

# 2021: HOW GENDER AND RACE AFFECT JUSTICE NOW



## GENDER AND JUSTICE COMMISSION

Promoting Gender Equality  
in the Justice System



## Executive Summary and Recommendations



[www.courts.wa.gov/genderjustice](http://www.courts.wa.gov/genderjustice)



# 2021 Gender Justice Study: Executive Summary and Recommendations

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

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## 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+<sup>1</sup> 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 women in poverty.

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.

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<sup>1</sup> 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

## 2021 Gender Justice Study Authors

### Kelley Amburgey-Richardson, JD

Kelley Amburgey-Richardson is the Senior Court Program Analyst to the Gender and Justice Commission. Prior to joining the Administrative Office of the Courts in 2017, she was the statewide PREA Program Coordinator for the Washington Coalition of Sexual Assault Programs, and served as an appointed member of the Gender and Justice Commission. Ms. Amburgey-Richardson started her career as a legal aid attorney in Oregon, representing primarily immigrant survivors of domestic and sexual violence in family and employment matters.

### Judge Joseph Campagna

Joe Campagna is the Presiding Judge of the West Division of the King County District Court. Prior to taking the bench in 2019, Judge Campagna worked in private practice representing criminal defendants and personal injury plaintiffs in courts throughout the region. Judge Campagna has a particular interest in therapeutic courts and prisoner re-entry initiatives.

### Kristi Cruz, JD

Kristi Cruz is a staff attorney at the Northwest Justice Project. Ms. Cruz was a co-reporter for the American Bar Association's Standards for Language Access in Courts project, which created national standards for the effective delivery of interpreter and translation services in courts, and she is involved in state and national efforts to reduce language barriers for limited English proficiency (LEP) and Deaf individuals as they access education, healthcare, legal, and governmental services.

### Laurie Dawson

Laurie Dawson was born and raised in Thailand. In 2012, after experiencing the incarceration of a close friend in Washington State, Laurie became actively involved in learning about restorative practices and the implementation of the United Nations Standard Minimum Rules for the Treatment of Women Prisoners (Bangkok Rules). She is a member of the Local Family Council at

the Washington Corrections Center for Women (WCCW), the Kitsap County Community Partnership for Transition Solutions, Washington State Coalition for Children of Incarcerated Parents, and she is active with other Washington State based coalitions focused on criminal justice reform. She is also a volunteer with the Kitsap Dispute Resolution Center.

### **Judge Rebecca Glasgow**

Judge Rebecca Glasgow joined the Court of Appeals in 2019. Before joining the court, she was a Deputy Solicitor General in the Washington Attorney General's Office and she is a past statewide president of Washington Women Lawyers and a member of the Gender and Justice Commission

### **Katrina Goering, BSW, MPH**

Katrina Goering (she/her) is a Public Health and Social Work professional with over a decade of experience working in direct social service, prevention, and advocacy efforts with diverse populations in urban and rural settings. She currently works with migrant and seasonal farmworkers in Northwestern Washington. Her area of expertise is in community-led research and programming aimed at reducing health disparities and advancing health equity efforts affecting rural and underrepresented immigrant/migrant communities. She has worked in the non-profit and government sectors. She earned her Bachelor of Social Work from Eastern Mennonite University and her Master of Public Health from the Community Oriented Public Health Practice Program at the University of Washington.

### **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.

## Kelly Harris, JD

Kelly Harris is a career prosecutor, serving as a Senior King County Prosecuting Attorney and Assistant U.S. Attorney for the Western District of Washington in his 26-year career. He is currently Chief of the Criminal Division for the Seattle City Attorney's Office. Additionally, Kelly is an Adjunct Professor with Seattle University Law School, teaching Professional Responsibility & Ethics and a first of its kind Criminal Justice Reform seminar.

## Elizabeth Hendren, JD

Elizabeth Hendren is a staff attorney at Northwest Justice Project. In 2012, she created the Reentry Initiated through Services and Education (RISE) Project, which provides comprehensive civil legal services to currently and formerly incarcerated mothers to facilitate family reunification. Elizabeth also serves on the Gender and Justice Commission, where she chairs the Incarceration, Gender & Justice Committee.

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Laura Jones currently works as a Project Coordinator for the Gender and Justice Commission, staffing projects related to domestic and sexual violence. Since completing a law school internship at a legal clinic in Managua, Nicaragua, Laura has focused her career on gender-based violence issues, including managing King County Sexual Assault Resource Center's CourtWatch program and coordinating legislative work groups related to domestic violence. Laura has also volunteered with the King County Bar Association's Neighborhood Legal Clinics, and participated in its Family Law Mentor Program.

### Sharese Jones, MA

Sharese Jones began her career with the Washington State Department of Corrections (DOC) in 2002, beginning in the prison as a Correctional Officer and Classification Counselor. Then moving into Community Corrections, she worked as a Community Corrections Officer and Sex Offender Treatment Provider. In 2019 she took on the role of Gender Responsive Manager where she managed the Gender Responsivity in DOC for two years. She is now utilizing her education and experience to work in the mental health unit at Washington Corrections Center in Shelton as a Psychology Associate. She is doing Mental Health Evaluations and providing grief and/or crisis counseling to the incarcerated individuals. She earned a Bachelor's Degree from Evergreen in 2006 and a Master's Degree from Saint Martin's University in 2016.

### Judge David Keenan

Judge David Keenan is the Superior Court Judges' Association Liaison to the Legal Financial Obligations Consortium and was part of a Washington delegation to the National Conference of State Legislatures Fines and Fees Policy Learning Consortium. Judge Keenan currently serves on the Access to Justice Board, previously served as board president at Northwest Justice Project, and has personal experience with poverty and the juvenile criminal legal system.

### Shannon Kilpatrick, JD

Shannon Kilpatrick is a civil appellate lawyer with a solo practice in the Seattle area. She has spent most of her career representing people injured, killed, or mistreated by the negligence or misconduct of others, including large corporations and local and state governments. She began her career as a judicial law clerk to the Honorable Debra Stephens on the Washington Supreme Court.

### Stephanie Larson

Stephanie Larson will graduate from Pitzer College in 2023 with a major in Political Studies, a concentration in U.S. Politics, and a minor in English & World Literature. She is planning to pursue a career in law and is passionate about using law as a tool to combat systemic biases within the criminal justice system.

### Robert Lichtenberg, JD

Robert Lichtenberg serves as Senior Court Program Analyst for the Washington State Administrative Office of the Courts (AOC) and staffs the Supreme Court Interpreter Commission. He oversees spoken language interpreter testing and training, coordinates the policy-making efforts of the Interpreter Commission, and provides training and resource assistance to court personnel statewide on interpreter matters. Before joining AOC, he served as Assistant Director of the Office of the Deaf and Hard of Hearing, an agency in the Department of Social and Health Services, where he was responsible for program coordination and staff supervision of several program activities covering social and telecommunications services. Mr. Lichtenberg is a graduate of University of Washington School of Law and of Lewis and Clark College, where he majored in Economics. He also has a post-graduate certificate in Rehabilitation Management from San Diego State University.

### Judge Barbara Mack (ret.)

Judge Barbara Mack (ret.) served ten years as a King County Superior Court Judge. She convened and chaired the King County Task Force on Commercially Sexually Exploited Children (CSEC) for its first five years. She serves on the board of the National Council of Juvenile and Family Court

Judges, and has trained judicial officers and others nationwide on issues related to human trafficking.

### **Judge Maureen McKee**

Maureen McKee has been a King County Superior Court judge since her appointment on August 13, 2018. Prior to joining the bench, Maureen worked at The Defender Association, a division of the King County Department of Public Defense, for almost 16 years. During this period, Maureen was a staff attorney, supervisor for the Investigation and Misdemeanor Units, and the Interim Managing Attorney. Maureen received her B.A. degree in Black Studies from Oberlin College and received her law degree from Cornell Law School. Prior to law school, Maureen was a VISTA Volunteer in Chicago, IL, and a job developer with the National Institute for People with Disabilities in New York, NY. During law school, Maureen received the opportunity to serve displaced persons at the American Refugee Committee in Mostar, Bosnia and incarcerated mothers at Legal Services for Prisoners with Children in San Francisco, CA.

### **Robert Mead, JD, MLS**

Robert Mead is the State Law Librarian for Washington State. Prior to this position he was the Deputy Chief Public Defender for New Mexico. He is co-author of the treatise *Advising the Elderly Client*. His career path has alternated between law librarianship and public interest law including public defense, elder law, and disability rights.

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Joanne Moore was director of the Washington State Office of Public Defense until she retired in December of 2020. Her entire 40-year career was spent working for justice reform, including 22 years at the Office of Public Defense.

### **Sophia O'Hara**

Sophia O'Hara will graduate from University of California, Santa Barbara in 2022 with a Sociology B.A. and minor in History. She is passionate about sexual health, reproductive justice, and gender equity. She coordinates a human sexuality course at UCSB, conducts policy analysis for Students for Reproductive Justice and Students Against Sexual Assault, and previously worked at the Seattle Public Health HIV/STD department. She plans to pursue a career in public health and policy in hopes of ensuring all people have access to inclusive, accurate, and resourced sex education.

### **Shelby Peasley, JD**

Shelby Peasley graduated from University of Washington with a BA in Political Science and received her JD from Washington & Lee University School of Law. She previously externed for the Chambers of Washington Supreme Court Justice Sheryl Gordon McCloud. Shelby now lives and works as an attorney in Atlanta, GA with her cat Eleanor.

### **Dr. Dana Raigrodski, LLB, SJD**

Prior to joining the faculty at the University of Washington School of Law, Dana Raigrodski practiced law for the Israeli Defense Forces Military Advocate General Staff Command, serving as a military prosecutor and legal counselor. Dr. Raigrodski serves as an appointed member of the Gender and Justice Commission and is Co-Chair of the Gender Justice Study. As a scholar and advocate she focuses on human trafficking, migration and globalization, criminal procedure and jurisprudence, and feminist and critical race theories.

### **Judge Judith H. Ramseyer**

Judge Judith H. Ramseyer was elected to the King County Superior Court in 2012. Before joining the court, she practiced complex civil litigation and championed the rights of women and the disenfranchised. Judge Ramseyer chaired the task force that administered a state-wide survey and published the first Glass Ceiling report, assisted by the Gender and Justice Commission: 2001 Self-Audit for Gender and Racial Equity in Washington. She was Chief King County Juvenile Court Judge and is Immediate-Past President of the Superior Court Judges' Association.

### **Jennifer Ritchie, JD**

Jennifer Ritchie is a Senior Deputy Prosecutor with the King County Prosecuting Attorney's Office. She has been with the Prosecuting Attorney's Office for 27 years, and currently serves as the Unit Chair of the Sexually Violent Predator Unit. Ms. Ritchie was first appointed to the Gender and Justice Commission in 2016 as the first person to fill the new permanent Washington Women Lawyers membership seat. She now serves as an attorney member of the Commission.

### **Sierra Rotakhina, MPH**

Sierra Rotakhina is the Project Manager for the 2021 Gender Justice Study. She is a public health practitioner and researcher. Sierra earned her Masters in Public Health from the University of Washington Community Oriented Public Health Practice program. Sierra has focused her career on promoting equity in policies, programs, and procedures through evidence-based policy-making, the use of equity analysis tools, community engagement, and research.

### **Judge Jacqueline Shea-Brown**

Judge Jacqueline Shea-Brown has served on the Benton & Franklin Counties Superior Court for almost six years. She is a member of the Gender and Justice Commission, a co-chair of the Commission's Domestic & Sexual Violence Committee and a co-chair of the Commission's E2SHB 1320 Working Group. She is the chair of the Washington State Superior Court Judges' Association (SCJA) Judicial Assistance Services Program (JASP) Committee and a member of the SCJA Equality and Fairness Committee.

### **Julie Tergliafera, MPH**

Julie Tergliafera contracted as a Research Analyst for the Gender and Justice Commission's Gender Justice Study. Julie earned her Masters in Public Health from the University of Washington Community Oriented Public Health Practice program. Julie brought a public health and equity lens and extensive research experience to the study.

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Constance van Winkle started interpreting American Sign Language (ASL) around age three for an older deaf sibling. She spent many years working as a Certified ASL Interpreter and recently completed her JD in public interest law.

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Marla Zink is a partner in Luminata, PLLC where she practices as a criminal defense attorney handling appointed and private direct appeals and other post-conviction matters in both the federal and state systems. Her work prior to Luminata includes nearly a decade with the Washington Appellate Project and serving as a law clerk to the Honorable Robert Beezer on the Ninth Circuit Court of Appeals.

# Washington State Supreme Court Gender and Justice Commission

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### **Chief Judge Cindy K. Smith**

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### **Victoria L. Vreeland**

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2018 – 2021 (2<sup>nd</sup> Term)

For a list of current members, visit the [Gender and Justice Commission's website](#).

# 2021 Gender Justice Study Advisory Committee Members

Member	Affiliation
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The Honorable Michael Spearman	Former Washington State Court of Appeals Division I Judge
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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)

## Acknowledgments

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We would also like to thank the authors and contributors to the five pilot projects who did significant work to increase Washington specific high quality, trustworthy, evidence-based data:

Adam Wohlman	Erica Magana	Nicole Hurst
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Elizabeth Ramirez	Miranda Johnson	Dr. William Vesneski
Emilie Maddison	Nick Flett	Yurie Osawa

In planning for and implementing this large-scale study and its pilot projects, we relied on support from our judicial branch partners, including the following entities and their staff:

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.

This executive summary presents summaries of the findings and recommendations from each of the 16 chapters of the 2021 Gender Justice Study. For complete findings, supporting citations, methods, limitations and other supporting data, see the full report at:

<https://www.courts.wa.gov/?fa=home.sub&org=gjc&page=studyReport&layout=2&parent=study>

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## 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 the full [2021 Gender Justice Study](#).

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 Reconciliation 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

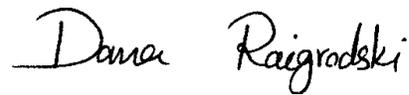
to domestic violence perpetrator treatment. Representatives from the Executive, Legislative, and Judicial branches, the law schools, legal professionals, and others volunteered their time to our oversight Advisory Committee. We celebrated our joys at the depth of the research produced, our principled 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 State Supreme Court Gender  
and Justice Commission Co-Chair,  
Gender Justice Study Co-Chair



Dr. Dana Raigrodski

Washington State Supreme Court Gender  
and Justice Commission Member,  
Gender Justice Study Co-Chair

## Recommendations to Improve Justice System Data

- The Washington State Center for Court Research of the Administrative Office of the Courts (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.
- 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.

# 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

### 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.<sup>1</sup>

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.

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<sup>1</sup> It is important to note that datasets which combine diverse populations into one racial category (e.g., combining all Asian and Native Hawaiian and Other Pacific Islanders) often mask disparities within those diverse populations.

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 needed to improve all court users' ability to conduct court business are: using low-cost remote means to "come to court," supporting access to childcare resources, and ensuring that user fees and other court related fees can be waived for those who can't afford them.

## 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.

## Chapter 2

### Communication and Language as a Gendered Barrier to Accessing the Courts

Kristi Cruz, JD and Robert Lichtenberg, JD

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

#### 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 laws 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) and LGBTQ+ individuals are disproportionately 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.

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.

## 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:
  - 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

### Summary

The diversity of a jury, and the larger jury pool from which the jury is selected, impacts jury decisions. Diverse juries typically deliberate for a longer period of time, discuss more case facts, make fewer inaccurate statements, and contain members who 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 as well as Lesbian, Gay, Bisexual, Transgender, and Queer or Questioning (LGBTQ+) people are underrepresented in Washington jury **pools**. 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, 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 that 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 development of strategies to reduce known barriers to jury service. We emphasize eliminating or mitigating economic barriers. Recommendations include increasing access to childcare and other family care for potential jurors and establishing pilot community and nontraditional courts to accommodate people with

childcare responsibilities. Finally, recommendations include exploring ways to expand financial compensation for jurors.

## 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

### Summary

The 1989 Gender and Justice in the Courts 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 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. 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 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.

## 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 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 (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.
- 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

### 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 affect 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; 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 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.

## 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

Shannon Kilpatrick, JD

Robert Mead, JD, MLS; Sierra Rotakhina, MPH

### 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.” 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 disproportionately represented among kinship caregivers in Washington.

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 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.

## Recommendations

- 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 7

## Gender Impact in Family Law Proceedings

David Ward, JD

Robert Mead, JD, MLS

### Summary

Gender bias in family law proceedings<sup>2</sup> 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

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<sup>2</sup> 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.

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 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. 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; and providing increased remedies when unmarried partners in committed intimate relationships separate.

## 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.

# PART III

## Gender, Violence, Youth, and Exploitation

# Chapter 8

## Consequences of Gender-Based Violence: Domestic Violence and Sexual Violence

Laura Jones, JD and Judge Jacqueline Shea-Brown

Katrina Goering, BSW, MPH; Stephanie Larson; Rob Mead, JD, MLS

### Summary

Domestic and sexual violence are categories of gender-based 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, 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. 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+ 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 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

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 Reconciliation Therapy (DV-MRT), and to promote and require education for justice system stakeholders working on cases involving domestic and sexual violence.

## 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<sup>3</sup> and develop a model guidance memo to implement them.
- Given that the evaluation of Domestic Violence Moral Reconciliation 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.
- 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

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<sup>3</sup> 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.

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.

# Chapter 9

## Juvenile Justice and Gender and Race Disparities

Judge Judith Ramseyer

Claire Mocha, MPH

### 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 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, 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 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.

## 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.
  - 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 LGBTQ+-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

### 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 under counted. 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 over-representation 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 socio-economic 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.

## 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.

- 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 LGBTQ+-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

### 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 of prisoners 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.

## 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

### 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, highlight 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 disproportionately incarcerated and doubly harmed by sexism and racism.

## 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

### 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 other 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 shows 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 all sexual assaults.

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 all racial and ethnic groups including 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.

## Recommendations

- 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.

- 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.
  - Courts should not order defendants into any program or treatment that has not proven to be effective enough to make that list.
- 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 14

## Sentencing Changes and Their Direct and Indirect Impact on Women

Marla Zink, JD

Judge Maureen McKee; Sierra Rotakhina, MPH

### 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.

## 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, 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 inmates 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

### 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.

## Recommendations

- To facilitate a single place to access statewide Legal Financial Obligation (LFO) data, by December 2021, stakeholders should be convened<sup>4</sup> 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).

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<sup>4</sup> 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).

- 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.
- 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.
    - 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

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### 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 disproportionately carried by women, especially Black, Hispanic/Latinx, and Indigenous women. As one astute commentator noted, “Women are the informal reentry system of this country.” 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), 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

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.

## 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 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.

## Recommendations to the Washington State Caseload Forecast Council

- The Caseload Forecast Council (CFC) should write a report outlining: (1) the current limitations of data from Felony Judgment 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.