Chapter 14

Sentencing Changes and Their Direct and Indirect Impacts on Women

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I. Summary

The Washington State Legislature has made many changes to the sentencing laws since the 1980s. These reforms have had the overall effect of increasing the length of sentences and therefore increasing overall incarceration rates. Average offender scores increased across all offense categories (violent, drug, property, and public order) from 1986 to 2016. These increases happened despite declines in crime rates and stable recidivism rates during this same time period.

In 1981, the Washington State Legislature enacted the Sentencing Reform Act (SRA). The stated purposes of the SRA are to ensure proportionate sentencing, mete just punishment, punish commensurately with others, protect the public, offer rehabilitative measures, reduce the use of governmental resources, and reduce recidivism. Washington allows judges to issue "exceptional sentences" outside the presumptive sentencing range if warranted by aggravating or mitigating circumstances. Washington provides sentencing enhancements triggered by other aggravating circumstances. Washington also allows certain structured sentencing alternatives such as community-based sanctions and rehabilitative programs.

Gender and other biases appear to play a role in sentencing because disparities exist even when controlling for factors such as seriousness of the offense and criminal history. While there is significant nuance and sometimes conflict in the literature on sentencing by gender, race, ethnicity, and other factors, Washington and national literature largely indicates that women are treated more leniently than men at sentencing. Researchers theorize that stereotypes contribute to this disparity. According to the chivalry/paternalism theory, males, who dominate the criminal justice system, associate women with their mothers, sisters, wives, and daughters. As such, they may be less likely to view some women as dangerous and blame-worthy, as women are often stereotyped as victims, and being nurturing and docile. It is important to note that this stereotype of women as nurturing and docile is not universal. Evidence indicates that Black, Indigenous, and women and girls of color are perceived differently than white women and girls, and the former are depicted very differently in the media from the latter. In addition, women who conform to

the “appropriate” gender role are most likely to be given preferential treatment whereas women who act in a manner outside of the role are more likely to receive harsher punishment.

While the sentencing literature on race and ethnicity is mixed, the body of literature overall shows that Black, Latinx, and Indigenous individuals are punished more severely than similarly situated white offenders under at least some conditions. There is very little research that looks at how race, ethnicity, and gender interact—making it almost impossible to understand sentencing outcomes for specific populations of women. But the few studies that have looked at the intersection of gender, race, ethnicity and other factors suggest that young Hispanic and young Black men have the worst sentencing outcomes while young Black women and young white women tend to receive the most lenient sentences. One study found that young Hispanic women received sentences more similar to those of male defendants than to those of female defendants of other racial or ethnic populations. This certainly suggests that Hispanic women may receive the harshest sentences of all women.

Research has also found that the influence of defendant race and ethnicity was impacted by employment status, education, crime type, seriousness of offense, criminal history, and victim race and ethnicity. These findings highlight the importance of research that considers the interaction of many factors to better understand how bias is amplified for some populations.

II. Introduction

Developments in sentencing laws are one of the most-studied drivers of the increase in incarceration of women. This chapter discusses changes in Washington State sentencing laws throughout the last few decades as a framework for evaluating how those laws impact women. Section IV covers the role of increased long and life sentences. Changes in national sentencing laws are discussed briefly in Section V. In Section VI, we dive more deeply into gender-based disparities in sentencing, discussing both Washington and, more briefly, national information. Finally, we examine disparate impacts of sentencing upon subpopulations, the shortcomings in that research, and the dearth of intersectional data or studies. It is important to note, as discussed at length in “Chapter 11: Incarcerated Women in Washington” and Section V of the full

report ("2021 Gender Justice Study Terminology, Methods, and Limitations"), that there are limitations to the data that this chapter relies upon. For example, the data almost exclusively uses a female/male gender binary that prevents us from understanding impacts to transgender, gender non-binary and gender-nonconforming individuals. There is also a lack of granularly with the race data which erases some populations and likely masks disparities.

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

III. Sentencing Laws and Practices in Washington State

The Washington State Legislature has made myriad changes to the sentencing laws since the 1980s. These reforms have had the overall effect of increasing the length of sentences and therefore increasing overall incarceration rates.

A. Developments in Washington State sentencing laws since the 1980s

During the 1980s, the Washington State Legislature broadly restructured sentencing laws largely with the intent of shifting from a rehabilitative focus to a punitive one and reducing judicial discretion as a means of preventing disparities. As we will discuss, the pendulum is now swinging back, in recognition that the restructured system did not provide the fairness or proportionality it touted and as sentencing lengths have increased and contributed to mass incarceration in Washington.

In 1981, the Legislature enacted the Sentencing Reform Act (SRA), which took effect for crimes committed on and after July 1, 1984. The stated purposes of the SRA are to ensure proportionate sentencing, mete just punishment, punish commensurately with others, protect the public, offer

rehabilitative measures, reduce the use of governmental resources, and reduce recidivism.[1] The Legislature developed mandatory sentencing ranges for the vast majority of felony offenses based upon two factors: 1) the severity of an offender's current offense; and 2) the offender's prior criminal history (which informs the "offender score").[2] Washington allows judges to issue "exceptional sentences" outside the presumptive sentencing range if the court finds it warranted by aggravating or mitigating circumstances or based on sentencing enhancements.[3] Washington also allows certain structured sentencing alternatives such as community-based sanctions and rehabilitative programs. Examples of these alternative sentences include alternatives to total confinement for sentences of one year or less (Conversion), the First-Time Offender Waiver (FTOW), Drug Offender Sentencing Alternative (DOSA), Family Offender Sentencing Alternative (FOSA), and the Special Sex Offender Sentencing Alternative (SSOSA).[4]

A 2010 report from the Washington State Sentencing Guidelines Commission concluded that there have been demographic shifts in sentencing following passage of the SRA (in the twenty-year period from 1989 to 2008), though it is unclear if these shifts are a result of the SRA or other factors: "The average age at sentencing increased by three years and there was an increase in females sentenced to felonies. Racial disproportionality, though still an issue, decreased slightly."[5]

A Sentencing Guidelines Commission 2019 report reviewing the SRA includes a review of the literature to better understand how sentencing guidelines have impacted racial disparities in sentencing. The report asserts that there is "general knowledge that sentencing disparity has decreased in Washington since it moved to a guidelines system," and the data presented do support a correlation between the SRA and decreased disparities, but this strong causative statement is not necessarily supported in the research. *United States v. Booker*, which found that

[1] RCW 9.94A.010.
[2] RCW 9.94A.510; RCW 9.94A.505; Rodney L. Engen et al., *Discretion and Disparity Under Sentencing Guidelines: The Role of Departures and Structured Sentencing Alternatives*, 41 CRIMINOLOGY 99 (2003).
[3] Engen et al., *supra* note 2.
[4] RCW 9.94A.680; Engen et al., *supra* note 2.
[5] SENT'G GUIDELINES COMM'N, 20 YEARS IN SENTENCING: A LOOK AT WASHINGTON STATE ADULT FELONY SENTENCING FISCAL YEARS 1989 TO 2008 50 (2010), https://sgc.wa.gov/sites/default/files/public/SGC/publications/twenty_years_in_sentencing.pdf.

U.S. sentencing guidelines must be advisory to comply with the Sixth Amendment, transformed mandatory federal sentencing guidelines to advisory guidelines in a single day. While this is not Washington State specific, it did create a unique opportunity to study the impacts of mandatory sentencing guidelines. The research findings are mixed, with some studies showing that sentences by federal judges following *Booker* had higher racial and ethnic disparities than those before *Booker* while other studies have found that the greater judicial discretion following *Booker* did not correlate with increased racial disparities. Research in other states suggests that states falling in different places on the mandatory-voluntary guidelines continuum did not differ in sentencing disparities, suggesting that higher judicial discretion may not impact racial or ethnic sentencing disparities. These findings led the Sentencing Guidelines Commission to note that there are real risks of increasing racial disparities through changes to the SRA and "there are concerns raised by the research so further investigation is encouraged and should guide implementation of any reforms."[6] Unfortunately there has not been similar study on the impact of the SRA in Washington or federal sentencing guidelines on gender disparities.

1. Sentencing within the standard range

Under the SRA, the offender score is a significant driver of the applicable sentencing range. A person's "offender score" is calculated by the number of points a person has. As a general rule, a felony conviction or a juvenile adjudication for a violent felony offense counts as one point in a person's offender score.[7] There are, however, a multitude of exceptions to this general rule, some of which were present in the SRA in its original form and others of which have arisen in subsequent amendments.[8] For certain offenses, past convictions may count as two or three points instead of just one.[9] The effect of this doubling or tripling of points for purposes of an individual's offender score is an increase in the individual's standard range (in other words, the minimum and maximum sentence). Since the adoption of the SRA in 1981, the Washington State

[6] SENT'G GUIDELINES COMM'N, FISCAL YEAR 2019: REVIEW OF SENTENCING REFORM ACT 10 (2019), https://sgc.wa.gov/sites/default/files/public/SGC/publications/SRA_review_report_rev20190802.pdf.
[7] RCW 9.94A.525(7).
[8] *See generally* RCW 9.94A.525(8)–(21).
[9] *See generally* RCW 9.94A.525(8)–(21). These offenses include but are not limited to: 1) manufacturing methamphetamine; 2) burglary or residential burglary; 3) sex offenses; 4) failure to register as a sex offender; 5) offenses related to theft of motor vehicles; and 6) domestic violence offenses. RCW 9.95A.525(13)–(21).

Legislature has passed laws increasing sentences in certain circumstances. These laws include the "hard time for armed crime" law, "three strikes and you're out" law, discussed separately below, and the "drug free zone" law, among others.

A 2020 ACLU report uses Washington State Superior Court sentencing data to show the increase in sentence lengths. These data indicate that average offender scores increased across all offense categories (violent, drug, property, and public order) from 1986 to 2016. These increases happened despite declines in crime rates and stable recidivism rates during this same time period. The authors posit that the rising offender scores are a result of statutory changes related to their calculation. The authors include some modeling, which estimates that long, very long, and life without possibility of parole sentences would have been reduced by 39% if offenders' scores had not increased due to legislative changes during this time period.[10] These data are not broken out by gender or race and ethnicity, making it impossible to determine if the trends differed by subpopulation. While there is some discussion of the equity impacts of sentencing guidelines in Washington broadly, and some literature on the equity impacts of federal sentencing guidelines (discussed in more detail above), there is a gap in the literature that would allow us to determine if changes to offender score calculations specifically have had different impacts by subpopulation.

Of note, a 2019 report from the Washington State Sentencing Guidelines Commission found that across the nation the higher the offender score, the higher the recidivism rate—suggesting offender score is a good predictor of future behavior. However, this trend does **not** exist in Washington State where the offender score does not strongly correlate with recidivism. The authors note that Washington is different from other states in that the calculation of the offender score is composed of factors beyond criminal history (e.g., length of time the defendant has been crime free, relationship between prior and current offenses, etc.).[11] As the report recommends, Washington recidivism data should be subject to the rigorous statistical analysis necessary to

[10] The report also does not show data from before the enactment of the SRA in 1984. KATHERINE BECKETT & HEATHER EVANS, ACLU, ABOUT TIME: HOW LONG AND LIFE SENTENCES FUEL MASS INCARCERATION IN WASHINGTON STATE (2020), https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state.

[11] SENT'G GUIDELINES COMM'N, *supra* note 6.

interpret results and institute effective reform and should be recorded in a standardized report. It would be useful to undertake a study examining why such a large percentage of incarceration derives from violations of conditions of release while recidivism is decreasing and whether other sanctions could be equally or more effective.

Increase in sentences for drug offenses

The SRA introduced sentencing ranges with presumptive minimum and maximum sentences for drug offenses as well. Whereas a pre-SRA court set only the maximum term and determined any mandatory minimums with the Parole Board determining the minimum term, post-SRA courts impose the sentence and are generally limited to imposing a sentence within a statutorily-prescribed range.[12] (The exceptions permitting sentences above or below that range are discussed at Section III.A.4).

Sentencing ranges for certain drug offenses including possession of cocaine and heroin have remained relatively static since 1984.[13] For other offenses including manufacturing, delivering, or possessing with intent to deliver certain narcotic drugs including heroin and cocaine, the sentencing ranges increased from 1988 to 1989 as a result of legislative changes to the seriousness level of these offenses.[14] In addition to the increase in standard ranges, beginning in 1989, a past drug offense conviction weighs more heavily when calculating the offender score.[15] For example, an individual, who had two past felony convictions (and no other criminal history) and who was convicted in 1988 of the crime of manufacturing, delivering or possessing with intent to deliver cocaine would have received a sentence of 31 to 41 months. An individual in that same scenario convicted in 1989 would have received a sentence of 67 to 89 months. See "Chapter 11: Incarcerated Women in Washington" for a discussion of changes to the underlying drug laws in 2021. See "Chapter 13: Prosecutorial Discretion and Gendered Impacts" for information on the role of prosecutors.

[12] RCW 9.95.010; RCW 9.94A.505.
[13] RCW 69.50.401(d).
[14] RCW 69.50.401(a)(1)(i).
[15] *Id.*

2. Concurrent versus consecutive sentences

When an individual is sentenced for more than one conviction, the sentences generally run concurrently.[16] A few exceptions have arisen, however, starting in the 1990s. First, sentences for two or more serious violent convictions must generally be served consecutively, which had previously been reserved for three or more serious violent convictions.[17] Multiple crimes related to driving under the influence or for possession of a firearm, theft of a firearm, and possession of a stolen firearm shall be served consecutively.[18] Finally, as discussed below, certain sentencing "enhancements" require the court to impose consecutive sentences unless the court finds a basis for an exceptional sentence.

3. Sentencing enhancements

In addition to the presumptive or base sentence, courts are mandated in certain circumstances to tack on additional time that must be served consecutive to the presumptive or base sentence. Below is a list of the different sentencing enhancements.

a. Firearm and deadly weapon enhancement

In 1995, Washington State citizens passed the "hard time for armed crime" initiative which increased the sentence an individual would receive for committing a felony offense when armed with a firearm.[19] Once an individual is found to have committed a felony with a firearm, the added time is 18 months to five years depending upon the class of felony conviction.[20] This period of time must be consecutive to all other sentencing provisions including any time added for other firearms or deadly weapons and must be served in prison.[21] The time received for the enhancement doubles if a person has received a firearm enhancement or a deadly weapon enhancement for a previous sentence.[22]

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[16] RCW 9.94A.589.
[17] RCW 9.94A.589(b).
[18] RCW 9.94A.589(c), (d).
[19] RCW 9.94A.533(3).
[20] *Id.*
[21] *Id.*; *State v. Santiago*, 149 Wn.2d 402, 417, 68 P.3d 1065 (2003).
[22] RCW 9.94A.533(3).

For individuals convicted of a felony while armed with a deadly weapon other than a firearm, the added time is six months to 24 months depending upon the class of felony conviction.[23] Consecutive sentencing and doubling apply to deadly weapons as with firearms.[24]

b. "Drug free zone" enhancements

In 1989, the Washington State Legislature enacted a law that increased the sentence for an individual convicted of delivering, manufacturing, or possessing certain drugs with intent to deliver if the act occurred in or near certain locations.[25] These locations included a school, school bus, public park, public transit vehicle, public housing project, public transit stop shelter, at a civic center or 1,000 feet from a school, school bus route stop, and civic center.[26] When there is a finding that a drug offense occurred at one of these locations, regardless of whether the individual knew or should have known the location was a drug free zone, an additional 24 months must be served consecutive to the presumptive sentence and must be served in prison.[27] The maximum imprisonment and fine one can receive are also doubled.[28] An accomplice, a person who knowingly assists another to commit an offense, will also receive the enhancement if both the accomplice and principal person committing the offense are within these locations.[29] In addition, one who passes through one of these zones in possession of drugs they intend to distribute elsewhere is also subject to a drug free zone enhancement.[30] In light of the size of zones (1,000 feet) and the numerous locations included around-the-clock (regardless of whether school-bus transit is in effect), drug zones are nearly ubiquitous.[31]

National data indicate that drug free zones disproportionally impact Black, Indigenous, and communities of color, at least in part because people of color are more likely to live in densely

[23] RCW 9.94A.533(4).
[24] *Id.*
[25] RCW 69.50.435.
[26] RCW 69.50.435(1)(a)-(j).
[27] RCW 9.94A.533(6).
[28] RCW 69.50.435.
[29] *State v. Silva Baltazar*, 125 Wn.2d 472, 483, 886 P.2d 138 (1994).
[30] *State v. McGee*, 122 Wn.2d 783, 864 P.2d 912 (1993).
[31] JUDITH GREENE, KEVIN PRANIS & JASON ZIEDENBERG, DISPARITY BY DESIGN: HOW DRUG-FREE ZONE LAWS IMPACT RACIAL DISPARITY -- AND FAIL TO PROTECT YOUTH 39 (2006), https://www.justicestrategies.org/sites/default/files/publications/Disparity%20by%20Design.pdf.

populated urban neighborhoods than white people. For example, in 2005, 96% of prisoners in New Jersey serving time for drug free zone offenses were Black or Hispanic.[32] While Washington data has not been analyzed in this same way at the state level, data from 1999 to 2005 found that, while in King County Black and white defendants were equally likely to receive drug free zone enhancements if they went to trial, in Pierce County, Black defendants who went to trial were more likely than their white counterparts to receive this enhancement. This has led some legal experts in Washington to indicate that drug free zone enhancements are not being used to deter drug activity near schools, but rather to put pressure on defendants to plead guilty rather than face the risk of a long prison sentence.[33]

c. DUI enhancements

In the 2000s, the Legislature also adopted an enhancement for those convicted of vehicular homicide.[34] Specifically, the court must sentence the individual for an additional two years of total confinement consecutive to all other sentencing provisions for each prior DUI or physical control conviction.[35] This mandatory enhancement also applies to people who have a prior conviction such as negligent driving if the prior conviction derived from a DUI charge.[36]

d. Sexual motivation enhancements

In 2006, the Washington State Legislature adopted an enhancement for those convicted of crimes with sexual motivation.[37] If a person is sentenced to a crime of sexual motivation or sentenced for an anticipatory offense with sexual motivation (such as taking steps in order to commit a crime), the court is mandated to sentence an additional two years for any past class A felony convictions, 18 months for past class B felony convictions and one year for past class C felony convictions.[38] If a person has received a prior sexual motivation enhancement after July 1,

[32] THE N.J. COMM'N TO REV. CRIM. SENT'G, REPORT ON NEW JERSEY'S DRUG-FREE ZONE CRIMES AND PROPOSAL FOR REFORM 39 (2005), http://sentencing.nj.gov/dfz_report_pdf.html; GREENE, PRANIS & ZIEDENBERG, *supra* note 31.
[33] GREENE, PRANIS & ZIEDENBERG, *supra* note 31.
[34] RCW 9.94A.533(7).
[35] *Id.*
[36] *City of Walla Walla v. Greene*, 154 Wn.2d 722, 728, 116 P.3d 1008 (2005).
[37] RCW 9.94A.533(8).
[38] *Id.*

2006, the subsequent sexual motivation enhancement is doubled.[39] This added time must be served consecutively to any presumptive sentence and must be served in prison.

e. Criminal street gang sentencing enhancement

In the 2000s, the Legislature adopted a sentencing enhancement for adults convicted of "any criminal street gang-related" felony for which the adult involved a minor in committing the offense.[40] It appears the enhancement has been applied in only one case.[41] Once the court makes this finding, the sentence range in this scenario is 125% of the sentencing range for the same crime in which there is no such finding.[42] For example, a person with a certain criminal history committing the crime of theft in the first degree and without gang-related finding and without involving a minor in committing the crime could be sentenced between the range of 22 to 29 months. In contrast, a person with the same criminal history committing the crime of theft in the first degree and with a gang-related finding and with a finding that this defendant involved a minor in the committing of the offense would receive a sentence between the range of 27.5 to 36.25 months in prison.

f. Other types of sentencing enhancements

Other sentencing enhancements – all of which have been adopted after the enactment of the SRA - include: 1) injuring someone while attempting to elude police; 2) having a minor in the car when committing certain felony driving offenses; 3) manufacturing methamphetamine or possessing certain ingredients with the intent to manufacture methamphetamine in the presence of a minor; 4) committing certain drug offenses in a jail or prison; 5) engaging in certain sex offenses involving a minor in exchange for a fee; 6) assaulting a law enforcement officer who

[39] *Id.*
[40] RCW 9.94A.533(10)(a).
[41] WASH. STATE CRIM. SENT'G TASK FORCE, SENTENCING EFFECTIVENESS WORKING GROUP – GRID SUBGROUP MEETING SUMMARY: SEPTEMBER 15, 2020 1-2 (2020), https://s3.wp.wsu.edu/uploads/sites/2180/2020/12/SU69B41.pdf. There is also an aggravating circumstance at RCW 9.94A.535(3)(aa) for "intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership."
[42] RCW 9.94A.533(10)(a).

is performing their duties; and 7) committing robbery of a pharmacy.[43] Each of these enhancements adds 12 to 24 months to the presumptive sentence.[44]

While there is not literature exploring the gender and other equity impacts of most enhancements, there is evidence that mandatory minimums are a significant source of the racial disparities in sentencing—and the Washington State Sentencing Guidelines Commission recently noted that because "of their mandatory nature and the ineligibility for application of earned release time, most enhancements are, at their core, mandatory minimums."[45] Except for the limited studies discussed in Section VI – we could not identify data showing the breakdown in the use of enhancements by gender or race and ethnicity and no intersectional analysis has been completed.

The Sentencing Guidelines Commission notes that Washington's guidelines provide structure to both judicial and prosecutorial discretion, creating a smaller shift of discretion from judges to prosecutors than happened at the federal level. However, the prosecutorial guidelines are advisory only, which can lead to the uneven application of some enhancements across the state.[46] See "Chapter 13: Prosecutorial Discretion and Gendered Impacts" for more information on prosecutorial guidelines and discretion.

4. Exceptional sentences above or below the guidelines range

While the SRA provides structure to sentencing, it does not eliminate a court's discretion altogether.[47] A judge may depart from a standard range sentence and impose an exceptional sentence above or below the standard range.[48] RCW 9.94A.535(1) lists eleven non-exclusive mitigating factors that are reasons a court may use to reduce a sentence. However, an exceptional sentence cannot be imposed below a mandatory minimum sentence if the Legislature has provided one.[49] RCW 9.94A.535(3) has an exclusive list of over thirty aggravating

[43] RCW 9.94A.533.
[44] *Id.*
[45] SENT'G GUIDELINES COMM'N, *supra* note 6, at 20.
[46] *Id.*
[47] RCW 9.94A.010.
[48] RCW 9.94A.535.
[49] RCW 9.94A.540.

factors that could lengthen a sentence, but which must be charged by the prosecution and found by a jury before the court can use one or more factor to impose an exceptional sentence above the standard range. Only a few aggravating circumstances can be found exclusively by the court and they largely relate to a defendant's criminal history (see RCW 9.94A.535(2)). A two-part test determines whether a factor actually supports an exceptional sentence.[50] First, a judge "'may not base an exceptional sentence on [crime-related] factors necessarily considered by the Legislature in establishing the standard sentence range.'"[51] For example, a lack of criminal history is generally not a sufficient reason to depart from a standard range because that was something the Legislature considered when setting the standard range.[52] However, a lack of criminal history may be considered in combination with a finding that the defendant was 'induced' to commit the crime or lacked a predisposition to commit the crime.[53] As discussed further below, at least some personal characteristics, such as youth, can be considered in imposing a mitigated sentence.

Second, the "'factor must be sufficiently substantial and compelling to distinguish the crime.'"[54] "[A]ny such reasons must relate to the crime and make it more, or less, egregious."[55] For example, family support or being low or moderate risk to reoffend are not considered relevant to the crime.[56] However, the court will accept a stipulation to an exceptional sentence in a valid plea deal as a substantial and compelling reason.[57] The court must explain in writing the reasons for imposing an exceptional sentence.[58]

a. Mitigating circumstances for sentencing below the standard range

The illustrative list of mitigating circumstances provided in RCW 9.94A.535(1) includes the following: 1) to a significant degree, the victim was an initiator, willing participant, aggressor or provoker; 2) the defendant was under duress, coercion, threat, or compulsion on some level; 3)

[50] *State v. Law*, 154 Wn.2d 85, 95, 110 P.3d 717 (2005); *State v. Graham,* 181 Wn.2d 878, 337 P.3d 319 (2014); RCW 9.94A.535.
[51] *Law*, 154 Wn.2d at 95 (quoting *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997)).
[52] *State v. Freitag*, 127 Wn.2d 141, 143-44, 896 P.2d 1254 (1995).
[53] *State v. Fowler*, 145 Wn. 2d 400, 406-07, 38 P.3d 335 (2002).
[54] *Law*, 154 Wn.2d at 95 (quoting *Ha'mim*, 132 Wn.2d at 840).
[55] *Fowler*, 145 Wn. 2d at 404.
[56] *Id.*
[57] *In re Breedlove*, 138 Wn.2d 298, 300, 979 P.2d 417 (1999).
[58] RCW 9.94A.535.

the defendant was induced by others without apparent predisposition to do so; 4) the defendant's capacity was impaired (but not by voluntary use of alcohol or drugs); 5) the defendant was not the principal in the offense and manifested concern for the victim; 6) the defendant or defendant's children suffered from a pattern of abuse by the victim and committed the offense in response to abuse; and 7) the defendant committed an act of domestic violence after and in response to suffering from a pattern of coercion, control or abuse by the victim. Although this list is non-exclusive, a basis for an exceptional sentence downward must distinguish the case from other cases in the same category of crime.[59] Once a court identifies a basis for an exceptional sentence downward, it must consider the purposes of the SRA as set forth in RCW 9.94A.010 when crafting an appropriate sentence.[60]

As noted above, an example of a mitigating circumstance is that the defendant's capacity was impaired.[61] Impairment of the defendant's capacity by voluntary use of alcohol or drugs, however, does not constitute a mitigating circumstance.[62] Furthermore, the Washington Supreme Court clarified that impairment by alcohol as a result of alcoholism is not, in and of itself, a mitigating factor.[63] The Court even further clarified in *State v. Hutsell* held that "the unforced, and not fraudulently induced, use of drugs or alcohol" regardless of dependence is not a mitigating factor.[64]

RCW 9.94A.535(1)(c) provides a basis for downward departure from the standard range when a defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense, but which significantly affected their conduct. In *State v. Pascal*, the court upheld a sentence in which the trial court imposed a downward departure for first-degree manslaughter based on a failed claim of self-defense based on battered woman's syndrome.[65] The trial court appropriately evaluated the evidence of mitigating factors and determined that the defendant's actions significantly distinguished her conduct from conduct

[59] *Fowler*, 145 Wn. 2d at 405.
[60] *State v. Alexander*, 125 Wn.2d 717, 730, 888 P.2d 1169 (1995).
[61] RCW 9.94A.535(5).
[62] *Id.*
[63] *State v. Allert*, 117 Wn.2d 156, 164, 815 P.2d 752 (1991).
[64] *State v. Hutsell*, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993).
[65] *State v. Pascal*, 108 Wn.2d 125, 136, 736 P.2d 1065 (1987).

typically present in manslaughter because the record showed the decedent had subjected the defendant to physical beatings and to verbal and emotional abuse both on the day of his death and prior.[66] In addition to the incomplete defense, the *Pascal* Court found the mitigated sentence supported by a former mitigating factor for battered woman's syndrome as well as RCW 9.94A.535(1)(a), which provides that the victim was an initiator, willing participant, aggressor, or provoker of the incident. The specific mitigator for battered woman's syndrome no longer exists. However, RCW 9.94A.535(1)(j) allows a sentencing court to issue a downward departure from the standard range after finding that "the current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse." It stands to reason that at least some defendants who present a failed self-defense claim at trial could still receive an exceptional sentence under this basis, if the trial court issues certain findings.

In *State v. Rogers*, the court reviewed the scope of duress in mitigation of a criminal sentence, compared the application of duress in mitigation with the substantive duress defense established by RCW 9A.16.060, and determined that duress must be from an outside force and not a mental or emotional condition.[67] The Court also interprets the mitigating factor of compulsion as connoting the influence of an outside force.[68] Therefore, as with psychological states, actions arising from drug or alcohol addiction would not constitute compulsion as a mitigating factor.[69]

RCW 9.94A.535(1)(g) provides another basis for an exceptional sentence when the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive considering the seven purposes of the SRA provided in RCW 9.94A.010. Recently, the Washington Supreme Court explained that the multiple sentencing policy applies not only to violent and nonviolent offenses but also to multiple serious violent offenses.[70]

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[66] *Id.*
[67] *State v. Rogers*, 112 Wn.2d 180, 770 P.2d 180 (1989).
[68] *Hutsell*, 120 Wn.2d at 918.
[69] *Id.*
[70] *State v. Graham*, 181 Wn.2d 878, 884, 337 P.3d 319 (2014).

Examples of such exceptional sentences are not simply confined to deviating below the standard range. In *In re Pers. Restraint of Mulholland*, the Washington Supreme Court explained that a court has discretion upon finding one or more mitigating factors justifying an exceptional sentence downward to order concurrent sentences for separate serious violence offenses.[71] A sentencing court also has discretion upon finding one or more mitigating circumstances supporting an exceptional sentence downward to run sentences for firearm-related offenses concurrently.[72]

An individual's youth can also be a basis for imposing a mitigated sentence.[73] Washington recognizes brain development science, which shows the frontal lobe that controls volition continues to develop well into an individual's twenties.[74] Because youthfulness may impact a defendant's culpability and has not been considered by the Legislature in setting the standard range for adults, courts can consider it and reduce an individual's sentence accordingly.

All sentencing guidelines must be imposed equally "without discrimination as to any element that does not relate to the crime or the previous record of the defendant."[75] The reasons for an exceptional sentence must relate to the crime, the defendant's culpability, or the defendant's criminal record.[76] The defendant's personal and unique factors unrelated to the crime, are not relevant.[77] The defendant's race and gender "should play no part in determining the appropriate sentence for a crime. . . . A determinate system, by its nature, should virtually eliminate such sentencing disparities."[78] However, the *victim's* personal and unique characteristics may be relevant.[79]

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[71] *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 331, 166 P.3d 677 (2007).
[72] *State v. McFarland,* 189 Wn.2d 47, 50, 399 P.3d 1106 (2017).
[73] *State v. O'Dell*, 183 Wn.2d 680, 688-96, 358 P.3d 359 (2015).
[74] *Id.* at 695-96 (relying on U.S. Supreme Court cases incorporating juvenile brain science); *In re Pers. Restraint of Monschke*, 197 Wn.2d 305, 482 P.3d 276 (2021).
[75] RCW 9.94A.340; *State v. Law*, 154 Wn.2d 85, 97, 110 P.3d 717 (2005).
[76] *Law*, 154 Wn.2d at 89.
[77] *Id.*
[78] Larry Michael Fehr, *Racial and Ethnic Disparities in Prosecution and Sentencing: Empirical Research of the Washington State Minority and Justice Commission,* 32 GONZ. L. REV. 577, 580 (1997) (quoting SENT'G GUIDELINES COMM'N, SENTENCING POLICY IN WASHINGTON: AN ASSESSMENT 8 (1996)).
[79] *State v. Nguyen*, 68 Wn. App. 906, 919, 847 P.2d 936 (1993) (reasoning an exceptional sentence was justified because the victims were particularly vulnerable based on their age and gender "under the circumstances").

Thus, sentencing courts have discretion to mitigate sentences for virtually any crime except those with a mandatory minimum, some sex offenses, and where the persistent offender laws apply. Because the mitigating factors listed in RCW 9.94A.535(1) are not exclusive, sentencing courts have some discretion to find their own bases for departing below the standard range. Within the constraints discussed herein, parties could advocate for mitigating circumstances based on some of the inequities described herein.[80] Within the described constraints, courts could use their discretion to impose such mitigated sentences.

b. Aggravating circumstances for sentencing above the standard range

The SRA also allows the court to depart above the standard range sentence when certain aggravating circumstances are present. Among the exclusive list of over 30 factors that can serve to increase the length of a sentence are: the victim of the current offense was particularly vulnerable or incapable of resistance, the current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant; the current offense included a finding of sexual motivation; the current offense involved domestic violence or stalking and includes additional circumstances; and a position of trust, confidence, or fiduciary responsibility was used to facilitate the commission of the current offense.

[80] While historically, a prosecutors' agreement to an exceptional sentence below the standard range helps insulate the below-range sentence from reversal on appeal, it is not and should not be a necessity. *Compare, e.g.*, *State v. Pascal*, 108 Wn.2d 125, 736 P.2d 1065 (1987) (on prosecution's appeal, affirming trial court's sentence below the presumptive SRA range where evidence showed the victim had abused his domestic partner and mother of his child, the defendant, physically, verbally, and emotionally before and on the day he was killed and also acted as the aggressor); *State v. Jeannotte*, 133 Wn.2d 847, 947 P.2d 1192 (1997) (on prosecution's cross-appeal, affirming trial court's sentence below presumptive range based on failed entrapment defense); *State v. Alexander*, 125 Wn.2d 717, 888 P.2d 1169 (1995) (on prosecution's appeal, affirming trial court's sentence below the presumptive range where based on the "extraordinarily small" amount of controlled substance involved, defendant's low level of involvement or sophistication, and defendant's peripheral involvement in the drug hierarchy) *with, e.g.*, *Law*, 154 Wn.2d at 95-104 (on prosecution's appeal, reversing exceptional sentence below the presumptive range as based on factors considered by the Legislature where those factors were defendant's age of 18 and lack of prior contacts with law enforcement; discussing *State v. Ha'mim*, 132 Wn.2d 834, 940 P.2d 633 (1997)); *State v. Freitag*, 127 Wn.2d 141, 145, 896 P.2d 1254 (1995) (on prosecution's appeal, reversing imposition of a reduced sentence because it was based on factors considered by the Legislature in establishing the standard range: lack of criminal history, "her concern for people beyond that normally shown by others," and the trial court's belief that community service would be more appropriate in light of current jail overcrowding); *State v. Gaines*, 122 Wn.2d 502, 859 P.2d 36 (1993) (on prosecution's appeal, reversing exceptional sentence below the presumptive range where trial court based in part on defendant's drug addiction and its causal role in the offense); *State v. Allert*, 117 Wn.2d 156, 815 P.2d 752 (1991) (on prosecution's appeal, reversing exceptional sentence below presumptive range where trial court based on improper factors including defendant's "voluntary use of alcohol").

Additionally, any fact that is the basis of an aggravating factor relied upon by the sentencing court must be proved to a jury.[81] There are limited exceptions including where the defendant and state stipulate that an exceptional sentence serves the interest of justice and the court agrees or, essentially, where the standard offender score calculation allows for too lenient a sentence.[82]

The use of aggravating circumstances can dramatically increase an individual's sentence. For example, in one case, a mother was convicted of assaulting her child by administering eye drops that were believed to have caused conjunctivitis and corneal thinning among other injuries. The prosecution charged and the jury found several aggravating circumstances, deliberate cruelty under RCW 9.94A.535(3)(a), particularly vulnerable victim under RCW 9.94A.535(3)(b), and abuse of position of trust, confidence, or fiduciary responsibility under RCW 9.94A.535(3)(n). The court, at sentencing, used the aggravating circumstances to justify a sentence of 40 years, four times the presumptive standard range based on the mother's lack of prior criminal history.[83]

In another example, the court imposed an exceptional sentence based on the aggravating circumstance that the degree of sophistication rendered the identity theft and forgery offenses "major economic" crimes. As a result of the aggravating circumstance, the sentencing court increased the presumptive sentence of 17 to 22 months, for forgery, and 0 to 12 months, for identity theft, to 36 months each, an increase of between 160 to 300% of the standard range.[84]

Life and long sentences are further discussed below in Section IV. Sentencing disparities based on gender, race, ethnicity, age, and other factors are discussed below in Section VI.

[81] *State v. Ose*, 156 Wn.2d 140, 148-49, 124 P.3d 635, 639 (2005).
[82] RCW 9.94A.535(2).
[83] *State v. Mothershead*, No. 73634-5-I (Wash. Ct. App. Mar. 28, 2016) (unpublished), https://www.courts.wa.gov/opinions/pdf/736345.pdf.
[84] *State v. Baldwin*, 150 Wn.2d 448, 78 P.3d 1005 (2003).

5. Sentencing alternatives

Washington also allows for sentencing alternatives for specific types of offenders including parents, drug offenders, and sex offenders.[85] These sentencing alternatives are not considered exceptional sentences.[86]

Seemingly most relevant to this Study is the Family and Offender Sentencing Alternative (FOSA).[87] Created by the Legislature in 2010, FOSA allows judges to waive a prison sentence for eligible persons and impose 12 months of community supervision along with conditions for treatment and programming. The FOSA allows parents to maintain family bonds and be productive contributors in their families and communities. FOSA seeks to break the cycle whereby children of incarcerated parents are more likely to end up in the criminal justice system themselves. To be eligible, the individual must be a parent, legal guardian, or custodian with physical custody of at least one minor child, facing more than one year in prison, not subject to deportation, and without prior or current violent felonies or sex offenses.[88] According to data from the Washington State Department of Corrections, FOSAs constitute only 232 of the 97,006 sentences imposed between 2015 and 2019. Of these 232 FOSA sentences, 141 were imposed on women and the other 91 were imposed on men.[89] The data does not allow for an intersectional analysis, nor does it provide information on how often FOSA sentences were requested but denied by the court. Anecdotal information suggests that, at least in some counties, FOSA sentences are requested only by agreement of the parties and thus allow prosecutors a gatekeeping function not inherent in the legislation. These are areas that should be studied and could help to determine how to increase imposition of FOSA sentences. See "Chapter 16: Gendered Consequences of Incarceration and Criminal Convictions, Particularly for Parents, Their Children,

[85] RCW 9.94A.655; RCW 9.94A.660; RCW 9.94A.670.
[86] *See State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005) (noting the similarities and differences of procedural requirements between sentencing alternatives and exceptional sentences); *State v. Murray*, 128 Wn. App. 718, 726, 116 P.3d, 1072 (2005) (noting the trial court cannot create a hybrid sentence of a sentencing alternative and an exceptional sentence).
[87] RCW 9.94A.655.
[88] *Id.*
[89] RDA Data Request from Washington State Department of Corrections: FOSA Distribution, SP3930, 2015-2019 (2020).

and Families" for a further discussion of the impacts of incarceration on parents and their families.

Given the role of drug convictions in the increase in incarceration of women, Drug Offender Sentencing Alternatives are also relevant to this Study. DOSA sentences are available for those with drug convictions involving only a "small quantity" of drugs as determined by the judge. There are other eligibility criteria such as the conviction cannot include a violent offense, sex offense, or driving under the influence and the individual has not received a DOSA sentence more than once in the prior ten years.[90] Very little research has been conducted in Washington or nationally to determine if alternative sentences generally, and DOSA sentences specifically, are equitably applied by gender or race and ethnicity. The body of literature only includes one Washington-specific study focused on DOSA sentences.

A 2005 study in Washington State looked at the First Time Offender Waiver, DOSA, and Work Ethic Camp alternatives. This study relies on now old data (1996-1999) from the Washington State Sentencing Guidelines Commission. The analysis found that men were significantly less likely than women to receive the First Time Offender Waiver and the Work Ethic Camp alternatives, but that there were no significant differences by sex for DOSA sentences.[91] This is an interesting finding given the trends in the literature which suggest that women are generally more likely to receive alternative or lesser sentences than men. It raises questions about what is unique about sentencing for women specific to drug crimes. The authors did find that also being eligible for Work Ethic Camp significantly decreased the odds that someone would get a DOSA sentence,[92] but the authors do not speculate how that could interact with gender- and race/ethnicity-based disparities for DOSA sentences. At the time of data collection DOSA sentences were infrequently used, with about one third of counties not using it at all during the study period.[93]

[90] Randy R. Gainey, Sara Steen & Rodney L. Engen, *Exercising Options: An Assessment of the Use of Alternative Sanctions for Drug Offenders*, 22 JUST. Q. 488 (2005); RCW 9.94A.660.
[91] *Id.* at 505.
[92] *Id.* at 507.
[93] *Id.*

Additionally, the authors found that eligible Hispanic individuals were significantly less likely than white or Black individuals to receive any of the sentencing alternatives. DOSA sentences reflected the apex of the disparity, where the odds of receiving the alternative sentence were 83% lower for Hispanic individuals than white individuals. For Black individuals the only significant difference was for First Time Offender Waivers, where the odds of a judge giving a Black individual this waiver were 26% lower than for white individuals.[94] The authors also conducted interviews with judges, defense attorneys, and prosecutors. These interviews suggest that at least one reason why Hispanic individuals may have been less likely to receive an alternative sentence was related to assumptions and negative attitudes about possible citizenship status.[95]

This study has significant limitations such as: 1) a lack of data analysis looking at the intersection of gender and race or ethnicity; 2) a lack of analysis for Indigenous, Asian, and Native Hawaiian or other Pacific Islanders; and 3) reliance on a dataset that inaccurately represents gender as a binary and that relies on felony judgment and sentencing forms (presumably introducing the same limitations inherent in the Caseload Forecast Council data as outlined in "Chapter 11: Incarcerated Women in Washington"). In addition, these data are now outdated, so it is impossible to determine how generalizable the findings are to Washington today. It would be useful to convene a new study on sentencing alternatives using more recent data and avoiding the identified flaws present in prior studies.

6. Community custody

Under the SRA, many sentences require a term of community custody—supervision while in the community—to follow the period of incarceration.[96] In 2018, the Department of Corrections reported the length of confinement for violations of community custody had been gradually increasing since 2014, even while the rate of violation behavior has remained steady.[97] The result, of course, is more people incarcerated in Washington. The report does not break the data

[94] *Id.* at 505.
[95] *Id.* at 508.
[96] RCW 9.94A.701-711.
[97] WASH. STATE DEP'T OF CORR., SWIFT AND CERTAIN SANCTIONING: 2018 REPORT TO THE LEGISLATURE 5 (2018), https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=2018%20SAC%20Report%20%28002%29_49eb2d39-061a-4230-b55f-40c7f2cdef85.pdf.

down by gender. More research is needed on the effect of increased community supervision violations on female incarceration in Washington. As noted in "Chapter 11: Incarcerated Women in Washington," nationally, the number of women subject to correctional supervision in the community greatly exceeds the admittedly large number of women confined to jails and prisons.[98]

7. Three strikes mandatory life without parole sentencing

In 1993, Washington State voters approved an initiative that created the persistent offender law, popularly known as the "three strikes and you're out" law.[99] Three-strike legislation was originally intended to remove repeat offenders of serious crimes from society for long periods or life. Washington State was one of the first states to implement three-strike laws.[100]

Under the persistent offender law, an individual must be incarcerated for life without the possibility of parole after receiving, on separate occasions, three convictions—or "strikes"—for certain serious felonies including all Class A felonies, any attempt, solicitation, or conspiracy to commit a Class A felony, and others such as assault in the second degree, extortion in the first degree, and kidnapping in the second degree.[101]

Research from Washington, California, and nationally shows three-strike laws are ineffective in addressing their stated goal of deterring or even preventing crime. They are also costly and discriminatory. A recent Washington study discusses the ineffectiveness and disproportionate impact of three-strikes and other lengthy-sentence legislation, finding "more sparing use of prisons, combined with enhanced crime prevention efforts, expanded and improved rehabilitative programming in prisons, and the development and expansion of restorative justice

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[98] Thomas Bonczar & Joseph Mulako-Wangota, *Corrections Statistical Analysis Tool (CSAT) – Probation*, BUREAU OF JUST. STAT. (June 29, 2020), https://www.bjs.gov/probation/ (count of year-end probation population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool); Thomas Bonczar & Joseph Mulako-Wangota, *Corrections Statistical Analysis Tool (CSAT) – Parole*, BUREAU OF JUST. STAT. (June 23, 2020), https://www.bjs.gov/parole/ (count of year-end parole population by sex, race/Hispanic origin, generated using the Corrections Statistical Analysis Tool); E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2016 (2018), https://www.bjs.gov/content/pub/pdf/p16_old.pdf; DANIELLE KAEBLE, PROBATION AND PAROLE IN THE UNITED STATES, 2016 (2018).

[99] Initiative 593 (codified at RCW 9.94A.570).

[100] Michael Vitiello, *Three Strikes Laws: A Real or Imagined Deterrent to Crime?* 29 ABA HUM. RTS. 3 (2002); James Austin et al., *The Impact of 'Three Strikes and You're Out'*, 1 PUNISHMENT & SOCIETY 131 (1999).

[101] RCW 9.94A.570; RCW 9.94A.030(33).

alternatives are far more promising" than lengthy and lifetime prison terms.[102] An analysis of three-strike laws in California using state-level data from 1986-2005, found that these laws appear to be associated with statistically significant but only slightly faster rates of decline for robbery, burglary, larceny, and motor vehicle theft. However, murder rates did not decline based on the three strikes law in California, leading the researcher to ultimately argue that the harshest sentencing punishment might not be the most effective. Other research finds no evidence that three strikes have any intended deterrent effect on crime rates in California.[103] None of these studies look at effectiveness with regard to gender.

In 2019, the Washington State Legislature removed robbery in the second degree from the list of qualifying "strikes."[104] While the final bill does not contain a statement of legislative intent, testimony supporting the bill advocated for the removal of robbery in the second degree because the crime does not involve weapons, bodily injuries, or financial institutions (in fact, it often criminalizes shoplifting while possessing any type of weapon), life sentences for this crime do not affect the crime rate, and the crime has been disproportionately applied by county and race.[105] At the time the bill was passed, a reported 62 persons were serving life sentences based on a robbery in the second degree strike. While the final bill did not include an explicit statement on whether it applies retroactively, the Legislature fixed the issue in separate legislation in 2021, which provides a resentencing for those individuals for whom robbery in the second degree was used as a strike.[106] We examine long and life sentences more broadly in Section IV.

8. Changes to sentencing for sex offenses

Two relatively recent changes in the sentencing of sex offenses in Washington have contributed to longer sentences (for the mostly male defendants) and, therefore, more persons held in custody. First, in 2001, the Washington State Legislature dramatically changed the way

[102] BECKETT & EVANS, *supra* note 10.
[103] Mike Males & Dan Macallair, *Striking Out: The Failure of California's Three Strikes and You're Out Law*, 11 STAN. L. & POL'Y REV. 65 (1999).
[104] LAWS OF 2019, ch. 187.
[105] *Id.*; S.B. REP. ON ENGROSSED SUBSTITUTE S.B. 5288, 66th Leg., Reg. Sess. (Wash. 2019); H.B. REP. ON ENGROSSED SUBSTITUTE S.B. 5288, 66th Leg., Reg. Sess. (Wash. 2019).
[106] S.B. 5164, 67th Leg., Reg. Sess. (Wash. 2021).

individuals with certain sex offense convictions were sentenced.[107] When a judge determines that an individual's conviction falls within this section, the judge is required to sentence the individual to a maximum term set by statute and a minimum term that is within the standard range or an exceptional sentence pursuant to RCW 9.94A.535.[108] Before the expiration of the minimum term, the indeterminate sentence review board will conduct a hearing to decide whether to release the individual before the maximum term has expired.[109] If the board does not release the person, it can set another minimum term of confinement not to exceed five years before the next review by the board for release.[110] The practical effect of this reform is that most sex offenders spend more time in total confinement.

Second, in an expansion of the persistent offender law passed in 1996, two separate convictions of certain sex offenses result in the mandatory sentence of life without parole.[111] The list of offenses include rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, indecent liberties by forcible compulsion, and a number of violent offenses if with a finding of sexual motivation.[112]

This two strikes and you're out law is expected to replace the civil commitment regime over time as repeat sex offenders will be subject to mandatory lifetime incarceration. Civil commitment for sex offenses began in 1990 when the Legislature passed the Sexually Violent Predator Act.[113] The definition of a "sexually violent predator" is someone who: 1) has been convicted of or charged with a crime of sexual violence; 2) who suffers from a mental abnormality or personality disorder; and 3) the mental abnormality or personality disorder makes the person likely to engage in

[107] RCW 9.94A.507(1). Individuals who are not persistent offenders are sentenced under the Sex Offender Management Act if convicted of (a) rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; (b) the following crimes with a finding of sexual motivation: murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or (c) an attempt of any offense falling in the above two sections.
[108] RCW 9.94A.507(3)(a).
[109] RCW 9.95.420(3).
[110] RCW 9.95.011(2).
[111] RCW 9.94A.570; RCW 9.94A.030(38).
[112] RCW 9.94A.030(38).
[113] ch. 71.09 RCW.

predatory acts of sexual violence if not confined in a secure facility.[114] If a person is deemed to be a sexually violent predator, the person is committed to the custody of the Department of Social Health Services for placement in a secure facility.[115] A person remains civilly committed only until it is established that they have changed so that they no longer fit the definition of a "sexually violent predator" or are granted—either by the Court or through the agreement of the State—a less restrictive alternative to commitment.[116]

Although civil committees are guaranteed due process rights, practically, few have managed to gain release. Only one cisgender woman has been civilly committed under the Sexually Violent Predator Act, and she was released in 2020 after the prosecution could no longer prove she met the criteria.[117] However, there are several transgender persons civilly committed.

IV. Increased Long and Life Sentences in Washington

As the above section demonstrates, the SRA and its various amendments over the last 30 years have created various mechanisms for imposing long and life sentences partly responsible for the increase in incarceration in Washington. A report released by the ACLU in February of 2020 found that felony sentencing data from the past 30 years indicate that life and long sentences are one driver of the increase in the Washington State prison population.[118] The data in this report are not broken out by gender, so it is unclear if the female and male prison populations have seen different trends. In the future, this area should be examined for gender and intersectional disparities in Washington.

As of 2019, over 41% of Washington's prison population was serving a sentence of ten years or more. Washington State Superior Court sentencing data show a steady increase in life and long sentences between 1986 and 2016, with the life without the possibility of parole sentences showing the most dramatic increase. The authors of the ACLU report attribute this increase in life and long sentences, that notably occurred despite declines in crime rates, to four key policy

[114] RCW 71.09.020(18).
[115] RCW 71.09.060; RCW 71.09.070.
[116] RCW 71.09.060(1).
[117] *In re L.M.*, Pierce County Superior Court No. 95-2-12979-5 (In April 2020, the case was dismissed and the respondent released because she had been found not to meet the criteria for commitment).
[118] BECKETT & EVANS, *supra* note 10.

changes: 1) the 1993 adoption of the Persistent Offender Accountability Act ("three-strikes law); 2) the 1995 enactment of the Hard Time for Armed Crime Act (which authorized weapons enhancements); 3) the combination of several incremental changes to statutory rules increasing the weight of prior offenses and increasing the offense seriousness level (which, in effect, increases the standard sentencing range); and 4) the decrease in opportunities for parole following enactment of the SRA and subsequent legislation reducing the ability to earn "good time" credits for early release. [119]

The increase in life and long sentences also contributes to an increase in incarceration of older adults. This is of extreme significance during the COVID-19 pandemic given the high risk the virus poses to older adults and those with underlying health conditions, particularly those in congregate living settings.[120] As of May 2021, known COVID-19 outbreaks had occurred at three quarters of the prisons managed by the Department of Corrections, and in many work release facilities.[121] Fourteen incarcerated individuals have died from COVID-19, and thousands have been infected.[122] The Department of Corrections released information on the first three deaths, all of whom were men over the age of 60.[123] The first staff member to pass away was also over 60 years old.[124] However, Department of Corrections subsequently stopped releasing age-based demographic data. According to an updating study by the Marshall Project, COVID-19 rate among

[119] *Id.*
[120] *Id.*; *Older Adults: COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 3, 2021), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html.
[121] *COVID-19 Data*, WASH. STATE DEP'T OF CORR. (2020), https://perma.cc/7TS4-2DHQ (numbers reported as of May 21, 2021).
[122] *Id.*
[123] *PRESS RELEASE: Third Incarcerated Individual in Washington Dies of COVID-19*, WASH. STATE DEP'T OF CORR. (Nov. 22, 2020), https://www.doc.wa.gov/news/2020/11222020p.htm; *PRESS RELEASE: Second Incarcerated Individual in Washington Dies of COVID-19*, WASH. STATE DEP'T OF CORR. (June 24, 2020), https://www.doc.wa.gov/news/2020/06242020p.htm; *PRESS RELEASE: First Incarcerated Individual in Washington Dies of COVID-19*, WASH. STATE DEP'T OF CORR. (June 18, 2020), https://www.doc.wa.gov/news/2020/06182020p.htm; *PRESS RELEASE: First COVID-Related Incarcerated Death at Stafford Creek*, WASH. STATE DEP'T OF CORR. (Dec. 10, 2020), https://www.doc.wa.gov/news/2020/12102020p.htm; *PRESS RELEASE: First COVID-Related Incarcerated Death at Airway Heights*, WASH. STATE DEP'T OF CORR. (DEC. 18, 2020), https://www.doc.wa.gov/news/2020/12182020p.htm.
[124] *PRESS RELEASE: First Washington Corrections Line of Duty Death from COVID-19*, WASH. STATE DEP'T OF CORR. (May 18, 2020), https://www.doc.wa.gov/news/2020/05182020p.htm. Numerous staff members have also been infected across many facilities. *COVID-19 Data*, WASH. STATE DEP'T OF CORR. (2020), https://perma.cc/7TS4-2DHQ (numbers reported as of May 21, 2021).

people incarcerated in prisons is 6.4 times the rate in Washington's general population.[125] Early in the pandemic, Governor Jay Inslee instituted emergency procedures to release approximately 1,100 individuals from our prisons.[126] Only nonviolent and non-sex-offense offenders nearing the end of their sentences were eligible for release. Washington State courts rejected lawsuits that would have resulted in the release of additional groups or individuals.[127] It also bears noting that prison conditions in Washington State have been widely reported to have worsened during the pandemic—incarcerated individuals have been without volunteer programs, social visits, and most professional visits for months, and time outside the cell has been extremely restricted for long periods of time, resulting in restrictions on access to showers, telephones, fresh air, and medical care. Further, many incarcerated individuals live in fear of contracting the virus and/or dying from it, creating a harshening of punishment unforeseen when most sentences were imposed.[128]

The authors of the ACLU report also posit that tough sentencing laws have increased prosecutor leverage in Washington, leading to an increase in plea deals and a decrease in trials. In 1986 the

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[125] *A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT, https://perma.cc/6M22-KL8V (updated May 31, 2021).

[126] Joseph O'Sullivan, *As COVID-19 Spreads in Washington's Prisons, Advocates Call for Better Conditions, Release of Inmates*, SEATTLE TIMES (Dec. 14, 2020), https://www.seattletimes.com/seattle-news/health/as-covid-19-spreads-in-washingtons-prisons-advocates-call-for-better-conditions-release-of-inmates/.

[127] *Colvin v. Inslee*, 195 Wn.2d 879, 467 P.3d 953 (2020); *In re Pers. Restraint of Pauley*, 13 Wn. App. 2d 292, 466 P.3d 245 (2020), *rev. denied* Order, No. 98586-3 (Wash. Supreme Ct. Aug. 6, 2020); *In re Pers. Restraint of Williams*, No. 99344-1 (Wash. Supreme Ct., oral arg. heard Mar. 11, 2021; orders entered Mar. 12 and Apr. 12, 2021) (although the court held confining 78-year-old Williams "in a space that does not include reasonable access to a bathroom and running water, and failing to provide him appropriate assistance in light of his physical disabilities [which left him confined to a wheelchair], is cruel" in violation of the Washington constitution, the court found the Department of Corrections remedied conditions such that release was not required).

[128] E.g., Lilly Fowler, WA inmates say they're retaliated against for getting COVID-19, Crosscut, https://crosscut.com/news/2020/12/wa-inmates-say-theyre-retaliated-against-getting-covid-19 (updated Dec. 15, 2020) (Department of Corrections uses solitary confinement to isolate sick prisoners; two prisoners who died had waited days to report difficulty breathing); Maggie Quinlan, *70 Percent of Airway Heights Prison Is COVID-19-Positive*, SPOKESMAN REV. (Dec. 24, 2020), https://www.spokesman.com/stories/2020/dec/24/70-of-airway-heights-prison-is-covid-positive. Harsh conditions have been reported in other prison systems as well. *E.g.*, Conrad Wilson, *Federal Lawsuit Calls Out COVID-19 Conditions at Sheridan Prison*, OR. PUB. BROAD. (June 30, 2020), https://www.opb.org/news/article/lawsuit-treatment-inmates-federal-prison-covid-sheridan-oregon; Joint Status Report, *Stirling v. Salazar*, No. 3:20-cv-00712-SB, Dkt. 48 at ¶ 2c (Oct. 30, 2020) (counsel for plaintiff "is hearing complaints that inmates at the FDC continue to be locked in their cells for most hours of the day; some FDC inmates are sleeping on mattresses on the floor of cells, as the third inmate in a two-person cell; and outdoor recreation time is limited to an hour every week").

average sentence imposed at trial in cases involving violent crime was 64 months longer than that imposed via a plea deal. In 2016, this number had jumped to 174 months.[129]

We recommend additional research be conducted using Department of Corrections data on factors that affect the length of time women spend in prison, for example: the extent that infractions increase length of stay in prison as well as at work release/community corrections and the extent that risk classification increases length of stay in prison. It would also be useful to examine the impact and necessity of maintaining distinct rates at which individuals earn a reduction in their sentence for positive behavior in prison ("good time"). For example, for some individuals good behavior results in a reduction of their sentence by one-third while for others it might be only ten percent and for many enhancements, for example, no good time credit can be applied. We also recommend additional research on court-related factors related to length of time served, for example: concurrent versus consecutive sentences and the use of enhancements and their effects on length of sentences.

V. Federal Sentencing Laws and Practices

Federal sentencing laws have developed since 1989 in many ways that impact the increases in incarceration rates. A comprehensive review of federal sentencing laws and practices is beyond the scope of this Washington study. A brief summary is provided.

Prior to 1984, federal courts had wide discretion when imposing sentences. In 1984, Congress passed the Comprehensive Crime Control Act, which included the federal Sentencing Reform Act with the goal, among other things, to reduce disparities in sentencing.[130] This broadly paralleled the change to the SRA in Washington. Under the federal SRA, the U.S. Sentencing Commission developed guidelines creating sentencing ranges with a minimum sentence and a maximum sentence for federal offenses.[131]

[129] BECKETT & EVANS, *supra* note 10.
[130] Sentencing Reform Act (SRA), Pub. L. No. 98-473 (codified as amended in scattered sections of 18 and 21 U.S.C).
[131] 18 U.S.C. § 3553.

As part of this movement, Congress passed the Anti-Drug Abuse Act of 1986 which created mandatory minimum sentences triggered by certain amounts of controlled substances including cocaine.[132] The Anti-Drug Abuse Act of 1986 created harsher penalties for the average drug users, by criminalizing small amounts of drugs. For example, the Act included a provision that imposed a sentence for simple possession of crack cocaine that was 100 times harsher than simple possession of powder cocaine.[133] In other words, an individual possessing five grams of crack cocaine would receive the same sentence as an individual possessing 500 grams of powder cocaine.

This sentence structure was extended to conspiring to deliver crack cocaine in the Omnibus Anti-Drug Abuse Act of 1988. The Omnibus Anti-Drug Abuse Act of 1988 further singled out crack from other forms of cocaine and for the first time required a five-year mandatory sentence even for first-time offenders and for anticipatory offenses like attempt and conspiracy. These laws, according to Bush-Baskette (2000), removed the consideration of minor children dependent on the defendant and ignore the role the offender played in the crime.[134] Both bills authorized substantial increases in spending on criminal drug enforcement efforts, which led to an increasing amount of female drug arrests nationally, jumping by 95% between 1995 and 1996.[135]

The disparity for crack and powder cocaine was not corrected until 2010 under the Fair Sentencing Act.[136] The Fair Sentencing Act applies retroactively to crimes committed before it became effective but sentenced after the effective date.[137]

Despite declining crime rates, the Violent Crime Control and Law Enforcement Act of 1994 increased funding for police, jails, and prisons, enacted three-strikes sentencing at the federal level, and incentivized states to adopt "truth-in-sentencing" laws that required individuals to

[132] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. §§ 841-904 (2012)).
[133] 21 U.S.C. § 841(b)(1)(A)(ii)(II); 21 U.S.C. § 841(b)(1)(A)(iii).
[134] Stephanie Bush-Baskette, *The War on Drugs and the Incarceration of Mothers*, 30 J. DRUG ISSUES 919 (2000).
[135] Stephanie S. Covington & Barbara E. Bloom, *Gendered Justice: Women in the Criminal Justice System*, GENDERED JUSTICE: ADDRESSING FEMALE OFFENDERS 3 (2003).
[136] Pub. L. No. 111-220 (Aug. 3, 2010) (amending 21 U.S.C. § 841 et seq.).
[137] *Dorsey v. United States*, 567 U.S. 260 (2012).

serve at least 85% of their sentences.[138] Washington State adopted the first truth-in-sentencing law in 1984, prior to the federal legislation.[139]

In 2004 and 2005, two United States (U.S.) Supreme Court decisions ruled the federal sentencing guidelines were only advisory and not mandatory.[140] The U.S. Sentencing Commission found the guidelines had a stabilizing effect on sentences for some of the most frequently prosecuted federal offenses, including drug trafficking, immigration, and firearms offenses. For other offenses, though, variation became prominent. The Commission found regional and individual-judge variations. It also concluded personal demographics have become more strongly correlated with sentencing outcomes.[141]

In 2018, the First Step Act was signed into law with the stated goal of reducing the federal prison population.[142] The law makes the 2010 Fair Sentencing Act retroactive to individuals sentenced before its implementation, reduces mandatory minimum sentences for some drug offenses, and expands the courts' authority to sentence low-level, non-violent drug offenders below the mandatory minimum. The First Step Act requires the Attorney General to study recidivism, to place prisoners in recidivism-reducing programs, and to provide greater assistance upon reentry into the community. The law also expands the ability of individuals to reduce the time served through earning credits for good behavior and engaging in programming and allows a court to consider compassionate release upon a defendant's motion and in consideration of certain criteria. The ultimate effect of this legislation has yet to be seen; however, it sets forth only incremental and small improvements to the systemic issue of mass incarceration.[143]

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[138] Pub. L. No. 103-322.

[139] PAULA DITTON & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS: SPECIAL REPORT, TRUTH IN SENTENCING IN STATE PRISONS 16 (1999), https://bjs.ojp.gov/content/pub/pdf/tssp.pdf.

[140] *United States v. Blakely*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005).

[141] U.S. SENT'G COMM'N, 2012 REPORT TO THE CONGRESS: CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING (2016), https://www.ussc.gov/research/congressional-reports/2012-report-congress-continuing-impact-united-states-v-booker-federal-sentencing (last visited Oct 2, 2020).

[142] Pub. L. No. 115-391.

[143] SHON HOPWOOD, THE EFFORT TO REFORM THE FEDERAL CRIMINAL JUSTICE SYSTEM 27 (2019); Andrea James, *Ending the Incarceration of Women and Girls*, 128 YALE L.J. F. 772 (2019); Jesselyn McCurdy, *The First Step Is Actually the Next Step After Fifteen Years of Successful Reforms to the Federal Criminal Justice System*, 41 CARDOZO L. REV. 189 (2020).

VI. Sentencing Disparities Based on Gender, Race, Ethnicity, Age, and Other Factors

Gender and other biases (likely implicit) appear to play a role in sentencing because disparities exist even when controlling for factors such as seriousness of the offense and criminal history. Stereotypes are theorized to contribute to the disparity of treatment for men and women. According to the chivalry/paternalism theory, men, who dominate the criminal justice system, associate women with their mothers, sisters, wives, and daughters. As such, they are less likely to view some women as dangerous and blame-worthy, as women are often stereotyped as victims, and being nurturing and docile.[144] It is important to note that this stereotype of women as nurturing and docile is not universal. Evidence indicates that Black, Indigenous, and women and girls of color are perceived differently than white women and girls and depicted differently in media. For example, Black women are often depicted in the media as angry and deserving of harsh punishment, Latinx women as hypersexualized, and Middle Eastern women as extremists.[145] Women who conform to the "appropriate" gender role are most likely to be given preferential treatment whereas women who act in a manner outside of those roles are more likely to be punished.[146]

It is likely that both litigants who make sentencing arguments to the courts and judges who make the ultimate determination hold these biases that lead to the disparities. We explore the findings

[144] Natalie Goulette et al., *From Initial Appearance to Sentencing: Do Female Defendants Experience Disparate Treatment?*, 43 J. CRIM. JUST. 406 (2015); Barbara A. Koons-Witt, *The Effect of Gender on the Decision to Incarcerate Before and After the Introduction of Sentencing Guidelines*, 40 CRIMINOLOGY 297 (2002); Cortney A. Franklin & Noelle E. Fearn, *Gender, Race, and Formal Court Decision-Making Outcomes: Chivalry/Paternalism, Conflict Theory or Gender Conflict?*, 36 J. CRIM. JUST. 279 (2008).

[145] Danielle C. Slakoff, *The Representation of Women and Girls of Color in United States Crime News*, 14 SOCIO. COMPASS (2020). This literature review outlines the depiction of Black, Ingenious, and women of color in crime news, looking at depictions of both victims and offenders. Of note, the authors found that the depiction of Asian and Indigenous women in the media was under-researched. See "Chapter 9: Juvenile Justice and Gender and Race Disparities" for a further discussion of adultification and other stereotypes about girls of color.

[146] Goulette et al., *supra* note 144; Koons-Witt, *supra* note 144. Angela Davis posits an historical narrative where women have been treated more commonly as insane (and hospitalized) than as criminals (and incarcerated), but when found guilty of crimes, women historically have been treated as "irrevocably fallen," "with no possibility of salvation." ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? SEVEN STORIES PRESS, NEW YORK 65-70 (2003), https://www.feministes-radicales.org/wp-content/uploads/2010/11/Angela-Davis-Are_Prisons_Obsolete.pdf.

showing gender-based and other disparities first for Washington and then summarize national studies.

A. Washington State research: Sentencing disparities based on gender, race, ethnicity, and age

There are few substantive studies of sentencing disparities in Washington. An ACLU report using 1986 to 2017 Washington State Superior Court data provided by the Caseload Forecast Counsel indicates that Black, Indigenous, and people of color (in particular Black individuals and Native Americans) and young people are disproportionally sentenced to life and long sentences in Washington—indicating that disparities in sentence length in Washington do exist.[147] The report relies on sources finding Black defendants were more likely to be sentenced to death and Black felony defendants were 62% more likely to be sentenced to prison than similar white defendants. The report further notes courts levy higher fees and fines upon Latinx defendants than non-Latinx defendants.[148]

A report from the Washington State Institute for Public Policy that focuses on 2019 felony non-drug offenses shows defendants who are Black, Indigenous, and people of color on average, received longer sentences than white defendants.[149] The report also looks at mitigated sentences down (or alternative sentences) and aggravated or enhanced sentences that increase the term of incarceration. In both categories, white defendants fared the best. White defendants were more likely to receive mitigated, or reduced and alternative, sentences than their Asian,[150] Hispanic, Black, and American Indian and Alaska Native (AIAN) counterparts.[151] Moreover, when viewed as a percentage of the minimum sentence range, "White defendants, on average,

[147] BECKETT & EVANS, *supra* note 10.
[148] *Id.*
[149] LAUREN KNOTH, EXAMINING WASHINGTON STATE'S SENTENCING GUIDELINES: A REPORT FOR THE CRIMINAL SENTENCING TASK FORCE (DOCUMENT NUMBER 21-05-1901) 21 (2021), http://www.wsipp.wa.gov/ReportFile/1736/Wsipp_Examining-Washington-State-s-Sentencing-Guidelines-A-Report-for-the-Criminal-Sentencing-Task-Force_Report.pdf.
[150] Per personal communication with Caseload Forecast Council staff, they very rarely get Felony Judgment & Sentencing forms with "Pacific Islander" marked, raising the possibility that this group is being lost at data collection. To our knowledge, Native Hawaiian and Pacific Islanders are not included in the "Asian" category in Caseload Forecast Counsel Data, so we are using "Asian" here rather than "Asian/Pacific Islander" in contrast to the language used in the underlying WSIPP report.
[151] KNOTH, *supra* note 149, at 32, 32 (ex. 15), 39.

received a departure that was equal to 55.8 percent of the minimum sentence range while defendants who are Black, Indigenous and people of color, on average, received a departure that was only 49.7 percent of the minimum sentence range."[152] White defendants were also less likely to receive aggravated, or increased, sentences than their Asian, Hispanic, Black, and AIAN counterparts. Hispanic defendants received the next greatest proportion of mitigated sentences, but they also received the greatest proportion of aggravated or enhanced sentences. Asian defendants received the lowest percentage of reduced sentences.[153] Moreover, white defendants again received greater benefit, on average, even when they received an increased sentence. "White defendants, on average, received an aggravated departure that was 86 percent of the maximum sentence range while defendants who are Black, Indigenous and people of color, on average, received an aggravated departure that was 146 percent of the maximum sentence range.[154] While firearm and deadly weapon enhancements account for the majority of all sentencing enhancements, white defendants accounted for a substantially reduced percentage of these enhancements (45.2%) as compared to their distribution in all sentences (64%).[155] As discussed in the report, mitigated and enhanced or aggravated sentences reflect discretion of the prosecutor and/or judge, but the data does not allow us to discern which has the greatest impact on the racial disparities. Unfortunately, the report does not break the data down by gender. Further, it is based on data from the Caseload Forecast Council, which has significant limitations with regard to the race and ethnicity data. These data erase Native Hawaiian and other Pacific Islanders completely, and only capture individuals in the "Hispanic" category who had unknown marked for the race field or who had the race field left blank, suggesting that only a subset of the Hispanic/Latinx population are captured in the data. It is not clear how representative this subset of the population is of the larger Hispanic/Latinx population.[156] Moreover, the data reflects a limited portion of enhancements. As the report explains, "Only 2% of the sentences in our analytic dataset included a sentencing enhancement (314 sentences). The

[152] *Id.* at 33.
[153] *Id.* at 32, 43 (ex. 15).
[154] *Id.* at 33.
[155] *Id.* at 37.
[156] For a more detailed explanation of the limitations of Caseload Forecast Council race and ethnicity data, see TATIANA MASTERS ET AL., INCARCERATION OF WOMEN IN WASHINGTON STATE: MULTI-YEAR ANALYSIS OF FELONY DATA 5-8 (2020).

dataset included only four enhancements: firearm and deadly weapons, vehicular homicide with a prior DUI, sexual motivation, and endangering others while attempting to elude the police. Many of the other enhancements (e.g., protected zones) are more likely with drug offenses, which were excluded from the dataset for this report since our focus was on non-drug offenses." Despite its shortcomings, this report and the data it presents is very concerning.

The Washington Sentencing Guidelines Commission reached consensus that there is "[u]neven application of some [sentencing] enhancements" in Washington, resulting in disproportionate sentences for Black, Indigenous, and people of color. The Commission notes that although the SRA contains guidelines for prosecutors, the guidelines are advisory only. This creates disparities in application of the guidelines among county prosecutor offices, which, in line with national studies, tends to disproportionately affect racial and ethnic minorities.[157]

Only one study has analyzed the equity impacts of upward and downward departures in Washington State specifically. Notably, it is fairly outdated, covers only a three-year period, and does not look at intersectionality. Its findings are also surprising. In a study conducted by Engen and colleagues (2003) of felony sentences ordered by Superior Courts in Washington from 1989-1992 (N=46,552), the researchers found that there was a statistically significant relationship between race, ethnicity, gender, age, type of plea and downward (lesser) sentencing. During the study period, about 20% of eligible cases received a downward departure. This figure includes both discretionary departure provisions and structured sentencing alternatives, such as conversion of a sentence of one year or less, First-Time Offender Waiver, and Special Sex Offender Sentencing Alternative (SSOSA).[158] The fact that Engen's study included these alternatives sentences as downward departures contributes to the surprisingly large percentage of eligible cases the study found as receiving such departures. Downward departures from the sentencing range (or exceptional sentences below the range) accounted for only two percent of the sentences studied.

[157] SENT'G GUIDELINES COMM'N, *supra* note 6, at 11–12.

[158] Felony sentences as reported to the Washington State Sentencing Guidelines Commission. Engen et al., *supra* note 2.

Women were more likely than similarly situated men to receive a downward departure. The odds of a man receiving a downward departure were 46% less than the odds for a similarly situated woman. Again, this study does not look at the intersection of race, ethnicity, and gender to determine if this trend is true across all racial and ethnic groups (see below for discussion of the limited national literature that has looked at intersection of multiple identities). For defendants who were Black or Hispanic, the odds of receiving a downward departure were about 32% less and 55% less respectively than a non-Hispanic white defendant. The researchers also found that older defendants and those who pleaded guilty were more likely to receive a lesser sentence than the presumed guidelines.[159]

Only incarcerated individuals eligible for alternatives were considered in the analysis, meaning that the cases analyzed were less serious cases. This could indicate that judges choose not to use available sentencing alternatives when the defendant is already facing a very short sentence and that they are more likely to use an alternative sentence when the sentence would be great enough that an alternative would make a meaningful difference. This is an important consideration when interpreting this study, because it highlights an area the analysis did not explore—the sentence severity by subpopulation when comparing those receiving a downward departure to those who may have had a short sentence without a departure.[160]

Upward (harsher) sentencing in Washington State during the study period was very rare, occurring in only two percent of eligible cases. This finding seems quite low in light of the vast number of available upward enhancements and case law demonstrating upward departures can be applied in many ways but downward departures are quite restrictive.[161] It is also possible the data was accurate for the time studied but would be different if later time periods were studied, after amendments to the SRA provided increased opportunities for upward enhancements. For upward sentencing departures, Engen's study found gender did not have a statistically significant relationship. The odds of a Hispanic defendant receiving an upward sentencing departure were 45% higher than a white defendant while Black defendants were 35% less likely than white

[159] *Id.*
[160] *Id.*
[161] *See e.g.*, *State v. Law*, 154 Wn.2d 85, 110 P.3d 717 (2005).

defendants to receive a harsher sentence. The older defendants had a higher chance of receiving an upward sentencing departure while those who plead guilty were less likely to receive a harsher sentence.[162]

Because the study did not look at intersectionality, it is impossible to determine, for example, if Black, Indigenous, and women of color are receiving upward or downward departures differently than white women. It is important to note that this study was completely quantitative, it does not detail the reasons behind the sentencing departures, and it does not consider whether other stages in the criminal justice process contribute to the discrepancies found.

It would be beneficial to replicate this study, perhaps over a longer period, including both felony and misdemeanor crimes, and separating the sample's race and ethnicity by gender for analysis to allow for the identification of effects based on the intersection of race, ethnicity, and gender. It would also be useful to study where within the standard range, or outside the standard range, judges are sentencing criminal defendants of different races, ethnicities, and genders and upon what factors the judges are basing those decisions.

Study is also needed in the area of the effect of sentencing policy on gender. For example, limiting use of personal characteristics in determining exceptional sentences may harm women more than men. If female offenders are more often single parents than their male counterparts, if female offenders' crimes are more often derived from trauma or psychological conditions, a "neutral" sentencing policy like not considering personal characteristics might impact female offenders to a greater extent than their male counterparts.[163] These might be reasons to do away with the policy for all offenders. It might also show that women receive longer sentences than they should, even if those sentences are often shorter than those of men.

It would also be useful to study what evidence-based curricula and/or programs work for judicial and legal education on gender and race bias and implement mandatory training for the judiciary accompanied by benchcards to help reduce or remove entirely the impact of biases on sentencing.

[162] Engen et al., *supra* note 2.
[163] Nancy Gertner, *Women Offenders and the Sentencing Guidelines*, 14 YALE J.L. & FEMINISM 291 (2002).

B. Nationwide research: sentencing disparities based on gender, race, ethnicity, age and other factors

1. Gender disparities

No Washington study compares sentences across gender and within the female population intersectionally. This type of research would be particularly useful if it controlled for other points in the criminal justice process where disparities might arise. Nationwide literature looking at state and federal court data largely indicates that women are treated more leniently than males in sentencing. This is supported by women having lower odds of being incarcerated and being more likely than their male counterparts to receive probation versus incarceration. However, the evidence is mixed with regard to whether men or women are more likely to be sentenced to jail versus prison. Sentence length research is also mixed with some studies finding that women receive shorter sentences than men while other studies have found no difference in sentence length based on gender.[164]

There is limited research that looks specifically at exceptional sentences. Nationwide research using sentencing data from federal and state courts indicates that, historically, female defendants have been more likely to receive a downward departure, and receive larger downward departures, compared to male defendants.[165] These national male-female disparities align with the findings of the Washington study discussed above.[166]

For upward departures, the limited research suggests that women were historically less likely than males to receive an upward sentencing departure.[167] Because the existing research relies

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[164] Jill K. Doerner & Stephen Demuth, *Gender and Sentencing in the Federal Courts: Are Women Treated More Leniently?*, 25 CRIM. JUST. POL'Y REV. 242 (2014); Tina L. Freiburger & Alyssa M. Sheeran, *The Joint Effects of Race, Ethnicity, Gender, and Age on the Incarceration and Sentence Length Decisions*, 10 RACE & JUST. 203 (2020); Travis W. Franklin & Tri Keah S. Henry, *Racial Disparities in Federal Sentencing Outcomes: Clarifying the Role of Criminal History*, 66 CRIME & DELINQUENCY 3 (2020).

[165] David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & ECON. 285 (2001); Brian D. Johnson, *Contextual Disparities in Guidelines Departures: Courtroom Social Contexts, Guidelines Compliance, and Extralegal Disparities in Criminal Sentencing*, 43 CRIMINOLOGY 761 (2005); Jill K. Doerner & Stephen Demuth, *The Independent and Joint Effects of Race/Ethnicity, Gender, and Age on Sentencing Outcomes in U.S. Federal Courts*, 27 JUST. Q. 1 (2010); John H. Kramer & Jeffery T. Ulmer, *Downward Departures for Serious Violent Offenders: Local Court "Corrections" to Pennsylvania's Sentencing Guidelines*, 40 CRIMINOLOGY 897 (2002).

[166] Engen et al., *supra* note 2.

[167] Mustard, *supra* note 165; Johnson, *supra* note 165.

primarily on data collected nearly twenty years ago, when incarceration trends were different than current trends, it is unclear if these trends around exceptional sentencing are relevant today. In addition, most of the available research focuses on the effect of race, ethnicity, gender, socioeconomic position, and other factors on sentencing outcomes and length of sentences, but does not focus specifically on upward and downward sentencing departures.

Research on sentencing disparities that only includes findings on one demographic variable (e.g., gender or race) runs the risk of masking the nuanced disparities that may exist within a population. Well-conducted studies control for potential confounding factors (such as age, income, and education). This means that research focusing on one variable still provides meaningful information about how similarly situated individuals may experience different outcomes based on that one factor (e.g., race). For this reason, studies using these methods are included in the analysis below. However, it is important to note that there are limitations with research that does not fully explore the interactions of race, ethnicity, gender, income, education, criminal background, and other factors. It is also important to note that all of this research used a female/male binary variable for sex. This prevents us from understanding disparities for transgender, gender-nonbinary and other gender nonconforming individuals.

2. Racial and ethnic disparities

Hundreds of studies on racial and ethnic disparities in sentencing have been conducted in diverse and expansive contexts nationwide (e.g., jurisdictions with and without sentencing guidelines, federal and state courts, racially diverse and more homogeneous jurisdictions). A 2018 review of this body of evidence by Dr. Travis Franklin concluded that the research is "mixed, conflicting, and potentially inconclusive," with some studies finding that Black, Latinx, and Native American individuals were sentenced more harshly that their white counterparts, some studies finding no race effect on sentencing, and an occasional study finding harsher sentencing for white individuals than their non-white counterparts.[168]

[168] Travis W. Franklin, *The State of Race and Punishment in America: Is Justice Really Blind?*, 59 J. CRIM. JUST. 18–28, 21 (2018).

Very few studies have examined sentencing of Asian individuals and research on Native Hawaiian and other Pacific Islanders is notably lacking. The Franklin review article suggests that the body of evidence on Asian populations is more consistent than the evidence for Black or Latinx sentencing disparities, with the evidence largely suggesting that Asian individuals are treated similarly to, or perhaps even more leniently than white individuals. This greater consistency in the literature may be due to the small number of studies, and should be interpreted with caution. Even within this small, relatively consistent body of literature, some studies have found that Asian individuals are sentenced more harshly than their white counterparts in some situations. For example, one study in New York County found that for most offenses Asians were sentenced less harshly than whites, but among those with felony drug offense and offense against the person charges, Asian defendants were more likely to be sentenced to incarceration compared to similarly situated white defendants.[169]

Franklin concludes that this mixed evidence shows that Black, Latinx, Native American, and Asian individuals are punished more severely than similarly situated white offenders under at least some conditions. So while Black, Indigenous, and people of color are not *always* treated more harshly, they are also not always treated equally to their white counterparts.[170]

Franklin asserts that these mixed findings are actually expected given the lack of uniformity among courts which sit within unique communities and legal cultures. Some early analyses of the body of evidence suggest that harsher sentencing for Black individuals was more prevalent in studies conducted in southern courts than in non-southern courts. However, a proportion of studies in each geographic region found these inequities indicating that there is still work to be done in all regions.[171]

This body of literature summarized in the Franklin article, and the variation between federal and state courts and from region to region, makes it clear that nationwide sentencing research may not be largely generalizable to Washington State and that local research is essential to

[169] Franklin, *supra* note 168.
[170] *Id.*
[171] *Id.*

understand what is happening in in Washington and how to address any inequities that are identified

Since Franklin's review article was published in 2018, several new studies have been conducted to build on the body of literature. These new studies continue to indicate that, while there is still a lack of consensus in the literature, Black, Indigenous, and people of color are sentenced more harshly than their white counterparts. The new literature in this area attempts to uncover some of the nuance within the findings and suggests that several factors such as criminal history, severity of offense, offense type, and rural versus urban location interact with race, ethnicity, and/or gender in sentencing outcomes.[172]

Research exploring exceptional sentences by race and ethnicity found that white defendants were more likely to receive a downward departure (and receive larger downward departures) and less likely to receive upward departures compared to Black and Hispanic defendants.[173] One of the only studies to include Asian defendants, found that Asians were slightly less likely than white offenders to receive a downward sentencing departure.[174]

3. Disparities by age

The small body of evidence on age and sentencing departures is mixed, with some studies finding that older adults are more likely to receive upward departures and others finding the opposite effect with still other studies finding that age does not substantially predict upward departures.[175] As discussed above, the one study conducted in Washington found that older

[172] Peter S. Lehmann, *Race, Ethnicity, Crime Type, and the Sentencing of Violent Felony Offenders*, 66 CRIME & DELINQUENCY 770 (2020); Kareem L. Jordan & Rachel Bowman, *Interacting Race/Ethnicity and Legal Factors on Sentencing Decisions: A Test of the Liberation Hypothesis*, 0 CORRECTIONS 1 (2020); Peter S. Lehmann & Anna I. Gomez, *Split Sentencing in Florida: Race/Ethnicity, Gender, Age, and the Mitigation of Prison Sentence Length*, 46 AM. J. CRIM. JUST. 345 (2020). For example, at a "criminal history level of 1, Black offenders received sentences that were approximately 7.4% longer than white offenders. Moving up the criminal history scale, this differential became smaller and then disappeared at a criminal history level of 4. By a criminal history level of 6, the pattern of disparity reversed, such that Black offenders received sentences that were approximately 7.4% shorter than white offenders." Franklin & Henry, *supra* note 164, at 22.

[173] Mustard, *supra* note 165; Johnson, *supra* note 165; Brian D. Johnson & Sara Betsinger, *Punishing the "Model Minority": Asian-American Criminal Sentencing Outcomes in Federal District Courts*, 47 CRIMINOLOGY 1045 (2009); Doerner & Demuth, *supra* note 165.

[174] Johnson & Betsinger, *supra* note 173.

[175] Mustard, *supra* note 165; Johnson, *supra* note 165; Brian Iannacchione & Jeremy D. Ball, *The Effect of* Blakely v. Washington *on Upward Departures in a Sentencing Guideline State*, 24 J. CONTEMP. CRIM. JUST. 419 (2008).

defendants were more likely to receive both upward and downward departures.[176] The role of age in departure decisions becomes slightly more clear when considering how it interacts with gender and race or ethnicity, as will be discussed below. Again, there is a broader body of research looking at sentencing generally, but these studies do not indicate if the in/out decisions and sentence length are impacted by sentencing outside of the standard range. This broader body of sentencing research also suggests that looking at age without considering how it interacts with gender, race, and ethnicity is insufficient.[177]

4. Other factors that impact sentencing and the intersection of these factors

The literature indicates that when researching upward and downward departures specifically, or sentencing more broadly, it is important to consider additional factors such as income, education, and criminal background as well as how race, ethnicity, gender, and age interact with these factors. When considering these interactions, it becomes clear that simple analysis looking only at race and ethnicity or only at gender does not provide a full picture.

Now outdated research from federal courts suggests that those without high school diplomas, with low incomes, or without U.S. citizenship status, were less likely to receive downward departures than high school graduates, higher income individuals, and U.S. citizens respectively. In addition, those without a high school diploma were also more likely to receive an upward departure than their counterparts.[178] It is not clear if current or Washington State data would replicate these findings.

The more recent sentencing literature almost unanimously argues that it is essential to consider how different demographic, crime, and community factors interact in order to understand potential disparities. Unfortunately, only one study examined departures from the standard range for men and women by race and ethnicity. This study, using only data for violent offenders in Pennsylvania, found that young Black women were the most likely population to receive a

[176] Engen et al., *supra* note 2.
[177] Freiburger & Sheeran, *supra* note 164; Franklin, *supra* note 168.
[178] Mustard, *supra* note 165.

downward departure, while young Hispanic males were the least likely to receive a downward departure.[179]

Sentencing literature which looks at in/out decisions and sentencing length in federal and state courts (rather than departures from the standard range specifically) indicates young, Black or Hispanic men receive the harshest sentences among all subpopulations.[180] One study found that young, Hispanic men were the most likely to be sentenced to prison while young, Black men received the longest sentences. These racial and ethnic disparities, while not as pronounced as for men, also existed for women in the study. Young Hispanic women received sentences more similar to male defendants than to female defendants of other racial or ethnic populations. In sharp contrast to the harsher punishment given to Black men when compared to white men, Black women were treated similarly or arguably more leniently than white women in sentencing.[181]

Other research has found that the influence of race and ethnicity was also impacted by employment status, education, crime type, seriousness of offense, criminal history, and victim race and ethnicity. These findings highlight the importance of research that considers the interaction of many factors to better understand how bias is amplified for some populations. Recent studies suggest that Black and Latinx individuals face odds of incarceration that are between ten and 50% greater and sentence lengths that are three to ten percent longer than similarly situated white individuals—but that these magnitudes generally become even larger when including analysis by gender, age, employment status, education, etc.[182]

[179] Kramer & Ulmer, *supra* note 165.
[180] Franklin, *supra* note 168; Doerner & Demuth, *supra* note 165.
[181] Doerner & Demuth, *supra* note 165.
[182] Franklin, *supra* note 168.

VII. Bases Behind the Disparate Impact of Sentencing Changes Upon Black, Indigenous, and Communities of Color and Other Marginalized Communities

As discussed above, there is a large body of robust national findings highlighting that Black, Indigenous, and people of color are often not receiving equal treatment during sentencing. Potential reasons behind these disparities are discussed below.

Throughout the past 50 years, developments in sentencing laws and sentencing courts' discretionary decisions effected marked disproportionate sentences for individuals belonging to Black, Indigenous, and communities of color and other marginalized communities. The dramatic increase in disparity resulted from both laws and policies focused upon certain categories of crimes as well as the explicit and implicit biases of sentencing judges granted discretion, albeit limited discretion.

Research on the impact of the "tough on crime" policies provide robust empirical support that these policies resulted in the overrepresentation of people of color in the criminal justice system, with Black men composing the greatest percentage.[183] Overall, the "war on drugs" legislative changes and the get "tough on crime" movement have led to a large body of robust findings showing harsher sentencing for Black, Indigenous, and people of color compared to white individuals and of men compared to women.

Despite the goal of reducing disparities by adopting sentencing guidelines, as discussed in Sections III (Washington laws) and V (federal laws), studies of exceptional sentencing use have found that "judicial departures" from the guidelines have continued the trend of disparities

[183] JENNIFER BRONSON & E. ANN CARSON, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., PRISONERS IN 2017 (2019), https://www.bjs.gov/content/pub/pdf/p17.pdf; Zhen Zeng, *BJS Releases Jail Inmates in 2017*, POL. & GOV'T BUS. 230 (2019); Angela J Hattery & Earl Smith, *Families of Incarcerated African American Men: The Impact on Mothers and Children*, 7 J. PAN AFR. STUD. 128 (2014); Lisa Pasko, *Villain or Victim: Regional Variation and Ethnic Disparity in Federal Drug Offense Sentencing*, 13 CRIM. JUST. POL'Y REV. 307 (2002); Michael Rocque, *Racial Disparities in the Criminal Justice System and Perceptions of Legitimacy: A Theoretical Linkage*, 1 RACE & JUST. 292 (2011); Pauline K. Brennan & Cassia Spohn, *Race/Ethnicity and Sentencing Outcomes Among Drug Offenders in North Carolina*, 24 J. CONTEMP. CRIM. JUST. 371 (2008); Jelani Jefferson Exum, *Forget Sentencing Equality: Moving from the'Cracked'Cocaine Debate Toward Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 95 (2014).

based on gender and race.[184] One theory behind the continued disparities associated with the use of exceptional sentencing focuses on the court players, i.e., judge and prosecutor, who make the decision to deviate from the presumed guidelines.[185]

The purpose of a court-ordered sentence is to act as a deterrent, directly and/or indirectly, and to be an appropriate punishment for the violation of a law. Exceptional sentencing is utilized when the sentencing range may be inappropriate for a case judgment for multiple reasons. Referred to as bounded rationality, research shows judges consider three overall factors: blameworthiness or culpability, dangerousness and risk of future crime, and individual offender and organizational sentencing constraints.[186] However, the determination of these three overall factors is based on the judge's individual subjective determination of what is dangerous, their determination of who is responsible, and by the needs of the offender, community, and court. Therefore, every judicial decision/judgment is subjected to the biases and experiences of that judge and the needs and influences of the community that court is within, including during election time.[187]

To determine the influence of the community around the courts, one study conducted an analysis of the Pennsylvania departure decisions for both upward and downward departures. Using data from 1999 and 2000 obtained from the Pennsylvania Commission on Sentencing, as noted above, the study found that young offenders, male offenders, offenders of color, and offenders convicted at trial are less likely to receive downward departures and more likely to receive upward departures. The researcher also found that sentencing departures by courts varied depending on the community and the court size. The larger the court, the higher the rate of both

[184] Johnson, *supra* note 165; Paula Kautt, *Heuristic Influences Over Offense Seriousness Calculations: A Multilevel Investigation of Racial Disparity Under Sentencing Guidelines*, 11 PUNISHMENT & SOC'Y 191 (2009); Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 LAW & SOC'Y REV. 695 (2010).

[185] Alexes Harris, Heather Evans & Katherine Beckett, *Courtesy Stigma and Monetary Sanctions: Toward a Socio-Cultural Theory of Punishment*, 76 AM. SOCIO. REV. 234 (2011); Johnson, *supra* note 165.

[186] Johnson, *supra* note 165; Kareem L. Jordan & Tina L. Freiburger, *The Effect of Race/Ethnicity on Sentencing: Examining Sentence Type, Jail Length, and Prison Length*, 13 J. ETHNICITY CRIM. JUST. 179 (2015).

[187] Johnson, *supra* note 165; Harris, Evans & Beckett, *supra* note 185; Carlos Berdejó & Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 REV. ECON. & STAT. 741 (2012); Kramer & Ulmer, *supra* note 165; Jeffery T. Ulmer & Brian Johnson, *Sentencing in Context: A Multilevel Analysis*, 42 CRIMINOLOGY 137 (2004); Rocque, *supra* note 183; Murakawa & Beckett, *supra* note 184; Chester L. Britt, *Social Context and Racial Disparities in Punishment Decisions*, 17 JUST. Q. 707 (2000).

upward and downward departures.[188] The findings also found modest support for a social trend theorized by other scholars that may be contributing to exceptional sentencing disparities: fear of the racial group threat based on stereotypes.[189]

One theory for the judicial decision-making process that has resulted in the increased likelihood of upward departures for people of color, especially Black populations, is the racial group threat theory. Racial group threat theory argues that the racialized social systems contribute to the racial disparity to contain the "threat" of racial groups to those in position and power.[190] The "threat" is reinforced by stereotypes, like criminality among people of color, which invokes fear and will often influence the thoughts and actions of people, like judges. Consciously or subconsciously, racial stereotypes influence the decision-making. A prime example is the determination of what makes someone more dangerous compared to another when they committed similar acts. Thus, the racial disparity is reinforced through policies and practices that are explicitly colorblind.[191]

In a study of judicial interviews conducted with criminal justice decisionmakers from three counties within Washington State in combination with three years of felony drug offense data, Steen and colleagues (2005) tested the impact of racial stereotypes on sentencing decisions. They found that offenders being the most like the perceived stereotypes of a dangerous drug offender ("being male, possessing a lengthy criminal history, and being convicted of a drug delivery offense [specifically delivery of heroin, cocaine or methamphetamine]") received less leniency regardless of race. However, race did impact the determination of stereotype.[192] The likelihood of incarceration was high for both white and Black offenders who fit the stereotype of a dangerous drug offender; however, among those who did not fully fit this stereotype (e.g., non-dealers with

[188] Johnson, *supra* note 165.
[189] *Id.*; Ulmer & Johnson, *supra* note 187; Sara Steen, Rodney L. Engen & Randy R. Gainey, *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing*, 43 CRIMINOLOGY 435 (2005).
[190] Ulmer & Johnson, *supra* note 187; Ben Feldmeyer & Jeffery T. Ulmer, *Racial/Ethnic Threat and Federal Sentencing*, 48 J. RSCH. CRIME & DELINQUENCY 238 (2011); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012).
[191] Traci Schlesinger, *The Failure of Race Neutral Policies: How Mandatory Terms and Sentencing Enhancements Contribute to Mass Racialized Incarceration*, 57 CRIME & DELINQUENCY 56–81 (2008); Ulmer & Johnson, *supra* note 187; Feldmeyer & Ulmer, *supra* note 187; Jordan & Freiburger, *supra* note 186; Steen, Engen & Gainey, *supra* note 189; ALEXANDER, *supra* note 190.
[192] Steen, Engen & Gainey, *supra* note 189, at 441.

no priors) white offenders were less likely to be incarcerated than their Black counterparts. The authors argue that this is a result of: 1) decision-makers being more likely to define low-level Black offenders as a threat compared to similarly situated white offenders; and 2) the greater judicial discretion allowed by sentencing guidelines for low-level offenders. They argue that racial stereotypes cause decision-makers to rectify slight deviations from the stereotype of a dangerous drug offender for Black individuals, and adjust all but the least threatening individuals upward to fit the stereotype. The only Black individuals who seemed to avoid this upward adjustment to fit the stereotype were female nondealers and male nondealers with no priors.[193]

Brennan (2006) examines predictors of sentencing for typical female offenders. She finds that Black and Hispanic females were more likely to receive jail sentences than their white counterparts, but that this was a result of differences in socioeconomic status, community ties, prior record, earlier case processing, and charge severity rather than directly as a result of race or ethnicity.

VIII. Recommendations

- To decrease disparities in sentencing, study what evidence-based programs work to educate the judiciary, the bar, and court partners on how to identify and avoid gender and race bias. Based on the results, the education programs, bench cards, and other resources that have proven to be effective should be continued, expanded, and made mandatory.
- For policy-makers: Consider legislation amending RCW 9.94A.535(1) to recognize that primary caregiving constitutes a mitigating sentencing factor. It is a mitigating factor because family structures can provide support to rehabilitating offenders; courts should therefore be able to consider the role of the offender within their family when determining sentences. Failing to recognize 'primary caregiving' as a mitigating factor also adversely impacts those who generally carry the burden of caregiving, that is,

[193] Steen, Engen & Gainey, *supra* note 189.

predominately women and families without resources. This should be done in the next two years or as soon as possible.

- For policy-makers: To reduce the disproportionate effect of mass incarceration and lengthy sentencing regimes, consider enacting legislation, such as HB 1282 which was considered in the 2021 regular session, to make all incarcerated individuals eligible for earned early release time at the rate of 33% or higher for all sentences and enhancements.
- Adopt the recommendation described in "Chapter 11: Incarcerated Women in Washington," which recommends considering legislation to retroactively account for trauma-based criminalization and incarceration.