begin collecting demographic data on jurors/potential jurors?

13. When did you stop collecting demographic data on jurors/potential jurors?

14. What are the barriers preventing your court from collecting these demographic data currently?

15. In what format are the data, how are the data stored, and for how long?

SECTION 4: [if "No, my court has never collected demographic data." to Q3 skip to SECTION 4]

16. What are the barriers preventing your court from collecting these demographic data?

SECTION 5:

SECTION 5: [all respondents will be directed to this section regardless of response to Q3]

17. Does your court have a standard jury questionnaire that is provided to attorneys as part of voir dire?

- Yes
- No
- I'm not sure

18. [If yes to Q17] **Please copy and paste a copy of your court's standard juror questionnaire here.**

19. Does your court currently collect data on the reasons for hardship releases from jury duty?

- Yes
- No
- I'm not sure

20. Does your court provide accommodations for jurors who are pregnant?

- Yes
- No
- I'm not sure

21. [if yes to Q20] **What accommodations does your court provide for jurors who are pregnant?**

22. Does your court provide accommodations for jurors who are breastfeeding?

- Yes
- No
- I'm not sure

23. [if yes to Q22] **What accommodations does your court provide for jurors who are breastfeeding?**

24. Does your court provide accommodations to assist jurors with childcare?

- Yes
- No
- I'm not sure

25. [if yes to Q24] **What accommodations does your court provide to assist jurors with childcare?**

26. Does your court provide accommodations for jurors with disabilities?

- Yes
- No
- I'm not sure

27. [if yes to Q26] What accommodations does your court provide for jurors with disabilities?

28. Does your court take steps to reduce barriers for jurors whose gender identity is non-binary or who are transgender (for example, gender neutral or family restrooms, forms that include options other than male and female, etc.)?

- Yes
- No
- I'm not sure

29. [if yes to Q28] **What steps does your court take to reduce barriers for jurors whose gender identify is non-binary or who are transgender?**

30. In your opinion, what are the most common barriers to jury service for women, women of color, parents, or any underrepresented groups?

31. Does your court take any other steps to reduce barriers to jury service for women, women of color, parents, or other underrepresented groups that you would like to share?

32. What challenges or barriers does <u>your court</u> encounter when trying to make accommodations for jurors or reduce barriers to jury service?

33. If your court provides accommodations to reduce barriers to jury service, how are potential jurors made aware of them? *[If your court does not provide accommodations to reduce barriers to jury service, skip this question]*

34. How much does your court/county pay for jury service?

35. If you marked "I'm not sure" or "Not sure" to any of the previous questions please provide the name(s) and email address(es) for others in your court who may be able to provide that information.

THE LAW OFFICES OF SMITH AND WHITE, PLLC

June 24, 2022 - 5:00 PM

Transmittal Information

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Petitioner's Reply with Appendix attached.

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