

Chapter 11

Incarcerated Women in Washington

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I. Summary

The number of women who are incarcerated in Washington State grew exponentially and largely in the shadows between 1980 and 2000, a trend mirrored in much of the nation. However, while the female population in prison has declined in many other states in the 2000s, Washington's numbers have continued to increase or have declined at a lower rate during this same time period. It is well past time to shine light into the shadows and address the growing incarceration of women in Washington.

Unfortunately, the data and research in this area is thin. Voluminous research shows American Indian/Alaska Natives and Black individuals are disproportionately represented in our prison and jail populations. However, for the most part, data analyses do not account for the intersection of sex, race, and ethnicity—even when the data would allow for such exploration. To start addressing this gap in the literature, the Gender and Justice Commission commissioned an analysis of Washington State felony judgment and sentencing data. The pilot project found that Black, Indigenous, and women of color are convicted and sentenced at rates two to eight times higher than white women. In addition, the types of crimes for which women and men are convicted, vary greatly. Women were convicted and sentenced in relatively higher proportions in drug, property, and fraud categories, compared to violent and sex offenses.

Complicating the problem, data on race and ethnicity suffers from problems in how groups are identified, classified, and reported. Moreover, Washington-specific gender identity and sexual orientation data largely does not exist. Therefore, we lack a complete picture. We extrapolate from national and other research where possible, but more work should be conducted to parse out Washington's data and to identify and address the root causes of over-incarceration.

Based on the research and data in which we do have confidence, the forces driving the growing incarceration of women in Washington center around criminalization rather than treatment of complex and other traumas; increasingly harsh penalties, particularly for drug offenses, which have disparately harsh impacts on Black, Indigenous, and communities of color; policing and prosecuting practices that zero-in on certain offenses in certain communities, particularly Black, Indigenous, and communities of color; a rise in pretrial incarceration and its relation to socioeconomic status but also its impact on

socioeconomic status; and persistent growth in sentencing laws that result in lengthier sentences, keeping more women locked up for longer. We also recognize that racism and marginalization underlie criminalization and incarceration in this country, and in Washington. Throughout this chapter, we recommend changes to end these practices and substantially reverse the trend.

II. Washington State's Increase in Female Convictions and Incarceration

Generally, data shows an increase in female convictions and incarceration in Washington State as compared to males in the 2010s.¹ This chapter examines the data, the policies and the laws that have been shown to be driving the data, and the effect of this trend on women and subpopulations of women.²

There are data limitations in this report, particularly for demographic data such as data on sex, race, and ethnicity. The datasets and research often use only binary female/male gender options, do not clarify how transgender individuals are being coded, or fail to differentiate between gender identity and sex.³ With regard to data related to incarceration specifically, Washington State anecdotes and research indicate that individuals are often housed based on their sex assigned at birth rather than their gender identity,⁴ therefore these individuals are likely often misclassified in data included in this chapter. Therefore, throughout this chapter

¹ E. Ann Carson, *National Prisoner Statistics Program*, BUREAU OF JUST. STAT. (2018), <https://bjs.ojp.gov/data-collection/national-prison-statistics-nps-program> (generated using the online Corrections Analysis Tool)

² We use the terms “women” or “female” to refer to the population of persons incarcerated in female facilities. We recognize, however, that some people in those facilities do not self-identify as women.

³ The Centers for Disease Control and Prevention defines “gender identity” as “an individual’s sense of their self as man, woman, transgender, or something else” and defines “sex” as “an individual’s biological status as male, female, or something else. Sex is assigned at birth and associated with physical attributes, such as anatomy and chromosomes.” *Terminology: Adolescent and School Health*, CTRS. FOR DISEASE CONTROL & PREVENTION (2020), <https://www.cdc.gov/healthyouth/terminology/sexual-and-gender-identity-terms.htm>.

⁴ Disability Rights Washington has collected extensive data through interviews with transgender prisoners in Washington. The Gender and Justice Commission received a presentation of preliminary data in 2019. The final report from Disability Rights Washington is forthcoming. GENDER & JUST. COMM’N, FRIDAY, NOVEMBER 1, 2019 MEETING NOTES 6 (2019), https://www.courts.wa.gov/content/publicUpload/Gender%20and%20Justice%20Commission%20Meeting%20Materials/20191101_m.pdf; DISABILITY RTS. WASH.: TRANS IN PRISON JUST. PROJECT, TRANS JUSTICE WORK IN WASHINGTON STATE PRISONS (2019), https://www.courts.wa.gov/content/publicUpload/Gender%20and%20Justice%20Commission%20Meeting%20Materials/20191101_d.pdf; Nick Garber, *She Protested in Seattle, Then Spent 2 “Terrifying” Days in Jail*, PATCH (June 8, 2020), <https://patch.com/washington/seattle/she-protested-seattle-then-spent-2-terrifying-days-jail>.

when we discuss female and male incarcerated individuals we are most likely actually discussing “individuals incarcerated in female facilities” and “individuals incarcerated in male facilities” regardless of their true gender identity. Race and ethnicity data is also limited by several factors. It is often unclear if individuals’ race and ethnicity was self-identified, the race categories generally lack granularity or have other limitations that can mask disparities. This happens frequently for Native Hawaiian and other Pacific Islander Populations. See Section V of the full report (“2021 Gender Justice Study Terminology, Methods, and Limitations”) for a more detailed explanation of the data limitations.

A. In the 2010s, Washington’s female incarceration rates have increased as compared to males

Generally, data shows an increase in female convictions and incarceration in Washington State as compared to males in the 2010s.⁵ This section examines available data that show recent trends. Both nationwide and Washington State data are analyzed. Moreover, within each category, various subgroups are addressed: state and federal jurisdictions, local city and county jails, and American Indian and Alaskan Native (AIAN)⁶ populations. The next section analyzes the social and legal environments that may explain the data trends. Although women are still incarcerated at a lower rate than men, in recent years, male imprisonment rates decreased faster than female rates, or even decreased in years that female rates increased both nationally and in Washington.⁷ The reasons for the disparity are somewhat unclear. However, recent studies suggest that an increase in pretrial detention, an increase in incarceration for probation

⁵ Carson, *supra* note 1.

⁶ The Urban Indian Health Institute, in its report titled *MMIWG: WE DEMAND MORE*, indicates that they “use the terms Native, Native American, and American Indian/Alaska Native interchangeably in [their] report to acknowledge the varying ways that North American Indigenous peoples are forced to identify within the American racial structure and English language.” ABIGAIL ECHO-HAWK, ADRIAN DOMINGUEZ & LAEL ECHO-HAWK, *MMIWG: WE DEMAND MORE* 4 (2019), <https://www.uihi.org/resources/mmiwg-we-demand-more/>. This Study is also based on the acknowledgement that race is a social construct and recognizes the limitations of both the terminology coded into datasets and used in research and the race/ethnicity data that our report relies upon. Often reports, research articles, and datasets cited here do not describe if race or other demographic information was self-reported and, if so, what options individuals were given to inform the terminology used. For this purpose, we generally use the terminology throughout this section that was used by the source authors to avoid the risk of inadvertently misrepresenting their findings. See Section V of the full report for a more detailed explanation of terminology used throughout the report.

⁷ Carson, *supra* note 1.

violations, an increase in mandatory sentences for drug offenses, fewer opportunities for post-sentence review and early release, and the impact of trauma on involvement in the justice system have all contributed to the increase in female incarceration rates. These contributors are examined in Section III of this chapter.

1. Types of confinement facilities in Washington

Research regarding incarceration rates in Washington includes information on incarcerated individuals in different confinement facilities.

Jails:⁸ In Washington, jails are facilities managed locally by municipalities, counties, or American Indian and Alaska Native Tribes. Jail facilities are intended to hold individuals for less than a year on a temporary or short-term basis.⁹ Jail populations include adult¹⁰ pretrial individuals who are unable to pay bail/were not granted bail while awaiting a trial date, some convicted adults waiting for sentencing, and adults serving misdemeanor sentences of less than a year.¹¹ Individuals incarcerated in jails may also be held temporarily as they wait to be transferred to a prison.¹²

Prisons:¹³ Prisons are facilities used to house adults following entry of a conviction in court. In other jurisdictions and generally in Washington, prisons house people with felony sentences

⁸ “Facilities include jails, detention centers, city and county correctional centers, special jail facilities (such as medical or treatment centers and pre-release centers) and temporary holding or lockup facilities that are part of the jail’s combined function.” DANIELLE KAEBLE & MARY COWHIG, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016 (2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>.

⁹ Ellen Belcher, *Lloyd Sealy Library LibGuides: New York Prisons and Jails: Historical Research: Definitions: Jail & Prison*, JOHN JAY COLL. OF CRIM. JUST., CUNY(2020), <https://guides.lib.jjay.cuny.edu/c.php?g=288375&p=1922709>; BERK IN PARTNERSHIP WITH ANNE PFLUG, CAMPBELL CONSULTING AND JOPLIN CONSULTING, FINAL REPORT: ANALYSIS OF STATEWIDE ADULT CORRECTIONAL NEEDS AND COSTS (2014); *What Is the Difference Between Jails and Prisons?*, FREQUENTLY ASKED QUESTIONS, BUREAU OF JUST. STAT., https://bjs.ojp.gov/frequently-asked-questions?iid=322&ty=qa&combine=&sort_by=changed&sort_order=DESC&page=1#faq-what-is-the-difference-between-jails-and-prisons.

¹⁰ “...may hold juveniles before or after they are adjudicated.” KAEBLE & COWHIG, *supra* note 8. In Washington, counties are required to maintain “juvenile detention facilities . . . separate and apart from” adult detention facilities. RCW 13.16.030. There are very limited circumstances and periods of time, outlined in RCW 13.04.116, in which a juvenile may be held in an adult facility. Juvenile Justice in Washington is examined in depth in “Chapter 9: Juvenile Justice and Gender and Race Disparities.”

¹¹ BERK IN PARTNERSHIP WITH ANNE PFLUG, CAMPBELL CONSULTING AND JOPLIN CONSULTING, *supra* note 9; Belcher, *supra* note 9.

¹² BERK IN PARTNERSHIP WITH ANNE PFLUG, CAMPBELL CONSULTING AND JOPLIN CONSULTING, *supra* note 9.

¹³ Prison facilities include: “public or private prisons, penitentiaries, correctional facilities, halfway houses, boot camps, farms training or treatment centers and hospitals.” KAEBLE & COWHIG, *supra* note 8.

greater than one year. In Washington, prison sentences can include some sentences of less than one year, such as a prison-based Drug Offender Sentencing Alternative (DOSA) sentence. Prisons can be operated by the state or federal government.¹⁴ In Washington, state prisons are managed by the statewide Department of Corrections.¹⁵

2. Community supervision

In national research, the community supervision population generally includes individuals on probation and parole.¹⁶ Washington has a system of probation, but it abolished parole for all crimes occurring after June 30, 1984 as part of the Sentencing Reform Act. See “Chapter 14: Sentencing Changes and Their Direct and Indirect Impact on Women” for more information.

Probation: Individuals are often given probation as an alternative to being incarcerated and have a “court-ordered period of supervision in the community while under the control, supervision, or care of a correctional agency.”¹⁷ Probation may or may not require reporting to a correctional agency and the amount of active supervision can vary widely.¹⁸

Parole or, in Washington, Community Custody: In Washington, the Sentencing Reform Act requires most felony sentences to include a term of community custody following incarceration where the individual is supervised according to certain conditions in the community.¹⁹ This includes individuals who committed sex offenses and are subject to the Indeterminate Sentence Review Board and are released from incarceration to supervision for the remainder of the statutory maximum for the crime(s).²⁰ Parole in Washington only applies to persons convicted of

¹⁴ BUREAU OF JUST. STAT., *supra* note 9.

¹⁵ Individuals held in immigration detention are not included in this study, although Washington State is home to one of the largest immigration detention centers, the Northwest ICE Processing Center (recently renamed from the Northwest Detention Center). Civil immigrant detainees are also held at the Federal Detention Center in SeaTac and in local jails, including the Cowlitz County Youth Services Center in Longview. ICE reports 23,429 individuals currently detained nationwide, as of 6/20/2020. This statistic is not broken out by location, sex, or other demographic. *Detention Management*, U.S. IMMIGR. & CUSTOMS ENFT (July 8, 2021), <https://www.ice.gov/detention-management>. Also not included in this study are persons detained due to mental health under the state’s civil commitment laws. See *generally* Chapter 71.05 RCW.

¹⁶ DANIELLE KAEBLE, PROBATION AND PAROLE IN THE UNITED STATES, 2016 (2018).

¹⁷ BUREAU OF JUST. STAT., *supra* note 9; KAEBLE, *supra* note 16.

¹⁸ KAEBLE & COWHIG, *supra* note 8.

¹⁹ RCW 9.94A.701-711.

²⁰ RCW 9.94A.507. Indeterminate sentences are discussed further in “Chapter 14: Sentencing Changes and Their Direct and Indirect Impact on Women.”

crimes occurring on or before June 30, 1984. Nationally, individuals are released on parole often either by a parole board or according to provisions of a statute.²¹ Individuals on parole are released early from their prison term and serve the remainder of their sentence in the community under the supervision of a correctional agency.²²

3. Net increase in incarceration rates across the United States

Female incarceration in state prisons, federal prisons, and jails nationwide increased more than 750% between the years 1980 and 2017. Rising from a total of 26,378 women incarcerated in 1980 to 225,060 in 2017.²³ While population increases since 1980 at least partially account for this steep increase, as shown below, the rates per 100,000 people have also increased in this time period. This shows that increases in incarceration have outpaced increases in the population. In evaluating these data, readers should keep in mind that, in the world, the United States (U.S.) has the highest jail and prison population, the highest female jail and prison population, the highest incarceration rate, and the highest female incarceration rate.²⁴

a. State and federal prisons in Washington State and nationwide

i. Summary - Washington State's female prison population has been on the rise

The incarceration rate in Washington State in 2016 was over three times higher than the average rate for the Organization for Economic Cooperation and Development (OECD) countries. Washington is one of only eight states nationwide that saw the prison population grow throughout most of the 2010s. Even as crime rates were falling, Washington's prison population

²¹ BUREAU OF JUST. STAT., *supra* note 9.

²² *Id.*; KAEBLE & COWHIG, *supra* note 8; KAEBLE, *supra* note 16.

²³ THE SENT'G PROJECT, FACT SHEET: INCARCERATED WOMEN AND GIRLS (2019), <https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf>. When studying national data from 1980 to 2019, female incarceration increased by more than 700%. THE SENT'G PROJECT, INCARCERATED WOMEN AND GIRLS (2020), <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/>.

²⁴ ROY WALMSLEY, WORLD FEMALE IMPRISONMENT LIST: FOURTH EDITION (2017), https://www.prisonstudies.org/sites/default/files/resources/downloads/world_female_prison_4th_edn_v4_web.pdf; ROY WALMSLEY, WORLD PRISON POPULATION LIST: TWELFTH EDITION (2018), https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf.

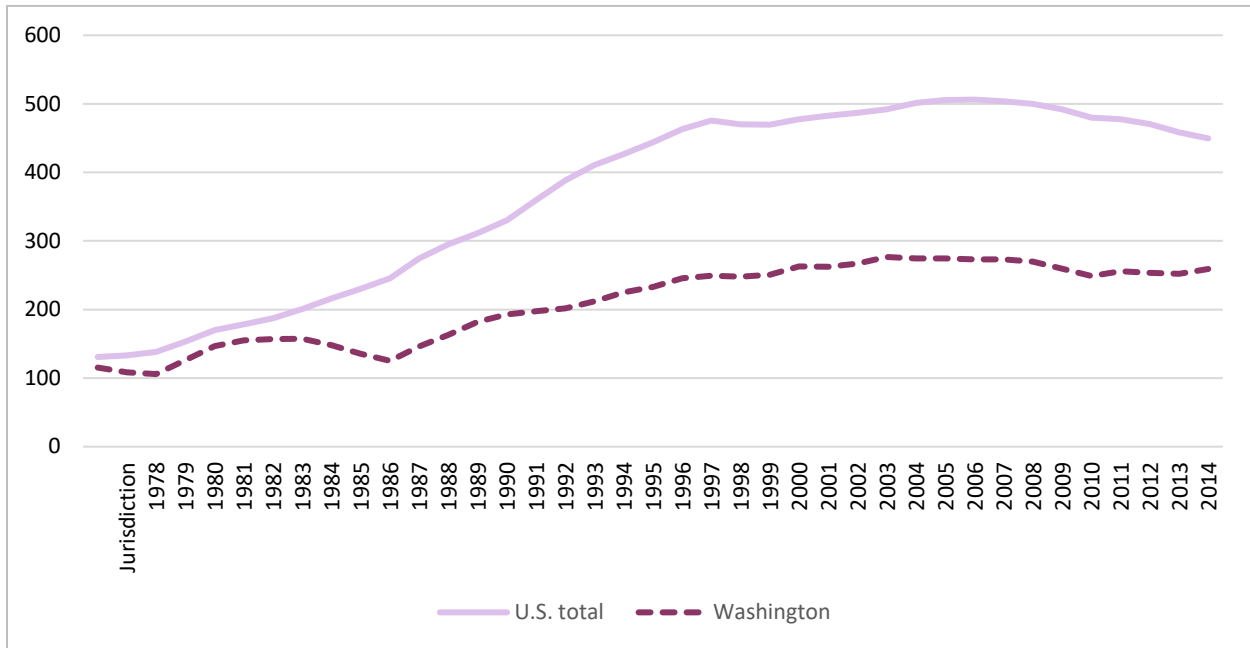
grew.²⁵ While growth in the prison population may be expected over time as the population grows, the fact that Washington saw an increase in the prison-population rate per 100,000 people while many other states reduced their prison populations is of interest. Within this context, we examine the rise in Washington State’s female prison population.

In Washington, and in the U.S., imprisonment rates for all genders combined increased during the 1980s and 1990s before leveling off in the 2000s. However, Washington diverges from U.S. trends more recently. From 2006-2016, the U.S. imprisonment rate decreased by ten percent, whereas Washington’s rate decreased only six percent in the same period, and even increased between 2015-2016 (Figure 1 and Table 1). Unfortunately, the analyses in Figures 1-4 and Table 1 are limited by the underlying dataset, which does not allow for the differentiation of individuals held under state versus federal jurisdiction in Washington State. This limitation means it is challenging to draw conclusions about changes that could be made to the state versus the federal system in order to address this dramatic increase in female incarceration.²⁶

²⁵ KATHERINE BECKETT & HEATHER EVANS, ACLU, ABOUT TIME: HOW LONG AND LIFE SENTENCES FUEL MASS INCARCERATION IN WASHINGTON STATE (2020), <https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state>.

²⁶ In 2017 federal prisons nationwide only accounted for 12% of the total U.S. prison population—indicating that the trends in incarceration rates may be largely driven by populations in state prisons. JENNIFER BRONSON & E. ANN CARSON, U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., PRISONERS IN 2017 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf>.

Figure 1. Imprisonment Rates (per 100,000) for State and Federal Prisons (All Genders Combined), U.S. and Washington State, 1978-2016



Footnotes for Figure 1.

Imprisonment rates include individuals serving prison sentences under the jurisdiction of state or federal corrections authorities. In some states, this may include individuals sentenced to one year or less. These data include youth sentenced as adults.

Source: E. Ann. Carson, Bureau of Just. Stat., National Prisoner Statistics Program (2018), www.bjs.gov (generated using the Corrections Statistics Analysis Tool).

Table 1. Imprisonment Rates (per 100,000) for State and Federal Prisons (All Genders Combined), U.S. and Washington State, 2006-2016*

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	% Change
U.S.	501	506	506	504	500	492	480	477	471	459	450	-10%
WA State	274	275	273	273	270	260	249	256	254	252	259	-6%

Footnotes for Table 1.

*Cells emphasized and shaded light purple indicate an increase in the rate compared to the previous year. Cells shaded maroon indicate a decrease in the rate compared to the previous year or no rate change compared to the previous year. Imprisonment rates include individuals serving prison sentences under the jurisdiction of state or federal corrections authorities. In some states, this may include individuals sentenced to one year or less. These data include youth sentenced as adults.

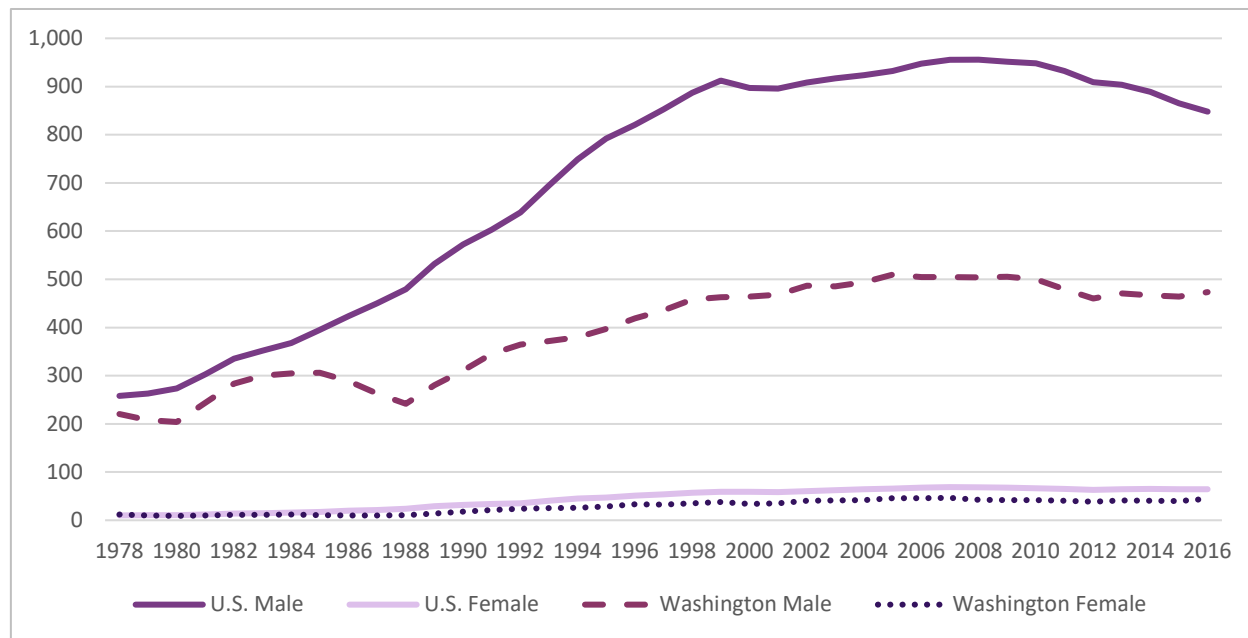
Source: E. Ann. Carson, Bureau of Just. Stat., National Prisoner Statistics Program (2018), www.bjs.gov (generated using the Corrections Statistics Analysis Tool).

In the U.S. and in Washington State, male imprisonment rates are far higher and have historically increased faster than female imprisonment rates. However, in recent years, male imprisonment rates decreased faster than female rates, or even decreased during time periods in which female rates increased (Figure 2). For example, the male imprisonment rate in Washington State decreased five percent between 2010 and 2016. In this same time period, the Washington female imprisonment rate increased seven percent (Table 2).²⁷ Nationally, increases in female incarceration rates and arrest rates began exceeding those of men in 1981. For example, between 1994 and 2004 arrest rates for men declined 6.7% while arrest rates for women increased 12.3%.²⁸

²⁷ Carson, *supra* note 1.

²⁸ Angela Moe & Kathleen Ferraro, *Criminalized Mothers: The Value and Devaluation of Parenthood from Behind Bars*, 29 *WOMEN & THERAPY* 135 (2006).

Figure 2. U.S. and Washington State Male and Female Imprisonment Rates (per 100,000), 1978-2016



Footnotes for Figure 2.

Imprisonment rates include individuals serving prison sentences under the jurisdiction of state or federal corrections authorities. In some states, this may include individuals sentenced to one year or less. These data include youth sentenced as adults.

Source: E. Ann. Carson, Bureau of Just. Stat., National Prisoner Statistics Program (2018), www.bjs.gov (generated using the Corrections Statistics Analysis Tool).

Table 2. Male and Female Imprisonment Rates (per 100,000) in Washington State, 2006-2016

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	% Change from 2006-2016	% Change from 2010-2016
Male	504	505	504	505	500	480	460	471	467	464	473	-6%	-5%
Female	46	46	43	42	42	40	38	41	40	40	45	-3%	+7%

Footnotes for Table 2.

*Cells emphasized and shaded light purple indicate an increase in the rate compared to the previous year. Cells shaded maroon indicate a decrease in the rate compared to the previous year or no rate change compared to the previous year. Imprisonment rates include individuals serving a prison sentence under the jurisdiction of state or federal corrections authorities. In some states, this may include individuals sentenced to one year or less. These data include youth sentenced as adults.

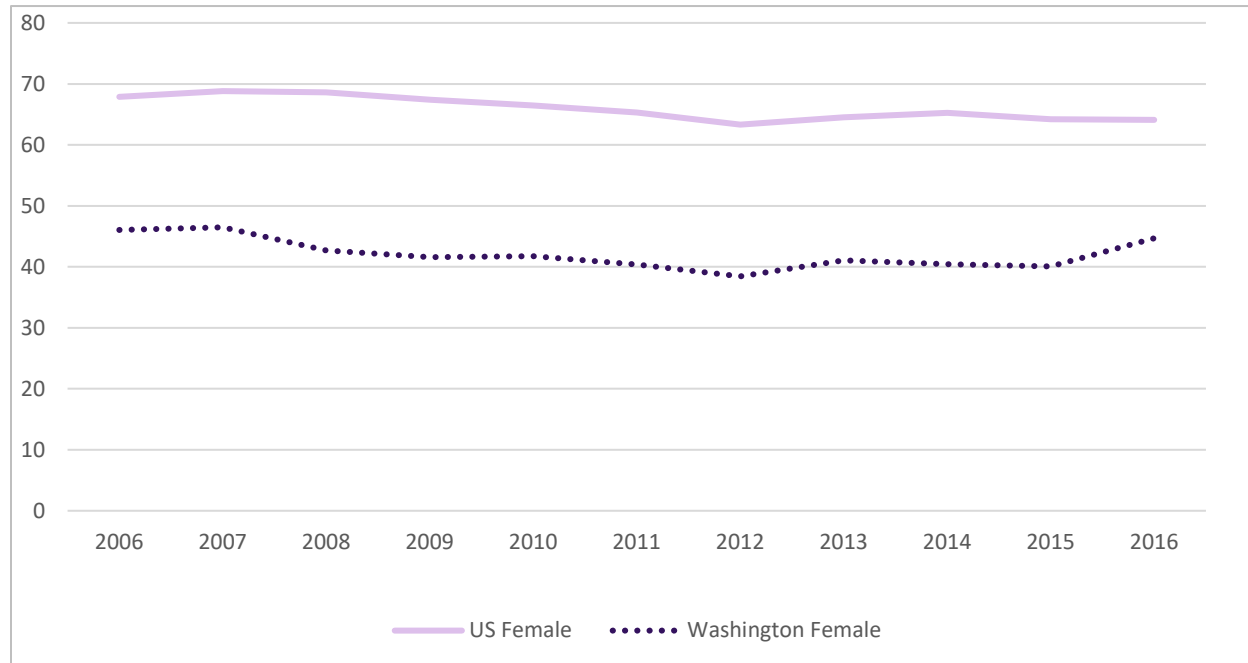
Source: E. Ann. Carson, Bureau of Just. Stat., National Prisoner Statistics Program (2018), www.bjs.gov (generated using the Corrections Statistics Analysis Tool).

While in recent years Washington State female-imprisonment rates were slightly lower than the average for all states, female-imprisonment rates across the U.S. are declining faster than in Washington State, with a six percent decrease in the U.S. between 2006 and 2016, but only a three percent decrease in Washington over that decade. In fact, female imprisonment rates in Washington dipped to a low of 38 per 100,000 in 2012 (the lowest rate since 2001) but have steadily risen since (Figure 3 and Table 3).²⁹ Twenty-five states, the Federal Bureau of Prisons, and combined nationwide rates showed decreases in female prison populations from year-end 2016 to year-end 2017. The number actually increased in the other 25 states, including

²⁹ Carson, *supra* note 1.

Washington State.³⁰ This data suggests that the root causes of increasing female incarceration rates still needs to be addressed, and that Washington may have opportunities to learn from other states that are seeing a decline in contrast to Washington’s increase in female incarceration.

Figure 3. Female Imprisonment Rates (per 100,000) in the U.S. and Washington State, 2006-2016



Footnotes for Figure 3.

Imprisonment rates include individuals serving prison sentences under the jurisdiction of state or federal corrections authorities. In some states, this may include individuals sentenced to one year or less. These data include youth sentenced as adults.

Source: E. Ann. Carson, Bureau of Just. Stat., National Prisoner Statistics Program (2018), www.bjs.gov (generated using the Corrections Statistics Analysis Tool).

³⁰ For the purposes of the cited report by Bronson and Carson, prison is defined as “a long-term confinement facility that is run by a state or the federal government.” BRONSON & CARSON, *supra* note 26.

Table 3. Female Imprisonment Rates (per 100,000) in the U.S. and Washington State, 2006-2016*

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	% Change
U.S.	68	69	69	67	66	65	63	65	65	64	64	-6%
WA State	46	46	43	42	42	40	38	41	40	40	45	-3%

Footnotes for Table 3.

*Cells emphasized and shaded light purple indicate an increase in the rate compared to the previous year. Cells shaded maroon indicate a decrease in the rate compared to the previous year or no rate change compared to the previous year. Imprisonment rates include individuals serving prison sentences under the jurisdiction of state or federal corrections authorities. In some states, this may include individuals sentenced to one year or less. These data include youth sentenced as adults.

Source: E. Ann. Carson, Bureau of Just. Stat., National Prisoner Statistics Program (2018), www.bjs.gov (generated using the Corrections Statistics Analysis Tool).

The experience of women and non-cisgendered persons during incarceration in Washington is explored in more detail in “Chapter 8: Consequences of Gender-Based Violence: Domestic Violence and Sexual Assault” (see subsection IV.B on sexual assault in prisons and jails) and Chapter 12: Availability of Gender Responsive Programming and Use of Trauma Informed Care in Washington State Department of Corrections.” Research still needs to be conducted on other aspects of gender bias during incarceration. For example, is money spent at the same per capita rate for men and women.

ii. Washington data showing racial and ethnic disparities in incarceration rates

At the inception of this study, there was a gap in the Washington State literature and publicly available data that would allow us to determine if Black, Indigenous, and women of color; LGBTQ+ populations; or other marginalized communities are disproportionately imprisoned.

Consequently, this study funded a limited review of females incarcerated for felonies in Washington, based upon data from six counties for fiscal years 2000, 2010 and 2019, as the first step in understanding and responding to factors contributing to the growth of this population. The goals of this pilot study were to take a first look at who we are incarcerating and for what crimes. It was important to us to conduct intersectional analysis to understand the demographic breakdown of women in Washington State prisons and to identify any racial or ethnic disparities in crimes for which women are convicted and how they are sentenced. [See Chapter 14: Sentencing Changes and Their Direct and Indirect Impact on Women]. In all counties examined and across all points in time, the pilot found statistically significant differences indicating racial disproportionality in Washington’s conviction and sentencing of women. The disproportionality for Black and Native American women are the most severe (Tables 4 and 5).³¹ This should be unsurprising as Washington data also shows that people of color and AIAN populations are disproportionately represented in the justice system.³² Unfortunately, most publicly available data are not disaggregated by sex or gender, now with the exception of the pilot study. Additionally, national level research widely highlights racial disparities in female incarceration as well as disparities by sexual orientation. These disparities are reflected in higher incarceration rates for Black, Indigenous, and communities of color than white populations (see Section III for more on the intersection of incarceration rates, gender and race).³³ These Washington State findings of racial and ethnic disparities in our carceral system for all genders combined, the new pilot study

³¹ The pilot study, like most Washington data, was constrained by the same limitations on race and ethnicity identified previously. [See section V of the full report: “2021 Gender Justice Study Terminology, Methods, and Limitations”.] The data sets available for the study made it particularly likely Hispanic/Latinx people are undercounted and made it impossible to include Hispanic/Latinx people in chi-square testing comparing racial and ethnic groups. For a more detailed explanation of these limitations and the work that is being undertaken to resolve them, see Pilot Study at 5-8. TATIANA MASTERS ET AL., INCARCERATION OF WOMEN IN WASHINGTON STATE: MULTI-YEAR ANALYSIS OF FELONY DATA (2020).

³² Thomas Bonczar & Joseph Mulako-Wangota, *Corrections Statistical Analysis Tool (CSAT) – Probation*, BUREAU OF JUST. STAT. (June 29, 2020), <https://www.bjs.gov/probation/> (count of year-end probation population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool); Thomas Bonczar & Joseph Mulako-Wangota, *Corrections Statistical Analysis Tool (CSAT) – Parole*, BUREAU OF JUST. STAT. (June 23, 2020), <https://www.bjs.gov/parole/> (count of year-end parole population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool); E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2016 (2018), https://www.bjs.gov/content/pub/pdf/p16_old.pdf; KAEBLE, *supra* note 16; U.S. Census Bureau American Communities Survey (2016) (for the U.S. and Washington population counts for rates calculations).

³³ BRONSON & CARSON, *supra* note 26; THE SENT’G PROJECT, *supra* note 23.

findings that Black, Indigenous, and women of color are disproportionately represented, and the national data finding racial and ethnic disparities among the female justice-involved population specifically, leave no doubt that Washington’s female justice-involved population has similar unacceptable disproportionality.

The pilot study found, “statistically significant differences indicating racial disproportionality in Washington’s conviction and sentencing of women in all of the six counties examined, across all three time points.”³⁴ Black women were typically convicted and sentenced at two or three times the rate of their proportion of each county’s population.³⁵ In some counties, in some fiscal years, they were convicted and sentenced at rates up to eight times higher.³⁶ Native American women, across counties, often made up two to four times as large a proportion of the convicted and sentenced population as they did of the general population of each county.³⁷ White women were generally represented at or below their level in the general population.³⁸ Asian American women typically were convicted and sentenced at a lower rate than their representation in the general population.³⁹ It is important to acknowledge that disparities are often masked for Asian communities when many diverse populations are combined into one broad Asian category in a dataset. Other data shows that much higher rates of AIAN individuals and non-Hispanic Black individuals in Washington are present in prison, parole, and probation populations compared to other subpopulations (Figure 4).⁴⁰

While women’s representation in the incarcerated population increased from 19 to 21% from 2000 to 2019, men still make up the majority of persons incarcerated in Washington.⁴¹ The types of crimes for which women and men are convicted, however, vary greatly. Women were convicted and sentenced in relatively higher proportions in drug, property, and particularly fraud

³⁴ MASTERS ET AL., *supra* note 31, at 19.

³⁵ MASTERS ET AL., *supra* note 31, at 2,19.

³⁶ *Id.*

³⁷ MASTERS ET AL., *supra* note 31, at 2.

³⁸ MASTERS ET AL., *supra* note 31, at 19.

³⁹ MASTERS ET AL., *supra* note 31.

⁴⁰ It is important to note there is a high rate of “unknown” reports of race/ethnicity for both probation and parole in Washington and the U.S.—64% of the probation population in Washington is listed with race/ethnicity unknown, so these data should be interpreted with caution. Bonczar & Mulako-Wangota, *supra* note 32; Bonczar & Mulako-Wangota, *supra* note 32; CARSON, *supra* note 34; KAEBLE, *supra* note 16.

⁴¹ MASTERS ET AL., *supra* note 31, at 30.

categories, but were convicted and sentenced much less for violent offenses (12 to 14%) and sex offenses (never more than three percent).⁴²

Unfortunately, the only Washington-specific data that has been published analyzing by both race/ethnicity and gender identity or sex is the pilot study. We recommend that the pilot study be expanded to canvas the entire state, that better data be collected and reviewed for the Hispanic/Latinx population in particular, and that the intersectional research on women of different identities be studied throughout the different stages of the criminal justice system from community support to policing, charging, incarceration, and reentry. We further recommend additional qualitative research, using facts and circumstances if appropriate, to further examine the disproportionality for Black women charged with violent crimes, causes of disproportionality in drug conviction and sentencing, and the nature and antecedents of the relatively high levels of fraud felony convictions among women. More research is also needed specifically on Indigenous women, given the racial disproportionality and the almost complete lack of national research. This research should be led by Indigenous researchers.

⁴² *Id.* at 9, 25.

Table 4: Distribution of Racial and Ethnic Groups (Within Gender and County) Among Convicted and Sentenced Men and Women in Caseload Forecast Counsel Data for Selected Washington State Counties, Fiscal Year 2019

	King		Pierce		Snohomish		Spokane		Yakima		Benton-Franklin*	
	Men	Women	Men	Women	Men	Women	Men	Women	Men	Women	Men	Women
White	56%	57%	56%	65%	83%	88%	81%	84%	41%	55%	69%	80%
African American	34%	29%	28%	19%	9%	9%	11%	6%	6%	4%	7%	3%
Asian American	7%	8%	7%	7%	3%	2%	2%	1.5%	>1%	2%	1%	1%
Native American	1%	4%	2%	4%	2%	1%	5%	7%	4%	8%	1%	1%
Hispanic/Latinx**	2%	2%	7%	4%	3%	<1%	1%	1%	49%	31%	21%	10%
Unknown	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	<1%	1%	5%
Total count by gender	2,526	385	2,554	573	1,610	438	2,231	529	990	245	940	233
Total convicted and sentenced individuals by county	2,884		3,127		2,048		2,760		1,235		1,173	
Proportion of total convicted and sentenced individuals	87%	13%	82%	18%	79%	21%	81%	19%	80%	20%	80%	20%

Footnotes for Table 4.

* In combining proportions across Benton and Franklin counties, the authors used weighted averages to account for the difference between the two counties' populations.

** Hispanic/Latinx figures are likely an undercount due to Caseload Forecast Council coding methodology and should be interpreted with caution.

Source: Data adapted from information available at TATIANA MASTERS ET AL., INCARCERATION OF WOMEN IN WASHINGTON STATE: MULTI-YEAR ANALYSIS OF FELONY DATA (2020).

Table 5: Distribution of Racial Groups Among Convicted and Sentenced Women in Caseload Forecast Counsel (CFC) Data, Compared to Washington State Census Data, for Selected Offense Categories, Fiscal Year 2019

	White		African American		Asian American		Native American	
	Census	CFC	Census	CFC	Census	CFC	Census	CFC
Violent (n = 433)	79%	70%	4%	15%	9%	3%	2%	6%
Drug (n = 1607)	79%	85%	4%	5%	9%	2%	2%	4%
Property (n = 1484)	79%	78%	4%	9%	9%	3%	2%	5%
Fraud (n = 677)	79%	81%	4%	7%	9%	4%	2%	3%
Public Order (n = 498)	79%	76%	4%	11%	9%	4%	2%	5%

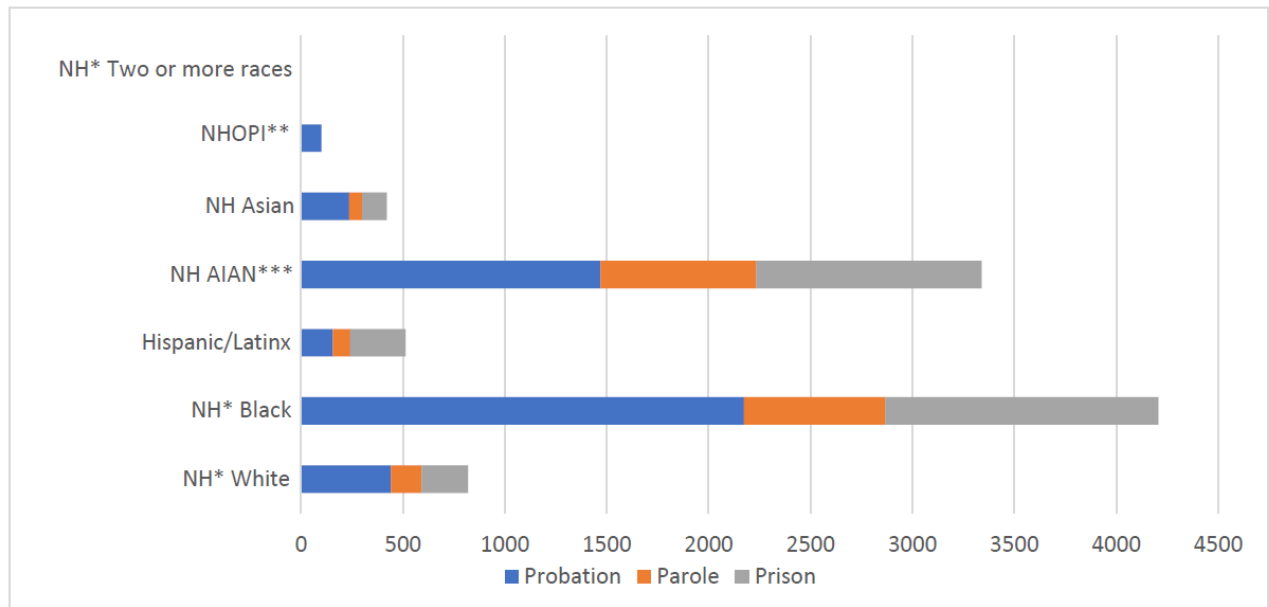
Footnotes for Table 5.

Statistical significance of differences:

Proportions of women across racial categories were significantly different in CFC data than in Washington State Census data in all offense categories. Violent $\chi^2 = 190$, df 3, $p < 0.001$; Drug $\chi^2 = 136$, df 3, $p < 0.001$; Property $\chi^2 = 226$, df 3, $p < 0.001$; Fraud $\chi^2 = 45$, df 3, $p < 0.001$; and Public Order $\chi^2 = 106$, df 3, $p < 0.001$.

Source: Data adapted from information available at TATIANA MASTERS ET AL., INCARCERATION OF WOMEN IN WASHINGTON STATE: MULTI-YEAR ANALYSIS OF FELONY DATA (2020).

Figure 4. Washington Rates (per 100,000) of Probation, Parole, and Prison by Race/Ethnicity, All Genders Combined, 2016



Footnotes for Figure 4.

*NH means Non-Hispanic

**NHOPI means Native Hawaiian or Other Pacific Islander

***AIAN means American Indian or Alaska Native

Prison refers to State and Federal prison, and includes juveniles sentenced as adults, and in some states may include individuals with sentences of less than one year.

The Washington State Department of Corrections places offenders on “community supervision,” not on probation or parole in most circumstances. They only allocate them to either probation or parole for Bureau of Justice Statistics (BJS) according to the “cause” that put them on probation or parole.

Probation and parole counts for Washington could deviate from the actual numbers because several agencies in Washington did not provide data in 2016 and BJS estimated the 2016 populations based on 2015 reports for these agencies.

Probation and parole counts in the U.S. and Washington have high rates of “unknown” race (60% of Washington probation population reported in BJS has “unknown” listed as race).

The very low number of individuals of two or more races indicates that multi-racial individuals are likely not being captured or are being counted under another racial category.

Sources: Data adapted from:

Thomas Bonczar & Joseph Mulako-Wangota, Corrections Statistical Analysis Tool (CSAT) – Probation, BUREAU OF JUST. STAT. (June 29, 2020), <https://www.bjs.gov/probation/> (count of year-end probation population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool).

Thomas Bonczar & Joseph Mulako-Wangota, Corrections Statistical Analysis Tool (CSAT) – Parole, BUREAU OF JUST. STAT. (June 23, 2020), <https://www.bjs.gov/parole/> (count of year-end parole population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool).

E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2016 (2018), https://www.bjs.gov/content/pub/pdf/p16_old.pdf. DANIELLE KAEBLE, BUREAU OF JUST. STAT., PROBATION AND PAROLE IN THE UNITED STATES, 2016 (2018), <https://www.bjs.gov/content/pub/pdf/ppus16.pdf>.

U.S. Census Bureau American Communities Survey (2016) (for the U.S. and Washington population counts for rates calculations).

iii. National data showing racial and ethnic disparities in female incarceration rates

Because limited Washington-specific research exists, it is helpful to look at national research as well. As with the Washington pilot study, national research shows that the rate of increased incarceration is not borne evenly across women of different racial, ethnic, and socioeconomic groups and by persons of any sexual orientation. Black, Indigenous, and communities of color and other marginalized communities tend to be increasingly impacted by the increase in convictions and incarceration. This national research suggests the likelihood of similar disproportionate impacts in Washington and the need for Washington-specific research and data collection.

Similar to male incarceration, race impacts the rate at which women are incarcerated nationally. In 2017, according to the Bureau of Justice Statistics, the imprisonment rates in federal and state prisons for Black and Hispanic women were substantially higher than the rate for white women. It is important to discuss the racial shifts in incarceration nationally since 2000 for Black, Hispanic, and white women. Between 2000 and 2017, the rate of imprisonment in federal and state prisons decreased 55% for Black women, increased ten percent for Hispanic women, and increased 44%

for white women.⁴³ The impact of the swelling-shadow of incarceration on Indigenous women is set forth separately below.

While there is robust research to support the racial inequality facing women (and men) in incarceration rates, there are several deficits that deserve attention. Often low-socioeconomic position is conflated with race and ethnicity in the research (for example when assumptions are made that race or ethnicity serves in some way as a proxy for income rather than gathering income data independently), so further research should be conducted to parse out how income interacts with other demographic variables to impact outcomes. Furthermore, the available datasets and research on incarcerated populations often do not indicate how race and ethnicity data were collected (e.g., self-report or based on the assumption of others) or analyzed. There is a notable lack of research focusing on Indigenous, Asian, and Native Hawaiian or Other Pacific Islander populations and substantial missing race and ethnicity data for some datasets. Our report has been limited by these deficiencies and we recommend Washington State collect more accurate and complete demographic information throughout the criminal justice system. See Section V of the full report (“2021 Gender Justice Study Terminology, Methods, and Limitations”) for more information on data limitations.

iv. Data showing disparities in incarceration rates based on gender and sexual orientation

Incarceration rates based on gender and sexual identity need to be parsed out in Washington. Nationally, according to 2011-2012 National Inmate Survey data, sexual minorities are disproportionately incarcerated in prisons and jails in the U.S. The incarceration rate for self-identified sexual minorities of all genders was over three times higher than the rate in the total U.S. adult population. The weighted results showed a disproportionate number of incarcerated women self-identifying as sexual minorities as compared to incarcerated men (42.1% of women in prison compared to 9.3% of men in prison and 35.7% of women in jail compared to 6.2% of men in jail).⁴⁴ Additionally, this research and Bureau of Justice Statistics data indicates that sexual

⁴³ THE SENT'G PROJECT, *supra* note 23. Between 2000 and 2017, the national imprisonment rate for Black women decreased from 205 to 92 per 100,000; the rate for Hispanic women increased from 60 to 66 per 100,000, the rate for white women increased from 34 to and 49 per 100,000. BRONSON & CARSON, *supra* note 26.

⁴⁴ Meyer et al. analyzed data (n=80,601) from interviews conducted in the 2011-2012 National Inmate Survey. The survey used a random sample of people incarcerated in state and federal prisons, local jails, and special facilities

minorities are more likely than their counterparts to report being sexually victimized and experiencing solitary confinement and other sanctions while incarcerated (see “Chapter 8: Consequences of Gender-Based Violence: Domestic Violence and Sexual Assault” for further discussion of the disparities and consequences of sexual assault in jails and prisons).⁴⁵ These results highlight the need to address the root causes contributing to the disproportionate incarceration rates and harsher treatment while incarcerated of sexual minorities, and women in particular. Additional analysis of the root causes of incarceration can be found in “Chapter 9: Juvenile Justice and Gender and Race Disparities.”

b. City and county jails in Washington State

While the Washington Association of Sheriffs and Police Chiefs collects and publicly posts city and county jail population data annually, almost every annual dataset from 1997 to 2020 is missing data from several jails. The missing data each year is not consistently from the same facilities. This makes it very challenging to look at trends over time at the state, county, or facility level. In addition, gender data is not included every year, further decreasing the ability to look at trends by gender. Table 6 shows data from 1997-2001, 2015, and 2018—the only years which include complete gender data for all jails in Washington. This table should be interpreted with caution as so many years were excluded due to missing data and to ensure the years presented were comparable. More consistent and complete data reporting by facilities would vastly improve Washington’s ability to track trends in jail incarceration by gender, race, and ethnicity. Despite the limitations of these data, more meaningful findings could be derived from these datasets with more advanced modeling. The simple data provided in Table 6 does indicate that jail incarceration rates for women increased dramatically between 1997 and 2018 while the rates

(e.g., military, Indian country, and Immigration and Customs Enforcement facilities) and asked questions regarding sexual orientation, race/ethnicity, incarceration-related factors, health outcomes, sexual victimization, and consensual sex. The incarceration rate for sexual minorities of all genders was 1,882 per 100,000 for U.S. residents over the age of 18, over three times higher than the rate in the U.S. adult population. This article defined “sexual minorities” to include, “those who self-identify as lesbian, gay, or bisexual or report a same-sex sexual experience before arrival at the facility.” Ilan Meyer et al., *Incarceration Rates and Traits of Sexual Minorities in the United State: National Inmate Survey. 2011-2012*, 107 AM. J. PUB. HEALTH 234 (2017).

⁴⁵ *Id.*

for men declined in the same time period.⁴⁶ This suggests that analyzing these data more completely could reveal important trends. This is an area that needs to be studied, particularly because we know a large portion of the incarcerated population in Washington State is being held locally in pretrial detention.⁴⁷ See Section III for further discussion of pretrial detention.

Table 6: Statewide City and County Jails, Average Daily Population Rates (per 100,000), Washington State, By Gender, 1997-2001, 2015, 2018*

	1997	1998	1999	2000	2001	2015	2018	% change from 1997 to 2018
Male	312	327	324	330	346	283	276	-11%
Female	41	45	47	48	53	56	72	+75%
% Total Jail Population that was Female	12%	12%	13%	13%	13%	17%	21%	

Footnotes for Table 6.

*Cells emphasized and shaded light purple indicate an increase in the rate compared to the previous year. Cells shaded maroon indicate a decrease in the rate compared to the previous year or no rate change compared to the previous year.

This table should be interpreted with caution as several years of data are excluded for several reasons. This prevents any true analysis of the trends over time and prohibits the ability to see if the years included are anomalies. In addition, this table does not show trends between 2001 and 2015 which means a significant piece of the picture is missing. The years 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2016, 2017, 2019, and 2020 are excluded due to missing data from several counties that did not report any data, or that did not report gender data, and/or because gender data was not included in the publicly available dataset for that year.

Sources: Washington Association of Sheriffs and Police Chiefs, Annual Jail Statistics, 1997-2020, (2020), <https://www.waspc.org/cjis-statistics---reports> (last visited June 22, 2021); Office of Financial Management 1997-2018 Population Estimates; available from <https://ofm.wa.gov/washington-data-research/population-demographics/population-estimates/estimates-april-1-population-age-sex-race-and-hispanic-origin>, accessed June 22, 2021.

⁴⁶ *Annual Jail Statistics: 2019*, WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, ANNUAL JAIL STATISTICS (2020), <https://www.waspc.org/cjis-statistics---reports>.

⁴⁷ INTISAR SURUR & ANDREA VALDEZ, PRETRIAL REFORM TASK FORCE: FINAL RECOMMENDATIONS REPORT 39.

c. City and county jails nationwide

Among incarcerated women nationwide, the largest population was being held in city and county jails across the U.S. with numbers reaching 113,700 in 2017.⁴⁸ Nationwide data shows a steady increase between 1990 and 2007 in jail populations. This trend exists for incarcerated men, women, and the combined jail population.^{49,50}

Beginning in 2009 the U.S. saw the beginning of an overall downward trend in jail incarceration rates. However, while the male population continued this general downward trend through 2018 (with some oscillation from year-to-year), the female jail incarceration rate began climbing again in 2012, reaching the highest historical rate in 2017 and 2018 (data is only available through 2018). Between 2005 and 2018 the jail incarceration rate for males fell 14%. During this same time period, the rate grew ten percent for women (Table 7 and Figure 5).⁵¹

⁴⁸ THE SENT'G PROJECT, *supra* note 25.

⁴⁹ On average, the adult female jail population grew 6.6% annually between 1990 and 2000, while the adult male inmate population grew 4% annually in that time period. ALLEN BECK & JENNIFER KARBERG, PRISON AND JAIL INMATES AT MIDYEAR 2000 (2001), <https://www.bjs.gov/content/pub/pdf/pjim00.pdf>.

⁵⁰ Between 1999 and year-end 2013, the female jail inmate population increased by 48%. In this same time period, the male jail inmate population increased by 17%. TODD MINTON ET AL., CENSUS OF JAILS: POPULATION CHANGES, 1999–2013 (2015), <https://www.bjs.gov/content/pub/pdf/cjpc9913.pdf>.

⁵¹ ZHEN ZENG, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT, JAIL INMATES IN 2018 (2020), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6826>.

Table 7: Male and Female Jail Incarceration Rates (per 100,000), City and County Jails Nationwide, 2005-2018*

	2005	2010	2011	2012	2013	2014	2015	2016	2017	2018	% change
Male	448	431	419	418	404	405	394	398	394	387	-14%
Female	63	59	59	62	64	67	64	66	69	69	+10%

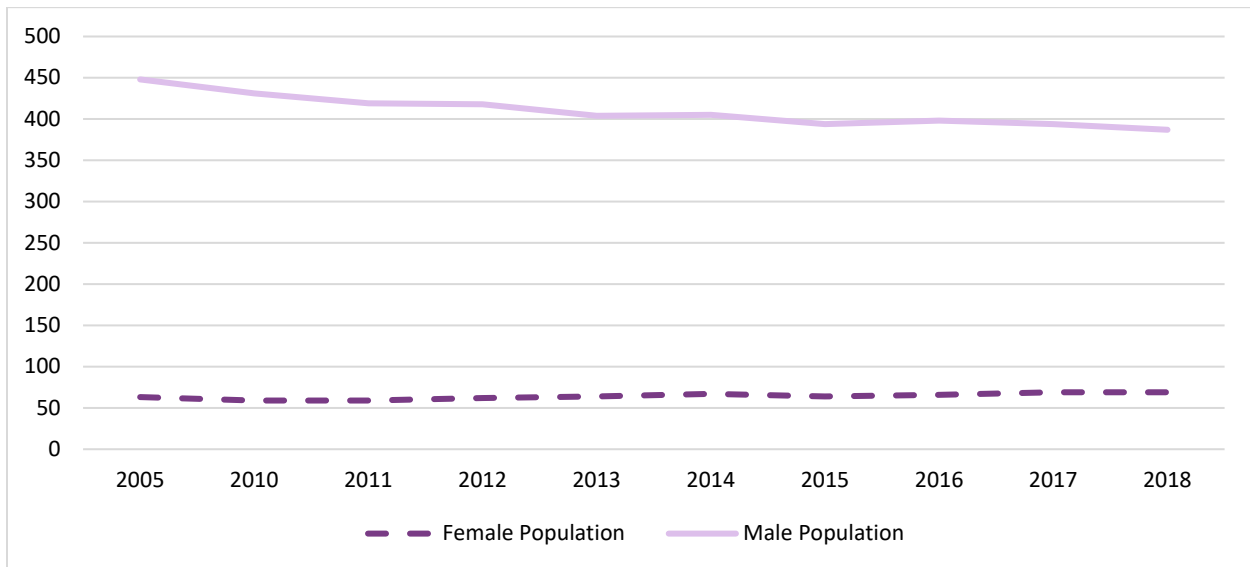
Footnotes for Table 7.

*Cells emphasized and shaded light purple indicate an increase in the rate compared to the previous year. Cells shaded maroon indicate a decrease in the rate compared to the previous year or no rate change compared to the previous year.

Rates are based on the number of individuals confined in local jails at midyear per 100,000 U.S. residents of a given demographic group. In 2015 and 2016, the Annual Survey of Jails (the source for the underlying data) collected demographic data on inmate populations at year-end instead of midyear. Jails typically hold fewer individuals at year-end than at midyear, so the 2015 and 2016 inmate populations were adjusted for seasonal variation in the source document.

Source: This table is adapted from information available from:
 ZHEN ZENG, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., JAIL INMATES IN 2018 (2020), <https://www.bjs.gov/content/pub/pdf/ji18.pdf>.

Figure 5. Male and Female Jail Incarceration Rates (per 100,000), City and County Jails Nationwide, 2005-2018



Footnotes for Figure 5.

Rates are based on the number of individuals confined in local jails at midyear per 100,000 U.S. residents of a given demographic group. In 2015 and 2016, the Annual Survey of Jails (the source for the underlying data) collected demographic data on inmate population at year-end instead of midyear. Jails typically hold fewer individuals at year-end than at midyear, so the 2015 and 2016 inmate populations were adjusted for seasonal variation in the source document.

Source: This figure is adapted from information available from:
 ZHEN ZENG, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., JAIL INMATES IN 2018 (2020),
<https://www.bjs.gov/content/pub/pdf/ji18.pdf>.

A national report published in 2019 by the Prison Policy Initiative shows that 60% of incarcerated women who are under local control in jail facilities “have not been convicted of a crime and are awaiting trial.”⁵² Women are often detained for long periods of time as they await their trial because of the financial strain of bail and other fines imposed by the correctional system.⁵³ This

⁵² ALEKS KAJSTURA, WOMEN’S MASS INCARCERATION: THE WHOLE PIE 2019 (2019), <https://www.prisonpolicy.org/reports/pie2019women.html#fnref:6>.

⁵³ *Id.*

report highlights that jail conditions create adverse consequences for women as unique barriers exist for individuals incarcerated in jail facilities such as more expensive phone calls and sometimes more restricted mail entry requirements, as opposed to prisons which still have many of these barriers but generally to a lesser degree than the jails. These constraints make it difficult for women in jail to maintain contact with family members.⁵⁴ While these hardships affect both men and women in jail, they are more acutely borne by women due to the gender-wage gap and systemic sexism that normalizes women bearing a greater share of childcare obligations (see “Chapter 1: Gender and Financial Barriers to Accessing the Courts” and “Chapter 4: The Impact of Gender on Courtroom Participation and Legal Community Acceptance” for more in-depth discussions of the gender-wage gap and a lack of gender-parity in childrearing responsibilities). Incarcerated women in jail facilities nationally also reported high rates of mental health illness and trauma: “86 percent report having experienced sexual violence in their lifetime. . . and one in five has experienced [Serious Mental Illness] SMI, [Post Traumatic Stress Disorder] PTSD, and substance use disorder in her lifetime...”⁵⁵ These complex medical conditions call for critical mental health treatment that jail facilities have difficulty providing. Moreover, research shows that medical and mental health symptoms worsen when incarcerated individuals cannot access treatment and remain in jail for longer periods of time.⁵⁶ See “Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families” for more information on the impacts of incarceration on parents and families.

d. Probation and community custody in Washington State

In Washington State, female probation numbers are more than five times female imprisonment and parole (i.e., community custody) numbers combined (Figure 6), but note that the number may have significant inaccuracies, as 40% of individuals on probation were listed with sex unknown.⁵⁷ The requirements of any particular term of probation also varies widely among jurisdictions, offenses, and other factors. Thus, while a large proportion of criminal-justice-

⁵⁴ *Id.*

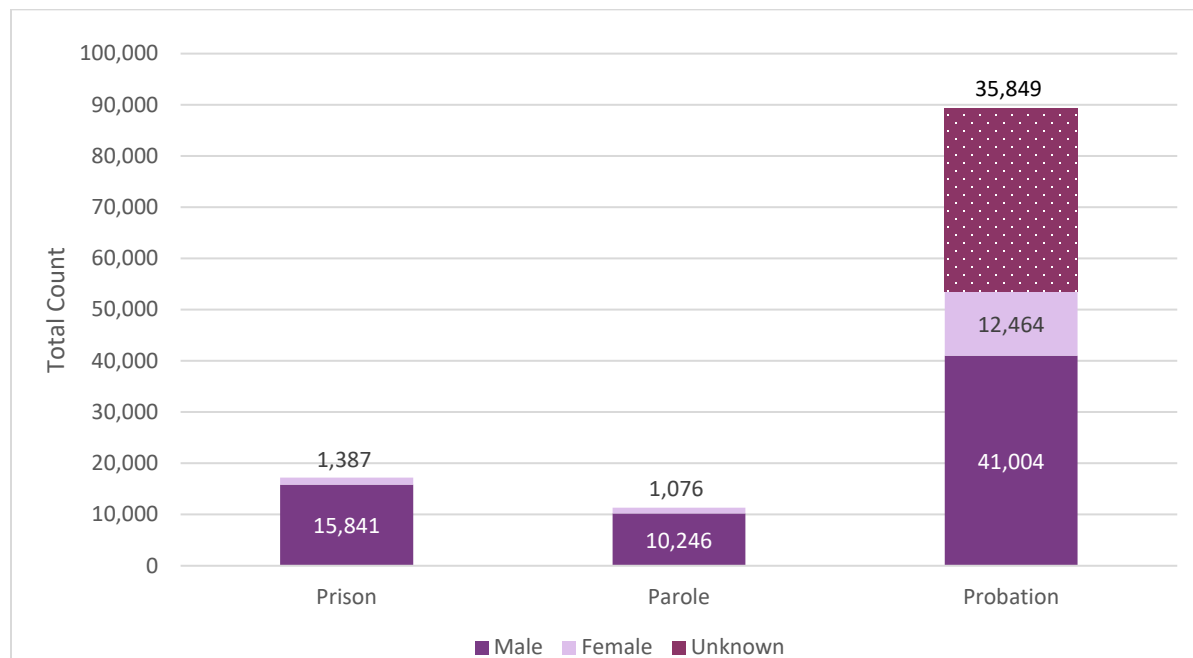
⁵⁵ ELIZABETH SWAVOLA, KRISTINE RILEY & RAM SUBRAMANIAN, *OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM* (2016).

⁵⁶ *Id.*

⁵⁷ For further explanation of allocation of probation and parole see the note at Figure 4; Bonczar & Mulako-Wangota, *supra* note 32.

involved women are subject to probation, the actual impact of probation is not easily captured or comprehensively available for study.

Figure 6. Female and Male Counts in Prison, Parole, and Probation in Washington State, 2016



Footnotes for Figure 6.

Prison refers to state and federal prison, and includes juveniles sentences as adults. The Washington Department of Corrections places offenders on “community supervision,” not on probation or parole. They only allocate them to either probation or parole for Bureau of Justice Statistics according to the “cause” that put them on probation or parole.

Sources:

Thomas Bonczar & Joseph Mulako-Wangota, Corrections Statistical Analysis Tool (CSAT) – Probation, BUREAU OF JUST. STAT. (June 29, 2020), <https://www.bjs.gov/probation/> (count of year-end probation population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool).

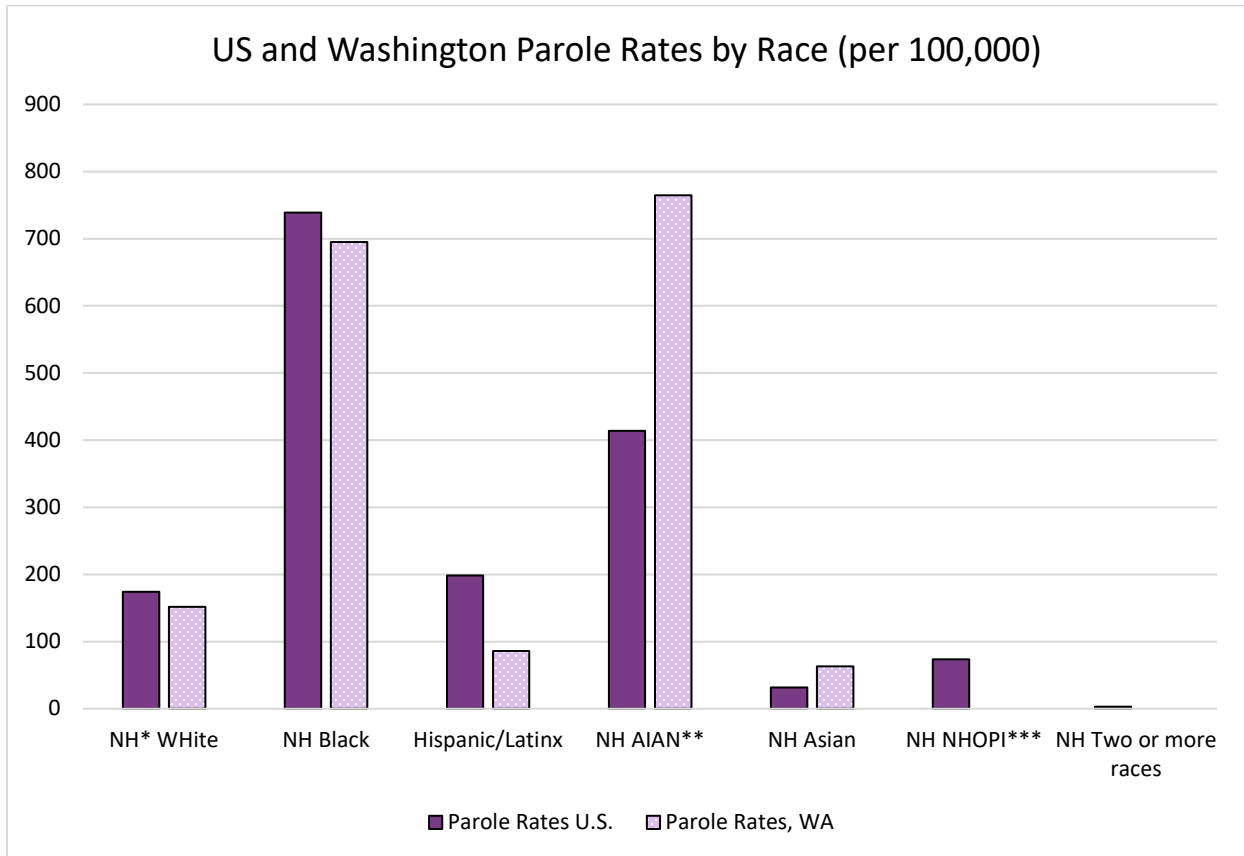
Thomas Bonczar & Joseph Mulako-Wangota, Corrections Statistical Analysis Tool (CSAT) – Parole, BUREAU OF JUST. STAT. (June 23, 2020), <https://www.bjs.gov/parole/> (count of year-end parole population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool).

E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2016 (2018), https://www.bjs.gov/content/pub/pdf/p16_old.pdf.

DANIELLE KAEBLE, BUREAU OF JUST. STAT., PROBATION AND PAROLE IN THE UNITED STATES, 2016 (2018), <https://www.bjs.gov/content/pub/pdf/ppus16.pdf>.

While Washington’s racial disparities in corrections overall appear to be similar to U.S. racial disparities, Washington State has higher rates of AIAN individuals on parole compared to national totals (Figure 7). However, it is important to note that 13% of parolees nationally and two percent of Washington State parolees had race/ethnicity reported as “unknown” in 2016.⁵⁸

Figure 7. U.S. and Washington State Parole Rates (per 100,000) by Race/Ethnicity, 2016



⁵⁸ Bonczar & Mulako-Wangota, *supra* note 32.

Footnotes for Figure 7.

*NH means Non-Hispanic

**AIAN means American Indian or Alaska Native

***NHOPI means Native Hawaiian or Other Pacific Islander

The Washington Department of Corrections places offenders on “community supervision,” not on probation or parole in most circumstance. They only allocate individuals to either probation or parole for the Bureau of Justice Statistics (BJS) according to the “cause” that put them on probation or parole. Probation and parole counts in the U.S. and Washington have high rates of “unknown” race (60% of Washington probation population reported in BJS has “unknown” listed as race). Individuals listed as “unknown” are not presented here. Parole counts for Washington could deviate from the actual numbers because several agencies in Washington did not provide data in 2016 and BJS estimated the 2016 populations based on 2015 reports for these agencies. The very low number of individuals of two or more races indicates that multi-racial individuals are likely not being captured or are being counted under another racial category.

Sources: Data adapted from:

Thomas Bonczar & Joseph Mulako-Wangota, Corrections Statistical Analysis Tool (CSAT) – Parole, BUREAU OF JUST. STAT. (June 23, 2020), <https://www.bjs.gov/parole/> (count of year-end parole population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool).

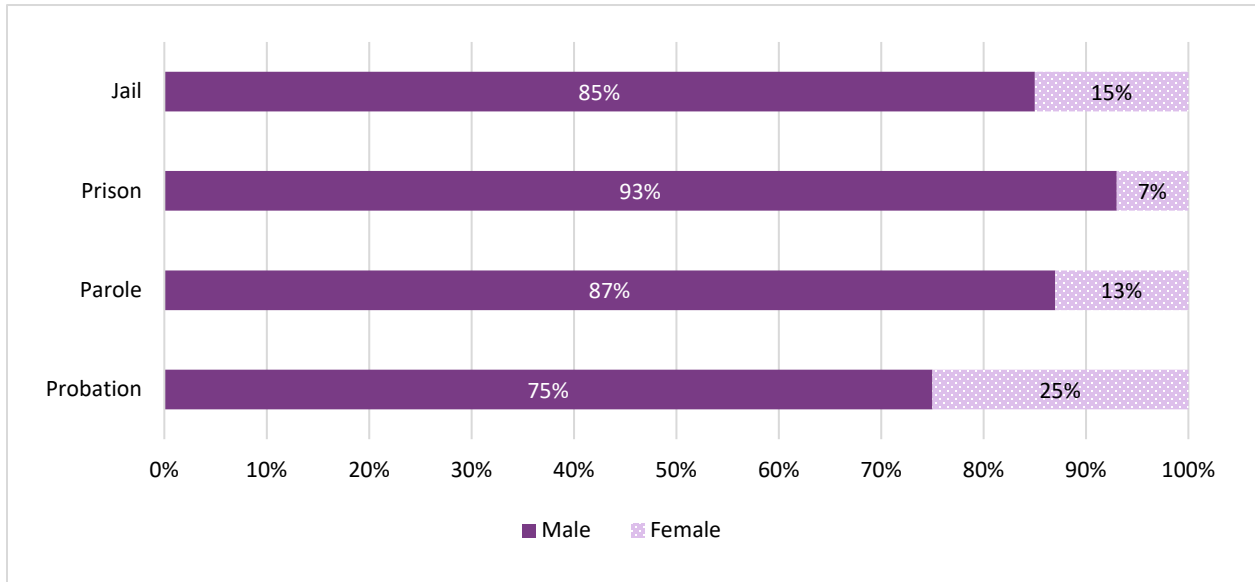
U.S. Census Bureau American Communities Survey (2016) (for the U.S. and Washington population counts for rates calculations).

e. Probation and parole nationally

It also bears noting that the vast majority of the female population interacting with the criminal justice system is doing so through probation. Nationwide only a small portion (19%) of the female population involved in the correctional system are actually in correctional facilities. The remaining 81% of the population are either on probation or parole with the majority on probation. Nationally, women make up a higher proportion of individuals on probation (25%) compared to parole, prison, and jail (Figure 8).⁵⁹

⁵⁹ *Id.*; Carson, *supra* note 1; KAEBLE, *supra* note 16; ZENG, *supra* note 51.

Figure 8. Percent Men and Women Under Control of the Correctional Systems In The U.S., 2016



Footnotes for Figure 8.

Prison refers to state and federal prison, and includes juveniles sentenced as adults, and in some states may include individuals with sentences of less than one year. Jail refers to local city and county jails.

Sources: Data adapted from:

Thomas Bonczar & Joseph Mulako-Wangota, Corrections Statistical Analysis Tool (CSAT) – Probation, BUREAU OF JUST. STAT. (June 29, 2020), <https://www.bjs.gov/probation/> (count of year-end probation population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool).

Thomas Bonczar & Joseph Mulako-Wangota, Corrections Statistical Analysis Tool (CSAT) – Parole, BUREAU OF JUST. STAT. (June 23, 2020), <https://www.bjs.gov/parole/> (count of year-end parole population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool).

E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2016 (2018), https://www.bjs.gov/content/pub/pdf/p16_old.pdf.

DANIELLE KAEBLE, BUREAU OF JUST. STAT., PROBATION AND PAROLE IN THE UNITED STATES, 2016 (2018), <https://www.bjs.gov/content/pub/pdf/ppus16.pdf>.

ZHEN ZENG, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., JAIL INMATES IN 2018 (2020), <https://www.bjs.gov/content/pub/pdf/ji18.pdf>.

As discussed in “Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families,” many barriers exist for women who are on probation that create significant hardship. As noted above, these hardships are more acutely born by women due to the gender-wage gap and systemic sexism that normalizes women bearing a greater share of childcare obligations (see “Chapter 1: Gender and Financial Barriers to Accessing the Courts” and “Chapter 4: The Impact of Gender on Courtroom Participation and Legal Community Acceptance” for more in-depth discussions of the gender-wage gap and a lack of gender-parity in childrearing responsibilities). A report by the Prison Policy Initiative highlights, “probation often comes with steep fees, which like bail, women are in the worst position to afford. Failing to pay these probation fees is often a violation of probation.” Additional barriers include finding and affording childcare and transportation to and from required meetings with a probation officer.⁶⁰ See “Chapter 15: The Gendered Impact of Legal Financial Obligations” for more information on gendered impacts of the costs of incarceration.

f. Juvenile detention nationwide

Juvenile detention and other youth interactions with the justice system are discussed in “Chapter 9: Juvenile Justice and Gender and Race Disparities,” which covers gender impact for juveniles as they relate to shifts in juvenile law focus, such as limiting judicial discretion and effects of treatment, and “Chapter 10: Commercial Sex and Exploitation.”

g. American Indian and Alaska Natives in Washington prisons

In Washington, AIANs are over-represented in our prisons and in community custody. The rate of AIANs in community custody in Washington is over 3.5 times higher than the rate for whites. The rate of imprisonment for AIANs is almost five times the white rate in Washington (Figure 4).⁶¹ This disparity is also evident when looking only at life and long sentences, where AIANs are also over represented.⁶² Although unfortunately these data are not disaggregated and presented by

⁶⁰ KAJSTURA, *supra* note 52.

⁶¹ Bonczar & Mulako-Wangota, *supra* note 32; CARSON, *supra* note 32; KAEBLE, *supra* note 16; U.S. Census Bureau American Communities Survey (2016) (for the U.S. and Washington population counts for rates calculations).

⁶² While only 1.2% of the state population identified as Native American in 2016, 2.4% of those receiving long sentences, 2.5% of those receiving very long sentences, and 1.9% of those receiving life sentences are identified in the sentencing data as Native American that year. BECKETT & EVANS, *supra* note 25.

gender, the Pilot Study mentioned above takes a first look at intersectionality within the Native American population. This study found Native American women, across counties, often made up two to four times as large a proportion of the convicted and sentenced population as they did of the general population of each county.⁶³ Taking 2019 as an example, Benton-Franklin and Snohomish Counties had no significant disproportionality among Native American women. In King County, Native American women were convicted and sentenced at four times the rate of their representation in the general population. Spokane County convicted and sentenced Native American women at over three times the rate of their representation in the population. In Pierce County, Native American women were more than twice as likely to be sentenced and incarcerated as their presence in the population would suggest. In Yakima, Native American women were overrepresented in the convicted and sentenced population but to a somewhat lesser extent.⁶⁴

h. American Indian and Alaska Natives in local jails in Washington and across the United States

Washington numbers and national statistics look similar as to the alarmingly high rates at which AIANs are incarcerated in local facilities. The jail incarceration rate for this population increased by 17% in Washington between 1999 and 2013, and by 60% nationally in this same time period. Relative to other racial and ethnic groups, AIANs are disproportionately represented in jails nationwide.⁶⁵ It is important to note that the Bureau of Justice Statistics analyses providing these figures only include AIANs of a single race (i.e., excludes multiracial AIANs) and excludes persons of Hispanic or Latinx origin. While the adult AIAN jail population nationally was 12,100 in 2011 when using this narrow definition, the population count was 68,500 when including both Hispanic

⁶³ MASTERS ET AL., *supra* note 31, at 19–26.

⁶⁴ *Id.*

⁶⁵ According to Bureau of Justice Statistics data, at year-end 2013, jails in Washington State held 620 AIANs. Between 1999 and 2013, the national AIAN jail incarceration rate increased from 288 to 398 incarcerated AIANs per 100,000 AIAN U.S. residents. The jail incarceration rate for AIANs nationally is 398 per 100,000 U.S. residents. The jail incarceration rate for all other racial/ethnic groups combined is 236 per 100,000 U.S. residents. TODD MINTON, SUSAN BRUMBAUGH & HARLEY ROHLOFF, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST STAT., AMERICAN INDIAN AND ALASKA NATIVES IN LOCAL JAILS, 1999-2014 (2017), <https://www.bjs.gov/content/pub/pdf/aianlj9914.pdf>.

and Non-Hispanic AIANs and AIANs of single or multiple races.⁶⁶ Any Bureau of Justice Statistics data and reports on AIANs should be interpreted with caution given this methodology paired with the already pervasive undercounting of AIANs in many datasets.⁶⁷

Although Washington data on the gender breakdown of incarcerated AIANs is lacking, national data shows AIAN women constitute a larger percentage of the jailed AIAN population than for all other racial and ethnic groups combined. In 2011, the AIAN population held in local jails across the U.S. was 80% men and 20% women. For all other racial and ethnic groups combined, the breakdown was 87% men and 13% women.⁶⁸

i. Jails in Indian Country across the United States and in Washington

Males continued to account for the largest proportion of the population in Indian Country jails nationally in 2016. However, the proportion of women incarcerated in jails in Indian Country nationally increased from 20% of the incarcerated population in 2000 to 27% in 2016. In midyear 2016, 381 individuals were being held in Indian Country jails in Washington State (77% male and 23% female).⁶⁹ Similarly, the proportion of individuals in Indian Country jails in Washington State who were female increased from 11% in 2000 to 23% in 2016.⁷⁰ So, while Indian Country jails in Washington State had a lower proportion of incarcerated women (23%) than the average for all Indian Country jails nationally (27%), Washington saw an increase of 12 percentage points between 2000 and 2016 compared to an increase of seven percentage points nationally.

4. The Impact of COVID-19 on incarceration rates

The COVID-19 pandemic has been ravaging the world while this report was being researched and published, and the U.S. has been particularly hard hit. Prisons and jails are congregate environments where incarcerated individuals sleep, eat, and live together and staff travel

⁶⁶ *Id.*

⁶⁷ URB. INDIAN HEALTH INST., MISSING AND MURDERED INDIGENOUS WOMEN & GIRLS, <http://www.uihi.org/wp-content/uploads/2018/11/Missing-and-Murdered-Indigenous-Women-and-Girls-Report.pdf>.

⁶⁸ MINTON, BRUMBAUGH & ROHLOFF, *supra* note 65.

⁶⁹ TODD MINTON & MARY COWHIG, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST STAT., JAILS IN INDIAN COUNTRY, 2016 (2017), <https://www.bjs.gov/content/pub/pdf/jic16.pdf>.

⁷⁰ *Id.*; TODD MINTON, BUREAU OF JUST. STAT. BULL., JAILS IN INDIAN COUNTRY, 2000 (2001), <https://www.bjs.gov/content/pub/pdf/jic00.pdf>.

between the facility and the community. Like nursing homes, cruises, bus terminals, or meatpacking plants, effective preventative measures including physical distancing and avoiding contact with shared surfaces are nearly impossible to enact.⁷¹ A massive reduction in prison and jail populations was widely discussed as the only way to reduce the risk of outbreaks and large-scale illness and death.⁷² Some jails and prisons took such calls seriously and significantly reduced their populations.⁷³ But many took much more limited measures, including the federal prison system and Washington State.⁷⁴ Overall, the tragic result has been that individuals in prisons

⁷¹ E.g., *Correctional and Detention Facilities: COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 30, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/index.html>; *Infection Control for Nursing Homes: COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 29, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/long-term-care.html>; *Traveler's Health: COVID-19 and Cruise Ship Travel*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 16, 2021), <https://wwwnc.cdc.gov/travel/notices/covid-4/coronavirus-cruise-ship>; *Martinez-Brooks v. Easter*, No. 3:20-CV-00569 (MPS), 2020 WL 2405350, at *5, 23 (D. Conn. May 12, 2020); Order Granting Motion for Temporary Restraining Order, *Pimentel-Estrada v. Barr*, 2:20-cv-00495, Dkt. 51, pp. 6-9 (Apr. 28, 2020) (describing conditions at immigration detention center); Written Statement of Dr. Scott Allen, Examining Best Practices for Incarceration and Detention During COVID-19 Before the Senate Committee on the Judiciary, pp. 2-4 (Jun. 2, 2020), <https://www.judiciary.senate.gov/imo/media/doc/Scott%20Allen%20Testimony.pdf>.

⁷² E.g., Kelsey Kauffman, *Why Jails are Key to 'Flattening the Curve' of Coronavirus*, THE APPEAL (Mar. 13, 2020), https://theappeal.org/jails-coronavirus-covid-19-pandemic-flattening-curve/?fbclid=IwAR1K9cf0ardpNwlfxtzjLlegqusQ4l_ZpY1MEuagMfncqsttzMi5aGfKnCQ; *U.S. Jails Begin Releasing Prisoners to Stem COVID-19 Infections*, BBC NEWS (Mar. 19, 2020), <https://www.bbc.com/news/world-us-canada-51947802>; Weihua Li & Nicole Lewis, *This Chart Shows Why The Prison Population Is So Vulnerable to COVID-19*, THE MARSHALL PROJECT (Mar. 19, 2020), <https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19>; *Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic*, OFF. OF THE ATT'Y GEN. (Mar. 26, 2020), <https://www.justice.gov/file/1262731/download>; Katie Benner, *Barr Expands Early Release of Inmates at Prisons Seeing More Coronavirus Cases*, N.Y. TIMES (Apr. 3, 2020), <https://www.nytimes.com/2020/04/03/us/politics/barr-coronavirus-prisons-release.html>.

⁷³ E.g., Chad Sokol, *Dozens Released from Spokane County Custody Following Municipal Court Emergency Order*, SPOKESMAN REV. (Mar. 17, 2020), <http://www.courts.wa.gov/content/publicupload/eclips/2020%2003%2018%20Dozens%20released%20from%20Spokane%20County%20custody%20following%20Municipal%20Court%20emergency%20order.pdf>; *164 "Low Level, Nonviolent" Offenders Being Released from Hillsborough County Jails*, ABC ACTION NEWS (Mar. 19, 2020), <https://www.abcactionnews.com/news/region-hillsborough/164-low-level-nonviolent-offenders-being-released-from-hillsborough-county-jails>; Julia Marsh & Ben Feuerherd, *NYC Jail Population Lowest Since World War II After Coronavirus Releases*, N.Y. POST (Mar. 26, 2020), <https://nypost.com/2020/03/26/nyc-jail-population-lowest-since-world-war-ii-after-coronavirus-releases>; Kathleen Hopkins, *Coronavirus in NJ: Up to 1,000 Inmates to Be Released from Jails*, ASBURY PARK PRESS (Mar. 23, 2020), <https://www.app.com/story/news/2020/03/23/nj-coronavirus-up-1-000-inmates-released-jails/2897439001/>.

⁷⁴ E.g., Damini Sharma et al., *Prison Populations Drop by 100,000 During Pandemic – But not Because of COVID-19 Releases*, THE MARSHALL PROJECT (July 16, 2020), <https://www.themarshallproject.org/2020/07/16/prison-populations-drop-by-100-000-during-pandemic> (finding average prison populations reduced by eight percent due mostly to halt in transfers from jails to prisons; Washington's prison population reduced by seven percent in 2020); Keri Blakinger & Joseph Neff, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied*, THE MARSHALL PROJECT (Oct. 7, 2020), <https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied>.

nationwide have contracted COVID-19 at rates far greater than the general population.⁷⁵ In Washington’s prison system, for example, one in three incarcerated individuals has tested positive, 6.4 times the rate in Washington overall, although death rates have been consistent across the two populations. Among individuals incarcerated in federal facilities, two in seven have tested positive.⁷⁶ In addition, while adult release data or changes to admission data resulting from COVID-19 have not been analyzed to date, there are some early indications in the Washington State juvenile admissions data showing that reductions in admissions following the start of the COVID-19 outbreak are not being distributed equally across all genders and racial or ethnic groups, with female youth and Black, Indigenous, and youth of color seeing smaller reductions in admissions than their counterparts (see “Chapter 9: Juvenile Justice and Gender and Race Disparities”).⁷⁷

In Washington State, Governor Inslee directed the release of approximately 1,100 prisoners, approximately a six percent reduction, in April 2020.⁷⁸ However, individuals also continued to be returned to prison for violating conditions of release, limiting the effect of the meager releases and resulting in additional possible exposures.⁷⁹ By May 2021, nine of 12 prisons reported coronavirus cases among incarcerated individuals (ranging from 11 to 1,675 confirmed cases), many other facilities and work release facilities were also affected, and all but one prison had several to hundreds of reported staff cases.⁸⁰ By May of 2021, 14 incarcerated individuals and

⁷⁵ *E.g.*, Associated Press, *One in Every Five Prisoners in US Has Tested Positive for Covid-19*, GUARDIAN (Dec. 18, 2020), <https://www.theguardian.com/us-news/2020/dec/18/us-prisoners-coronavirus-stats-data>; Brendan Saloner et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 J. AM. MED. ASS’N 602 (2020); see also *A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT, <https://perma.cc/6M22-KL8V> (updated May 31, 2021).

⁷⁶ THE MARSHALL PROJECT, *supra* note 74.

⁷⁷ Personal Communication with Dr. Amanda Gilman, Washington State Center for Court Research (Nov. 4, 2020) (based on analysis of statewide juvenile admissions data).

⁷⁸ Joseph O’Sullivan & David Gutman, *As Coronavirus Spreads in Washington’s Prisons, Here’s What a State Watchdog Says Needs to Change*, SEATTLE TIMES (Aug. 10, 2020), <https://www.seattletimes.com/seattle-news/politics/fresh-air-outside-visitors-and-more-testing-watchdog-recommends-changes-in-washingtons-prisons-amid-coronavirus-pandemic/>.

⁷⁹ *Id.*

⁸⁰ *COVID-19 Data*, WASH. STATE DEP’T OF CORR. (2020), <https://perma.cc/7TS4-2DHQ> (numbers reported as of May 21, 2021).

two staff had died of COVID-19.⁸¹ Conditions within the state facilities have been shocking and dangerous.⁸²

Many local jails in Washington took reductions in populations more seriously.⁸³ The ACLU found Washington's overall statewide jail population was reduced initially by approximately 50%. The Prison Policy Initiative reports Snohomish, Yakima, and Kitsap counties as among the leaders nationwide among large local jails in percentage of population reduction, at 50, 50, and 49% reductions respectively.⁸⁴ King County reported an approximately 35% reduction in population between March 2020 and May 2021.⁸⁵ These reductions were accomplished by a combination of some of the following: releasing elderly and medically vulnerable persons, adopting booking criteria and restrictions to limit the influx of persons entering jails, and/or delaying prosecutions.⁸⁶ However, a Washington Courts study found "most courts also continued to issue warrants for failure to appear which is possibly contrary to the Supreme Court Order (No. 25700-B-646, October 13, 2020)," which set forth criteria courts should consider before issuing warrants for failing to appear including the risk of COVID-19 transmission.⁸⁷

Intersectional data on COVID-19 in Washington's prisons, jails, and population reductions have not been reported. The Department of Corrections reports race data for confirmed COVID-19 cases. At present, the data roughly tracks each race's percentage within the total incarcerated

⁸¹ *Id.*

⁸² *E.g.*, Lilly Fowler, *WA Inmates Say They're Retaliated Against for Getting COVID-19*, CROSSCUT (Dec. 15, 2020), <https://crosscut.com/news/2020/12/wa-inmates-say-theyre-retaliated-against-getting-covid-19> (Department of Corrections uses solitary confinement to isolate sick prisoners; two prisoners who died had waited days to report difficulty breathing); Maggie Quinlan, *70 Percent of Airway Heights Prison Is COVID-19-Positive*, SPOKESMAN REV. (Dec. 24, 2020), <https://www.spokesman.com/stories/2020/dec/24/70-of-airway-heights-prison-is-covid-positive>.

⁸³ Jaime Hawk, *Don't Go Back - Washington Jails Should Permanently Adopt Practices That Led to Reductions in Populations Due to COVID-19*, ACLU (Aug. 31, 2020), <https://www.aclu-wa.org/story/don%E2%80%99t-go-back-washington-jails-should-permanently-adopt-practices-led-reductions-populations>.

⁸⁴ Emma Widra & Peter Wagner, *Jails and Prisons Have Reduced Their Populations in the Face of the Pandemic, but not Enough to Save Lives*, PRISON POL'Y INITIATIVE (Aug. 5, 2020) <https://www.prisonpolicy.org/blog/2020/08/05/jails-vs-prisons-update-2/>.

⁸⁵ *Emergency COVID-19 Actions to Ensure Everyone's Safety at Correctional Facilities*, KING CNTY. (2020), <https://perma.cc/8RZW-U3Q4> (data visited May 21, 2021).

⁸⁶ Hawk, *supra* note 83.

⁸⁷ BJA COURT RECOVERY TASK FORCE & LESSONS LEARNED COMMITTEE, *CHANGING COURT PRACTICES AMIDST COVID AND BEYOND 1* (2020), http://www.courts.wa.gov/programs_orgs/pos_bja/Final%20Changing%20Court%20Practices%20Admist%20COVID%20Survey%20summary.pdf.

population. Just as Black individuals are overrepresented in the prison population, they are overrepresented in confirmed COVID-19 cases, accounting for 16.8% of cases among the Washington prison population in May of 2021. Incarcerated AIANs are experiencing COVID-19 at an even higher rate than their incarceration rate, accounting for 6.2% of COVID-19 cases and 5.9% of the incarcerated population.⁸⁸ Black, AIAN, Native Hawaiian or other Pacific Islanders, Latinx and other people of color have been disproportionately affected by COVID-19 writ large.⁸⁹ The two women’s prison facilities have, as of May 2021, incurred 35 reported inmate cases and 41 staff cases of COVID-19, with no deaths.⁹⁰ It is important to note that disparities are often masked when we group many diverse populations into one racial or ethnic category—such as combining all Asian populations into one group as the datasets cited here do.

Widespread recidivism due to the larger reductions in jail populations and more modest reduction in the prison population have not been reported. In fact, as to pretrial releases, the ACLU concludes “These past several months have shown that people facing charges can remain safely in the community while their case is pending in court.”⁹¹ Thus, Washington and its counties should consider making these reductions permanent. We recommend the response of the state and localities to COVID-19 in our prisons and jails be studied, including why so many outbreaks occurred, what various stakeholders could have done to prevent suffering and death, and the effect of the releases that occurred on recidivism, public and inmate safety, and health.

III. The Environments Causing Increased Female Convictions and Incarceration Generally and Across Subpopulations

⁸⁸ WASH. STATE DEP’T OF CORR., *supra* note 80.

⁸⁹ *COVID-19 Data Dashboard*, WASH. STATE DEP’T OF HEALTH, <https://perma.cc/F7FT-CS2Y>, (last accessed May 28, 2021); *The COVID Racial Data Tracker*, ATLANTIC, <https://perma.cc/4MFG-CV6W> (last accessed May 31, 2021); *Coronavirus Disease 2019 (COVID-19), Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/Q6M9-75TT> (last accessed May 31, 2021); *COVID-19 Hospitalization and Death by Race/Ethnicity*, CTRS. FOR DISEASE CONTROL & PREVENTION <https://perma.cc/9TNQ-TS9E> (updated May 26, 2021); see also Gina Kolata, *Social Inequities Explain Racial Gaps in Pandemic, Studies Find*, N.Y. TIMES (Dec. 9, 2020), <https://www.nytimes.com/2020/12/09/health/coronavirus-black-hispanic.html>.

⁹⁰ WASH. STATE DEP’T OF CORR., *supra* note 80.

⁹¹ Hawk, *supra* note 83.

As the previous section demonstrates, there has been a historical increase in the convictions and incarceration of women, a trend that seems to be continuing in Washington State. National research points to several factors contributing to these gender disparities. The national data reviewed below demonstrates specific impacts along gender lines, and particularly on subpopulations of women. More work needs to be done to study the drivers of increasing incarceration of women in Washington and, in particular, to study the reasons for the racial and ethnic disparities identified in the Pilot Study, as discussed previously. This section describes several, largely unquantified, drivers of the growing incarceration of women in Washington: untreated trauma, legislative changes, policing and prosecution practices, pretrial detention, socioeconomic factors, and sentencing laws. It is also important to recognize systemic racism as its far-reaching impacts undergird many, if not all, of these drivers.

A. The trauma-to-prison pipeline

Trauma is well established as a driver of female incarceration. A 2018 national study found that incarcerated women arrive at prison with higher rates of PTSD than incarcerated men, and that when women had experienced adult psychological trauma, they tended to commit more severe offenses and receive longer prison sentences.⁹² Childhood adversity and trauma serve as significant risk factors for women's perpetration of intimate partner violence. Childhood adversity and trauma are also linked to adult risk factors, such as substance abuse disorder. Incarcerated women are often simultaneously victims and perpetrators. Although women do not commit a high proportion of violent offenses, over three fourths of violent women offenders commit their offenses with co-offenders, generally male partners, and fewer than 14% of women

⁹² Thanos Karatzias et al., *Multiple Traumatic Experiences, Post-Traumatic Stress Disorder and Offending Behaviour in Female Prisoners*, 28 CRIM. BEHAV. MENTAL HEALTH 72 (2018); see also Christy K. Scott et al., *Trauma and Morbidities Among Female Detainees in a Large Urban Jail*, 96 PRISON J. 102 (2016) (reviewing research showing that "the experience of trauma is a likely determinant in women's involvement in criminal activities," and noting that incarcerated women are more likely than men to experience trauma-related addictions and psychological disorders); Bonnie Green et al., *Trauma Experiences and Mental Health Among Incarcerated Women*, 8 PSYCH. TRAUMA 455 (2016), (finding high rates of trauma exposure and psychiatric disorders among incarcerated women, reinforcing the conclusion that trauma is a significant pathway to criminal activity for women); Andrea James, *Ending the Incarceration of Women and Girls*, 128 YALE L.J. F. 772 (2019).

have a primary role in the offense.⁹³ Thus, traumas, adversity, and relationships form key bases for female offending.

To address these issues, it is important to recognize the complexities and the breadth of traumatic experiences befalling women in our state (and throughout the nation). Some women experience complex trauma and PTSD as a result of chronic exposure to traumatic events such as human trafficking situations, long-term domestic violence, long-term child physical abuse or child sexual abuse, organized child exploitation rings,⁹⁴ or intergenerational drug use.⁹⁵ In these situations, generally, the victim is held in a state of physical or emotional captivity, is under the control of the perpetrator, and is unable to escape.⁹⁶ For example, a survivor of childhood abuse who also witnessed the long-term psychological and physical abuse of her mother and siblings became the victim of relationship domestic violence perpetrated by her husband.⁹⁷ Despite attempts to seek help from her doctor, law enforcement, and the courts, she was unable to find adequate protection and never received mental health counseling or adequate support in the community. One night she took the knife she had in her purse for her own protection to the throats of herself and her young children, who all survived. She has been incarcerated for the last 25 years, serving a 40-year sentence for two counts of attempted murder despite the non-life-threatening nature of everyone's wounds and her complex trauma history. At trial in 1995, the defense focused on diminished capacity due to dissociative amnesia and the court at sentencing

⁹³ Gina Fedock & Stephanie Covington, *Female Violent Offending, Theoretical Models of*, THE SAGE ENCYCLOPEDIA OF CRIM. PSYCH. 516–18 (2019).

⁹⁴ Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923 (2007).

⁹⁵ Chris Taplin et al., *Family History of Alcohol and Drug Abuse, Childhood Trauma, and Age of First Drug Injection*, 49 SUBSTANCE USE & MISUSE 1311 (2014); Elizabeth A. Swedo et al., *Adolescent Opioid Misuse Attributable to Adverse Childhood Experiences*, 224 J. PEDIATRICS 102 (2020); Kevin P. Haggerty & Beatriz H. Carlini, *Understanding the Intergenerational Transmission of Substance Use and Problem Behavior: Implications for Future Research and Preventive Interventions*, 34 PSYCH. ADDICTIVE BEHAVS. 894 (2020). Anecdotally, this author and other defense attorneys she has spoken with have heard from multiple clients that they were introduced to drug use at young ages by adult family members.

⁹⁶ Wayland, *supra* note 94; *PTSD: National Center for PTSD, Complex PTSD*, U.S. DEP'T OF VETERANS AFFS. (Jan. 31, 2020), https://www.ptsd.va.gov/professional/treat/essentials/complex_ptsd.asp.

⁹⁷ This example is provided with the permission of the woman described. Support for these facts are available in her clemency petition, which is on file with her attorney, Marla Zink.

had only a limited awareness of childhood abuse, depression, and stress as well as peripartum symptoms.

Complex trauma and PTSD is often experienced by racially marginalized individuals, particularly the intergenerational trauma to Black and AIAN women in the U.S., and those marginalized due to their gender or sexual identity.⁹⁸ The impact arises from the cumulative effect of hegemonic norms and systemic racism as well as more-commonly recognized, interpersonal acts of psychological and physical abuse.

Other women experience unique and relatively-unstudied traumas related, for instance, to separation, bereavement, or attachment. Trauma in young girls, moreover, may alter development and interfere with school performance, which in Washington, as discussed under legislative changes below, often leads to young women's first interaction with the criminal justice system and detention.⁹⁹ Washington criminalizes both women's attempts to escape abuse and trauma (including drug addiction, economic crimes, runaway girls, and prostitution) and their entrapment in violent relationships that coerce them into crime (including economic crimes, and violent crimes of self-defense or protection of others).¹⁰⁰ In short, the effects of trauma are myriad and unresolved through incarceration. Work remains to prevent abuse and trauma and to recognize and treat its various sources and manifestations in the community. See "Chapter 10: Commercial Sex and Exploitation" for a detailed analysis of the pathways leading to and the criminalization of sex work.

It is also important to consider that individuals' traumas may intersect with the criminal justice system in very particular ways that can exacerbate the trauma. For example, women who have suffered trauma through domestic violence may have situational responses to living in a controlling carceral environment. Those who have experienced systemic racism and/or

⁹⁸ Kate Richmond & Theodore Burnes, *Lost in Trans-Lation Interpreting Systems of Trauma for Transgender Clients*, 18 TRAUMATOLOGY 45 (2012).

⁹⁹ MARY GILFUS, VAWNET.ORG, WOMEN'S EXPERIENCES OF ABUSE AS A RISK FACTOR FOR INCARCERATION (2002), https://vawnet.org/sites/default/files/assets/files/2017-08/AR_Incarceration.pdf.

¹⁰⁰ *Id.* at 3-6; MELISSA DICHTER & SUE OSTHOFF, VAWNET.ORG, WOMEN'S EXPERIENCES OF ABUSE AS A RISK FACTOR FOR INCARCERATION: A RESEARCH UPDATE (2015), <https://vawnet.org/material/womens-experiences-abuse-risk-factor-incarceration-research-update>; Melissa S. Jones et al., *Childhood Adversity and Intimate Partner Violence in Adulthood: The Mediating Influence of PTSD in a Sample of Women Prisoners*, 36 J. INTERPERSONAL VIOLENCE 8590 (2021).

marginalization may be triggered by biases exposed during their involvement with the criminal justice system.

Implementing and maintaining trauma-informed care throughout civil society and government agencies is key to helping to heal women in Washington.¹⁰¹ Highlighting the impact of trauma on our female prison population, the Washington State Office of the Corrections Ombuds published a 2019 report describing seven areas of recommended changes based on complaints they have received from incarcerated individuals in the last year. The report highlights a recommendation specifically focusing on applying a “trauma-informed and gender-responsive lens to programs...particularly for women and [Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), and Intersex] LGBTQI individuals across facilities.”¹⁰² Further, the report asserts the following regarding the root causes of gender disparities in correctional facilities:¹⁰³

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

Several programs in Washington target reducing female recidivism by, in part, working to heal trauma. For example, the Kitsap County Girls’ Court responds to women (self-identified) presenting in juvenile court with greater negative childhood experiences and greater trauma histories by providing holistic post-disposition treatment that includes mental health, behavioral health, medical care, education and job training, independent living skills, and mentorship.¹⁰⁴ For details see “Chapter 9: Juvenile Justice and Gender and Race Disparities.” The IF Project, a

¹⁰¹ *E.g.*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, SAMHSA’S CONCEPT OF TRAUMA AND GUIDANCE FOR A TRAUMA-INFORMED APPROACH (2014), https://ncsacw.samhsa.gov/userfiles/files/SAMHSA_Trauma.pdf; SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES (2014), <https://store.samhsa.gov/sites/default/files/d7/priv/sma15-4912.pdf>.

¹⁰² JOANNA CARNS, WASHINGTON STATE OFFICE OF THE CORRECTIONS OMBUDS. ANNUAL REPORT 2019 (2019), <https://oco.wa.gov/sites/default/files/public/Annual%20Report%202019%20Final.pdf>.

¹⁰³ *Id.*

¹⁰⁴ *Kitsap County Girls Court*, CTR. FOR CHILDREN & YOUTH JUST. (2020), <https://ccyj.org/our-work/girls-court/girls-court-kitsap-county>.

collaboration of law enforcement, current and previously incarcerated adults, and community partners, meets women where they are after they are incarcerated and provides:¹⁰⁵

- a one-day writing intensive workshop that asks the question “If there was something someone could have said or done to change the path that led you here what would it have been?”;
- a creative writing course;
- a 10-week health and wellness program that focuses on life-planning for physical, emotional, and mental health needs; and
- a 10-week reentry program for women within 6 months of their release date, which covers topics including transportation, access to services/resources, healthy relationships, family reunification, stigma, personal responsibility, financial literacy, employment readiness, access to education/union membership, and technology.

Community Passageways is a further example. Among its many programs aimed at zero youth incarceration and felony diversion in King County, Community Passageways hosts women’s-only healing circles to better support the unique needs of young women. The healing circles address trauma and build the skills necessary for youth to thrive while creating shared experiences within a supportive peer network. Community Passageways also hosts mixed-gender circles and their Ambassadors are trained to draw from evidence-based interventions: Multisystemic Therapy (MST), Dialectical Behavior Therapy (DBT), and Motivational Interviewing (MI). Their new reentry program, Not Forgotten, is directed by Andrea Altheimer, who spent more than 20 years incarcerated after in-home, childhood trauma. Andrea and her team work with incarcerated participants to build a comprehensive release plan that addresses factors that her lived experience and research suggest are most influential for reentry success: health, employment, housing, skills development (education and interpersonal), mentorship, and social connection. After collaborating to build a specific and realistic release plan, the reentry team walks alongside individuals upon release to decrease anxiety, build confidence, and grow their community. According to Community Passageways, this has proven to be the exact support individuals need

¹⁰⁵ THE IF PROJECT, <https://www.theifproject.org>.

to move forward on a positive path. Their program is built on the premise that connection to the community is critical to a positive path forward, and the work is accomplished by individuals who are a part of the communities they serve.¹⁰⁶ For more information about gender-responsive programming in the Department of Corrections see “Chapter 12: Availability of Gender Responsive Programming and Use of Trauma Informed Care in Washington State Department of Corrections.”

B. Legislative changes as drivers of incarceration rates and their disproportionate impact on Black, Indigenous, and women of color

In Washington’s largest counties, the Pilot Study discussed above shows that although men make up a greater percentage of the convicted and sentenced population, women are being convicted in relatively higher proportions of drug, property, and fraud offenses. Black women are typically convicted and sentenced at two or three times the rate we would expect based on their proportion of the state’s population in each offense category. However, their representation for drug crimes was less pronounced in 2019, as compared with 2010 and 2000. Native American women are also disproportionately represented across these offense categories at only a slightly lower rate than Black women.¹⁰⁷

National-level research widely cites the “war on drugs” as a root cause for the increase in convictions and incarceration of women. The so-called war on drugs has affected Washington women (and men) similarly to their national counterparts. The “war on drugs” includes the introduction of mandatory minimum sentences for federal drug offenses, specifically the Anti-Drug Abuse Act of 1986 and the Omnibus Anti-Drug Abuse Act of 1988, that have exacerbated the impact of the so-called war.¹⁰⁸ The legislation and its effect is further described and examined in “Chapter 14: Sentencing Changes and Their Direct and Indirect Impact on Women.”

¹⁰⁶ This discussion of Community Passageways is based on conversations between the author and staff members of Community Passageways as well as the publicly-available information here: Our Programs, Community Passageways, available at <https://www.communitypassageways.org/programs-impact> (last visited May 2, 2021).

¹⁰⁷ MASTERS ET AL., *supra* note 31, at 10, 16–18, 27–30.

¹⁰⁸ Stephanie Bush-Baskette, *The War on Drugs and the Incarceration of Mothers*, 30 J. DRUG ISSUES 919 (2000).

The “war on drugs” has been the most frequently studied reason for the increase in convictions and incarceration of women in the last forty years.¹⁰⁹ Between 1990 and 1997 the number of women sentenced to more than a year in state and federal prisons nationwide for drug offenses rose 99%, compared to a 48% increase among males. Drug offenses were the largest source of total population growth among women sentenced to more than a year in this time period, accounting for 38% of the increase. Furthermore, when examining the entire female population sentenced to over one year in state or federal prisons nationwide, in 1997 approximately 35% of women were incarcerated with a drug-related offense.¹¹⁰ Female arrests for drug crimes have continued an overall increasing trend, whereas male drug arrests have declined. The effect is that women’s drug arrests have increased 216% from 1985 to 2019 while men’s drug arrests have risen a-still-alarming but comparatively more modest 48%.¹¹¹

In Washington, the Pilot Study suggests women’s conviction and incarceration for drug offenses has been volatile. The data from the selected counties are similar for fiscal years 2000 and 2019, but there was a small dip for 2010.¹¹² More should be done to study the trends and root causes among types of offenses statewide.

The “war on drugs” effort outwardly claimed to focus criminal justice efforts toward reducing the sale, distribution, and consumption of illegal drugs.¹¹³ In implementation, it grossly disproportionately affects Black individuals. The resulting mass incarceration has been suggested

¹⁰⁹ Barbara Bloom, Barbara Owen & Stephanie Covington, *Women Offenders and the Gendered Effects of Public Policy*, 21 REV. POL’Y RSCH. 31 (2004); Stephanie S Covington & Barbara E Bloom, *Gendered Justice: Women in the Criminal Justice System*, GENDERED JUSTICE: ADDRESSING FEMALE OFFENDERS 3 (2003); Susan D. Phillips & Nancy J. Harm, *Women Prisoners: A Contextual Framework*, 20 WOMEN & THERAPY 1 (1998).

¹¹⁰ Women experienced sharper growth in incarceration rates than males for each of the four offense categories analyzed (violent, property, drug, and public-order) between 1990 and 1997. Public-order offenses (i.e., “weapons, drunk driving, court offenses, commercialized vice, morals and decency charges, liquor law violations, and other public-order offenses”) increased 274% for women compared to a 131% increase for men. Despite this sharp increase, public-order offenses only accounted for 17% of the growth among incarcerated women compared the 38% accounted for by drug offenses. It is not clear from the report if individuals were classified by their most serious offense only, but all categories add up to the total population count which implies that this is the methodology used. ALLEN BECK & CHRISTOPHER MUMOLA, BUREAU OF JUST. STAT. BULL., PRISONERS IN 1998 (1999), <https://www.bjs.gov/content/pub/pdf/p98.pdf>.

¹¹¹ Tiana Herring, *Since You Asked: What Role Does Drug Enforcement Play in the Rising Incarceration of Women?*, PRISON POL’Y INITIATIVE (Nov. 10, 2020), <https://www.prisonpolicy.org/blog/2020/11/10/women-drug-enforcement/>.

¹¹² MASTERS ET AL., *supra* note 31, at Tables 5-7.

¹¹³ Lisa D. Moore & Amy Elkavich, *Who’s Using and Who’s Doing Time: Incarceration, the War on Drugs, and Public Health*, 98 AM. J. PUB. HEALTH S176 (2008).

to create the new “racial caste system,” which Michelle Alexander argues is driven by politics and not crime.¹¹⁴ History shows that anti-immigrant and anti-Black racism have underpinned selective drug criminalization since the early 1900s.¹¹⁵ President Theodore Roosevelt’s Opium Commissioner, Hamilton Wright, “used disturbing racial claims to advance his cause [of international drug controls and domestic regulation], blaming opium for illicit sexual relations between white women and Chinese men and linking cocaine to violence in African American men.” In the 1930s, the first commissioner of the Federal Bureau of Narcotics, Harry Anslinger, “reframe[ed] drug use from a medical issue to a public menace responsive only to tough criminal controls. His vehicle was fearmongering that used racism as a tool to amplify the dangers of drugs.” For example, he campaigned against marijuana by “deploying the mass media and antipathy toward Mexicans and Mexican Americans to demonize ‘loco weed.’” The anti-drug movement has long relied on “emotional drivers, principally racialized fears and nostalgia for an imagined peaceful and innocent past.” Prohibition laws restricting alcohol consumption were even used to justify the disenfranchisement of Black “wet” voters who were holding back the South from becoming “‘dry’ and progress[ing] to a brighter future.”

There now should be no doubt criminalizing Black communities was the precise intent of the war on drugs, as President Nixon’s head of domestic affairs admitted the administration’s strategy in a 1994 interview:

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I’m saying? We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin. And then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify

¹¹⁴ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

¹¹⁵ Doris Marie Provine, *Race and Inequality in the War on Drugs*, 7 ANN. REV. L & SOC. SCI. 41 (2011). For another comprehensive review of selective drug laws and policy and a lengthy analysis of its historical roots, see LEGAL FRAMEWORKS GRP., KING CNTY. BAR ASS’N DRUG POL’Y PROJECT, *DRUGS AND THE DRUG LAWS: HISTORICAL AND CULTURAL CONTEXTS* (2005), https://www.kcba.org/kcba/druglaw/pdf/report_hc.pdf.

them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.¹¹⁶

Drug use was actually in decline when President Reagan declared the war on drugs in the 1982.¹¹⁷ In the 1980s, Lee Atwater, a Republican operative then working in the White House, acknowledged a strategy to mask the racial animus underlying policies:

You start out in 1954 by saying, “N*****, n*****, n*****.”¹¹⁸ By 1968 you can’t say “n*****”—that hurts you, backfires. So you say stuff like, uh, forced busing, states’ rights, and all that stuff, and you’re getting so abstract. Now, you’re talking about cutting taxes, and all these things you’re talking about are totally economic things and a byproduct of them is, blacks get hurt worse than whites.¹¹⁹

In 2017, drug offenses still accounted for one of the largest proportions of the female population sentenced to more than one year in state and federal prisons. Just over 25% of the incarcerated female population was incarcerated for a drug offense as their most serious offense. However, nearly 38% of sentenced women were incarcerated for a violent crime as their most serious offense in 2017, compared to less than 28% in 1997.¹²⁰ This indicates that, while drug offenses still have a substantial impact on women, violent offenses also have a significant (and growing) impact on women nationwide.

This year has seen significant changes in Washington’s drug laws. First, in February 2021, the Washington Supreme Court held Washington’s drug possession statute unconstitutional.¹²¹ The case involved a woman charged of possessing methamphetamine after a small baggy containing the substance was found in the coin pocket of her jeans. Ms. Blake defended against the charge

¹¹⁶ Dan Baum, *Legalize It All*, HARPER’S MAG. (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all>.

¹¹⁷ Kenneth Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks”*, 6 J. GENDER RACE & JUST. 381 (2002).

¹¹⁸ We have redacted the racial epithet used to avoid repeating harmful language, although we find it relevant the speaker used and repeated this particularly abhorrent language during his explanation.

¹¹⁹ Rick Perlstein, *Exclusive: Lee Atwater’s Infamous 1981 Interview on the Southern Strategy*, THE NATION (Nov. 13, 2012), <https://www.thenation.com/article/archive/exclusive-lee-atwaters-infamous-1981-interview-southern-strategy>.

¹²⁰ BECK & MUMOLA, *supra* note 110; ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2018 (2020), <https://www.bjs.gov/content/pub/pdf/p18.pdf>.

¹²¹ *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

by asserting her possession was unwitting, a friend had bought the jeans secondhand and then given them to her. Ms. Blake said she did not know the drugs were in the pocket. The Supreme Court held the statute unconstitutional because it did not require the prosecution to prove Ms. Blake, and other defendants, knew of the drugs in their possession. Under federal and state due process protections, and following decisions of the U.S. Supreme Court, the Washington Supreme Court held the strict liability drug possession statute with substantial felony penalties for potentially innocent, passive conduct exceeds the Legislature's police power. The result of the holding not only vacated Ms. Blake's conviction but all charges and convictions for possession of drugs under the same statute, RCW 69.50.4013. Individuals who had such convictions included in the calculation of their offender score and sentence for other crimes also became entitled to resentencing. Data presented by the American Equity and Justice Group show between 1999 and 2019 Black people were convicted of simple drug possession at "disproportionally high rates in every county except for Pacific, Pend Oreille, San Juan (which recorded zero Black residents in 2019), Grays Harbor, and Ferry (also zero Black people). Racial disparities were widest in King County, which saw 13,941 simple possession convictions during that twenty-year period. Of those cases, 40.2% involved Black people, 5% involved Asians, 1.5% involved Native Americans, and 50.5% involved white people. In 2019, King County's racial breakdown was seven percent Black, 19.9% Asian, one percent Native, and 67.1% white."¹²² Unfortunately, the data has not yet been broken out by gender. Furthermore, the data derives originally from the Caseload Forecast Council and therefore suffers from the same shortcomings and concerns discussed above and in the Pilot Study (see Appendix C for the full Pilot Study).

In response, the Washington State Legislature passed a new drug possession law.¹²³ The new law requires the prosecution to prove the defendant's knowledge of the drugs in their possession and it also reduces the penalties from those imposed under the invalidated statute by making the offense a misdemeanor instead of a felony. The legislation also provides funding to

¹²² Rich Smith, *New Data Analysis Shows the Astonishing Breadth of the Racial Disparity in Washington's Drug Possession Convictions*, THE STRANGER (Mar. 17, 2021), <https://www.thestranger.com/slog/2021/03/17/55910514/new-data-analysis-exposes-wide-racial-disparities-in-drug-possession-convictions-across-washington>.

¹²³ ENGROSSED S.B. 5476, 67th Leg., Reg. Sess. (Wash. 2021).

community services and requires law enforcement to divert suspected offenders to assessment, treatment, or other services. The bill encourages prosecutors also to divert individuals to services in the community rather than prosecute them. Most of the changes will sunset in 2023 unless the Legislature takes further action. The effect of this legislation cannot be stated yet, but it should be studied. It would be useful to compare it to a new law that took effect in Oregon this year, which reduces possession of small quantities of drugs to a civil infraction and invests in drug treatment programs and community services.¹²⁴

Drug laws and policy are not the only factors increasing incarceration rates. Other legislation and practices in the “get tough on crime movement,” including the Violent Crime Control and Law Enforcement Act of 1994, three-strikes legislation in Washington¹²⁵ and other states, and pretrial detention have further increased the incarceration of women.¹²⁶ These laws have a particular impact on women, for whom the combined factors of child care needs, poverty, and domestic violence have forced them into pathways involving crime and drug dealing to support themselves and their families to avoid homelessness. A small qualitative study with women incarcerated in a jail in Arizona found that conflicts between work, childcare, and probation requirements inevitably led to their incarceration. Those with dependent children in their custody talked about crime as an alternative to hunger and homelessness or as a means to protect their children from domestic violence. The interviews also highlighted the interactions of race, gender, and poverty with women noting experiences of racism and childhood trauma.¹²⁷ Moreover, Washington data reported in the Pilot Study also shows the number of women convicted and sentenced for public order offenses to be on the rise from 2000 to 2019.¹²⁸

¹²⁴ *Drug Addiction Treatment and Recovery Act*, OREGON HEALTH AUTH. (May 18, 2021) <https://www.oregon.gov/oha/HSD/AMH/Pages/Measure110.aspx>; Melissa Santos, *Washington Could Become the Second State to Decriminalize Drugs*, CROSSCUT (Feb. 4, 2021), <https://crosscut.com/news/2021/02/washington-could-become-second-state-decriminalize-drugs>.

¹²⁵ Initiative 593 (codified at RCW 9.94A.570). This legislation is discussed further in “Chapter 14: Sentencing Changes and Their Direct and Indirect Impact on Women.”

¹²⁶ Bloom, Owen & Covington, *supra* note 109; Covington & Bloom, *supra* note 109; Kathleen J. Ferraro & Angela M. Moe, *Mothering, Crime, And Incarceration*, 32 J. CONTEMP. ETHNOGRAPHY 9 (2003).

¹²⁷ Ferraro & Moe, *supra* note 126.

¹²⁸ MASTERS ET AL., *supra* note 31, at Tables 5-7.

The criminalization and incarceration of female youth, and its disproportionate impact on Black, Indigenous, and youth of color, is studied in depth in “Chapter 9: Juvenile Justice and Gender and Race Disparities.” Nonetheless, it deserves mention here because youth who interact with the criminal justice system are more likely to remain involved as adults and are likely to experience long-term social, psychological, health, educational, political, and economic outcomes post-release.¹²⁹ Within the U.S., Washington State detains the highest rate of girls for status offenses (i.e., noncriminal activity) including truancy (absence from school), running away from home, and violating curfew or rules of probation.¹³⁰ This makes Washington particularly susceptible to losing girls and women in the school-to-prison pipeline.¹³¹ Also, female youth in Washington are more commonly detained for lower-level misdemeanor offenses than for more serious felony offenses.¹³² Perhaps most troubling, a recent Washington-based study shows girls of particular races and ethnicities disproportionately receive the harshest sentences:

Native girls made up 2.4% of the female youth population but 7.0% of female detention admissions in 2019; Latinx girls made up 18.5% of the female youth population but 24.6% of female detention admissions; and Black girls made up 4.9% of the female youth population but 14.6% of female detention admissions.¹³³

The effect this increasing detention of girls, and especially the disproportionate effect on Indigenous, Latinx, and Black girls, has on this state’s large incarcerated adult female population should be studied further.

¹²⁹ *E.g.*, Gabrielle Prisco, *When the Cure Makes You Ill: Seven Core Principles to Change the Course of Youth Justice*, 56 N.Y. L. SCH. L. REV. 1433 (2011); Yael Cannon & Andrew Hsi, *Disrupting the Path from Childhood Trauma to Juvenile Justice: An Upstream Health and Justice Approach*, 43 FORDHAM URB. L.J. 425 (2016). The impact is felt exponentially by Black, Indigenous, and people of color. A recent Seattle-based study found Black youth who have contact with police by eighth grade are eleven times more likely to report arrest by age 20 than their Black peers without police contact, but the same is not true for white youth, even though more white than Black youth reported engaging in some criminal behavior. Anne McGlynn-Wright et al., *Usual, Racialized, Suspects: The Consequence of Police Contacts with Black and White Youth on Adult Arrest*, SOC. PROBS. (2020); ALIYAH ABU-HAZEEM ET AL., GIRLS OF COLOR IN JUVENILE DETENTION IN WASHINGTON STATE (2020), <https://www.courts.wa.gov/subsite/mjc/docs/MJC%20Special%20Detention%20Report%202020.pdf>.

¹³⁰ *See, e.g.*, RCW 13.32A.030; ch. 28A.225 RCW; RCW 28A.320.124.

¹³¹ Prisco, *supra* note 129; Jonathon Arellano-Jackson, *But What Can We Do? How Juvenile Defenders Can Disrupt The School-to-Prison Pipeline*, 13 SEATTLE J. SOC. JUST. 751 (2015); Wendy S. Heipt, *Girl’s Court: A Gender Responsive Juvenile Court Alternative*, 13 SEATTLE J. SOC. JUST. 803 (2014).

¹³² ABU-HAZEEM ET AL., *supra* note 129.

¹³³ *Id.* at 1.

In 2019, the Washington State Legislature passed legislation authorizing the Juvenile Rehabilitation Administration to house and rehabilitate youth up to the age of 25, rather than transfer those with lengthy sentences to adult prisons.¹³⁴ The effect of this new legislation is not yet known but should be studied.

C. Policing and prosecution practices as drivers of incarceration rates and its disparate impact on Black, Indigenous, and women of color

Criminalization and incarceration are not just driven by laws but also by enforcement of those cases. Police and prosecutors play a significant role in who is arrested, who is charged, what they are charged with, whether they are offered a plea deal and what plea deal, and what sentence is sought. Police and prosecutorial discretion and bias is discussed in depth in “Chapter 13: Prosecutorial Discretion and Gendered Impacts.” Briefly, while no statewide Washington-specific research on gender disparities in policing and prosecution exist, several projects by Dr. Katherine Beckett have found policing disparities in Seattle.¹³⁵ The policing of drug activity was by far the most common reason cited for why disproportionate numbers of Black, Indigenous, and people of color are convicted of felony drug charges. These are areas that should be examined through future research studies. In addition to researching drug-policing (and other) disparities in Washington, intersectional and gender-focused research should be conducted to study whether the use of traffic laws have a disparate impact across genders. There is reason to believe there is a widespread police practice of using the traffic laws to routinely stop and detain Black, Hispanic,

¹³⁴ LAWS OF 2019, ch. 322.

¹³⁵ KATHERINE BECKETT, RACE AND DRUG LAW ENFORCEMENT IN SEATTLE (2004), <https://static.prisonpolicy.org/scans/Beckett-20040503.pdf>; Katherine Beckett, Kris Nyrop & Lori Pflingst, *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105 (2006); Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419 (2005); Barbara Ferrer & John M. Connolly, *Racial Inequities in Drug Arrests: Treatment in Lieu of and After Incarceration*, 108 AM. J. PUB. HEALTH 968 (2018); Ojmarrh Mitchell & Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, 32 JUST. Q. 288 (2015); Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257 (2009); THE SENT’G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities>; SAMUEL R GROSS, MAURICE POSSLEY & KLARA STEPHENS, *RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES* 37 (2017); HUM. RTS. WATCH & ACLU, EVERY 25 SECONDS THE HUMAN TOLL OF CRIMINALIZING DRUG USE IN THE UNITED STATES (2016), https://www.hrw.org/sites/default/files/report_pdf/usdrug1016_web.pdf.

and other motorists of color for the investigation of crime in the absence of probable cause or reasonable suspicion for the stop.¹³⁶ The disproportionate impact is commonly referred to as “driving while Black.” Data from the Washington State Patrol confirms that Black, Latino, Native American, and Native Hawaiian and other Pacific Islander drivers are searched at a higher rate than white motorists. Native Americans, in particular, are searched at a rate five times higher than white motorists—and these searches appear to be focused along the I-5 corridor and near the Yakima and Colville reservations.¹³⁷ National data indicates Black women are 17% more likely than white women to be in a police-initiated traffic stop, and are arrested three times as often as white women during police-initiated street and traffic stops.¹³⁸

With national data showing the incarceration rate for LGBTQ+ individuals of all genders is over three times higher than the rate of LGBTQ+ individuals in the U.S. adult population,¹³⁹ it is fitting to study the extent to which policing or prosecutorial practices contribute to this disparity as well. Moreover, while mandatory sentencing changes, such as increased minimum sentencing terms and three-strikes legislation, constrain courts, they provide more leverage to prosecutors who control the crimes and enhancements that are charged and also control plea deal offers. Thus, Washington would be well-served if it studied the composition of prosecutors’ offices by gender, race, and ethnicity as well as disparities in prosecution throughout the state. It would be particularly interesting to study whether policing and/or prosecuting practices impact the disproportionate conviction and sentencing rates for Black and Indigenous women and across offense categories found in the six-county Pilot Study. We also recommend finding a way, if possible, to cover disparities affecting the Latinx and Native Hawaiian and other Pacific Islander populations and other intersectional data that has been limited to date.

¹³⁶ THE STANFORD OPEN POLICING PROJECT (2021), <https://openpolicing.stanford.edu>; Joy Borkholder & Jason Buch, *Driving While Indian: How InvestigateWest Conducted the Analysis*, INVESTIGATEWEST (DEC. 19, 2019), <https://www.invw.org/2019/12/19/driving-while-indian-how-investigatwest-conducted-the-analysis>.

¹³⁷ THE STANFORD OPEN POLICING PROJECT, *supra* note 136; Borkholder & Buch, *supra* note 136.

¹³⁸ *Policing Women: Race and Gender Disparities in Police Stops, Searches, and Use of Force*, PRISON POL’Y INITIATIVE (May 14, 2019), <https://www.prisonpolicy.org/blog/2019/05/14/policingwomen>.

¹³⁹ Meyer et al., *supra* note 48; WALLACE SWAN, THE ROUTLEDGE HANDBOOK OF LGBTQIA ADMINISTRATION AND POLICY (2018).

D. Pretrial detention as a driver of incarceration rates and the racial disparity of pretrial detention

Individuals arrested and charged with a crime can be released or detained while they await trial, depending on recommendations made by the prosecuting attorney, arguments presented by defense counsel, and the final decision made by a judge. Because of the presumption of innocence, state and federal law generally hold that defendants not detained on a capital offense should only be detained before trial if they pose a danger to the public or if they are likely to interfere with the exercise of justice.¹⁴⁰ If a judge feels the defendant is unlikely to return for their court date, the judge may choose to place conditions on the defendant's release to incentivize them to return to court. Judges often have very little time in which to make these decisions—the Washington State Auditor found that it was not uncommon for judges to have only three to five minutes per defendant—and in this time, the judge must make complex calculations such as the likelihood that the defendant will commit a crime while released, or the amount of bail needed to incentivize their return.¹⁴¹

Over the past decade, the female jail population has increased while the male jail population has decreased (see Table 6 and Table 7).¹⁴² The vast majority of the overall increase in jail confinement nationally since 2000 is due to increases in the unconvicted population.¹⁴³ A 2018 law review, provides an overview of bail policy and practice across the U.S., and traces this increase to changes in bail and release policy made during the Nixon era when concerns about public safety dominated the discourse on criminal justice.¹⁴⁴ According to the most recent national data from 2018, 66% of people in local jails have not been convicted of a crime.¹⁴⁵ In Washington State, the Administrative Office of the Courts estimated pretrial jail populations to

¹⁴⁰ OFF. OF THE WASH. STATE AUDITOR, REFORMING BAIL PRACTICES IN WASHINGTON (2019), https://sao.wa.gov/wp-content/uploads/Tabs/PerformanceAudit/PA_Reforming_Bail_Practices_ar1023411.pdf.

¹⁴¹ *Id.*

¹⁴² ZENG, *supra* note 51.

¹⁴³ The authors estimate that 95% of the increase in jail inmate confinement nationally is due to increases in the unconvicted population; this estimate uses data from 2014. TODD MINTON & ZHEN ZENG, BUREAU OF JUST. STAT., JAIL INMATES AT MIDYEAR, 2014 18 (2014), <https://bjs.ojp.gov/content/pub/pdf/jim14.pdf>.

¹⁴⁴ John Logan Koepke & David G Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725 (2018).

¹⁴⁵ ZENG, *supra* note 51.

range from 57.3% in Thurston County to 77.7% in King County.¹⁴⁶ However, it is unknown at the state level how long that population is held, or what percentage are held during the entire period before their trial. The most comprehensive national data regarding pretrial detention and release show that in 2009, 62% of felony defendants were released at some point before their trial, while 38% were held for the entire period before their trial.¹⁴⁷ The median time between arrest and trial for detained defendants was 68 days, or over two months. Of those released, the majority were released on financial conditions. Of those held for the entire period pretrial, the vast majority (nine out of ten) had bail set for their release but were unable to make bail.¹⁴⁸ In other words, their personal lack of financial resources was the reason for their continued incarceration. Unsurprisingly, defendants with lower bail amounts were more likely to make bail and be released from jail. The median bail amount was \$10,000.¹⁴⁹ Sixteen percent of defendants released prior to their trial were rearrested during pretrial release, nearly half of those on a misdemeanor charge. Seventeen percent of defendants released prior to trial missed a court date during pretrial release, though the majority ultimately returned to court—only three percent of defendants released pretrial never returned to court.¹⁵⁰ Unfortunately, there is a lack of data from Washington regarding the gender and racial or ethnic composition of populations held pretrial across the state.

Overall, the severity of the alleged offense and a defendant’s prior record are the strongest predictors of pretrial detention. However, when controlling for these factors, significant disparities by gender, race, ethnicity, and socioeconomic status emerge—meaning that two people with the same criminal record and accused of the same offense will likely be treated differently at bail hearings based on their demographics. Research indicates that women, when compared to men, were more likely to be released on recognizance,¹⁵¹ less likely be denied release, and have lower bail amounts set.¹⁵² However, the financial impacts of being detained

¹⁴⁶ These data are not disaggregated by gender or race. SURUR & VALDEZ, *supra* note 47.

¹⁴⁷ A review of the data of felony defendants from large urban counties in the U.S. Brian A Reaves, *Felony Defendants in Large Urban Counties, 2009 - Statistical Tables*, STAT. TABLES 40 (2009).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Released without bail.

¹⁵² LINDSEY DEVERS, *BAIL DECISIONMAKING: RESEARCH SUMMARY* (2011).

and unable to work or of paying the non-refundable fee to a commercial bond bailman in order to secure her release can have serious financial repercussions for those who can least afford it. For a discussion of how women disproportionately pay the costs of bail and other financial fees, even when it is men close to them who are incarcerated, see “Chapter 15: The Gendered Impact of Legal Financial Obligations.” As the table below shows, most incarcerated women of color detained pretrial for failure to make bail were living in poverty before their arrest.¹⁵³

¹⁵³ DATA FROM BJS, COLLECTED IN 2002. THIS IS THE MOST RECENT PUBLISHED DATA ON THE TOPIC. BERNADETTE RABUY & DANIEL KOPF, PRISON POL'Y INITIATIVE, DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME (2016), <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf>.

Figure 9. Median Annual Income (Pre-Incarceration), 2015

	People in jail unable to meet bail (prior to incarceration)		Non-incarcerated people	
	Men	Women	Men	Women
All	\$15,598	\$11,071	\$39,600	\$22,704
Black	\$11,275	\$9,083	\$31,284	\$23,760
Hispanic	\$17,449	\$12,178	\$27,720	\$14,520
White	\$18,283	\$12,954	\$43,560	\$26,136

Footnotes for Figure 9.

“Median annual pre-incarceration incomes for people in local jails unable to post a bail bond, ages 23-39, in 2015 dollars, by race/ethnicity and gender. The incomes in [bold] fall below the Census Bureau poverty threshold. The median bail bond amount nationally is almost a full year’s income for the typical person unable to post a bail bond.”

Source: BERNADETTE RABUY & DANIEL KOPF, Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time, <https://www.prisonpolicy.org/reports/incomejails.html> (last visited Oct 1, 2020).

National studies assessing the impact of race on pretrial detention have found varied levels of effect. The Prison Policy Initiative conducted a review of the literature in 2019 and concluded that broadly, Black defendants and Hispanic/Latinx defendants are more likely to be held pretrial and have bail amounts set higher than their white peers. They looked at studies published on national datasets (limited to felony defendants) and smaller, local studies, and note that the

strength of the effect varies by location.¹⁵⁴ There is a lack of recent studies from Washington State on this topic, and these studies very rarely look at the intersection of race and gender.

Despite the fact that defendants held pretrial are presumed innocent, detention has numerous negative impacts on the lives of detainees. Being held in jail puts defendants at risk for losing their employment and resulting financial instability.¹⁵⁵ Additionally, there is strong evidence to show that pretrial detention is associated with later negative outcomes in the criminal justice system. Researchers note that when a defendant is held in jail, they are more likely to be convicted later, at least partly due to an increase in guilty pleas, and on average receive harsher sentences.¹⁵⁶ The coercive effect may be higher among women than men. In New York City, female misdemeanor defendants were found to be more likely to plead guilty than their male counterparts when they expected to be released upon pleading. The authors speculate that childcare concerns may contribute to this difference.¹⁵⁷ Women incarcerated in state prisons who are parents are more likely to report having been the main caregivers for their children prior to incarceration;¹⁵⁸ there are no comparable data on those incarcerated in jails, but it seems reasonable to assume a similar pattern of female parental caretaking exists within that population as well. See “Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families” for a discussion of the interactions of incarceration and parenting including termination of parental rights resulting from

¹⁵⁴ WENDY SAWYER, *How Race Impacts Who is Detained Pretrial* (2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race. See an overview of the studies reviewed here: https://www.prisonpolicy.org/reports/pretrial_racial_disparities_sources.html.

¹⁵⁵ In a survey of groups of pretrial defendants in three states (not including Washington), 84% of those who were employed before their arrest indicated they might lose their job. CATHERINE S KIMBRELL & DAVID B WILSON, MONEY BOND PROCESS EXPERIENCES AND PERCEPTIONS 37 (2016).

¹⁵⁶ Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201 (2018); Paul Heaton & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017). Dobbie et al. note that defendants released from jail are in a better position to bargain regarding plea deals, while those detained may take the first deal offered in order to obtain release.

¹⁵⁷ Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J. L. & ECON. 529 (2017).

¹⁵⁸ In a 2007 survey of the U.S. prison population, women incarcerated in state prisons were more likely than males to report being the parents of minor children (61% vs 51.2%), and were much more likely to report having lived with their minor children in the month before arrest or just prior to incarceration (64.3% vs 46.5%). More than three quarters of women in state prisons reported being primary caregivers for their children prior to incarceration, compared to one quarter of their male counterparts. LAUREN GLAZE & LAURA MARUSCHAK, BUREAU OF JUST. STAT., PARENTS IN PRISON AND THEIR MINOR CHILDREN (2008), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=823>.

incarceration. Additionally, in some locations pretrial detention has been found to be associated with increased odds of recidivism, potentially because defendants who experience detention may lose their jobs, housing, and social support.¹⁵⁹

Numerous studies have developed strong evidence that experiences of parental incarceration have a negative impact on a dependent child's mental health and emotional wellbeing, and to some extent on their physical health as well. The evidence regarding the impact of maternal incarceration specifically is less well developed; but given that mothers are more likely to be primary caregivers of their children than are fathers, maternal incarceration is thought to have a more disruptive emotional and financial impact on children.¹⁶⁰ The majority of unconvicted women held in jail are mothers to children under 18, and women in jail are more likely than their male counterparts to be parents of minor children and to have lived with their children before incarceration.¹⁶¹ See "Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families" for a more detailed analysis of these points, including the impact of onerous dependency court obligations, which can be nearly impossible to meet for incarcerated women, where the state has intervened into the parenting relationship.

Disability Rights Washington (DRW) notes that jails across the state have varying abilities to meet health and disability needs of incarcerated individuals: for example, they may not provide timely access to prescribed medications.¹⁶² This could be dangerous for any medical condition, but the barriers appear to be higher for those receiving treatment for opioid use disorder. A state-sponsored survey of Washington State jails in 2018 found that fewer than half (14 of 33) of surveyed jails were actively providing treatment medication for opioid use disorder, and that

¹⁵⁹ Heaton & Stevenson, *supra* note 156; CHRISTOPHER T LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, THE HIDDEN COSTS OF PRETRIAL DETENTION 32 (2013), <https://nicic.gov/hidden-costs-pretrial-detention>. Heaton et al. use data from over 380,000 misdemeanor cases in Harris County, Texas; Lowenkamp et al. use data from over 150,000 defendants in Kentucky.

¹⁶⁰ Julie Smyth, *Dual Punishment: Incarcerated Mothers and Their Children*, 10 COLUM. SOC. WORK REV., VOLUME III 13 (2019).

¹⁶¹ Wendy Sawyer, *How Does Unaffordable Money Bail Affect Families?*, PRISON POL'Y INITIATIVE (Aug. 15, 2018), <https://www.prisonpolicy.org/blog/2018/08/15/pretrial/> (from an analysis of a national survey of individuals incarcerated in jails conducted by the BJS in 2002).

¹⁶² AVID PRISON PROJECT, COUNTY JAILS, STATEWIDE PROBLEMS: A LOOK AT HOW OUR FRIENDS, FAMILY AND NEIGHBORS WITH DISABILITIES ARE TREATED IN WASHINGTON'S JAILS (2016).

barriers remain to wider implementation, including a lack of knowledge within institutions and a lack of resources to provide adequate treatment.¹⁶³ Additionally, in their 2016 survey of jail facilities across the state, DRW noted that those with cognitive disabilities and mental illness were often held in solitary confinement because of a lack of appropriate facilities. Several jails were found to be using solitary confinement to house women due to a lack of female-specific space.¹⁶⁴ These are reported as anecdotal observations, and there is a lack of data regarding the use of this practice. Given the high prevalence of trauma and mental health issues in the incarcerated female population, as noted above, the use of solitary confinement is deeply concerning.

While deaths from all causes in jail, including suicide, have been declining in recent years, suicide remains the single leading cause of death in jail, and is substantially higher among the jail population than in the general population. The suicide rate for unconvicted women in jails nationally is 29 per 100,000 jail inmates—almost five times higher than the rate in the general population. While jailed and non-jailed male populations experience suicide rates higher than their female counterparts, the difference between jailed and non-jailed populations is much starker for women.¹⁶⁵

Finally, pretrial detention has a financial cost to society. Increases in jail population and lengthier jail stays contribute to jail overcrowding. In Washington State in 2019, 11 jails reported average daily counts over 100% design capacity, with Spokane County jail at 121%, Clark County jail at 165%, and Stevens County jail at over 221%.¹⁶⁶ An audit of Washington’s bail processes found that, when looking at variable costs, each additional person jailed increases the cost of running a

¹⁶³ LUCINDA GRANDE & MARC STERN, PROVIDING MEDICATION TO TREAT OPIOID USE DISORDER IN WASHINGTON STATE JAILS 20 (2018).

¹⁶⁴ AVID PRISON PROJECT, *supra* note 162.

¹⁶⁵ The suicide rate for men in jail is just over twice as high as in the general population. E ANN CARSON & MARY P COWHIG, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., MORTALITY IN LOCAL JAILS, 2000-2016 - STATISTICAL TABLES (2020), <https://bjs.ojp.gov/content/pub/pdf/mlj0016st.pdf>; HOLLY HEDEGAARD, INCREASE IN SUICIDE MORTALITY IN THE UNITED STATES, 1999–2018 8 (2020), <https://www.cdc.gov/nchs/data/databriefs/db362-h.pdf>.

¹⁶⁶ Data from 58 county, city and tribal jails and multi-jurisdiction facilities. WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, ANNUAL JAIL STATISTICS, *supra* note 46.

jail by just over \$10 per person, per day; and the average length of stay in Washington State jails is 15 days.¹⁶⁷

Concerns about the negative impacts of pretrial detention are leading states and jurisdictions across the U.S. to make changes to policies regarding pretrial detention, release conditions, services, and bail. As the Washington State Pretrial Reform Task Force noted, “Accused individuals should not be detained pretrial solely because of their inability to post a bond or pay for their release.”¹⁶⁸ In Washington State, a performance audit of current bail practices found that an average of 4,700 people per day, who could qualify for release but cannot afford their bail, are being held in jail unconvicted. Providing pretrial services instead of imposing bail that cannot be paid would save taxpayers \$6 and \$12 billion every year.¹⁶⁹ As discussed previously, COVID-19 led to a reduction in jail populations of, on average, 50% seemingly without a corresponding increase in crime.¹⁷⁰ These results should be studied and applied more broadly to pretrial detention practices.

The Seattle Municipal Court recently initiated a community court with a “release-first model” that aims to greatly reduce the number of individuals held in jail at all and for any length of time.¹⁷¹ Instead of waiting for sentencing to offer community services, the Seattle Community Court provides services to participants at the time of charging, and participants are released from jail upon entering into the program. Participants give up no trial rights to enroll. The city prosecutors have agreed to not delay charging for eligible offenses so participants can be released from jail and into community services right away. Seattle Community Court works with 10 to 15 community partners to provide services such as housing, substance abuse disorder treatment, and assistance obtaining food, cash, and medical benefits.¹⁷² The level of services

¹⁶⁷ OFF. OF THE WASH. STATE AUDITOR, *supra* note 140; WASH. ASS'N OF SHERIFFS AND POLICE CHIEFS, ANNUAL JAIL STATISTICS, *supra* note 46.

¹⁶⁸ SURUR & VALDEZ, *supra* note 47, at 39.

¹⁶⁹ OFF. OF THE WASH. STATE AUDITOR, *supra* note 140.

¹⁷⁰ Hawk, *supra* note 83.

¹⁷¹ This paragraph is based on an October 23, 2020 conversation between the author and Judge Damon Shadid as well as the publicly-available information here: SEATTLE CMTY. CT. (2020), <http://www.seattle.gov/courts/programs-and-services/community-resource-center/crc-services#S1>.

¹⁷² *Community Resource Center*, SEATTLE MUN. CT. (2020), <http://www.seattle.gov/courts/programs-and-services/community-resource-center>.

participants are required to participate in varies depending on the seriousness of the charges—from information on how to connect with identified social service recommendations to actual appointments for such services to sustained engagement in a program or service. Seattle Community Court is keeping data, including police and self-identification data on race and ethnicity. Preliminary data studying eligibility from between 2019 and 2021 and for referrals made between August 2020 and March 2021 show women and men are referred into the program in proportions roughly equal to their share in overall eligibility, but that Black and AIAN referrals are made at a reduced level to their eligibility.¹⁷³ Because the program is new and has been occurring while COVID-19 has impacted the criminal legal system, the data should be analyzed when more becomes available with a particular review of its equity impact.

Washington’s Pretrial Reform Task Force recommends the use of various forms of pretrial services including court date reminders, voluntary service referrals (though not as a condition of release), and transportation support for defendants released pretrial.¹⁷⁴ They note that defendants should not be expected to pay for any of these services; and that any pretrial reform efforts should be made as part of a transparent and inclusive process of decision-making. Moreover, researchers note that to be effective, services must address the specific needs of defendants and particular reasons influencing failed court appearances or rearrest, some of which may be gendered.¹⁷⁵ The Pretrial Reform Workgroup notes that current pretrial services are unevenly distributed across the state, with most clustered around Puget Sound and the Central Washington area, while areas like Eastern Washington and the Olympic Coast have fewer or no options available.¹⁷⁶

Pretrial risk assessment (PTRA) tools weigh different factors for an individual defendant and give a score, which is interpreted to assess risk, such as the risk that the defendant will commit a crime

¹⁷³ Seattle Community Court Outcomes Q1 2021. On file with authors.

¹⁷⁴ SURUR & VALDEZ, *supra* note 47.

¹⁷⁵ Krista S. Gehring & Patricia van Voorhis, *Needs and Pretrial Failure: Additional Risk Factors for Female and Male Pretrial Defendants*, 41 CRIM. JUST. & BEHAV. 943 (2014). This small study in Ohio interviewed defendants and found correlations between failure to appear and substance abuse, mental health, and homelessness; these effects were particularly strong for female defendants.

¹⁷⁶ SURUR & VALDEZ, *supra* note 47.

while on release, or the risk that they will fail to appear for trial.¹⁷⁷ In 2019, the Pretrial Reform Task Force found that ten courts in Washington were currently using PTRAs.¹⁷⁸ However, rather than removing bias from the system, some PTRAs may serve to reproduce or even enhance existing biases in pretrial detention practices. The 2018 law review referenced above, which provides an overview of bail policy and practice across the U.S., notes that these tools are built using existing data about defendant practices. If a jurisdiction previously had no pretrial services and, as a result, had high court appearance failure rates, the tool is likely to overestimate the court appearance failure rate for many defendants even after reforms are enacted. The authors argue that tools should be adapted and tested in the location where they are to be used, to account for local demographics and criminological patterns. Moreover, there is currently a lack of evidence regarding the reasons why defendants fail to appear for court dates, or what motivates activity that could lead to re-arrest. Without this information, PTRAs are unlikely to lead to improvements in pretrial detention practices.¹⁷⁹ While the Pretrial Reform Task Force refrained from recommending (or not) the use of PTRAs, they similarly noted that if jurisdictions should choose to adopt one, they should follow best practices such as clearly defined goals and terms, local development and validation, and data collection and evaluation, especially with an eye to racial disparities in outcomes. They note that PTRAs should be part of a transparent and inclusive process, involving the voices of Black, Indigenous, and communities of color and others impacted by pretrial detention practices.¹⁸⁰

Yakima County is an example of a jurisdiction embarking on pretrial reform. Their intervention included the use of a PTRAs in pretrial judicial decision-making; providing an attorney to all defendants for their first court appearance (regarding pretrial release); and an expansion of pretrial services.¹⁸¹ An initial evaluation found that after the implementation of these reforms, more defendants were released pretrial, and there was no increase in re-arrest rates or failures

¹⁷⁷ Koepke and Robinson, *supra* note 144.

¹⁷⁸ SURUR & VALDEZ, *supra* note 47.

¹⁷⁹ Koepke and Robinson, *supra* note 144.

¹⁸⁰ SURUR & VALDEZ, *supra* note 47.

¹⁸¹ CLAIRE M B BROOKER, YAKIMA COUNTY, WASHINGTON PRETRIAL JUSTICE SYSTEM IMPROVEMENTS: PRE- AND POST-IMPLEMENTATION ANALYSIS 25 (2017).

to appear in court.¹⁸² The positive impacts were particularly strong for defendants of color, leading to an increase in racial parity in pretrial release. However, areas of concern remain, including the number defendants eligible for release who are detained for failure to make bail.¹⁸³

It would be useful to obtain sufficient bail data from the counties to study the impact of pretrial reform, including bail reform and more widespread pretrial services such as those enacted by Yakima, on wellbeing, recidivism, and incarceration. It is our recommendation throughout that data be examined at the race, ethnicity, and gender level and that best practices be followed with regard to determining and reporting racial, ethnic, gender, and other categories.

E. Socioeconomics, as both cause and effect, and the disparate impact on Black, Indigenous, and people of color

In light of the overuse of pretrial detention for women, it should be unsurprising that socioeconomics play a role in the increased incarceration rates.¹⁸⁴ National research indicates that female offenders are low-income, undereducated, and sporadically employed. They are likely to be mothers of children under 18, are disproportionately Black, Indigenous, and women of color, and are marginalized by race, class, and gender.¹⁸⁵

The effects are particularly acute for Black, Indigenous, and women of color. Several national studies have examined the impact of race and drug use, among both male and female offenders, and found that Black, Indigenous, and people of color have increased risk of felony drug conviction, which in turn limits their resources; and when returning from prison without resources (education, jobs, insurance, healthcare, housing) they face an increased risk of

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ See James, *supra* note 92.

¹⁸⁵ Bloom, Owen & Covington, *supra* note 109; Barbara Bloom, *Gender-Responsive Programming for Women Offenders: Guiding Principles and Practices*, INTERVENTIONS 22; Barbara E Bloom, *Triple Jeopardy: Race, Class, and Gender as Factors in Women's Imprisonment* (June 1996) (Ph.D. dissertation, University of California Riverside) (ProQuest); CARSON, *supra* note 120; THE SENT'G PROJECT, *supra* note 25.

recidivism.¹⁸⁶ According to a 1995 report from The Sentencing Project, between the years of 1986 and 1991, nationally, the state female prison populations for drug offenses increased by 828% for Black non-Hispanic women, 328% for Latinx women, and 241% for white non-Hispanic women.¹⁸⁷ Therefore, the “war on drugs” that is specifically cracking down on some drug users has a disproportionate impact on Black, Indigenous, and women of color compared to white women. National literature indicates that compared to white women, Black, Indigenous, and women of color are far more likely to be arrested, convicted, and incarcerated at rates that exceed their representation in the free world.¹⁸⁸

As discussed, our recent Pilot Study found statistically significant differences indicating racial disproportionality leading to higher rates of conviction and incarceration for Black and Native American women in Washington in all of the six counties examined, across all three time points.¹⁸⁹ The Pilot Study did not include socioeconomic data. However, it found women’s convictions and sentencing for drug offenses remained fairly consistent over the points studied in the last 20 years.¹⁹⁰ The study should be expanded to cover all counties and more years as well as to look into socioeconomic status.

Like our Pilot Study, other research focuses more on comparing gender disparities than examining the racial, ethnic, and socioeconomic differences within the increased conviction and incarceration of women. The research is very robust with regard to racial inequality facing both men and women in incarceration rates and increased convictions. Typically, however, low-socioeconomic status is often conflated with race in the research or is not studied as frequently as racial disparities. Furthermore, as discussed above there are many limitations in the current research with regard to how race and ethnicity are analyzed. The evidence suggests that Black,

¹⁸⁶ Martin Y. Iguchi et al., *Elements of Well-Being Affected by Criminalizing the Drug User*, 117 PUB. HEALTH REP S146 (2002); Beth M. Huebner, Christina DeJong & Jennifer Cobbina, *Women Coming Home: Long-Term Patterns of Recidivism*, 27 JUST. Q. 225 (2010).

¹⁸⁷ MARC MAUER & TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* (1995), <https://www.sentencingproject.org/publications/young-black-americans-and-the-criminal-justice-system-five-years-later/>.

¹⁸⁸ MARC MAUER, CATHY POTLER & RICHARD WOLF, *GENDER AND JUSTICE: WOMEN, DRUGS AND SENTENCING POLICY* (1999), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Gender-and-Justice-Women-Drugs-and-Sentencing-Policy.pdf>; CARSON, *supra* note 120; THE SENT’G PROJECT, *supra* note 25.

¹⁸⁹ MASTERS ET AL., *supra* note 31.

¹⁹⁰ *Id.*

Indigenous, and women of color are punished more harshly and at increasing rates compared to their white counterparts. There remains a paucity of research examining these areas. We recommend increased attention be paid to intersectional research and analysis of race and ethnicity data for the incarcerated female population in Washington.

F. Sentencing laws and practices as drivers of incarceration rates

Sentencing laws have been completely restructured since the 1989 Gender & Justice in the Courts study. They are the most robustly studied driver of increased incarceration across genders. Sentencing laws, policies, and practices have also been found to have a profoundly disparate impact on Black, Indigenous, and people of color (with some notable deficiencies in the available research). To give this topic fair treatment, we cover it in depth in “Chapter 14: Sentencing Changes and Their Direct and Indirect Impact on Women.”

IV. Conclusion

Washington can undertake policy changes to reduce the swelling of female incarceration by investing in societal programming and education, providing programming known to reduce recidivism, reforming sentencing laws, and enacting a second-look process where all individuals serving lengthy sentences are evaluated for parole after 15 or 20 years.¹⁹¹

In addition, more research should be undertaken to better understand female incarceration in Washington and nationally. Criminal justice research has been focused more on men than women, in large part because there are far more men incarcerated in the U.S. than women. In 2018 in Washington State, there were 17,702 men incarcerated in state prisons compared to 1,706 women, and this is a trend we see nationally.¹⁹² Furthermore, gendered role stereotypes create the belief that men should be more violent and susceptible to violating laws compared to women. There has been a recent influx in the different pathways to crime that impact men and women, however, further research must be conducted. While the impact of the “war on drugs”

¹⁹¹ BECKETT & EVANS, *supra* note 25.

¹⁹² *State-by-State Data*, THE SENT'G PROJECT (2020), <https://www.sentencingproject.org/the-facts>.

on women has been studied rather robustly, further research needs to be conducted on the social-environmental impacts and the role of gender on pretrial release. Some of the analysis provided can only be collaborated by one or two citations or relies on research conducted 15 to 20 years ago, therefore these are the areas that need further examination.

V. Recommendations

- Adopt the recommendation described in “Chapter 13: Prosecutorial Discretion and Gendered Impacts” to institute a centralized database and standardized reporting criteria for jail bookings.
- Adopt the recommendation described in “Chapter 13: Prosecutorial Discretion and Gendered Impacts” to collect and analyze data on the prosecutors’ diversionary practices.
- Government data collection should follow the best practices recommended by the 2020 *Incarceration of Women in Washington State* pilot study commissioned by the Gender and Justice Commission. The pilot study sets forth comprehensive recommendations for improvements in data collection as well as additional analyses and research to be implemented by the Caseload Forecast Council, the Washington State Legislature, and the Department of Corrections (see pages 31-32 of the *Incarceration of Women in Washington State* pilot study).
- When sufficient bail data can be obtained from the counties, WSCCR should study the impact of pretrial reform (including bail reform and more widespread pretrial services, such as those enacted by Yakima County) on wellbeing, recidivism, incarceration, community safety, and failure to appear rates.
- WSCCR and/or other stakeholders should undertake a study of (1) the impacts of incarcerating women for violating conditions of release, and (2) whether other sanctions could be equally or more effective.
- In the short term (next two years), criminal justice stakeholders, including the Department of Corrections and Juvenile Rehabilitation Administration, should study the effect that the increasing detention of girls - especially Indigenous, Latinx, and Black girls

- has on this state's large incarcerated-adult female population. We also recommend finding a way to measure disparities impacting other populations not currently represented in the data, such as Native Hawaiian and other Pacific Islander populations.

- The Washington State Legislature recently enacted SB 5476 (2021), which codifies simple drug possession as a misdemeanor; requires law enforcement to divert certain suspects to assessment, treatment, or other services and encourages prosecutors to do the same; and invests in programs and oversight. The Gender and Justice Commission should partner with stakeholders to evaluate that new law's impact on women and girls, including Black, Indigenous, and other women and girls of color, in terms of incarceration rates, legal financial obligations (both of their own and of their family members and partners), treatment impact, and public safety.
- During the 2022 legislative session, the Washington State Legislature should again consider legislation to retroactively account for trauma-based criminalization and incarceration, similar to the way that the Survivors Justice Act, HB 1293 (proposed during the 2021 Regular Session) and N.Y. Penal Law § 60.12 address this problem in the area of domestic violence trauma. The Legislature should consider whether other sources of trauma, such as adverse childhood experiences, surviving through war, etc., should be included in any such legislation.
- In the short term (next two years), criminal justice stakeholders should convene to consider whether to amend CrR 2.2, CrRLJ 2.2, CrR 3.2, and/or CrRLJ 3.2 to limit trial court power to issue bench warrants for failures to appear and to consider alternative methods of addressing non-appearances.