

Chapter 13

Prosecutorial Discretion and Gendered Impacts

Kelly Harris, JD; Joanne Moore, JD; and Claire Mocha, MPH

Contents

I. Summary	681
II. Background	682
A. Constitutional and ethical limitation on prosecutorial discretion	683
B. Understanding the impact of prosecutorial discretion	686
III. The Impact of Prosecutorial Discretion on Policing and Arrests	687
A. Washington arrest data	689
IV. The Impact of Prosecutorial Discretion on Screening and Charging.....	693
A. Disparities in charging	695
B. Charging in Domestic Violence (DV) and Intimate Partner Violence (IPV) cases	697
C. Charging in sexual assault cases	698
D. Charging in offenses related to the sex industry.....	700
E. Other charging decisions.....	701
F. Pre-trial diversion.....	701
G. Mandatory minimums.....	702
V. Prosecutorial Discretion in Pretrial Detention and Bail Recommendations	703
VI. Prosecutorial Discretion in Plea Bargaining.....	704
VII. Misdemeanors	713
VIII. Prosecutorial Discretion in Federal Courts.....	718

IX. Conclusion.....	722
A. Cumulative disadvantage	722
B. Positive prosecutorial discretion and other interventions to reduce criminal justice disparities.....	724
C. Gaps and unanswered questions.....	729
XI. Recommendations	730

I. Summary

Prosecutors have wide discretion in deciding whether and how to charge defendants; to whom diversion and deferral opportunities should extend; whether to recommend pretrial detention or how much bail to request; and when to make plea bargain offers. The evidence from across the U.S., and the limited evidence from Washington State, suggests that Black, Indigenous, and women of color are systematically disadvantaged when compared to their white peers at those discretionary decision points. While judges can oversee some aspects of the power of prosecutors in the context of an individual case, there is a lack of systematic public oversight or accountability, and a lack of data to understand if, how, and where prosecutors may be contributing to disparities in the criminal justice system.

The data we do have, though, suggests that individuals from marginalized communities may experience systematic and cumulative layers of disadvantage, both inside and outside the criminal justice system. Inequities outside of the justice system may compound disparities within the system. For example, racial disparities in arrests negatively influence pretrial bail decisions, which influence plea deals, affect charging decisions, and create a higher likelihood of incarceration and longer sentences for both men and women of color.

Data from the Washington State Patrol confirms that Black, Latinx, and Pacific Islander drivers, and particularly Native American drivers, were searched at higher rates than white motorists in 2009-2015. Native Americans were searched at a rate five times higher than white motorists. And 2019 data from Washington shows that Black and Indigenous women are also arrested at rates higher than their representation in the population. The evidence also suggests that transgender women are subjected to disproportionate arrests, and aggressive or even abusive policing practices.

Looking at charging decisions, female defendants may be more likely to have arresting charges against them dropped or decreased when compared to male defendants (although females with prior felonies may actually be treated more severely than male defendants). For female defendants, having minor children may increase the chances of charges being dropped. There is

a gap in the research regarding outcomes for transgender, gender non-binary, and gender-nonconforming individuals.

In addition, evidence suggests that prosecutors may believe that cases fitting stereotypical ideas of rape and rape victims have the best chances of winning in court. Survivors who are attacked by strangers, who are injured during the attack, or who are attacked in public places are more likely to see charges brought against their attackers. However, these charging patterns do not align with the reality of sexual assault.

The data also shows that prosecutors can (and in some places do) use their discretion to lessen disparities. But more data is needed (particularly on prosecutorial discretion in smaller jurisdictions and rural areas) on outcomes for Asian Americans, Native Hawaiians and Other Pacific Islanders, and Indigenous populations. More data is also needed on the intersection of gender with race, ethnicity, sexual orientation, poverty, and disability. This data is needed to understand the effect of prosecutorial discretion on different populations and to build systems of accountability to counteract documented criminal justice disparities in Washington State.

II. Background

Prosecutors play an extremely powerful role in the criminal legal system. Decisions made by prosecutors, particularly in case charging and plea bargaining, can be as impactful to a criminal defendant as the ultimate sentence. Prosecutors' decisions also impact crime victims. Washington law provides some prosecutorial guidelines to shape a prosecutor's review and charging of criminal referrals. RCW 9.94.A.411 pertains to adult cases and RCW 13.40.077 to juvenile cases. These statutes set out principles for prosecutors, but they are limited. Prosecutors must exercise discretion in cases presenting a variety of circumstances, and their discretion is broad.

Prosecutorial immunity laws protect prosecutors from judicial scrutiny for many types of decisions. Federal civil rights claims are difficult to sustain because victims of biased prosecution

must be able to prove intentional discrimination.¹ These laws, and the lack of published charging standards and detailed charging statistics from individual offices, result in limited public transparency about the charging process. The rules governing discretion are largely a matter of an elected prosecutor’s internal policies, and how the assistant prosecutors who make these operational decisions on charging are trained and supervised. In a sense, the broadest check on a prosecutor’s discretion is the ballot box. As all county prosecutors in Washington State are elected executive branch officials, if the public is unhappy with a prosecutor’s exercise of discretion, voters can elect another prosecutor. However, the electorate is rarely, if ever, informed of this most important prosecutorial practice among elected prosecutors. In 2018, almost three-quarters of prosecutors on the ballot in Washington State were running unopposed.² As one Washington State expert noted anecdotally, “there’s no mechanism to challenge prosecutorial discretion, [and] no data to check the reality of what’s going on.” Under the current absence of transparency, elections cannot be expected to provide a substantial check on prosecutorial discretion.

A. Constitutional and ethical limitation on prosecutorial discretion

While prosecutorial discretion is generally not limited by laws, discrimination against constitutionally protected groups is prohibited. Both the case law and ethics rules prohibit a prosecutor’s office from exercising prosecutorial discretion based on race or gender discrimination as a denial of equal protection and a violation of ethics laws governing prosecutors’ official actions. The United States (U.S.) Supreme Court has established that “[t]he decision to prosecute may not be based on race, religion, or other arbitrary classification.”³ The Washington State Supreme Court has established that while charging and prosecuting in general is a matter of prosecutorial choice, such discretion is subject to constitutional constraints, and selective enforcement deliberately based on unjustifiable standards raises equal protection

¹ *Wayte v. United States*, 470 U.S. 598, 609, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985).

² Lilly Fowler, *WA’s Prosecutors Are Mostly Male, White - and Running Unopposed*, CROSSCUT (Nov. 2, 2018), <https://crosscut.com/2018/11/was-prosecutors-are-mostly-white-male-and-running-unopposed>.

³ *Wayte*, 470 U.S. at 609.

concerns.⁴ The Washington State Supreme Court has declared that exercising prosecutorial discretion based on race, religion, or other arbitrary classifications would be an unjustifiable standard and a denial of equal protection.⁵ In *State v. Monday*, the Washington State Supreme Court reversed the defendant's murder conviction due to the prosecutor's racially motivated remarks during trial.⁶

The Rules of Professional Conduct (RPCs), adopted by the Washington Supreme Court, set out mandatory ethics requirements for attorneys, which must be followed when prosecutors exercise their discretionary powers. In addition to appellate review, lawyers are subject to discipline when they violate the RPCs. The Washington State Bar Association and the Washington Supreme Court conduct disciplinary processes which can result in publicly reported reprimands, suspension, or disbarment.⁷ RPC 8.4, entitled Misconduct, establishes that an attorney's discriminatory act based on sex or race is professional misconduct.⁸ RPC 8.4(g) is one of several RPCs establishing that prosecutors, as lawyers serving the public, have exceptional responsibilities and duties to uphold justice and exceptional ethical duties.⁹ RPC 3.8, entitled Special Responsibilities of a Prosecutor, sets out singular ethical duties held by prosecutors. Because prosecutors are entrusted by the public with such substantial powers, including prosecutorial discretion, they must act in conformance with their duty to protect the integrity of the justice system:

Comment 1 (Washington Revision.) A prosecutor has the responsibility of a minister of justice and not simply that of an advocate...This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice

⁴ *State v. Monday*, 171 Wn.2d 667, 675-81, 257 P.3d 551 (2011). See also *United States v. Armstrong*, 517 U.S. 456, 470, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996); *State v. Alonzo*, 45 Wn. App. 256, 723 P.2d 1211 (1985).

⁵ *State v. Lee*, 87 Wn.2d 932, 936-37, 558 P.2d 236 (1976); *State v. Talley*, 122 Wn. 2d 192, 215, 858 P.2d 217 (1993).

⁶ 171 Wn.2d 667 (2011).

⁷ Washington RPC 3.8, cmt. 1.

⁸ "It is professional misconduct for a lawyer to . . . (g) commit a discriminatory act prohibited by state law on the basis of sex, race (or other specified characteristics) . . . where the act of discrimination is committed in connection with the lawyer's professional activities." RPC 8.4.

⁹ The rule establishes that "[L]awyers holding public office assume legal responsibilities beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers." RPC 8.4(g).

and that guilt is decided upon the basis of sufficient evidence...Competent representation of the government may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.¹⁰

In addition to the preceding mandatory ethics provisions which apply directly to Washington State prosecutors (and also to federal prosecutors in Washington due to the cross reference to the RPCs by the federal district court rules), the American Bar Association has promulgated national guidance, entitled Standards of Criminal Justice Relating to the Prosecution Function. Washington RPC 3.8 Comment 1 discusses these favorably. They address a prosecutor's active duties with respect to bias:

(a) A prosecutor should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of the prosecutor's authority.

(b) A prosecutor's office should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work. A prosecutor's office should regularly assess the potential for biased or unfairly disparate impacts of its policies on communities within the prosecutor's jurisdiction and eliminate those impacts that cannot be properly justified.¹¹

Prosecutorial discretion is also addressed by the National District Attorney Association (NDAA) prosecutor guidelines.¹²

¹⁰ RPC 3.8, cmt. 1.

¹¹ ABA, *Criminal Justice Standards for the Prosecution Function*, std. 3-1.6(a)-(b) (2017).

¹² NAT'L DIST. ATT'YS ASS'N, NATIONAL PROSECUTION STANDARDS: THIRD EDITION, <https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf>.

B. Understanding the impact of prosecutorial discretion

Federal and state lawmakers placed statutory restrictions on judicial discretion in the form of sentencing guidelines in the 1980s, making charging decisions (rather than judicial discretion at sentencing) the key factor in determining sentences. Social scientists turned to studying prosecutorial decision making.¹³ This is a challenging area to study, because in most jurisdictions there is little or no documentation publicly available on how charging and plea decisions are made. The studies that have been published usually focus on individual jurisdictions where the prosecutor's office has agreed to make case records available to researchers; or researchers use state court processing statistics to analyze disparities in charges brought, cases dismissed or diverted, and convictions obtained. While the latter approach has the benefit of making comparisons across jurisdictions, it relies on records with very limited details. To our knowledge, there have been no studies looking exclusively at prosecutorial decision-making in Washington State; therefore, evidence from other jurisdictions in the U.S. and from cities within Washington are examined here.

The following analysis discusses disparities by demographics such as race, ethnicity, and gender. See Section V of the full report for an overview of the limitations of many datasets, such as the systemic undercounting of Latinx and Indigenous populations, limitations of combining diverse populations into one broad category like "Asian," the failure of datasets to differentiate between gender identity and sex¹⁴, and the lack of self-identification in many datasets. Of particular note for this section is that protocols for recording gender, race, and ethnicity in arrest data vary by arrest agency, meaning demographic data may be based on the arresting officer's perception, rather than self-report.¹⁵ We do not know the protocols for coding in every law enforcement

¹³ See Cassia Spohn, *Reflections on the Exercise of Prosecutorial Discretion 50 Years After Publication of The Challenge of Crime in a Free Society: President's Crime Commission: Past and Future*, 17 CRIMINOLOGY & PUB. POL'Y 321 (2018).

¹⁴ The Centers for Disease Control and Prevention defines "gender identity" as "an individual's sense of their self as man, woman, transgender, or something else" and defines "sex" as "an individual's biological status as male, female or something else. sex is assigned at birth and associated with physical attributes, such as anatomy and chromosomes." *Terminology: Adolescent and School Health*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 18, 2019), <https://www.cdc.gov/healthyyouth/terminology/sexual-and-gender-identity-terms.htm>.

¹⁵ Personal Communication with Brook Bassett, Statistical Compiler, Washington Association of Sheriffs and Police Chiefs (Feb. 24, 2021).

agency in the state. Additionally, data on sexual orientation or transgender, gender non-binary, or gender non-conforming identity are almost non-existent in this context.

III. The Impact of Prosecutorial Discretion on Policing and Arrests

Most cases enter the criminal justice system through an arrest, citation, or referral from the police. As a result, policing decisions and policies largely shape the population encountered by prosecutors. Additionally, prior arrests influence prosecutorial decision-making in charging and plea bargaining, as discussed below. As discussed in “Chapter 11: Incarcerated Women in Washington,” there are well-documented patterns of racially disproportionate policing and arrests nationally and in Washington State. Nationally, there has been an historical increase in the incarceration of women, a trend that seems to be continuing in Washington State and which disproportionately impacts Black, Indigenous, and women of color.¹⁶ Nationally, the “war on drugs” in the 1980s has been cited as a driver of racial disproportionality in drug convictions across genders.¹⁷ Research on policing, including Dr. Beckett’s 2004 Seattle-based research, highlights implicit bias a contributing factor to racial disproportionality. It also points to police efforts that:¹⁸

- Target certain geographical areas (resulting in class and race-based targeting);

¹⁶ Ann Carson, Bureau of Justice Statistics, National Prisoner Statistics Program. Generated using the online Corrections Statistics Analysis Tool (2018), www.bjs.gov; TATIANA MASTERS ET AL., *Incarceration of Women in Washington State: Multi-year analysis of felony data* (2020). For more information on trends in incarceration rate by gender and race see “Chapter 11: Incarcerated Women in Washington”

¹⁷ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); Doris Marie Provine, *Race and Inequality in the War on Drugs*, 7 ANN. REV. L. & SOC. SCI. 41 (2011). For more information on the impacts of the war on drugs on incarceration see “Chapter 11: Incarcerated Women in Washington.”

¹⁸ Jamie Fellner, *Race, Drugs, and law enforcement in the United States*, 20 STANFORD LAW & POLICY REVIEW, 2009, at 257-; KATHERINE BECKETT, *Race And Drug Law Enforcement in Seattle* (2004); Katherine Beckett, Kris Nyrop & Lori Pfingst, *Race, drugs, and policing: understanding disparities in drug delivery arrests*, 44 CRIMINOLOGY 105–137 (2006); Katherine BECKETT et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOCIAL PROBLEMS 419–441 (2005); Barbara Ferrer & John M. Connolly, *Racial Inequities in Drug Arrests: Treatment in Lieu of and After Incarceration*, 108 AM. J. PUB. HEALTH 968 (2018); Ojmarrh Mitchell & Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, 32 JUST. Q. 288 (2015); REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>; SAMUEL R GROSS, MAURICE POSSLEY & KLARA STEPHENS, *RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES* 37 (2017); EVERY 25 SECONDS THE HUMAN TOLL OF CRIMINALIZING DRUG USE IN THE UNITED STATES (2016), https://www.hrw.org/sites/default/files/report_pdf/usdrug1016_web.pdf.

- Focus on outdoor drug exchanges, which are more visible compared to indoor exchanges; and
- Focus arrests on crack-related exchanges.¹⁹

Additionally, trauma from sexual abuse, long-term domestic violence, and human trafficking are widely recognized as significant driving factors in the incarceration of women.²⁰ See “Chapter 11: Incarcerated Women in Washington,” for more information on the trauma-to-prison pipeline that impacts many women.

Data from the Washington State Patrol confirms that Black, Latinx, and Native Hawaiian and other Pacific Islander drivers, and particularly Native American drivers, were searched at higher rates than white motorists in 2009-2015. Native Americans were searched at a rate five times higher than white motorists. These data were not disaggregated by gender.²¹ However, national data indicate that Black women were 17% more likely than white females to be in a police-

¹⁹ See Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257 (2009); KATHERINE BECKETT, RACE AND DRUG LAW ENFORCEMENT IN SEATTLE (2004), <https://www.prisonpolicy.org/scans/Beckett-20040503.pdf>; Katherine Beckett, Kris Nyrop & Lori Pfingst, *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests* 44 CRIMINOLOGY 105 (2006); Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419 (2005); Barbara Ferrer & John M. Connolly, *Racial Inequities in Drug Arrests: Treatment in Lieu of and After Incarceration*, 108 AM. J. PUB. HEALTH 968, 968–969 (2018); Ojmarrh Mitchell & Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, 32 JUST. Q. 288 (2015); REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities>; SAMUEL R. GROSS, MAURICE POSSLEY & KLARA STEPHENS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 37 (2017), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1121&context=other>; EVERY 25 SECONDS THE HUMAN TOLL OF CRIMINALIZING DRUG USE IN THE UNITED STATES (2016), https://www.hrw.org/sites/default/files/report_pdf/usdrug1016_web.pdf.

²⁰ Thanos Karatzias et al., *Multiple Traumatic Experiences, Post-Traumatic Stress Disorder and Offending Behaviour in Female Prisoners*, 28 CRIM. BEHAV. MENTAL HEALTH 72 (2018); Christy K. Scott et al., *Trauma and Morbidities Among Female Detainees in a Large Urban Jail*, 96 PRISON J. 102 (2016); BONNIE GREEN ET AL., TRAUMA EXPERIENCES AND MENTAL HEALTH AMONG INCARCERATED WOMEN (2016); ANDREA JAMES, ENDING THE INCARCERATION OF WOMEN AND GIRLS 19 (2019); Gina Fedock & Stephanie Covington, *Female Violent Offending, Theoretical Models of*, SAGE ENCYC. CRIM. PSYCH. 516 (2019); Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 928 (2008).

²¹ THE STANFORD OPEN POLICING PROJECT, <https://openpolicing.stanford.edu>; Joy Borkholder, *Driving While Indian: How InvestigateWest Conducted the Analysis*, INVESTIGATEWEST (Dec. 19, 2019), <https://www.invw.org/2019/12/19/driving-while-indian-how-investigatewest-conducted-the-analysis>.

initiated traffic stop and were arrested three times as often as white females during police-initiated street and traffic stops.²²

The evidence suggests that transgender women are also subject to disproportionate arrests. In national studies, transgender women report being “subjected to aggressive, often abusive, policing practices based upon law enforcement’s perception that they are universally and perpetually engaged in sex work.”²³ While interviews and surveys reveal higher rates of “survival crimes” as a result of high rates of unemployment and homelessness,²⁴ experts note that this profiling of transgender women results in unnecessary, and at times negative or even violent, interactions with law enforcement.²⁵

A. Washington arrest data

Statewide arrest data from the Washington Association of Sheriffs and Police Chiefs show that in 2019, Black and Indigenous women were arrested for all crimes at rates higher than their representation in the population (in the case of Black women, at almost four times the rate). When looking at arrests for drug crimes only, Indigenous, Black, and white women are all overrepresented. Overrepresentation is worse for Indigenous women for drug crimes than for all crimes combined, while the opposite is true for Black women (Table 1).

²² *Policing Women: Race and Gender Disparities in Police Stops, Searches, and Use of Force*, PRISON POL’Y INITIATIVE (May 14, 2019), <https://www.prisonpolicy.org/blog/2019/05/14/policingwomen>.

²³ Leonore F Carpenter & R Barrett Marshall, *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof*, 24 WM. & MARY J. WOMEN & L. (SPECIAL ISSUE) 5 (2017).

²⁴ A series of in-depth interviews with 10 Black trans former offender females in the Northeast U.S. revealed that sex work was commonly used as a means of survival due to post-incarceration unemployment and homelessness and that it often led to re-arrest. Brittany Shakir, *Factors of Black Transgender Ex-Offender Women that Contribute to Recidivism* (2020) (doctoral dissertation). In a nationally-representative survey of the experiences of transgender individuals, trans people of color report disproportionately high rates of arrest and incarceration. JAIME GRANT, LISA MOTTET & JUSTIN TANIS, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY* (2011).

²⁵ Carpenter & Marshall, *supra* note 23.

Table 1: Washington State Female Arrests and Female Drug Arrests in 2019 By Race, Compared to the Proportion of the Washington State Population (N=45,196)

	American Indian/ Alaska Native	Asian	Black	Native Hawaiian/ Pacific Islander	White
Percent of female arrests	4.3%	3.3%	12.0%	0.2%	80.4%
Percent of female drug arrests	5.7%	2.5%	7.5%	0.2%	84.1%
Percent of Washington's female adult population	1.6%	10.4%	3.5%	0.7%	80.3%

Footnotes for Table 1.

Notes: Cells shaded in light purple note where the proportion of a racial group in each arrest offense category exceeds the proportion of that racial group in the Washington population. “Drug arrests” includes drug equipment violations and drug/narcotics violations (categories from FBI’s NIBRS system, <https://www.fbi.gov/file-repository/ucr/ucr-2019-1-nibrs-user-manua-093020.pdf/view>). Arrest data from Washington Association of Sheriffs and Police Chiefs, 2019. Note that in 2019, just over three percent of female arrestees had race marked “unknown” and were excluded from this analysis. American Indian/Alaska Native disproportionality is likely an underestimate, as the numerator (arrests) does not account for arrests made by tribal police agencies, while the denominator (population) may include people living on reservations. Latinx/Hispanic ethnicity was not analyzed because 15% of female arrests had “unknown” ethnicity. Population data are Washington State Office of Financial Management population estimates derived from American Community Survey data, 2019 and include female residents of Washington State, ages 20+. Due to limitations in the data, we were unable to include adult females ages 18-20 in the population data. Additionally, arrest data do not include individuals categorized as “two or more races” – a category which accounts for

approximately 3.5% of adult females in the statewide population estimates. Due to these limitations in the data, results should be interpreted with caution.

Sources: Adapted from arrest data from Washington Association of Sheriffs and Police Chiefs, 2019; Washington State Office of Financial Management population estimates derived from American Community Survey data, 2019.

Female arrests most frequently fall into the categories of driving under the influence (16.2% of female arrests), simple assault (15%), and shoplifting (9.7%). But arrest policies vary by jurisdiction; and experts noted that “King County has not booked or charged most drug level possession offenses for some time.”

Even arrests that end in short jail stays can have serious consequences for the person arrested. In some jurisdictions, transgender or gender non-conforming individuals may be placed in facilities according to the sex assigned to them at birth, potentially exposing them to gender-based violence.²⁶ This circumstance could lead to these individuals accepting plea offers that will result in their release, even when it may not be in their best interests, just to escape such violence. Being arrested or charged with a crime, even without a conviction, can lead to loss of some types of government aid and job opportunities.²⁷ Washington State experts confirm anecdotally that arrests can be grounds for losing “the ability to be a relative placement for a child who otherwise will go into foster care,” or can prompt Child Protective Services (CPS) involvement “if they are the sole custodian of minors and have no one else who can care for them.” See “Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families” for more on this topic.

People with substance use disorders receiving medication-assisted treatment may find their treatment interrupted, as jails in Washington State do not yet uniformly facilitate access to these types of treatment. However, experts note that the Washington Association of Sheriffs and Police Chiefs has been “working actively to provide and facilitate [medication-assisted treatment] in all

²⁶ GRANT, MOTTET & TANIS, *supra* note 24.

²⁷ Megan Comfort, “A Twenty-Hour-a-Day Job”: *The Impact of Frequent Low-Level Criminal Justice Involvement on Family Life*, 665 ANNALS AM. ACAD. POL. & SOC. SCI. 63 (2016).

jails.”²⁸ Frequent drug users who experience sudden withdrawal during jail stays are at particularly high risk of overdose immediately after leaving jail.²⁹ While prosecutors have the ability to divert people into treatment programs or to other services, in areas with case filing backlogs this could take several days, during which the individual in question has already been taken to jail and may be at risk of facing the above negative outcomes. There is a lack of evidence regarding how frequently people might be held in jail prior to diversion to treatment in Washington State; however, experts from Washington noted anecdotally, “Prosecutors sometimes seem to delay agreeing to diversion as a way to pressure the defendant into pleading guilty.”

In King County, the Law Enforcement Assisted Diversion (LEAD)³⁰ program, piloted in 2011, was designed to divert individuals who would otherwise be arrested for low-level drug and prostitution crimes directly into a harm-reduction case management program that provides support and connection to community resources. An initial randomized evaluation of the program found that individuals diverted through LEAD had lower odds of re-arrest and charging compared to individuals who were arrested and processed under usual procedures.³¹ Another evaluation found that participants are “significantly more likely to obtain housing, employment, and legitimate income in any given month subsequent to their LEAD referral” compared to before participating in the program.³² And population modeling has estimated that LEAD could lead to significantly lower rates of new cases of HIV and Hepatitis C virus, fewer overdose deaths among people who inject drugs, and a lower jail population.³³ Over 4,000 women were arrested in Washington in 2019 for drug-related and prostitution offenses, and the majority of drug-related

²⁸ LUCINDA GRANDE & MARC STERN, PROVIDING MEDICATION TO TREAT OPIOID USE DISORDER IN WASHINGTON STATE JAILS 20 (2018).

²⁹ Cora L. Bernard et al., *Health Outcomes and Cost-Effectiveness of Diversion Programs for Low-Level Drug Offenders: A Model-Based Analysis*, 17 PLOS MED. 1 (2020).

³⁰ In a movement to de-center the role of law enforcement in diversion, the Seattle-based program is now known as *Let Everyone Advance with Dignity*. LEAD NAT’L SUPPORT BUREAU, www.leadbureau.org.

³¹ Susan E. Collins, Heather S. Lonczak & Seema L. Clifasefi, *Seattle’s Law Enforcement Assisted Diversion (LEAD): Program Effects on Recidivism Outcomes*, 64 EVALUATION & PROGRAM PLAN. 49, 49–56 (2017).

³² SEEMA L CLIFASEFI, HEATHER S LONCZAK & SUSAN E COLLINS, LEAD PROGRAM EVALUATION: THE IMPACT OF LEAD ON HOUSING, EMPLOYMENT AND INCOME/BENEFITS (2016).

³³ Bernard et al., *supra* note 29: the authors estimate that over 10 years, LEAD could reduce new cases of HIV by 3.4%, Hepatitis C virus by 3.3%, overdose deaths by people who inject drugs by 10.0%, lower jail populations by 6.3%, and result in significant savings to the healthcare and criminal justice systems.

arrests were for possession and/or consumption.³⁴ While not all of these individuals would qualify for LEAD, pre-charging diversion programs have great potential to reduce contact with the criminal justice system for the female population. From October 2011-January 2014, 39% of LEAD participants were women, and the majority of participants of all genders were Black, Indigenous, and people of color.³⁵ Data showing the intersection of gender and race, which would allow us to understand how many Black, Indigenous, and women of color participated in LEAD, were not provided. [See also “Chapter 10: Commercial Sex and Exploitation.”] In 2020, the Washington State Association of Sheriffs and Police Chiefs partnered with the LEAD National Support Bureau to provide \$1.1 million in grants to local law enforcement agencies in Olympia and Port Angeles to “support local initiatives to properly identify criminal justice system-involved persons with substance use disorders and other behavioral health needs and engage those persons with therapeutic interventions and other services prior to or at the time of booking, or while in custody.”³⁶

IV. The Impact of Prosecutorial Discretion on Screening and Charging

The most critical of all the duties and responsibilities of a prosecutor is the power to charge someone with a crime. Prosecutors have exclusive control over whether to charge an offense, and what offense should be charged. As discussed more below, prosecutors can use their discretion to charge “conservatively,” where they limit their charging to the lowest level crime

³⁴ TONYA TODD & BROOK BASSETT, CRIME IN WASHINGTON, 2019 ANNUAL REPORT (2020), <https://waspc.memberclicks.net/crime-statistics-reports>. Female arrests from dataset obtained from Washington Association of Sheriffs and Police Chiefs. Among statewide drug equipment violations for all genders, 83.1% were possessing/concealing, and 13.9% were using/consuming. Among statewide drug/narcotic violations for all genders, 75.6% were possessing/concealing, and 9.9% were using/consuming. Fewer than 10% of all drug-related arrests were for manufacture, distribution, or transport.

³⁵ CLIFASEFI, LONCZAK & COLLINS, *supra* note 32. Participant gender, race, and ethnicity were reported by the referring officer, as follows: “57% participants were African American, 26% were European American, 6% were American Indian/Alaska Native or Pacific Islander, 4% were Multiracial, 4% were Hispanic/Latino/a, 1% were Asian American, and 2% were ‘Other.’” *Id.* at 4.

³⁶ WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, \$1.1 MILLION IN ARREST AND JAIL ALTERNATIVES GRANTS AWARDED TO LAW ENFORCEMENT AGENCIES (2020), <https://waspc.memberclicks.net/assets/docs/arrest%20and%20jail%20alternatives%20grants%20-%20statewide%20release.pdf>.

and least number of individual offense counts that the facts of a case dictate; or they can use their discretion to charge “liberally,” where they charge the highest level offense and the greatest number of individual offenses that the facts support. They have the discretion, for example, to charge crimes that carry mandatory minimum sentences and to allege sentencing enhancements. Prosecutors may decide not to charge a referred case at all. And as more jurisdictions consider alternative responses to criminal activity such as referral to pre-charge or post-charge deferral programs, prosecutorial latitude in deciding who has the opportunity to enter these programs will become more important. In pre-charge diversion programs, prosecutors have total control to offer entry to the program; for post-charge deferral programs, entry may be governed by a set of qualifying factors.

Prosecutors make their charging decisions based on a wide variety of case-related factors, such as the strength of the evidence in the case, how serious they deem the offense to be, and the wishes of the victim of the crime (if there is one).³⁷ They may consider the consequences of charging decisions in terms of safety of the victim or community, or the defendant’s need for rehabilitation or treatment.³⁸ Charging decisions may also be driven by a desire to obtain restitution for crime victims.³⁹

Contextual factors may shape or constrain charging decisions, including a lack of resources that might lead to a decline in quality investigations or a shortage of courtrooms, judges, and clerks. Prosecutors may also consider fairness and equity issues when deciding whether to file charges, such as declining to file a theft charge for a homeless person stealing food to survive. Also relevant are the prosecutor’s relationships with the judges, police, and defense attorneys in their district, as well as local office policies and unstated norms.⁴⁰ Factors that are not associated with the legal aspects of the case can also influence charging decisions. When a prosecutor reviews a

³⁷ BRUCE FREDERICK & DON STEMEN, VERA INST. OF JUSTICE, *THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING – SUMMARY REPORT* (2012), <https://www.ojp.gov/pdffiles1/nij/grants/240334.pdf>. This National Institute of Justice-funded study selected two large country prosecutor’s offices (anonymous), conducting statistical analysis of case files, surveys of prosecutors, interviews and focus group discussions to analyze prosecutorial decision-making.

³⁸ ARIANA ORFORD ET AL., *PROSECUTORS’ DOMESTIC VIOLENCE HANDBOOK* 147 (2017).

³⁹ RCW 9.94A.753(5).

⁴⁰ FREDERICK AND STEMEN, *supra* note 37.

police report to make a charging decision, their decision may be influenced by their own personal biases, prejudices, perspectives, experiences, and training. Anecdotally, prosecutors in Washington have noted that it is very common to have different prosecutors in the same office make wildly different charging decisions on the same set of facts.

When members of the public are injured or die during encounters with police, it is often the local prosecutor who decides whether to file charges. The State Attorney General and U.S. Attorney's Office may also investigate and charge, but that is not the norm. Experts note that when prosecutors, local, State or Federal, decline to charge, this decision can have an impact on communities, particularly those who face disproportionate rates of police violence.⁴¹

A. Disparities in charging

The evidence from jurisdictions across the U.S. suggests that defendant demographics unrelated to their legal case (e.g., gender and race) do sometimes influence charging decisions, although results have found inconsistent effects between locations and charge type. When looking only at gender, female defendants may be more likely to have the original charges against them dropped or lowered when compared to male defendants (although females with prior felonies may actually be treated more severely than male defendants).⁴² For female defendants, having minor children may increase the chances of charges being dropped.⁴³ There is a gap in the research regarding outcomes for transgender, gender non-binary, and gender-nonconforming individuals.

The evidence from other state jurisdictions regarding the impact of race on charging is mixed. A meta-analysis of studies published between 1960 and 2012 found some evidence that race and

⁴¹ *Suquamish Tribal Council Releases Statement on Police Shooting of Stonechild Chiefstick*, SUQUAMISH TRIBAL COUNCIL (Aug. 7, 2019), <https://lastrealindians.com/news/2019/8/7/suquamish-tribal-council-releases-statement-on-police-shooting-of-stonechild-chiefstick>; Richard Arlin Walker, *Residents Demand Accountability in Fatal Shooting of Chippewa Man*, INDIAN COUNTRY TODAY (July 16, 2019), <https://indiancountrytoday.com/news/residents-demand-accountability-in-fatal-shooting-of-chippewa-man?redir=1>.

⁴² Carlos Berdejo, *Gender Disparities in Plea Bargaining*, 94 IND. L.J. 1247 (2019) (analyzing 45,000 misdemeanor and felony cases between 1999-2006 in Dane County, Wisconsin); Daniel Brice Baker & Shahidul Hassan, *Gender and Prosecutorial Discretion: An Empirical Assessment*, 31 J. PUB. ADMIN. RSCH. & THEORY 73-90 (2021) (including an analysis of case management system data from an unnamed northern county between 2009-2011, examining 105,122 arrest charges).

⁴³ Frank A. Sloan et al., *Does Having a Minor Child Affect Criminal Charges and Sanctions Imposed on Female Defendants?*, WOMEN & CRIM. JUST. 1 (2019) (including an analysis of 836,384 female felony and misdemeanor defendants in North Carolina).

ethnicity play a role in charge filing decisions, specifically that Black and Latinx defendants had higher odds of being charged than white defendants. However, the study also found a wide variation between jurisdictions, suggesting that local contextual factors also shaped decision making.⁴⁴ More recent studies have found contradictory results, specifically that Black and Latinx defendants were more likely to have their case dismissed than white defendants in one jurisdiction,⁴⁵ but less likely to be diverted or dismissed in another.⁴⁶ In some jurisdictions, prosecutors may become aware of racial disparities in arrests and then use their discretion to dismiss cases if they believe the arrest was baseless or rooted in racially disparate policing practices (see “Section IX.B: Positive prosecutorial discretion and other interventions to reduce criminal justice disparities” below).

In the few studies that look at the intersection of gender and race, Black female defendants were found to have their arrest charges reduced or dropped less frequently than white females in one jurisdiction,⁴⁷ but more likely to have charges reduced in another jurisdiction.⁴⁸ There is evidence that defendant and victim demographics interact to influence charging decisions. For example, a study of Chicago homicide cases found that Black defendants charged with killing white victims received more harsh charges than all other defendant/victim pairs, and Black and Latinx defendants charged with killing Latinx strangers receive the most lenient charges.⁴⁹

⁴⁴ Jawjeong Wu, *Racial/Ethnic Discrimination and Prosecution*, 43 CRIM. JUST. & BEHAV. 437 (2016) (including a meta-analysis of 26 studies from the U.S. examining differences in prosecution between white, Black, and Hispanic/Latinx defendants).

⁴⁵ Besiki L. Kutateladze et al., *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, 52 CRIMINOLOGY 514 (2014) (examining felony and misdemeanor cases [185,275 in total] accepted for prosecution by the District Attorney of New York’s office between 2010-2011).

⁴⁶ Jacqueline G. Lee & Rebecca L. Richardson, *Race, Ethnicity, and Trial Avoidance: A Multilevel Analysis*, 31 CRIM. JUST. POL’Y REV. 422 (2020).

⁴⁷ Berdejo, *supra* note 42.

⁴⁸ Katrina Rebecca Bloch, Rodney L. Engen & Kylie L. Parrotta, *The Intersection of Race and Gender: An Examination of Sentencing Outcomes in North Carolina*, 27 CRIM. JUST. STUD. 419, 432 (2014) (including an analysis of over 39,000 felony defendants in North Carolina between 1999-2000).

⁴⁹ Christine Martin, *Influence of Race and Ethnicity on Charge Severity in Chicago Homicide Cases: An Investigation of Prosecutorial Discretion*, 4 RACE & JUST. 152, 154, 166 (2014). See also *McClesky v. Kemp*, 481 U.S. 279, 286-89, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

Finally, the defendant’s prior record can be a factor—defendants with prior arrests or convictions on their record are less likely to have the charges against them dismissed,⁵⁰ and their records can justify their exclusion from diversion or treatment programs.⁵¹ As discussed above, there is ample evidence of racially disproportionate effects in policing and arrests. Therefore, using a defendant’s prior record to make charging decisions seems like a neutral policy, but it can actually reinforce disparities created in the past.⁵²

B. Charging in Domestic Violence (DV) and Intimate Partner Violence (IPV) cases

The Washington Association of Prosecuting Attorneys directs prosecutors to take a victim-centered approach toward charging in DV and IPV cases: the victim’s wishes for charging the abuser “should be taken into account, but should not control the decision.”⁵³ DV and IPV charging guidelines help guide, but do not constrain, prosecutorial decision-making.

The limited national evidence regarding disparities in charging in these cases is mixed: one large study found that DV and IPV cases against Black and Hispanic defendants were more likely to be dismissed than cases against white defendants, and that cases for white victims were more likely to be prosecuted.⁵⁴ However, studies in other jurisdictions have found no significant effects of victim or defendant race, sex, or sexual orientation on charging decisions.⁵⁵ There is a lack of

⁵⁰ Ira Sommers, Jonathan Goldstein & Deborah Baskin, *The Intersection of Victims’ and Offenders’ Sex and Race/Ethnicity on Prosecutorial Decisions for Violent Crimes*, 35 JUST. SYS. J. 178 (2014) (examining data on 541 violent crimes from five jurisdictions (not including Washington) in 2003).

⁵¹ John MacDonald et al., *Decomposing Racial Disparities in Prison and Drug Treatment Commitments for Criminal Offenders in California*, 43 J. LEGAL STUD. 155 (2014) (findings from an analysis of a random sample of drug arrests (97,507 in total) from California from 1980-2009).

⁵² Besiki Luka Kutateladze & Victoria Z. Lawson, *How Bad Arrests Lead to Bad Prosecution: Exploring the Impact of Prior Arrests on Plea Bargaining*, 37 CARDOZO L. REV. 973 (2016).

⁵³ ORFORD ET AL., *supra* note 38.

⁵⁴ Danielle M. Romain & Tina L. Freiburger, *Prosecutorial Discretion for Domestic Violence Cases: An Examination of the Effects of Offender Race, Ethnicity, Gender, and Age*, 26 CRIM. JUST. STUD. 289 (2013) (examining 1,009 DV charges brought in a large urban Midwest county in 2009).

⁵⁵ Patrick Q. Brady & Bradford W. Reynolds, *A Focal Concerns Perspective on Prosecutorial Decision Making in Cases of Intimate Partner Stalking*, 47 CRIM. JUST. & BEHAV. 733 (2020) (including an analysis of 268 DV incidents reported to Rhode Island police between 2001 and 2005). In a separate study, researchers conducted a survey of 107 prosecutors from geographically diverse parts of the U.S., using vignettes of DV cases with the victim and defendant, gender or sexual orientation was manipulated to assess how these factors affected decisions to bring charges. Jennifer Cox et al., *Partiality in Prosecution? Discretionary Prosecutorial Decision Making and Intimate Partner Violence*, J. INTERPERSONAL VIOLENCE 1 (2019).

empirical evidence from Washington State regarding disparities in charging decisions in DV and IPV cases.

C. Charging in sexual assault cases

Nationally, social scientists have found evidence of high rates of attrition for sexual assault cases, with one large study finding that only 1.6% end up being tried in court while the rest are being dropped during investigation or charging.⁵⁶ The national evidence suggests that charging is a significant point of case attrition,⁵⁷ and the limited evidence from Washington State shows the same. In a 2001 study of sexual assault of female victims in Washington State, among the 15% of victims of sexual assault who reported the incidence to police, only about half of those saw charges filed.⁵⁸ The best national estimate is that charges are filed in 72% of sexual assault cases where arrests are made; however, less than one-fifth of cases reported to police result in an arrest.⁵⁹

Researchers offer a variety of explanation. Some have theorized that prosecutors may choose to bring charges based on assumptions of how potential future juries would view the case, and interviews with prosecutors support this hypothesis.⁶⁰ The evidence suggests that prosecutors may believe that cases fitting stereotypical ideas of rape and rape victims have the best chances of winning in court.⁶¹ Victims who are attacked by strangers, who are injured during the attack,

⁵⁶ MELISSA S MORABITO, LINDA M WILLIAMS & APRIL PATTAVINA, *DECISION MAKING IN SEXUAL ASSAULT CASES: REPLICATION RESEARCH ON SEXUAL VIOLENCE CASE ATTRITION IN THE U.S.* 237 (2019) (involving a large, Department of Justice-funded multi-state study analyzing 2,887 cases of sexual assault reported by female victims in six jurisdictions from 2008-2010).

⁵⁷ Eryn Nicole O'Neal, Katharine Tellis & Cassia Spohn, *Prosecuting Intimate Partner Sexual Assault: Legal and Extra-Legal Factors That Influence Charging Decisions*, 21 *VIOLENCE AGAINST WOMEN* 1237 (2015) (describing a qualitative analysis of Intimate Partner Sexual Assault complaints to the Los Angeles Police Department in 2008 that found only 19.8% of cases presented to the prosecutor resulted in filing of charges); Megan A. Alderden & Sarah E. Ullman, *Creating a More Complete and Current Picture: Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Cases*, 18 *VIOLENCE AGAINST WOMEN* 525 (2012) (reporting that an assessment of criminal sexual assault cases in a large Midwestern police department in 2008 found that only 9.7% of cases resulted in charges).

⁵⁸ LUCY BERLINER, *SEXUAL ASSAULT EXPERIENCES AND PERCEPTIONS OF COMMUNITY RESPONSE TO SEXUAL ASSAULT: A SURVEY OF WASHINGTON STATE* 56 (2001).

⁵⁹ MORABITO, WILLIAMS & PATTAVINA, *supra* note 56 (describing that an estimated 18.8% of cases reported to police are cleared by arrest. This study examined cases of sexual assault with female victims ages 12+).

⁶⁰ *Id.*

⁶¹ See "Chapter 8: Consequences of Gender-Based Violence: Domestic Violence and Sexual Violence" for more about this.

or who are attacked in public places are more likely to see charges brought against their attackers.⁶² Victims with a prior criminal record, who have mental health issues, who used alcohol before the assault, or who invited the attacker into their home are less likely to have charges brought against their attackers.⁶³ However, these charging patterns do not align with the reality of sexual assault. The national and Washington State data show that most sexual assaults are committed by a person known to the victim; attacks often take place in the victim's or suspect's home; and force is not always used.⁶⁴ There is substantial evidence supporting the existence of stereotypes and assumptions about rape in the general public.⁶⁵

Victim non-cooperation is also cited as a reason for rejecting charges.⁶⁶ There is a lack of empirical evidence regarding the contextual factors that influence victims to withdraw cooperation. In interviews from other U.S. jurisdictions, prosecutors note that if they anticipate challenges with the case, they may present these weaknesses to victims to discourage them from moving forward; and that inconsistent handovers or snags in the transition when cases pass from law enforcement to prosecutors could potentially be points where victims choose to end their involvement.⁶⁷ Victims could also become frustrated and less interested in cooperating after long wait times. Before the pandemic, sexual assault victims in King County waited on average eight months after arraignment of a defendant for any disposition in their case; since the pandemic

⁶² Tara N. Richards, Marie Skubak Tillyer & Emily M. Wright, *When Victims Refuse and Prosecutors Decline: Examining Exceptional Clearance in Sexual Assault Cases*, 65 CRIME & DELINQUENCY 474 (2019).

⁶³ Dawn Beichner & Cassia Spohn, *Modeling the Effects of Victim Behavior and Moral Character on Prosecutors' Charging Decisions in Sexual Assault Cases*, 27 VIOLENCE & VICTIMS 3 (2012) (an analysis of adult sexual assault cases from 1996-1998 in Miami, Kansas City and Philadelphia); MORABITO, WILLIAMS & PATTAVINA, *supra* note 56.

⁶⁴ Michael Planty et al., *Female Victims of Sexual Violence, 1994-2010* (2013), <http://doi.apa.org/get-pe-doi.cfm?doi=10.1037/e528212013-001>. In a review of national incidents of sexual assault against female victims age 12 and older from 200-2010, the Department of Justice reports that 78% of incidents involved an offender who was a family member, intimate partner, friend or acquaintance; only 10% involved a weapon; 35% involved an injury that was later treated; 55% of incidents occurred in or near the victim's home, and an additional 12% in the home of a friend or acquaintance. *Id.* See also TODD & BASSETT, *supra* note 34. Of all rape incidents reported to police in Washington State in 2019, 66.3% occurred at a residence, and only 23.1% were committed by someone who was a stranger to the victim. *Id.*

⁶⁵ Katie M. Edwards et al., *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 SEX ROLES 761-773 (2011); Jericho M. Hockett et al., *Rape Myth Consistency and Gender Differences in Perceiving Rape Victims: A Meta-Analysis*, 22 VIOLENCE AGAINST WOMEN 139-167 (2016).

⁶⁶ *Id.*

⁶⁷ MORABITO, WILLIAMS & PATTAVINA, *supra* note 56, at 75-96. Morabito et al. conducted interviews with 24 prosecutors in six unnamed jurisdictions.

began, that wait has extended to an average 19 months.⁶⁸ The King County Auditor’s Office notes, “Waiting can be emotionally draining and difficult for victims who are seeking closure, which can discourage them from continuing with prosecution.”⁶⁹

There is some evidence to suggest that victim and suspect demographics influence charging decisions in sexual assault cases. A 2019 systematic review of 34 articles published in the U.S. concluded that in sexual assault cases, white victims were more likely than Black victims to have charges filed in their cases, and Black suspects were more likely than white suspects to be charged with more serious crimes and for their charges to be filed as felonies.⁷⁰

With regard to all of these considerations, it is important to note that the vast majority of social science research on this topic focuses on cisgender female victims of male-perpetrated assault. And, as noted in “Chapter 8: Consequences of Gender-Based Violence: Domestic Violence and Sexual Violence,” transgender individuals report very high rates of sexual violence and unwanted sexual contact.⁷¹ In addition, there is national evidence that male victims of sexual assault are more likely to have their cases declined by prosecutors.⁷² Finally, there is a lack of evidence regarding case charging decisions for victims who are LGBTQ+.

D. Charging in offenses related to the sex industry

See “Chapter 10: Commercial Sex and Exploitation” for a discussion of charging for charging offenses related to the sex industry.

⁶⁸ Jesse Franklin, *Prioritize Sexual-Assault Victims in Court Backlog*, SEATTLE TIMES (May 21, 2021).

⁶⁹ MIA NEIDHARDT ET AL., *SEX OFFENSE CASES: SOME VICTIMS AND THEIR CASES MAY BE HARMED BY GAPS* (2020), <https://kingcounty.gov/~media/depts/auditor/new-web-docs/2020/sai-2020/sai-2020.ashx?la=en>.

⁷⁰ Jessica Shaw & HaeNim Lee, *Race and the Criminal Justice System Response to Sexual Assault: A Systematic Review*, 64 AM. J. CMTY. PSYCH. 256 (2019). The majority of studies only assessed outcomes based on White and Black race of the victim or suspect; one included "Hawaiian" as a race variable but was published in the 1980s.

⁷¹ See SANDY E. JAMES ET AL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY* (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>. In the 2015 U.S. Transgender Survey, nearly half (47%) of respondents reported lifetime prevalence of sexual assault, and 10% reported having been sexually assaulted in the previous year *Id.* at 4-5. While different survey results cannot be compared exactly due to difference in wording of questions, this does appear to be higher than rates for lifetime prevalence of sexual violence for U.S. females.

⁷² Richards, Tillyer & Wright, *supra* note 62.

E. Other charging decisions

The recent criminalization of certain activities by the legislature has given prosecutors additional charging tools. One example is the case of “drug-induced homicide,” or controlled substances homicide, in which a person can be held responsible for the accidental overdose death of someone to whom they have provided illegal drugs. In Washington State, this is a class B felony.⁷³ The media report that the use of this law in charging decisions varies widely by jurisdiction. For example, a KING 5 story from 2016 reported that Bremerton police and prosecutors saw this law as an opportunity to seek accountability for dealers in the face of skyrocketing opioid overdose deaths, while the King County prosecutor preferred a public health approach to the opioid epidemic.⁷⁴ Notably, while many supporters of this law are focused on punishing dealers, the Washington law doesn’t actually specify that the substance must be sold, only “delivered.”⁷⁵ Researchers note that often there is not a clear line between user and dealer, as people with substance use disorder may also sell drugs to support their own habit.⁷⁶ One researcher analyzed state court records from Pennsylvania, concluding that about half of those prosecuted under this crime were friends or partners of the person who died—and about half of those were Black or Hispanic defendants providing to a white user.⁷⁷ There is a lack of systematic evidence regarding use of this law in charging decisions in both Washington State and in the U.S.

F. Pre-trial diversion

In many jurisdictions, prosecutors have the option to divert a defendant into a program for drug rehabilitation, community service, job training, or other community programs. If the defendant agrees, the charges against them will be dismissed upon successful completion of the program. One Washington State expert noted anecdotally that prosecutors are the “gatekeepers” to pre-

⁷³ RCW 69.50.415.

⁷⁴ Taylor Mirfendereski, *Fighting Heroin: Dealers Charged with Homicide when Customers Die*, KING 5 NEWS, <https://www.king5.com/article/news/local/fighting-heroin-dealers-charged-with-homicide-when-customers-die/281-424682320>.

⁷⁵ RCW 69.50.415.

⁷⁶ Kathryn Casteel, *A Crackdown on Drug Dealers Is Also a Crackdown on Drug Users*, FIVETHIRTYEIGHT (Apr. 5, 2018), <https://fivethirtyeight.com/features/a-crackdown-on-drug-dealers-is-also-a-crackdown-on-drug-users/>.

⁷⁷ Leo Beletsky, *America’s Favorite Antidote: Drug-Induced Homicide in the Age of the Overdose Crisis*, UTAH L. REV. 833 (2019).

trial diversion programs, with the final say for who will be accepted to alternative options like drug court or mental health court: “Plenty of defense attorneys ‘refer’ clients to these alternative programs, and get frustrated when the prosecutor gatekeeper has the final say of whether the person is accepted.”

Nationally, evidence suggests that racial disparities exist in pretrial diversion programs, as white defendants are more likely to receive pretrial diversion than Black or Latinx defendants (and more likely than Asian and Native American defendants in the studies that did include that analysis).⁷⁸ Some researchers note that if diversion programs have exclusion criteria relating to prior arrests or convictions, this could have the effect of amplifying disparities from earlier points in the system; however, disparities persist even when researchers compare defendants with similar criminal records.⁷⁹ These studies did not disaggregate data by gender, and few examine race and ethnicity beyond white, Black, and Latinx. There is a lack of data in Washington State regarding disparities in pretrial diversion by race and ethnicity, gender, or other factors; and there is no entity currently tracking this information statewide.

G. Mandatory minimums

“Chapter 11: Incarcerated Women in Washington” provides an overview of legislative changes in Washington that created enhanced sentences and mandatory minimum sentences for charges relating to the use of firearms and deadly weapons, and the commission of offenses in drug-free zones. Research on the use of mandatory minimums in federal courts has shown evidence of racial disparities;⁸⁰ however, research from Washington State is limited. Analysis of drug-free zone charges in Washington State from 1999-2005 suggested that these charges were primarily

⁷⁸ Lee & Richardson, *supra* note 46, Black and Hispanic defendants were found to be less likely to receive pretrial diversion than white defendants; MacDonald et al., *supra* note 51, finding that a large proportion of the difference between Black and white drug treatment diversion rates was unaccounted for when controlling for case factors; Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged With Felonies and Processed in State Courts*, 3 RACE AND JUSTICE 210–238 (2013), examining data on male felony defendants 1990-2006 and finding that white defendants were more likely to receive diversion than Black, Latinx, Asian and Native American defendants, regardless of prior convictions.

⁷⁹ Schlesinger, *supra* note 78: “Black, Latino, and Asian and Native American defendants have odds of receiving pretrial diversion that are 28%, 13%, and 31% lower, respectively, than those of white defendants with similar legal characteristics.” (p. 224).

⁸⁰ See, e.g., CODY TUTTLE, RACIAL DISPARITIES IN FEDERAL SENTENCING: EVIDENCE FROM DRUG MANDATORY MINIMUMS (2019), http://econweb.umd.edu/~tuttle/files/tuttle_mandatory_minimums.pdf.

being used to encourage guilty pleas or, as one lawyer put it, “as a ‘trial penalty’ which helps to persuade defendants that they should plead guilty rather than risk facing an enhanced prison term.”⁸¹ Although there are far fewer crimes carrying mandatory minimums under Washington State law than under federal law, they do exist. There is a lack of current data or research regarding the use of mandatory minimum charges and effects on gender, race, ethnicity or other factors in Washington State.

V. Prosecutorial Discretion in Pretrial Detention and Bail Recommendations

In Washington State, the majority of people confined in local jails have not yet been convicted of a crime—they are being held pretrial, either without the possibility for release or unable to post bail.⁸² Nationally, among the female population, women living in poverty and Black women are detained pretrial at a disproportionately high rate.⁸³ Pretrial detention has negative impacts on later case outcomes—defendants detained pretrial are more likely to be convicted and receive harsher sentences (see “Chapter 11: Incarcerated Women in Washington” for a more thorough discussion of this topic).

While prosecutors and defense counsel make recommendations about whether to release, on what conditions, and at what bail amount, judges make the decision. Judicial discretion thus serves as a check on prosecutorial discretion with regard to release and bail. There is a lack of data regarding the impact of these judicial decisions by race, ethnicity, gender, or other factors in all counties in Washington State. The reason is that we have no statewide system for tracking or reporting this data. Yakima County, with funding support from the U.S. Department of Justice,

⁸¹ JUDITH GREENE, KEVIN PRANIS & JASON ZIEDENBERG, *DISPARITY BY DESIGN: HOW DRUG-FREE ZONE LAW IMPACT RACIAL DISPARITY - AND FAIL TO PROTECT YOUTH* 39 (2006), <https://justicepolicy.org/research/disparity-by-design-how-drug-free-zone-laws-impact-racial-disparity-and-fail-to-protect-youth>.

⁸² INTISAR SURUR & ANDREA VALDEZ, *PRETRIAL REFORM TASK FORCE: FINAL RECOMMENDATIONS REPORT* 39 (2019).

⁸³ See Kelsey L. Kramer & Xia Wang, *Assessing Cumulative Disadvantage against Minority Female Defendants in State Courts*, 36 JUST. Q. 1284 (2019) (assessing felony case data 1990-2009 from 40 large urban counties in the U.S., and finding that Black female defendants are more likely to be detained pretrial than white female defendants); BERNADETTE RABUY & DANIEL KOPF, *DETAINING THE POOR* 20 (2016) (demonstrating that among people held in jail unable to meet bail, Black and Hispanic women have lower pre-incarceration incomes than their male and white counterparts).

analyzed pretrial detention rates and disparities from 2014-2016 as part of a system improvement process. They found statistically significant racial disparities in pretrial release rates: white defendants were released at higher rates than were Latinx/Hispanic, Native American, Black, Asian, and Pacific Islander defendants.⁸⁴ It was reported that this disparity disappeared after Yakima County implemented a pretrial improvement process.⁸⁵

VI. Prosecutorial Discretion in Plea Bargaining

Despite the fact that criminal defendants have a right to a trial by jury, very few defendants exercise this right. One national review of state court plea bargaining concluded that well over 90% of cases are resolved through this process.⁸⁶ Plea bargains allow prosecutors to move cases through the criminal justice system more quickly: they “serve an important role in the disposition of today’s heavy calendars.”⁸⁷

The charging policy of a particular office plays a large part in how a case is plea bargained. As explained by an expert familiar with prosecution practices nationally and in Washington State, offices employing a “conservative” charging policy start out with the lowest level of offense, and fewest number of offenses, and threaten to increase the seriousness of the offense or the number of the offenses charged if the defendant chooses trial over the “as charged” plea offer. Conversely, under a “liberal” charging policy, the negotiation works in reverse, lowering the level of seriousness of the offense or “dismissing” one or more charges in exchange for a plea of guilty. Many times, this charging policy changes according to the philosophy of the elected or appointed

⁸⁴ CLAIRE M B BROOKER, YAKIMA COUNTY, WASHINGTON PRETRIAL JUSTICE SYSTEM IMPROVEMENTS: PRE- AND POST-IMPLEMENTATION ANALYSIS 25 (2017).

⁸⁵ *Id.*

⁸⁶ Brian A Reaves, *Felony Defendants in Large Urban Counties, 2009 - Statistical Tables*, STAT. TABLES 40 (2013), analyzing felony case disposition data from the 75 largest urban counties in the US and finding that 97% of felonies were resolved through plea; Besiki L. Kutateladze & Victoria Z. Lawson, *Is a Plea Really a Bargain? An Analysis of Plea and Trial Dispositions in New York City*, 64 CRIME & DELINQUENCY 856–887 (2018) (finding that 99.2% of misdemeanor cases processed through the New York District Attorney's office were resolved by plea).

⁸⁷ *Santobello v. New York*, 404 U.S. 257, 264, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971).

chief prosecutor. Researchers and experts note that both policies have a coercive effect on defendants.⁸⁸

Plea deals are particularly difficult to study empirically, as prosecutors are not required to publicly report deals offered and rejected, or any other aspect of the negotiations. There is no entity in Washington State that systematically tracks demographics of defendants and plea deal resolutions. However, in an examination of sex offense cases in King County, the King County Auditor found that “white defendants represented by public defenders were 10 percent more likely to resolve through a plea agreement compared to cases with non-white defendants.”⁸⁹ Similarly, the national, literature generally shows that white defendants are more likely to plead guilty than Black and Latinx defendants, who are more likely to go to trial.⁹⁰ The same pattern has been found among juvenile justice defendants.⁹¹ However, this data can’t tell us empirically if white defendants are being offered plea deals at higher rates than Latinx and Black defendants, or if prosecutors offer less attractive deals to Black and Latinx defendants who then turn those deals down, or if Black and Latinx defendants are less likely to take offered plea bargains. The data also cannot tell us whether the public defense offices studied devoted equivalent amounts of time to Black, Native, and other clients of color as they did to white clients. There is some evidence that when Black and Latinx defendants take plea deals, those deals are less likely to reduce initial charges (noted below), but again, data noting the terms of the final deal taken can’t

⁸⁸ Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When do Prosecutors Cross the Line?*, 17 NEV. L.J. (2017); James Babikian, *Cleaving the Gordian Knot: Implicit Bias, Selective Prosecution, & Charging Guidelines*, 42 AM. J. CRIM. L. 139 (2015); LINDSEY DEVERS, BAIL DECISIONMAKING: RESEARCH SUMMARY (2011).

⁸⁹ MIA NEIDHARDT ET AL., SEX OFFENSE CASES: SOME VICTIMS AND THEIR CASES MAY BE HARMED BY GAPS 33 (2020), <https://kingcounty.gov/~media/depts/auditor/new-web-docs/2020/sai-2020/sai-2020.ashx?la=en>. The King County Auditor’s office examined a random sample of sexual offense cases (not just sexual assault) reported in 2017. The majority of these were child sex offense cases. Race was missing (“unspecified”) in 20% of cases. This analysis did not control for type or seriousness of accused offense.

⁹⁰ Lee & Richardson, *supra* note 46 (examining 58,248 state court felony case from 40 large urban counties 2000-2009, and finding that Black defendants were less likely to plead guilty than white or Latinx defendants); Sommers, Goldstein & Baskin, *supra* note 50 (examining violent crime data from 5 US jurisdictions and finding that Black male defendants were less likely to plead guilty than white defendants, especially if the victim of the crime was white); Christi Metcalfe & Ted Chiricos, *Race, Plea, and Charge Reduction: An Assessment of Racial Disparities in the Plea Process*, 35 JUST. Q. 223 (2018) (in an analysis of 907 felony cases from a public defender’s office in a large Florida county, 2002-2010, finding that Black females were less likely to plead guilty than white females).

⁹¹ John D. Burrow & Patrick G. Lowery, *A Preliminary Assessment of the Impact of Plea Bargaining Among a Sample of Waiver-Eligible Offenders*, 13 YOUTH VIOLENCE & JUV. JUST. 211 (2015) (from an analysis of juvenile cases eligible for waiver to adult criminal court in South Carolina, 2002-2006 (n=241)).

account for these other factors. Note that the majority of studies only examine Black, white, and Latinx race and ethnicity.

Social scientists have found evidence of disparities in plea deals by comparing the plea deals taken by defendants and controlling for legally relevant factors. The national research suggests that defendants who are detained (either denied bail or unable to pay bail and secure their release) are more likely to take plea deals, and take them more quickly, than defendants who are released (read more about pretrial detention in “Chapter 11: Incarcerated Women in Washington”).⁹² Defendants with prior arrests appear to take harsher plea deals (with more serious charges and longer sentence recommendations) than defendants without prior arrests.⁹³ Black and Latinx defendants are less likely to receive plea deals that include reductions in charge severity; this finding is true across and within gender groups.⁹⁴

⁹² Meghan Sacks & Alissa R. Ackerman, *Pretrial Detention and Guilty Pleas: If They Cannot Afford Bail They Must Be Guilty*, 25 CRIM. JUST. STUD. 265 (2012). A 2004 review of 634 New Jersey cases found that “defendants who were held pretrial in this sample had their cases disposed of quicker than defendants who were released.” *Id.* at 275. See also Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201 (2018). Dobbie, Goldin, and Yang examined 421,850 cases from Philadelphia and Miami-Dade between 2006 and 2014, and found that defendants detained pretrial are more likely to plead guilty. They note that defendants released from jail are in a better position to bargain regarding plea deals, while those detained may take the first deal offered in order to obtain release. See also Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017) (examining 380,689 misdemeanor cases in Harris County, Texas between 2008 and 2013 and finding that defendants detained pretrial plead guilty at a rate 25% higher than those released); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J. L. & ECON. 529 (2017) (examining 24,679 felony and misdemeanor cases in New York City courts between 2009 and 2013 finding that defendants detained pretrial are more likely to plead guilty, and when they do plead, the deals they take are more severe); Nick Petersen, *Low-Level, but High Speed?: Assessing Pretrial Detention Effects on the Timing and Content of Misdemeanor versus Felony Guilty Pleas*, 36 JUST. Q. 1314 (2019) (an analysis of state court felony data between 1990 and 2004 showed that defendants detained pretrial plead guilty 2.86 times faster than defendants who were released).

⁹³ Kutateladze & Lawson, *supra* note 52 (reporting findings from an analysis of 211,056 felony and misdemeanor case processings in the District Attorney of New York’s office between 2010 and 2011). The authors found that when prosecutors considered previous arrests, “Blacks become 20 percent more likely and Latinos 10 percent more likely to receive a punitive plea offer” than their white counterparts. *Id.* at 986.

⁹⁴ Brian D. Johnson & Pilar Larroulet, *The “Distance Traveled”: Investigating the Downstream Consequences of Charge Reductions for Disparities in Incarceration*, 36 JUST. Q. 1229 (2019) (examining 20,837 felony defendants in New York between 2010 and 2011, and finding that White female defendants received an average 46.5% “discount” on initial charges in plea deals, compared to a 45.7% reduction for Latina female defendants and 37.3% reduction for Black female defendants); Besiki Luka Kutateladze, *Tracing Charge Trajectories: A Study of the Influence of Race in Charge Changes at Case Screening, Arraignment, and Disposition*, 56 CRIMINOLOGY 123, 146 (2018) (analyzing 170,572 felony and misdemeanor cases in New York between 2010 and 2011, and finding that Black and Latinx defendants were “much less likely than Asian and White defendants to experience a reduction in charges via plea acceptance”).

It is almost certain that some proportion of defendants who take guilty pleas are innocent, either of the crime they pleaded guilty to, or of any crime at all.⁹⁵ Empirical studies with the lay population show that when people are faced with a choice between a possibly severe consequence later and a known reduced punishment immediately, many will take the reduced punishment even if they are factually innocent.⁹⁶ And criminal defense attorneys note that, in some cases, they think there are circumstances when pleading guilty despite being innocent might be to the client's benefit, for example by securing their release from jail or by avoiding a potential trial sentence much more severe than the plea offer.⁹⁷ Defendants who are detained pretrial for crimes that might not carry a carceral sentence (such as those charged with low-level misdemeanor offenses) may be particularly vulnerable to making a "false" guilty plea. As one pair of researchers notes, "obtaining a plea from an individual who is deprived of freedom tells you very little about whether or not that person is actually guilty of the crime."⁹⁸ A similar pattern has been observed in Tacoma, Washington, where one public defender notes, "poor people will

⁹⁵ See, e.g., *Causes of Wrongful Conviction*, WASH. INNOCENCE PROJECT (2021), <https://wainnocenceproject.org/causes> ("Sometimes a procedurally fair trial can result in an innocent person's conviction. Mistaken eyewitness identification and false confessions can lead to wrongful convictions. Prosecutors can fail to turn over evidence, or defense attorneys don't provide effective counsel. In many cases, racism and implicit bias play a significant role in the wrongful conviction of innocent people of color.").

⁹⁶ See, e.g., Lucian E. Dervan & Vanessa Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013) (explaining that from an empirical experiment with 82 college students accused of cheating, more than half of the "innocent" students chose to "falsely admit guilt in return for a reduced punishment"); Vanessa A. Edkins & Lucian E. Dervan, *Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences Against Pretrial Detention in Decisions to Plead Guilty.*, 24 PSYCH., PUB. POL'Y, & L. 204 (2018) (in a vignette study with 155 college students and 206 adults, between one third and one half of participants assigned to the innocent group accepted a guilty plea); Ryan A. Schneider & Tina M. Zottoli, *Disentangling the Effects of Plea Discount and Potential Trial Sentence on Decisions to Plead Guilty*, 24 LEGAL & CRIMINOLOGICAL PSYCH. 288 (2019) (in a vignette study with 1,225 adults recruited online, 11% of "innocent" participants accepted a guilty plea); Miko M. Wilford, Gary L. Wells & Annabelle Frazier, *Plea-Bargaining Law: The Impact of Innocence, Trial Penalty, and Conviction Probability on Plea Outcomes*, 46 AM. J. CRIM. JUST. 554 (2021) (describing a vignette study with 142 college students that found false guilty pleas exceeding 50%).

⁹⁷ Rebecca K. Helm et al., *Limitations on the ability to negotiate justice: attorney perspectives on guilt, innocence, and legal advice in the current plea system*, 24 PSYCH., CRIME & L. 915 (2018). In interviews with 189 criminal defense attorneys from across the U.S., over 40% said they had advised a client who they thought was innocent to plead guilty, and over 78% said that, given the current system, there are cases when innocent defendants should plead guilty. *Id.*

⁹⁸ Vanessa A. Edkins & Lucian E. Dervan, *Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences Against Pretrial Detention in Decisions to Plead Guilty.*, 24 PSYCH., PUB. POL'Y, & L. 204, 212 (2018).

plead to get out of jail because they can't post the bail."⁹⁹ According to one expert in Washington State, individuals vulnerable to assault or sexual violence, including transgender people housed in facilities by the sex assigned to them at birth, may accept guilty pleas to escape a dangerous situation.¹⁰⁰

Even when detained defendants are facing a carceral sentence where release will not be the outcome of their plea, the crowding, discomfort, and lack of services in many local and county jails may push defendants to plead guilty in order to enter prison more quickly. This appears to be particularly true during the COVID-19 pandemic, as trials are being delayed and the high turnover in jails puts detained defendants at an elevated risk for contracting the virus.¹⁰¹ As one Washington State defense attorney noted, "In-custody clients are facing a totally different situation than they were pre-COVID . . . Without trials clients are forced to choose between continued COVID exposure and the moving target that is their constitutional right to a speedy and public jury trial."¹⁰² More than two-thirds of defense attorneys surveyed in Washington State in December 2020 said that speedy trial suspensions and jury trial suspensions are causing more clients to plead guilty to get out of jail.¹⁰³

The U.S. Supreme Court has held that when defendants plead guilty and waive their constitutional rights, those pleas "not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."¹⁰⁴ However, the existing qualitative research suggests that many plea deals are made because the defendant is under pressure—for example, defendants detained pretrial may plead guilty to secure their release and return to work and family obligations.¹⁰⁵ Additionally, plea deals may be

⁹⁹ KAITLYN DUNN, MATT MUNOZ & ANDREW TAYLOR, EXAMINING DISPARITIES AND IMPLICIT BIAS IN THE PROSECUTION OF MISDEMEANORS IN TACOMA MUNICIPAL COURT (2018), https://s3-us-west-2.amazonaws.com/uw-s3-cdn/wp-content/uploads/sites/136/2019/01/12004328/LCY_ImplicitBias.pdf.

¹⁰⁰ For one transgender women's story of her experience being housed with male inmates in jail see *She Protested In Seattle, Then Spent 2 "Terrifying" Days In Jail*, PATCH (June 8, 2020), <https://patch.com/washington/seattle/she-protested-seattle-then-spent-2-terrifying-days-jail>.

¹⁰¹ Thea Johnson, *Crisis and Coercive Pleas*, 110 J. CRIM. L. & CRIMINOLOGY ONLINE 1 (2020).

¹⁰² KATRIN JOHNSON & JASON SCHWARTZ, DEFENDING CLIENTS IN THE COVID-19 ENVIRONMENT: SURVEY RESULTS FROM PRIVATE AND PUBLIC DEFENSE COUNSEL 19 (2021).

¹⁰³ KATRIN JOHNSON & JASON SCHWARTZ, DEFENDING CLIENTS IN THE COVID-19 ENVIRONMENT: SURVEY RESULTS FROM PRIVATE AND PUBLIC DEFENSE COUNSEL (2021) (a total of 396 defense attorneys responded from 34 counties statewide).

¹⁰⁴ *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)

¹⁰⁵ Edkins & Dervan, *supra* note 96.

made with limited understanding of the details and consequences of the deal. Federal and state law requires the court to ensure that the defendant understands the terms and consequences of the plea deal before the court accepts it. But given the press of cases, particularly in our most crowded limited jurisdiction courts (handling misdemeanors and gross misdemeanors), problems can arise.

A major aspect of the defense attorney role is to communicate well with their clients. Defendants' confusion regarding plea bargains often happens largely because of the lack of time public defenders can spend on their cases. In many jurisdictions nationally, they carry staggeringly high caseloads, resulting in little time for client communication. In Washington, public defenders and their clients' situation vastly improved nearly a decade ago, when the Washington Supreme Court adopted the Standards for Indigent Defense, which mandate reasonable caseload limits for all public defense attorneys. A public defender can handle no more than 150 felonies, or 250 juvenile cases, or 400 misdemeanor cases yearly, providing more hours to fulfill their roles, including discussing plea bargains with their clients. The caseload limits are not perfect; they are inconsistently applied, and the specifics on how to count cases are a subject of continued discussion.¹⁰⁶ An earlier public defense pilot program in Thurston and Whatcom counties showed that when public defense attorney caseloads were reduced, they spent one-quarter to one-third of their time per case communicating with their clients.¹⁰⁷ In addition, during the past few years, numerous trainings on client communication have been presented by the Washington Defender Association and the Washington State Office of Public Defense, attended by many hundreds of public defense attorneys.¹⁰⁸

The “knowing and voluntary” standard set by the Supreme Court requires that defendants be made aware of the direct consequences of their guilty plea, but there is no requirement that

¹⁰⁶

¹⁰⁷ BILL LUCHANSKY, THE PUBLIC DEFENSE PILOT PROJECTS: WASHINGTON STATE OFFICE OF PUBLIC DEFENSE (2010), http://www.opd.wa.gov/documents/0058-2010_PilotProject.pdf.

¹⁰⁸ *Resources: Training By Year*, WASH. DEFENDER ASS'N (2021), <https://defensenet.org/resource-category/trainings-by-year>; *Status Reports on Public Defense in Washington State 2006–2009*, WASH. STATE OFF. OF PUB. DEFENSE (2021), <https://opd.wa.gov/quicklink-report>.

defendants be made aware of all the “collateral consequences,”¹⁰⁹ the formal and informal penalties resulting from criminal convictions. Plea tender forms in Washington have limited treatment of collateral consequences: they only note collateral consequences regarding the right to vote and government assistance.¹¹⁰ As “Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families” notes, criminal convictions can also limit access to housing, employment, and education, and can have broader impacts on a person’s family and wider community. Individuals may be unaware of these life-long consequences when they give up their rights to a trial and take a guilty plea.

Individuals who are Deaf, Hard of Hearing, or DeafBlind (D/HH/DB) or who have limited English proficiency (LEP) require access to a certified interpreter in order to understand and knowingly agree to a plea bargain. However, as discussed in “Chapter 2: Communication and Language as a Gendered Barrier to Accessing the Courts,” limited funds, a lack of certified interpreters for languages of lesser diffusion, and court staff unfamiliar with the process for requesting an interpreter may lead to delays and difficulties in securing certified interpreters for court proceedings. Experts in Washington State note anecdotally that the idea of negotiating a plea deal, even when interpreted into a person’s first language, is a challenging idea to grasp: “there’s lots of confusion. Immigrants give odd looks regarding ‘pleading guilty to a lesser charge.’” Even among populations fluent in spoken and written English, defendants may face barriers to full comprehension of the terms and consequences of a plea deal. As noted in “Chapter 2: Communication and Language as a Gendered Barrier to Accessing the Courts,” individuals with cognitive disabilities are over-represented in the incarcerated population, particularly among the

¹⁰⁹ Carlie Malone, *Plea Bargaining and Collateral Consequences: An Experimental Analysis*, 73 VAND. L. REV. 1161 (2020). Although the American Bar Association encourages defense attorneys to discuss collateral consequences with defendants, not doing so is not enough basis for defendants to subsequently appeal on the basis of inadequate defense. *Id.* The U.S. Supreme Court changed its consideration of collateral consequences when evaluating ineffective assistance of counsel claims from dividing them into either direct or collateral consequences to the current manner of considering the severity of the consequence instead. *See, e.g.,* Paul Quincy, *Right to Be Counseled: The Effect of Collateral Consequences on the Strickland Standard*, 20 U. PA. J. CONST. L. 763 (2017); Soojin Kim, *United States v. Reeves: The Struggle to Save the Direct/Collateral Consequences Test After Padilla*, 62 CATH. U. L. REV. 853 (2013).

¹¹⁰ *Guilty Plea Statement*, WASHINGTON COURTS (2021), [https://www.courts.wa.gov/forms/documents/CrR4.2_g_Non-Sex percent20Offense percent201.1.21.pdf](https://www.courts.wa.gov/forms/documents/CrR4.2_g_Non-Sex%20Offense%201.1.21.pdf).

female population.¹¹¹ These disabilities could include language impairments that impact defendant decision-making in the plea deal process.

Meeting the “knowing and voluntary” standard for juveniles may be particularly challenging. Research on human development and decision-making note that children and youth process information and make decisions differently than adults do—thus why the juvenile justice system is separate from the adult system.¹¹² Cognitive development research has found that youth are also more easily moved by social influence,¹¹³ and tend to weigh immediate gratification more heavily than long-term consequences.¹¹⁴ Vignette experiments in the lay population nationally suggest that juveniles may be more likely to plead guilty compared to adults.¹¹⁵ The evidence suggests that youth involved in the criminal justice system have very limited understanding of the proceedings, their rights, and the conditions and requirements placed on them. “Chapter 9: Juvenile Justice and Gender and Race Disparities” notes that youth with intellectual and developmental disabilities appear to be over-represented in the juvenile justice system nationally.¹¹⁶ Youth involved in the juvenile justice system also have, on average, lower academic achievement than their peers.¹¹⁷ Given that legal language can be difficult for any person to understand, it seems reasonable to expect that justice-involved youth might face particularly high barriers to comprehension. This has been supported by empirical evidence in Washington State and nationally. In Washington, a team of researchers partnered with the Clark County courts and Benton-Franklin court system to assess how well youth understood court proceedings.¹¹⁸ They approached 20-30 individual youth in each court and requested permission to accompany them during their court appearance, and to conduct a short survey immediately

¹¹¹ JENNIFER BRONSON & MARCUS BERZOFKY, *DISABILITIES AMONG PRISON AND JAIL INMATES, 2011–12* 13 (2015).

¹¹² Jean J. Cabell & Shawn C. Marsh, *Swing and a Miss: Reflections on the “Voluntariness” of Pleas in Juvenile Court*, 117 CHILDREN & YOUTH SERVS. REV. 1 (2020).

¹¹³ *Id.*

¹¹⁴ Rebecca K. Helm, *Cognitive Theory and Plea-Bargaining*, 5 POL’Y INSIGHTS FROM BEHAV. & BRAIN SCIS. 195 (2018).

¹¹⁵ *Id.*; Allison D. Redlich & Reveka V. Shteynberg, *To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions.*, 40 LAW & HUM. BEHAV. 611 (2016).

¹¹⁶ DEV. SERVS. GRP., INC., LITERATURE REVIEW: YOUTHS WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES IN THE JUVENILE JUSTICE SYSTEM (2017), <https://www.ojjdp.gov/mpg/litreviews/Intellectual-Developmental-Disabilities.pdf>.

¹¹⁷ DEV. SERVS. GRP., INC., EDUCATION FOR YOUTH UNDER FORMAL SUPERVISION OF THE JUVENILE JUSTICE SYSTEM (2019), <https://ojjdp.ojp.gov/mpg/literature-review/education-for-youth-in-the-juvenile-justice-system>.

¹¹⁸ ROSA PERALTA ET AL., WASHINGTON JUDICIAL COLLOQUIES PROJECT: A GUIDE FOR IMPROVING COMMUNICATION AND UNDERSTANDING IN JUVENILE COURT (2012).

after. They found that youth overall showed very little understanding of the proceedings. Nearly one-third of youth interviewed told researchers they had not had a defense attorney present—even though researchers had confirmed they all did.¹¹⁹

Similar results were found in interviews with youth who had pleaded guilty to felony offenses in adult court in New York City.¹²⁰ Most youth didn't understand even the basic terms of their plea deal or know they'd had the option to go to trial; and none knew that they had waived their right to appeal.¹²¹ Juvenile public defenders from an urban, East Coast jurisdiction confirmed these findings, reporting in interviews that they often don't have enough time to discuss plea deals thoroughly with their clients, as plea offers are often made on the morning of a trial date.¹²² These attorneys spent, on average, under an hour discussing plea deals with their clients, focusing primarily on the charges being brought, the sentence on offer, and the evidence presented by the prosecution. Relatively few said they review the rights being waived in the plea deal, and fewer discuss other collateral consequences.¹²³ Unsurprisingly, under such conditions, “false guilty” pleas do occur. In interviews with youth incarcerated and on probation in two separate studies, researchers found that a quarter or more of youth claimed to be innocent of

¹¹⁹ *Id.* Most of the youth surveyed were youth of color: 49% Latinx, 39% white, 6% multiracial, 4% Black, and 2% some other race. This research led to the development of the Colloquies Project, a toolkit for courts and judges to improve communication with justice-involved youth. The Colloquies Project has been implemented in several counties in Washington State, as well as in several other states, and has been shown to greatly increase youth comprehension of court forms and proceedings. However, as the project implementation often depends on key stakeholders within the courts, this project is no longer implemented in Washington State. Personal communication with Rosa Peralta and George Yeannakis (Apr. 30, 2021).

¹²⁰ Tarika Daftary-Kapur & Tina M. Zottoli, *A First Look at the Plea Deal Experiences of Juveniles Tried in Adult Court*, 13 INT'L J FORENSIC MENTAL HEALTH 323 (2014) (interviews with 40 youth offenders ages 13-18 tried for felony offenses in adult court in New York City).

¹²¹ *Id.*

¹²² Erika N. Fountain & Jennifer L. Woolard, *How Defense Attorneys Consult with Juvenile Clients About Plea Bargains*, 24 PSYCH., PUB. POL'Y, & L. 192 (2018) (from semi-structured interviews with 23 juvenile public defense attorneys in an urban, East Coast jurisdiction).

¹²³ *Id.*

the charge they pleaded guilty to.¹²⁴ In one study, nearly a third of youth who took guilty pleas reported having done so to protect someone else, and 14% said they'd done so under duress.¹²⁵

In summary, the national and limited Washington State evidence suggests that among female defendants, Black and Latina defendants, those living in poverty, those with limited understanding of spoken and/or written English, and those with intellectual disabilities, may be offered pleas with more severe penalties; may be more likely to accept plea deals under coercive conditions; or may have poorer understanding of the consequences of a guilty plea, compared to their peers. However, there is a lack of statewide, empirical evidence regarding outcomes by gender, race, ethnicity, poverty, disability, language, and more in Washington State.

VII. Misdemeanors

While misdemeanors are often overlooked in criminal justice research, some researchers argue they deserve particular attention because of their sheer volume. An estimated 13 million misdemeanor cases are filed every year in the U.S.¹²⁶ Misdemeanor offenses are by definition less serious than felonies; however, conviction of a misdemeanor carries many of the same long-term collateral consequences as conviction with a felony. As noted in “Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children, and Families,” a misdemeanor conviction can be the basis for being denied entry to school, jobs, housing, and more. When social scientists compare felony and misdemeanor charging data, they have found greater gender and racial disparities in misdemeanors compared to felonies, and

¹²⁴ Lindsay C. Malloy, Elizabeth P. Shulman & Elizabeth Cauffman, *Interrogations, Confessions, and Guilty Pleas Among Serious Adolescent Offenders*, 38 LAW & HUM. BEHAV. 181 (2014) (a series of interviews with 193 male youth incarcerated in California. Of concern, 5.7% of youth who maintained their innocence despite pleading guilty said they'd been under the influence of drugs or alcohol at the time of their guilty plea); Tina M. Zottoli et al., *Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults who Pleaded Guilty to Felonies in New York City*, 22 PSYCH., PUB. POL'Y, & L. 250 (2016) (from interviews with 55 adolescents in alternatives to incarceration programs in New York City; almost half of youth in this sample said they'd had less than one hour to make a decision).

¹²⁵ Malloy, Shulman & Cauffman, *supra* note 124.

¹²⁶ ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICAN MORE UNEQUAL (2018).

theorize that less serious offenses could be more subject to bias in discretionary practices.¹²⁷ Moreover, misdemeanor arrest and charge rates appear to fluctuate independently of violent crime rates, suggesting “there is not a direct relationship between misdemeanor enforcement and prevention of more serious crime.”¹²⁸

Washington has an estimated misdemeanor caseload rate of 2,698 filings per 100,000 people—lower than the national average of 4,124 per 100,000.¹²⁹ Misdemeanors made up about 64% of prosecuted cases in Washington State in 2014, and female defendants in Washington are more likely to have a misdemeanor charge than male defendants.¹³⁰ While misdemeanor arrest rates have fallen around the country, they have decreased more rapidly for males than females.¹³¹

Nationally, researchers note that misdemeanor offenses are often “amorphously defined and subject to significant discretion in policing.”¹³² This is particularly noted regarding “public order” misdemeanors.¹³³ Public order offenses are generally non-violent crimes without direct victims and have historically been used to control the movement and activities of Black, Indigenous, and people of color in public spaces.¹³⁴ Nearly 12,000 females in Washington were arrested under public order charges in 2019, the vast majority for disorderly conduct, liquor law violations, and trespassing.¹³⁵ However, these arrests occurred in counties across Washington State, and may have been charged under local ordinances which vary widely. More research is needed to

¹²⁷ Berdejo, *supra* note 42 (finding that the disparity in charge reduction between Black and white women was greater among misdemeanor defendants than felony defendants in Dane County Wisconsin).

¹²⁸ BECCA CADOFF, PREETI CHAUHAN & ERICA BOND, MISDEMEANOR ENFORCEMENT TRENDS ACROSS SEVEN U.S. JURISDICTIONS (2020). This longitudinal study of misdemeanor enforcement examined trends in seven U.S. cities, including Seattle, Washington.

¹²⁹ NATAPOFF, *supra* note 126.

¹³⁰ *Misdemeanor Cases, Washington*, MEASURES FOR JUSTICE, <https://measuresforjustice.org/portal/WA/measures/103?c=1&fc=4&ds=1&d=1>.

¹³¹ CADOFF, CHAUHAN & BOND, *supra* note 128 (examining misdemeanor trends in Seattle, WA; Los Angeles, CA; St. Louis, MO; Louisville, KY; Durham, NC; Prince George’s County, MD; and New York, NY).

¹³² Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731 (2018).

¹³³ Here, we include arrests categorized by the Washington Association of Sheriffs and Police Chiefs as those charged as betting/wagering, curfew/loitering/vagrancy, disorderly conduct, drunkenness and liquor law violations, gambling violations, and trespassing.

¹³⁴ U.S. DEP’T OF JUST. C.R. DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016), <https://www.justice.gov/crt/file/883296/download>; Stevenson & Mayson, *supra* note 132; NATAPOFF, *supra* note 126.

¹³⁵ Arrest data from Washington Association of Sheriffs and Police Chiefs (2019).

understand the use of public order arrests in Washington State for different populations, and their treatment by prosecutors.

While there is no current statewide research on charging for misdemeanors, data from Seattle reveal significant disparities. A recent analysis of Seattle misdemeanor arrest and charging practices found that, while misdemeanor bookings decreased from 2008-2016, the rate of decline was greater for males than for females.¹³⁶ Among females, arrest rates for white and Asian females saw little change from 2008-2016, and both were under 1,000 per 100,000 people in the general population. It is important to note that when diverse populations are grouped together under one broad category, like often happens with the “Asian” category in datasets, disparities for populations within that category may be masked. The arrest rates for Black and Indigenous females were substantially higher during this time, and the rate for Indigenous females increased from 5,960 in 2008 to 8,117 in 2016, as seen in Figure 1.¹³⁷

¹³⁶ JACQUELINE B HELFGOTT ET AL., SEATTLE UNIV. DEP'T OF CRIM. JUST., TRENDS IN MISDEMEANOR ARRESTS, REFERRALS, AND CHARGES IN SEATTLE (2018).

¹³⁷ *Id.*

Figure 1. Seattle Police Department Misdemeanor Arrest Rates (for 100,000 Population) for Females, by Race, Ages 18-65, 2008-2016 (replicated figure)

Figure 18: Seattle Police Department Misdemeanor Arrest Rates for Females by Race for 100,000 Population, Ages 18-65, 2008-2016.

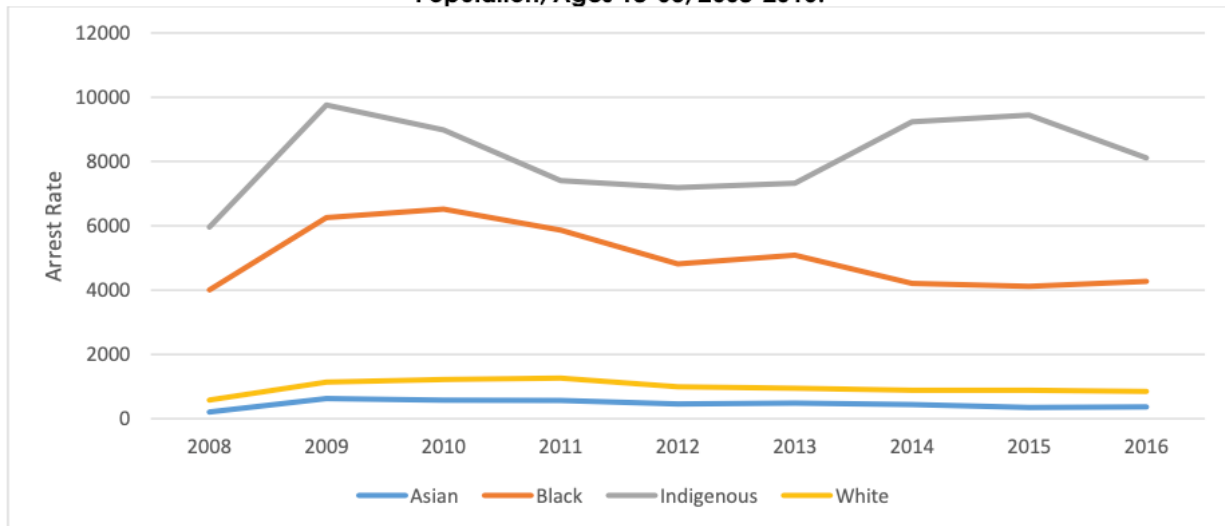


Figure 18 illustrates the misdemeanor arrest rates of females by race (per 100,000 population ages 18-65). The arrest rate for Asian females and White females was low and stable over time. In 2008, the arrest rate of Asian females was 207 and in 2016 rose slightly to 370. Similarly, the arrest rate for White females was 579 and 845 in 2016. The arrest rate for Black and Indigenous females was substantially higher than for Asian and White females, with the rate for Indigenous females the highest of all groups for the entire study period. This pattern of arrests for Indigenous females being higher than all other groups was not the case for male misdemeanor arrests where arrests were consistently higher for Black males. Arrest rates for all racial groups were higher in 2016 than 2008. The arrest rate of Indigenous females in 2008 was 5,960 and 8,117 in 2016. The arrest rate of Black females was 4,004 in 2008 and 4268 in 2016.

Footnotes for Figure 1.

Source: Image replicated from JACQUELINE B HELFGOTT ET AL., SEATTLE UNIV. DEP'T OF CRIM. JUST., TRENDS IN MISDEMEANOR ARRESTS, REFERRALS, AND CHARGES IN SEATTLE (2018).

The majority of misdemeanor arrests in Seattle don't end in conviction, but are deferred, diverted or declined.¹³⁸ However, misdemeanor charges demonstrate similar racial disproportionality as seen in arrests, where Black and Indigenous females were charged at rates exceeding three times and four times (respectively) the rates of white and Asian females, as shown in Figure 2.

Figure 2. Seattle City Attorney Misdemeanor Charging Rates (per 100,000 Population), Females by Race, Ages 18-65, 2008-2016 (replicated figure)

Figure 66: Seattle City Attorney Misdemeanor Charging Rates for Females by Race per 100,000 Population, Ages 18-65, 2008-2016.

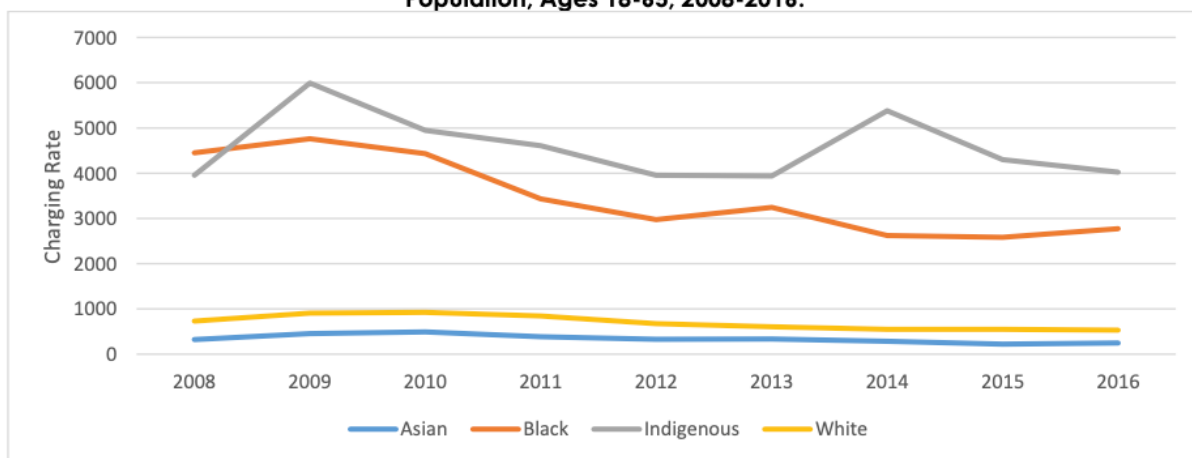


Figure 66 shows misdemeanor charge rates for females by race per 100,000 population, ages 18-65. As was the case for male charging rates, charge rates for Asian and White females were low and stable relative to the Black and Indigenous groups. In contrast with the charging rate patterns for males where the rates were higher for the Black males, for females, the Indigenous group was charged at a higher rate for all years in the study period after 2008 and was the only racial/ethnic group that had a charging rate 2016 (4,025) higher than the charging rate 2008 (3,954). The only year that Black females were charged at a higher rate than all other groups was in 2008 when the rate was 4,447 but after 2008 there was a steady decline to a low point of 2,775 in 2016.

Footnotes for Figure 2.

Source: Image replicated from JACQUELINE B HELFGOTT ET AL., SEATTLE UNIV. DEP'T OF CRIM. JUST., TRENDS IN MISDEMEANOR ARRESTS, REFERRALS, AND CHARGES IN SEATTLE (2018).

¹³⁸ Deferral is when prosecutors charge the individual but agree not to pursue conviction if the defendant complies with a set of requirements or avoids re-arrest during a certain period of time. Declination is when prosecutors choose not to file charges. See CADOFF, CHAUHAN & BOND, *supra* note 128 (noting that between 23-27% of misdemeanor arrests in Seattle from 2008 to 2016 were declined for prosecution; 32-50% were dismissed; and 34-44% were convicted).

Ballooning unemployment rates and the specter of mass evictions due to the economic downturn during the COVID-19 pandemic may have the effect of increasing offenses relating to poverty, mental health, and substance use disorder as needs increasingly surpass the capacity of available services.¹³⁹ The pandemic's economic crisis has disproportionately impacted middle- and low-wage workers and workers who are Black, Indigenous, and people of color, nationally and in Washington State.¹⁴⁰ Enforcement of these misdemeanor offenses, therefore, may result in disproportionate criminal justice contact for women living in poverty and Black, Indigenous, and women of color. Increased data collection and further analysis will be needed to assess if and how misdemeanor arrest and charge trends change during the COVID-19 pandemic.

VIII. Prosecutorial Discretion in Federal Courts

Female defendants are under-represented in the federal courts, but within the federal offender population, Black, Indigenous, and women of color are overrepresented. Women accounted for 12.3% of all people sentenced in U.S. federal court in 2019, and were most commonly sentenced for drug trafficking (34.7%), immigration (19.7%), and fraud (18.6%) offenses.¹⁴¹ Of female offenders, 43.5% were Hispanic, 32.9% were white, 17.6% were Black, and 6.1% were “other” races.¹⁴² This demographic data, however, is incomplete when broken out by Eastern District versus Western District, and so could not be analyzed by gender, race, and ethnicity for Washington State.¹⁴³ To our knowledge, there is no research looking at disparities by gender and race, ethnicity, or other factor specifically for Washington residents in federal courts, although some of the studies cited below include data from Washington in their broader data sets. There is a lack of data regarding transgender individuals in the federal courts.

¹³⁹ CADOFF, CHAUHAN & BOND, *supra* note 128.

¹⁴⁰ Armagan Gezici & Ozge Ozay, *An Intersectional Analysis of COVID-19 Unemployment*, 3 J. ECON. RACE POL'Y 270 (2020); *Washington's Economy in the Age of COVID-19*, ECON. OPPORTUNITY INST. (2020), <http://www.opportunityinstitute.org/research/post/covid19-toolkit/#wa-covid-econ>.

¹⁴¹ *Women in the Federal Offender Population, USSCFY15-USSCFY19*, U.S. SENT'G COMM'N, <https://www.ussc.gov/research/quick-facts>. District-level sentencing data are not broken out by gender.

¹⁴² *Id.* The relatively high proportion of individuals listed as “Hispanic” is likely in part because the federal justice system has jurisdiction over immigration offenses.

¹⁴³ Some demographic data were available online but were incomplete.

“Chapter 11: Incarcerated Women in Washington” provides a brief overview of federal sentencing laws since 1989 that have impacted incarceration rates, including the creation of sentencing guidelines; the creation of mandatory minimum sentences for drug charges; and three-strikes sentencing. Researchers and policy experts note that federal prosecutors have gained increased discretionary power from these legislative changes, as they can decide whether or not to bring charges that trigger extremely long sentences.¹⁴⁴ The rate of convictions resulting from guilty pleas rather than trials has increased since the early 1980s, suggesting this increased discretionary power has also given prosecutors more leverage in the plea bargain process.¹⁴⁵ While subsequent U.S. Supreme Court decisions made sentencing guidelines advisory only, meaning that judges regained some level of discretion in sentencing, prosecutors still hold the power to decide whether to file charges, which charges to bring, whether to trigger enhanced sentences or mandatory minimums, whether to offer a plea, what deal to offer, and whether to request a “substantial assistance” departure below the federal guideline sentences.¹⁴⁶

Federal prosecutors have complete discretion to file prior criminal record information or firearm information with the court if they so choose, triggering mandatory minimum sentences.¹⁴⁷ Whether that information is filed for use at sentencing depends greatly on the current policy of the particular U.S. Attorney for that district. Nationally, mandatory minimums are filed against Black and Hispanic defendants at rates disproportionate to their share of the U.S. population,¹⁴⁸ and research has found wide racial disparities in the use of mandatory minimums for male

¹⁴⁴ Paul J. Hofer, *Has Booker Restored Balance? A Look at Data on Plea Bargaining and Sentencing*, 23 FED. SENT'G REP. 326 (2011); Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 FED. SENT'G REP. (2019).

¹⁴⁵ Hofer, *supra* note 144; Johnson, *supra* note 144.

¹⁴⁶ Brian D. Johnson, *In Search of the Missing Link: Examining Contextual Variation in Federal Charge Bargains across U.S. District Courts*, 35 JUST. Q. 1133 (2018).

¹⁴⁷ JAMIE FELLNER, AN OFFER YOU CAN'T REFUSE: HOW U.S. FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY (2013); Cody Tuttle, *Racial Disparities in Federal Sentencing: Evidence from Drug Mandatory Minimums*, SSRN JOURNAL (2019), <https://www.ssrn.com/abstract=3080463>.

¹⁴⁸ U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES, FY 2019 1 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY19.pdf (“Hispanic offenders accounted for the largest group (40.4 percent) of offenders convicted of an offense carrying a mandatory minimum penalty, followed by Black (29.7 percent), White (27.2 percent), and Other Races (2.7 percent)”).

defendants even when controlling for offense type.¹⁴⁹ In 2019, the U.S. Sentencing Commission reported that a greater proportion of female defendants nation-wide were convicted of an offense carrying a mandatory minimum penalty when compared to male defendants, although the data had significant limitations. It was not disaggregated by race or ethnicity and it does not control for offense type (a larger proportion of male federal offenders are convicted of immigration offenses compared to female offenders).¹⁵⁰ Nationally, the rate of mandatory minimum charging declined 5.3 percentage points from 2010-2016, and there is some evidence that racial disparities have narrowed regarding the use of sentencing departures to provide relief from mandatory minimum charges.¹⁵¹

The rate of plea bargaining is incredibly high in federal courts – in 2019, over 98% of convictions were secured through guilty pleas in the Eastern and Western district courts of Washington.¹⁵² The discretion prosecutors have in filing mandatory minimum charges could be used as leverage to convince defendants to plead guilty, as offenders sentenced for offenses with mandatory minimum penalties receive sentences on average more than nine years longer than those convicted without mandatory minimums.¹⁵³ Nationally, female defendants are more likely to get

¹⁴⁹ M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences*, SSRN JOURNAL (2012), <http://www.ssrn.com/abstract=1985377>. In a study examining non-immigration federal cases from 2007-2009 for Black and white U.S. citizens, researchers found that prosecutors were almost twice as likely to file mandatory minimum charges against Black male defendants than white male defendants, even when controlling for legal case characteristics. *Id.*

¹⁵⁰ U.S. SENT'G COMM'N, WOMEN IN THE FEDERAL OFFENDER POPULATION, USSCFY15-USSCFY19, <https://www.ussc.gov/research/quick-facts>. In 2019, 28.5% of female offenders and 25% of male offenders were convicted of an offense carrying a mandatory minimum penalty. Among offenders facing mandatory minimums, 70.3% of female offenders received some form of relief (downward deviation) from the sentence mandated by the charges, compared to 40.2% of male offenders. See also “Chapter 14: Sentencing Changes and Their Direct and Indirect Impact on Women” for more information on disparities in upward and downward sentencing departures.

¹⁵¹ U.S. SENT'G COMM'N, 2017 OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 89 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf. “While Black offenders convicted of an offense carrying a mandatory minimum penalty continued to receive relief from the mandatory minimum penalty least often, the gap between Black offenders and white offenders has narrowed. In fiscal year 2016, 73.2% of Black offenders convicted of an offense carrying a mandatory minimum penalty remained subject to that penalty, compared to 70.0% of White offenders convicted of such an offense. This difference of 3.2% in fiscal year 2016, compares to a difference of 11.6% in fiscal year 2010 (65.1% of Black offenders convicted of an offense carrying a mandatory minimum penalty compared to 53.5% of white offenders).” *Id.* at 7.

¹⁵² U.S. SENT'G COMM'N, EASTERN DISTRICT OF WASHINGTON, FY 2019 (2019).

¹⁵³ U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES, FY 2019 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY19.pdf. In 2019, offenders subject to a mandatory minimum were sentenced to

charge reductions as part of a plea bargain compared to male defendants,¹⁵⁴ and are more likely to plead guilty (and plead guilty more quickly) than male defendants.¹⁵⁵

Prosecutors can also leverage their discretion in requesting substantial assistance sentencing departures for defendants who provide information relating to other criminal investigations. Nationally, female defendants are more likely to receive downward sentencing departures for substantial assistance,¹⁵⁶ and receive larger substantial assistance sentencing reductions,¹⁵⁷ compared to male defendants. Females who had been using drugs at the time of arrest, and female offenders employed full time at the time of arrest, are particularly more likely than other female defendants to receive substantial assistance sentencing departures.¹⁵⁸ Some race and ethnicity disparities have been found in the use of prosecutor-initiated substantial assistance

an average 141 months of incarceration, compared to 24 months for those not subject to mandatory minimums. *Id.*

¹⁵⁴ Brian D. Johnson, *In Search of the Missing Link: Examining Contextual Variation in Federal Charge Bargains across U.S. District Courts*, 35 JUST. Q. 1133 (2018) Mr. Johnson's research examined non-immigration cases in U.S. states between 2003 and 2006, finding that females were more likely to get charge reductions than male defendants, but not reporting the magnitude of the difference, and also finding significant regional variation by district. There was no analysis of race/ethnicity differences among female defendants.

¹⁵⁵ Sonja B. Starr, *Estimating Gender Disparities in Federal Criminal Cases*, 17 AM. L. & ECON. REV. 127 (2015) Ms. Starr analyzed federal property, fraud, drug, regulatory and violent crimes from 2001 to 2009 in all U.S. state district courts, finding that 97.5% of female offenders pleaded guilty, compared to 96.2% of male offenders, and that female offenders pleaded guilty an average of two weeks earlier than male defendants. There was no significant race gap found among female offenders.

¹⁵⁶ Cassia Spohn & Pauline K. Brennan, *The Joint Effects of Offender Race/Ethnicity and Gender on Substantial Assistance Departures in Federal Courts*, 1 RACE & JUST. 49 (2011). The authors examined data from Minnesota, Nebraska, and Iowa districts between 1998 and 2000, finding that female gender, young age, more dependent children, and higher level of education were all associated with greater likelihood of receiving a downward departure. The analysis did not find evidence of racial or ethnic differences among female defendants.

¹⁵⁷ Mario V. Cano & Cassia Spohn, *Circumventing the Penalty for Offenders Facing Mandatory Minimums: Revisiting the Dynamics of "Sympathetic" and "Salvageable" Offenders*, 39 CRIM. JUST. & BEHAV. 308 (2012) (examining data from Minnesota, Nebraska, and Iowa districts between 1998 and 2000, finding that female defendants were given sentence reductions 14% greater than male defendants in substantial assistance departures; no racial or ethnic differences were found among female defendants).

¹⁵⁸ Natalie R. Ortiz & Cassia Spohn, *Mitigating the Effect of a Criminal Record at Sentencing: Local Life Circumstances and Substantial Assistance Departures Among Recidivists in Federal Court*, 25 CRIM. JUST. POL'Y REV. 3 (2014) (examining data from Minnesota, Nebraska, and Iowa between 1998 and 2000, and looking at offenders with a history of drug crime convictions; they did not find evidence of racial or ethnic differences among female offenders).

departures nationally: specifically Hispanic¹⁵⁹ and Indigenous defendants¹⁶⁰ were less likely to receive these departures than defendants of all other races; and Black males were less likely to receive any type of prosecutor-led sentencing departure than white and Hispanic defendants.¹⁶¹ Among female defendants, Black females are less likely than Hispanic females and white females to receive a prosecutor-led sentencing departure.¹⁶² These analyses, however, cannot tell us whether prosecutors ask all defendants for substantial assistance and some refuse, whether prosecutors ask for substantial assistance at different rates for different populations, or whether there are disparities in which defendants have the knowledge of other criminal conduct that enables them to provide substantial assistance.

There is remarkably little literature examining plea bargaining disparities by gender and race or ethnicity. More research is needed to understand how prosecutorial discretion in federal courts may be impacting women in Washington State.

IX. Conclusion

A. Cumulative disadvantage

The evidence regarding disparities on the basis of gender, race and ethnicity at each of the points of prosecutorial decision-making has been mixed. However, when studied together, researchers find strong evidence nationally showing cumulative disadvantage, meaning relatively small

¹⁵⁹ Mario V. Cano, *Prosecutorial Discretion Across Federal Sentencing Reforms: Immediate and Enduring Effects of Unwarranted Disparity* (Dec. 2015) (Ph.D. dissertation, Arizona State University). Mr. Cano examined white, Black and Hispanic offenders convicted of non-immigration offenses between 2001 and 2010 in 89 federal district courts, and found that Hispanic defendants facing mandatory minimum charges had lower odds than Black and white defendants of receiving substantial assistance departures. There was no analysis of gender-race or ethnicity interactions.

¹⁶⁰ Jeffery T. Ulmer & Mindy S. Bradley, *Punishment in Indian Country: Ironies of Federal Punishment of Native Americans*, 35 JUST. Q. 751 (2018). The authors examined non-immigration cases in districts with substantial numbers of Indigenous defendants, including both Washington districts between 2010 and 2012, and finding that Indigenous defendants were less likely to receive substantial assistance downward departures, and more likely to receive upward sentencing departures, than similarly situated white, Black, and Hispanic defendants. Their study did not examine the effect of gender and race or ethnicity.

¹⁶¹ Bryan Holmes & Christopher D'Amato, *Judicial and Prosecutorial Decision-Making: Assessing the Effects of Race, Gender, and Age on Federal Downward Sentencing Departures, 2013 – 2016*, 43 J. CRIME & JUST. 449 (2020) (examining all felony and serious misdemeanor cases against adult U.S. citizen defendants from 2013 to 2016).

¹⁶² *Id.*

disparities in each step of the process build up to create substantial disparities in final outcomes. We are convinced that the data, considered as a whole, shows: discriminatory policing patterns lead to racial disparities (including among women and girls) in arrests, which negatively influence pretrial bail decisions, which influence the offers and terms of plea deals, which result in more severe charges, higher likelihood of incarceration, and longer sentences.¹⁶³ This has been well-documented for Black and Latino males¹⁶⁴ and, to a smaller extent, Black and Latina females,¹⁶⁵ and is at least partly influenced by poverty (by influencing the ability to secure pretrial release through bail and hiring private defense).¹⁶⁶ Megan Kurlycheck and Brian Johnson note that there are relatively few studies that examine how cumulative disadvantage builds in the context of the criminal justice system, and that studies that examine only a single decision point in the continuum will fail to account for the influence of biases and structural inequities earlier in the

¹⁶³ Megan C. Kurlychek & Brian D. Johnson, *Cumulative Disadvantage in the American Criminal Justice System*, 2 ANNU. REV. CRIMINOLOGY 291 (2019) (defined by the authors as the “process that encompasses the cumulative impact of a specific form of disadvantage over time and/or the accumulation of multiple, interactive forms of disadvantage, both within and across time points”).

¹⁶⁴ See, e.g., Ellen A Donnelly & John M MacDonald, *The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration*, 108 J. CRIM. L. & CRIMINOLOGY 775 (2018) (analyzing 75,912 adult criminal and driving under the influence (DUI) arrests between 2012 and 2014 in Delaware, and finding that the bail and pretrial detention decision explained a significant portion of racial disparities between Black and white defendants in case outcomes); EMILY OWENS, ERIN KERRISON & BERNARDO SANTOS DA SILVEIRA, EXAMINING RACIAL DISPARITIES IN CRIMINAL CASE OUTCOMES AMONG INDIGENT DEFENDANTS IN SAN FRANCISCO (2017) (from a review of 10,753 records from the San Francisco public defender's office between 2011 and 2014, finding that later disparities between Black, white, and Latinx defendant outcomes were explained by the seriousness of the arrest charge and differences in criminal records); Lisa Stolzenberg, Stewart J. D'Alessio & David Eitle, *Race and Cumulative Discrimination in the Prosecution of Criminal Defendants*, 3 RACE & JUST. 275 (2013) (analyzing state court statistics for Black and white felony defendants from 1990 to 2004 in 65 urban counties, and finding that while disparities varied by decision point, overall Black defendants received more severe criminal sanctions than white defendants); John R. Sutton, *Structural Bias in the Sentencing of Felony Defendants*, 42 SOC. SCI. RSCH. 1207 (2013) (analyzing felony defendant outcomes in U.S. courts for Black, white, and Latino male defendants in 2000, and tracing a cumulative effect of pretrial detention through plea bargaining to sentencing); Brandon P. Martinez, Nick Petersen & Marisa Omori, *Time, Money, and Punishment: Institutional Racial-Ethnic Inequalities in Pretrial Detention and Case Outcomes*, 66 CRIME & DELINQUENCY 837, 854 (2020) (detailing a review of adult felony defendant cases in Miami-Dade County from 2011 to 2015, finding that disparities in “detention length and bail amount... contribute to disparate case outcomes”).

¹⁶⁵ Don Stemen & Gipsy Escobar, *Whither the Prosecutor? Prosecutor and County Effects on Guilty Plea Outcomes in Wisconsin*, 35 JUST. Q. 1166 (2018) (analyzing non-traffic felony and misdemeanor cases from Wisconsin between 2009 and 2013, finding that white females had a greater chance of having their case dismissed, of being offered a plea bargain with a reduced charge, and of receiving a sentence with no incarceration, compared to Black and Latina female defendants).

¹⁶⁶ See “Chapter 11: Incarcerated Women in Washington” findings regarding poverty and pretrial detention. See Stemen & Escobar, *supra* note 165 (finding that defendants with a public defender had significantly worse outcomes throughout the process).

process—and those outside of the system (such as inequities in education, housing, employment, and more).¹⁶⁷

B. Positive prosecutorial discretion and other interventions to reduce criminal justice disparities

There is a lack of consistent evidence regarding the existence of racial or gender bias among prosecutors in Washington State. Bias is generally very hard to measure. In the case of explicit bias, in most areas of the U.S. it is now considered socially undesirable to endorse explicitly racist and sexist beliefs, and so many people are unlikely to respond honestly to questions about biases they might hold. And implicit bias functions unconsciously, so individuals may not be able to recognize whether and how implicit biases shape their decisions and actions.¹⁶⁸ Among prosecutors, explicit bias may lead them to consciously treat Black, Indigenous, and defendants of color more harshly than their white counterparts, while implicit bias may reinforce ideas about dangerousness or culpability based on race, gender, or other social identity. It's unlikely that prosecutors are more immune from implicit biases than the general population; one study in Tacoma employing an implicit bias test found patterns of racial preference among prosecutors that are consistent with those found in other groups nationally.¹⁶⁹

However, bias is not the only engine of criminal justice disparities. The evidence reviewed in this chapter strongly suggests that race- and gender-neutral practices and policies can result in disparate outcomes, as they systematically advantage or disadvantage individuals on the basis of external structural inequities. Prosecutors who enact facially neutral policies without consideration of even unintended discriminatory consequences can reinforce or exacerbate those inequities; prosecutors who are attentive to even unintended discriminatory consequences can reduce those disparities. One example is the fact that using prior arrests and convictions, particularly for crimes that don't necessarily correlate with violence (e.g., certain drug offenses),

¹⁶⁷ Kurlychek & Johnson, *supra* note 163.

¹⁶⁸ In this context, implicit bias refers to an unconscious preference for, or aversion to, a certain person or group of people based on prior associations or stereotypes. *Implicit Bias*, PERCEPTION INST., <https://perception.org/research/implicit-bias>.

¹⁶⁹ KAITLYN DUNN, MATT MUNOZ & ANDREW TAYLOR, EXAMINING DISPARITIES AND IMPLICIT BIAS IN THE PROSECUTION OF MISDEMEANORS IN TACOMA MUNICIPAL COURT (2018), https://s3-us-west-2.amazonaws.com/uw-s3-cdn/wp-content/uploads/sites/136/2019/01/12004328/LCY_ImplicitBias.pdf.

as a tool in decision-making will lead to greater racial and ethnic disparities in case outcomes, because Black, Indigenous, and other communities of color have been subjected to decades of disparate treatment by police stop-and-frisk practices and car searches. Changing charging and bargaining practices to reduce the disparities created by a neutral consideration-of-prior-arrests-and-convictions rule, to eliminate consideration of many priors, would be an example of a rule change that could reduce disparate outcomes. Evidence-based training to pay attention to, and try to reduce, disparate outcomes in the first place, though, seems to be a necessary prerequisite. Another example is the coercive power of pretrial detention and its impact on plea outcomes. As noted in “Chapter 11: Incarcerated Women in Washington,” female defendants who are Black, Indigenous, and people of color are more likely than their white, male counterparts to be living in poverty, and therefore less likely to be able to secure their release with bail. Chapter 11 finds that, at the same time, the impact of pretrial detention on their lives may be greater, because they are disproportionately likely to be single parents and/or be working low-wage jobs without paid leave. That their detention pre-trial should then predispose them to take unfavorable plea deals in order to secure their release is another way in which pre-existing disadvantages are compounded.

The social science literature suggests that prosecutors in some jurisdictions have begun to systematically use their discretion to balance out racial disparities in policing.¹⁷⁰ Prosecutors around the country have adopted certain practices meant to reduce disproportionality in the criminal justice system (sometimes over the objections of law enforcement.)¹⁷¹ The wide discretion afforded to prosecutors and the variability in practice between jurisdictions means

¹⁷⁰ Kutateladze, *supra* note 94. The author examined over 170,000 felony and misdemeanor cases from 2010 to 2011 in the New York County District Attorney's office, finding prosecutors declined more cases against Black and Latinx defendants than white and Asian defendants, and that the most common reasons for decline were lack of evidence and lack of prosecutorial merit. See also Christopher L. Griffin, Frank A. Sloan & Lindsey M. Eldred, *Corrections for Racial Disparities in Law Enforcement*, 55 WM. & MARY L. REV. 1365, 1385 (2017) (analyzing 517,629 Driving While Intoxicated arrests in North Carolina from 2001 to 2011, and finding that prosecutors were more likely to drop charges against Hispanic men, who were "arrested at rates far higher than their underlying incidence of drunk driving would suggest as proportionate," compared to Black and white men).

¹⁷¹ Caren Morrison, *Progressive Prosecutors Scored Big Wins in 2020 Elections, Boosting a Nationwide Trend*, CONVERSATION (2020), <https://theconversation.com/progressive-prosecutors-scored-big-wins-in-2020-elections-boosting-a-nationwide-trend-149322>; Jaclyn Diaz, *Judge Blocks LA District Attorney's Reforms*, NPR (Feb. 9, 2021), <https://www.npr.org/2021/02/09/965673109/judge-blocks-la-district-attorneys-reforms>.

that prosecutors across Washington State may be using their discretion to very different ends. The constitution vests prosecutors with enormous discretion and the criminal justice system provides few checks; thus, prosecutors are ultimately answerable to the voters of their jurisdiction. However, in the absence of systematic data collection, it is almost impossible to identify disparities originating in the prosecutor's office, so under the current system voters concerned about equity in the justice system have no way to independently assess prosecutorial practices.

In some states, legislators have mandated statewide criminal justice data collection, finding "that it is an important state interest to implement a uniform data collection process and promote criminal justice data transparency."¹⁷² In some locations, individual jurisdictions have begun collecting, analyzing, and publicizing their own data. Prosecutorial Performance Indicators were developed by researchers and policy-makers to help prosecutors develop and implement relevant indicators regarding organizational capacity, public safety, and equity.¹⁷³ The King County Prosecuting Attorney's Office has a public-facing dashboard with data on open cases, felony referrals, declines, filings, dispositions, and demographics of defendants and victims including race, ethnicity, age, and gender (but not in combination).¹⁷⁴ The Philadelphia District Attorney's office has a similar dashboard, allows visitors to open longitudinal reports on arrests, charges, bail, case outcomes and more, along with monthly snapshots on incidents and arrests relevant to public safety.¹⁷⁵

If the data should demonstrate biased actions by prosecutors, or disparities resulting from prosecutorial practices, who has the power to intervene? In theory, judges can review and reject plea bargains and can diverge from the sentence recommended by prosecutors. However, it is not clear how often that may happen; particularly in the misdemeanor system where detailed review of each plea deal made is unlikely. And of course, unless the details of all plea deals offered are recorded, judges don't have context to understand how final decisions were made. Some

¹⁷² Fla. Stat. § 900.05.

¹⁷³ PROSECUTORIAL PERFORMANCE INDICATORS, <https://prosecutorialperformanceindicators.org>.

¹⁷⁴ *Data Dashboard*, KING CNTY. (2021), <https://kingcounty.gov/depts/prosecutor/criminal-overview/CourtData.aspx>

¹⁷⁵ *Public Data Dashboard*, PHILA. DIST. ATT'YS OFF. (2021), <https://data.philadao.com>.

researchers and policy makers advocate for the creation of additional review processes, either civilian review panels,¹⁷⁶ or conviction review units internal to the prosecutor's office.¹⁷⁷ The data we have analyzed does not allow us to draw a conclusion about the best path forward for Washington.

We would be remiss, however, if we failed to note that the data we have on plea bargaining and sentencing – the points in the process where a defense lawyer is ordinarily involved – suggests another area in which changes might be needed. As discussed above, Washington State and national studies of juvenile and adult defendants suggest that many defendants do not fully understand the criminal justice system or their rights, and that they may accept plea deals with incomplete understanding. We have not studied if criminal defense lawyers, or public defenders, in particular, contribute to this problem. If the answer is yes, then two solutions seem obvious: (1) train defense lawyers to overcome this deficiency, and (2) increase opportunities for communication, including remote communication, between clients and attorneys.¹⁷⁸ Additionally, informational materials can be created and made available to all defendants, giving an overview of the different stages of the process and the defendant's rights.¹⁷⁹ These should be as accessible as possible, using multiple formats and languages, and distributed to defendants as early in the process as possible. This could be particularly impactful for youth and their families.¹⁸⁰ Written materials relating to plea deals should contain clear explanations of the collateral consequences of a misdemeanor or felony conviction.

Pretrial detention puts undue pressure on defendants to plead guilty early. Release on recognizance is the default option, according to court rules in Washington State;¹⁸¹ however, according to the Washington State Auditor (in a pre-pandemic report, when pre-trial detention was far higher than during the COVID-19 pandemic), “[a]bout 72 percent of those awaiting trial

¹⁷⁶ John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157 (2014).

¹⁷⁷ JOHN HOLLWAY, CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE (2016), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty_scholarship.

¹⁷⁸ N.Y. COUNTY LAWYERS ASS'N, *Solving the Problem of Innocent People Pleading Guilty* (2019).

¹⁷⁹ *Id.*

¹⁸⁰ Cabell & Marsh, *supra* note 112.

¹⁸¹ CrRLJ 3.2 and CrR 3.2.

in jail on a typical day could be released” because they pose little risk to public safety or for failing to appear in court.¹⁸² Increased investment in pretrial services could level the power imbalance between a defendant and a prosecutor during the plea bargain process.

The high volume of cases in many jurisdictions, especially misdemeanor cases, reduces the ability of each system actor to carefully assess case details and make deliberate, thoughtful decisions regarding each defendant.¹⁸³ Reducing the volume of people interacting with the criminal justice system can reduce negative outcomes for individuals; allow for more deliberate use of discretion at every stage; and ensure timely access to justice for those involved. This change can be influenced at every step of the process, including increasing opportunities for pre-arrest and pre-file diversion. Diversion programs should be evaluated rigorously to assess their effectiveness in addressing their stated purpose, with special attention to if they are equally effective across all genders, races, and ethnicities. Additionally, referral and participation rates should be evaluated to assess whether access and availability are equitably distributed in Washington State, and barriers to entry (such as prior criminal history) should be analyzed for disproportionate impacts.¹⁸⁴ Experts in Washington State note that individuals with tribal affiliation should be identified early in the process so they can be served through Tribal Health or given services through an Indian health care provider.¹⁸⁵ Finally, taking low-level, victimless crimes that are often the result of poverty, mental health problems, and substance use disorder out of the criminal justice system as much as possible, and referring them to community health systems, could address disparities; it could also save resources by reducing incarceration rates and investing in healthy communities.¹⁸⁶

¹⁸² MARY MCCARTHY, REFORMING BAIL PRACTICES IN WASHINGTON 11 (2019), https://sao.wa.gov/wp-content/uploads/Tabs/PerformanceAudit/PA_Reforming_Bail_Practices_ar1023411.pdf.

¹⁸³ Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. UNIV. L. REV. 261 (2011).

¹⁸⁴ Ronald F Wright & Kay L Levine, *Models of Prosecutor-Led Diversion Programs in the United States and Beyond*, 4 ANN. REV. CRIMINOLOGY 331 (2021).

¹⁸⁵ It is important for any information collected on tribal affiliation to be developed through consultation with each Tribal Government, and with full observation of tribal data sovereignty.

¹⁸⁶ ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICAN MORE UNEQUAL (2018); N.Y. COUNTY LAWYERS ASS'N, *supra* note 178.

C. Gaps and unanswered questions

There is a lack of data regarding the use of prosecutorial discretion in Washington State. There is no legal requirement or statewide system to collect data on charging and plea decisions. As a result, statewide case trends can only be analyzed at the entry point (arrest) or the exit (sentencing). The few attempts at data collection and analysis have centered on Seattle and King County. Even the national social science research often uses datasets from large urban areas. This leaves a significant gap regarding prosecutorial discretion in rural areas. Finally, the literature reviewed here analyzes disparities primarily by white, Black, and Latinx race or ethnicity, often omitting data on Asian Americans, Native Hawaiians and Other Pacific Islanders, and Indigenous populations; and only rarely examining the intersection between race and gender. There is a need for more research addressing these gaps.

Some topics noted in the literature or in the media which merit additional attention include:

- Disparities in arrest and charging for prostitution by gender, race, ethnicity, and sexual orientation.
- Disparities in arrest and charging for statutory rape by gender, race, ethnicity, and sexual orientation.
- The effect of victim demographics on charging patterns beyond domestic violence and sexual assault cases.
- Arrest and charging decisions in violent crimes involving Black transgender women, including arrest and charging in homicide of Black transgender women and treatment of Black transgender women who use violence in self-defense.¹⁸⁷
- Mandatory minimums and sentencing ranges in Washington State, and their use by prosecutors in leveraging guilty pleas.

¹⁸⁷ Nicole Pasulka, *The Case of CeCe McDonald: Murder - Or Self-Defense Against a Hate Crime?*, MOTHER JONES (May 22, 2012), <https://www.motherjones.com/politics/2012/05/cece-mcdonald-transgender-hate-crime-murder>.

- Traffic offenses, especially driving with a suspended license, merit particular scrutiny because of their relationship to poverty.¹⁸⁸
- The effects of “color blind” and “gender blind” charging policies on the disparities in charging for different demographic groups.

XI. Recommendations

- To systematize and incentivize more equitable pretrial, charging, and plea bargain practices, prosecutors in every jurisdiction in the state should conduct an internal analysis of their use of prior arrest, charge, and conviction data in decisions regarding pretrial detention and bail, charging, and plea bargaining, to assess the public safety impact and the gender, race, ethnicity, and LGBTQ+ impacts of using those prior records. Prosecutors should also revisit policies that limited consideration of prior records as part of office charging and plea-bargaining guidelines, to determine more accurate means of protecting public safety while reducing disproportionate impacts.
- To increase the use and effectiveness of pre-arrest and pre-file diversion and deferral programs, the Washington State Legislature should direct the Washington State Institute for Public Policy to partner with relevant state and tribal experts to create and maintain an inventory of criminal justice diversion programs that have proven to be effective for different populations and different needs, with a particular emphasis on cultural competence, trauma-informed care, and gender responsiveness.
 - After the creation of this list, jurisdictions should ensure that any program or treatment required as part of a formal pre-arrest or pre-file diversion agreement must belong to the list maintained by the Washington State Institute for Public Policy.

¹⁸⁸ ROBERT C. BORUCHOWITZ, AM. CONST. SOC'Y FOR L. & POL'Y, DIVERTING AND RECLASSIFYING MISDEMEANORS COULD SAVE \$1 BILLION PER YEAR: REDUCING THE NEED FOR AND COST OF APPOINTED COUNSEL 19 (2010), <http://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/Boruchowitz%20Diverting%20and%20Reclassifying%20Misdemeanors.pdf>.

- To better understand and address disparities in charging, pretrial detention, bail, plea bargain, and diversion or deferral decisions, the legislature should work with the appropriate statewide and county prosecutorial agencies to fund the creation of a statewide system for data collection and publication, and forge partnerships with individual jurisdictions to collect and submit data from charging, bail, pretrial detention, plea bargain, and diversion or deferral decisions, with these data disaggregated by gender, race/ethnicity, sexual orientation and gender identity, and disability. Data should be made available to the public in a timely and accessible manner.