V. 2021 Gender Justice Study Terminology, Methods, and Limitations

A. Terminology

1. Race and Ethnicity

There are significant limitations to terms used to discuss race and ethnicity. Race and ethnicity terms are socially constructed and each term comes with unique limitations.[1] Looking at the terms Hispanic, Latinx, and Latina/o as an example highlights this complexity. "Hispanic" is rooted in a history of Spanish "colonialism, slavery, [and] genocide . . . across the Americas."[2] The term "Latinx" is used by a wide range of individuals and organizations in place of Latina/o as a more inclusive, gender-neutral term[3] However, in 2019 the Pew Research Center found that only three percent of survey respondents who identified as Hispanic or Latino reported using the term "Latinx" to describe themselves.[4] This Pew survey highlights that there is not consensus around the best term(s) to use. In addition, there are significant limitations of terms that have been used as identifiers for so many different aspects of one's identity such as race, ethnicity, shared Spanish colonial histories, fluency in the Spanish language, and geographic ancestry.[5]

Terms used to describe and categorize Indigenous populations are also riddled with limitations and problems. The Urban Indian Health Institute, in its report titled MMIWG: WE DEMAND MORE, indicates that they "use the terms Native, Native American, and American Indian/Alaska Native interchangeably in [their] report to acknowledge the varying ways that North American

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[1] Carlos E. Santos. *The History, Struggles, and Potential of the Term Latinx*, 4 LATINA/O PSYCH. TODAY 7 (2017).

[2] Robyn Schelenz & Nicole Freeling, *What's in a Name? How the Concepts of Hispanic and Latino Identity Emerged*, UNIV. OF CAL. NEWSROOM (Oct. 10, 2019), https://www.universityofcalifornia.edu/news/whats-in-a-name-how-concepts-hispanic-and-latino-identity-emerged.

[3] Santos, *supra* note 1, at 11.

[4] Luis Noe-Bustamante, Lauren Mora & Mark Hugo Lopez, *About One-in-Four U.S. Hispanics Have Heard of Latinx, but Just 3% Use It*, Pew Rsch. Ctr. (Aug. 11, 2020), https://www.pewresearch.org/hispanic/2020/08/11/about-one-in-four-u-s-hispanics-have-heard-of-latinx-but-just-3-use-it.

[5] Santos, *supra* note 1, at 11.

Indigenous peoples are forced to identify within the American racial structure and English language."[6]

There are also significant data limitations for Asian and Native Hawaiian and other Pacific Islander populations in most datasets and research. These are discussed in more detail in the section on data limitations, but deficiencies in the underlying data often make it challenging to identify the best terminology to use for these populations. For example, research and datasets often do not clearly describe how Native Hawaiian and Other Pacific Islanders were coded in the dataset, making it challenging to ensure we were using language in this study that best describes the actual underlying data.

This study also acknowledges that race is a social construct and recognizes the limitations of both the terminology coded into datasets and used in research, and the race and ethnicity data that this report relies upon. Often reports, research articles, and datasets cited here do not describe if race or other demographic information was self-reported or, if so, what options individuals were given. This report generally uses the terminology that was used by the authors of the underlying source to avoid the risk of inadvertently misrepresenting the underlying research findings. For example, if a study participant self-identified as Hispanic, this is the term used when discussing that research in this report. While this approach preserves the underlying research and data most closely, it also creates an inconsistent use of race and ethnicity terminology throughout this report.

2. Sex and Gender Identity

The underlying datasets and research often use only binary gender options, do not clarify how transgender individuals were coded, or fail to differentiate between gender identity and sex.[7] These limitations are discussed in more detail in the data limitations section. From a terminology

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[6] ABIGAIL ECHO-HAWK, ADRIAN DOMINGUEZ & LAEL ECHO-HAWK, MMIWG: WE DEMAND MORE 4 (2019), https://www.uihi.org/resources/mmiwg-we-demand-more.

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

perspective, this makes it challenging to determine the best terms to use when discussing the research and underlying data. For example, most prison and jail datasets use a female/male binary. This fails to account for anyone who is intersex, nonbinary, or otherwise does not identify as female or male. In addition, Washington State anecdotes and research indicate that incarcerated individuals are often housed based on their sex assigned at birth rather than their gender identity.[8] This means that the female and male coding for these datasets actually represents "individuals incarcerated in female facilities" and "individuals incarcerated in male facilities" regardless of their true gender identity. The authors have tried to be thoughtful and accurate throughout this report by critically examining how the sex or gender identity data was collected, and the deficiencies in that dataset in order to use the most accurate terms throughout.

3. Sexual Orientation

Underlying research and datasets are also not always clear on how data on sexual orientation has been collected or coded. Some researchers have collected these data with discrete self-identified response options (e.g., heterosexual, lesbian, gay, or bisexual) while other researchers have collected data using questions about attraction or behaviors, then used these data to code people as heterosexual or non-heterosexual. Research and reports will often also conflate gender identity and sexual orientation, or combine the analysis for "sexual and gender minorities." Throughout this report the authors have been careful to accurately describe the population included in the underlying research and data and to disentangle, when possible, the findings based on sexual orientation and those based on gender identity. The authors also tried to understand the complex intersection of gender identity, sexual orientation, and other factors in

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

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the rare cases where the data allowed. In cases where the underlying data and sources present combined information for lesbian, gay, bisexual, and transgender populations, or when the report is talking about a body of literature that address both sexual orientation and gender identity, the term LGBTQ+ is used for consistency. The use of this term is meant to be inclusive of individuals who identify as Two-Spirit, Intersex, Asexual, etc.

4. Other Terminology

There are other terms used in the report where there is a lack of consensus about the best term to use (e.g., using "survivor" or "victim" in cases of domestic or sexual violence). In these instances, we have tried to note the limitations of the terms being used within the relevant chapters.

B. Methods

1. Combining Various Types of Expertise

A study of this type requires analysis of statutes, court rules, case law, internal policies and procedures, anecdotal evidence, social science research, and primary datasets. For this reason, we conducted the study through extensive collaboration between legal professionals, social science researchers, and people with lived experience working in or navigating the court and justice systems. We fostered this cross-sector collaboration in three primary ways:

1) Creating small teams for each chapter of the report that included at least one legal expert and at least one social science researcher. These experts worked together to write a first draft of the report, merging the analysis of the legal framework with the analysis of the social science evidence and data.

2) Seeking consistent feedback and guidance throughout the research and writing from members of the Gender and Justice Commission (see membership above) and the Gender Justice Study Advisory Committee (see membership above).

3) Broadly circulating drafts of the sections to individuals and organizations with diverse perspectives and relationships with the court and justice systems, meeting with these experts, and integrating feedback from these experts.

2. Inclusion Criteria for Research and Data

We applied flexible inclusion criteria when conducing literature reviews (see Appendix A). The reviews were traditional narrative literature reviews that sought to provide an accurate and unbiased representation of the body of literature on a topic. These were not systematic reviews, which would have required strict inclusion and exclusion criteria, identical search terms across all members of the study team, and documentation of the number of abstracts and articles reviewed and included or excluded. Traditional narrative literature reviews were more appropriate for the goals of this study, which aims to present the literature on numerous parts of the justice system, and the complicated and nuanced interactions between the various parts.

We conducted the literature reviews and legal research between April 2019 and May 2021, and each chapter was researched at different times within that window. Once the literature reviews and legal analyses were completed, we attempted to add any new research, data, case law, and statutory changes that became available between the completion date for that chapter and June of 2021. However, we did not conduct formal supplemental literature reviews or legal research for each chapter once the initial literature review for that chapter was completed. It is possible that some new research or changes to the legal framework were not captured.

C. Limitations

1. Lack of Washington Specific Data and Data That Looks at Gender or the Intersection of Gender with Race, Ethnicity, Income, or Other Factors

One goal of the report was to analyze Washington State specific data, research, and legal frameworks to identify gender inequities in the court and justice systems. Another goal was to study whether (and if so, how) those inequities were amplified for people who are also subjected to poverty, racism, homophobia, ableism, and other forms of discrimination. Our work was often limited by a lack of Washington (and sometimes national) data and research that analyzes data by gender. Looking at how gender and race, sexual orientation, income, and other factors interact was even more challenging due to insufficiencies in the data. There is a pressing need to:

1) Collect more data, and data that is high-quality;

2) Collect data that goes beyond the male/female gender binary, and that captures sexual orientation, income and granular race and ethnicity; and

3) Generate reports and data fact cards for existing datasets that look at how different demographic factors interact or amplify inequities.

2. Limitations of Existing Datasets

A major limitation of this study is that it relies on research and data that are imperfect. This is particularly true for demographic information such as data on sex, gender, race, and ethnicity. As noted above, the datasets and research often use only binary gender options, do not clarify how transgender individuals are being coded, or fail to differentiate between gender identity and sex. This limitation in the data makes it difficult to understand the experiences and potential disparities impacting transgender and gender non-binary individuals. In addition, this suggests a high likelihood of gender-misclassification within the data where these populations are likely to go uncounted or be inaccurately classified. With regard to data related to incarceration specifically, individuals are likely misclassified in incarceration-related data included in this report if they are housed in facilities based on their sex assigned at birth rather than their gender identity.

Race and ethnicity data is also limited by several factors. It is often unclear if an individual's race and ethnicity was self-identified or based on the assumptions of an observer. Anecdotal evidence suggests that race or ethnicity data that is not self-identified is much less accurate in correctly identifying some populations compared to others. This indicates that data which is not self-identified is inaccurate, but also that the inaccuracies are not consistent across all racial or ethnic groups.[9] Even when an individual is given the opportunity to self-identify their race and ethnicity, the categories from which they must choose may lack granularity or have other limitations. Data collected with insufficient granularity can mask disparities. For example, when datasets combine

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[9] One researcher shared her experience cross-checking race and ethnicity healthcare data by calling respondents and asking them to self-identify their race. The researcher found that the rate of the data matching the self-identified responses "was high for 'White' and 'Black' (the rate was 97 and 96 percent, respectively). Only 52 percent of Asian, 33 percent of Hispanic or Latino, and 33 percent of American Indian or Alaska Native beneficiaries were correctly identified." Heather Krause, *What To Do When You Can't Pick The Data*, We All Count (Jan. 22, 2021), https://weallcount.com/2021/01/22/what-to-do-when-you-cant-pick-the-data.

the very diverse populations of Asian and Native Hawaiian or Other Pacific Islanders into one category, it overgeneralizes the data and often hides disparities experienced by some populations within that category. This poses problems, because data for many Native Hawaiian and Other Pacific Islander populations indicates that these populations suffer clear disparities in education and other arenas – more than other populations included in the usual "Asian Pacific Islander" category.[10] This is also true for recent African immigrant and other immigrant populations whose unique outcomes and needs are masked through data aggregation.[11] In addition, there is a lack of consistency and consensus in how to code and analyze race and ethnicity data, leading to these variables sometimes being handled separately and other times being merged into one race/ethnicity variable. This makes it difficult to compare numbers across multiple datasets. In addition, some methods can inflate or deflate numbers for certain populations, particularly Latinx populations.[12]

Many populations are almost completely erased from the data through imperfect data collection. For example, people who identify as more than one race are often coded as "multiracial." The multiracial category can be valuable, because it is important to identify disparities for populations who identify as two or more races. But the multiracial category can also be misleading and artificially deflate the numbers for other racial categories. This occurred with the 2010 Census data: it indicates that high number of Indigenous, Black, and Asian populations were likely to identify with more than one race;[13] so Indigenous individuals might identify as Black or Asian and

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[10] *Asian Americans and Pacific Islanders in Washington State*, WASH. STATE COMM'N ON ASIAN PAC. AM. AFFS. (2019), https://capaa.wa.gov/resources; SHIRLEY HUNE & DAVID T. TAKEUCHI D, ASIAN AMERICANS IN WASHINGTON STATE: CLOSING THEIR HIDDEN ACHIEVEMENT GAPS (2009), https://www.digitalarchives.wa.gov/GovernorGregoire/oeo/educators/asian_american_ach_gap_report.pdf; Samuel D. Museus & Peter N. Kiang, *Deconstructing the Model Minority Myth and How it Contributes to the Invisible Minority Reality in Higher Education Research*, 142 NEW DIRECTIONS FOR INSTITUTIONAL RSCH., 5 (2009); Robert T. Teranishi, *Asian American and Pacific Islander Students and the Institutions That Serve Them*, 44 CHANGE: MAG. HIGHER LEARNING, 16 (2012).

[11] Randy Capps & Michael Fix, *Sensitive Subjects: Research Choices and Presentational Challenges in Studying Immigrant Children and Families*, 141 NEW DIRECTIONS FOR CHILD & ADOLESCENT DEV. 79 (2013).

[12] *See, e.g.*, TATIANA MASTERS ET AL., INCARCERATION OF WOMEN IN WASHINGTON STATE: MULTI-YEAR ANALYSIS OF FELONY DATA (2020).

[13] *2010 Census Shows Multiple-Race Population Grew Faster Than Single-Race Population*, U.S. CENSUS BUREAU (Sept. 27, 2012), https://www.census.gov/newsroom/releases/archives/race/cb12-182.html.

be coded as multiracial; the result is that they are not accounted for in the datapoints for Indigenous populations, thereby deflating those numbers.

3. Highlighting Disparities Can Perpetuate Stereotypes

Learning about extreme disparities can cause people to become more, rather than less, supportive of policies that create and enforce those disparities, driving people to support harsher criminal-justice policies based in racial bias.[14,15] In the case of the justice system, the discussion of racial disparities can often trigger negative stereotypical associations with Black, Indigenous, and other people of color.[16] Without personal experience with racial inequality, people may understand disparities differently. Some interpret extreme disparities in the justice system to be a result of systemic racial bias, while others attribute the disparities to the incorrect belief that some racial groups are more prone to engage in criminal activity.[17] In that way, revealing disparities in the justice system might ingrain bias, even though the bias results from racism and sexism. For example, witnessing multiple police encounters with a particular race may cause someone to conclude that a group has inherently higher crime rates, rather than realizing certain groups are targeted by police[18]

But it is inaccurate to attribute such disparities to actual differences in criminality by race. The disproportionality of Black, Indigenous, and people of color represented in the criminal justice system is startling, and the way these disparities are discussed is critical. In any discussion of inequity, it is important to avoid contributing to bias.

The 2021 Gender Justice Study presents extensive data on disparities in the justice system based on race, gender, sexual orientation, and other factors. It is essential that readers of this report understand that these inequities are a result of historical and current, institutional and individual,

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[14] Rebecca C. Hetey & Jennifer L. Eberhardt, *The Numbers Don't Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System*, 27 Current Directions Psych. Sci. 183 (2018).
[15] Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 Psych. Sci. 1949 (2014).
[16] Hetey & Eberhardt, *supra* note 14.
[17] *Id.*
[18] Yuan Meng & Fei Xu, *How Do Disparities Reproduce Themselves? "Ground Truth" Inference from Utility-Maximizing Agent's Sampling Behavior*, CogSci 903 (2020).

and implicit and explicit bias and discrimination in the system. There is no evidence to support that these disparities are a result of different rates of criminality.

4. The impact of COVID-19 and other resource limitations

The Gender and Justice Commission began the work of scoping and planning for the 2021 Gender Justice Study in 2016. When much of the content of this report had already been drafted, the COVID-19 pandemic hit in early 2020. The study authors acknowledge that this event impacted every aspect of life, including the justice system. Data clearly shows that the pandemic has disproportionally impacted historically marginalized communities such as Black, Indigenous, and communities of color with higher rates of infection, higher COVID-related hospitalizations and deaths,[19] and harsher financial impacts.[20] It has also impacted Asian communities, in particular, with increased violent hate crimes. The data also shows that women have disproportionally shouldered the increased childcare responsibilities resulting from school and childcare closures,[21] and have left the workforce at incredibly high rates.[22]

The data on the impacts of COVID-19 is still developing since the pandemic is ongoing. In addition, the Gender and Justice Commission did not have the resources to expand the scope of this

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[19] *COVID-19 Data Dashboard*, Wash. State Dep't of Health, https://perma.cc/F7FT-CS2Y (last accessed May 28, 2021); *The COVID Racial Data Tracker*, The Atlantic, https://perma.cc/4MFG-CV6W (last accessed May 31, 2021); *COVID-19: Health Equity Considerations and Racial and Ethnic Minority Groups*, Ctrs. for Disease Control & Prevention, https://perma.cc/Q6M9-75TT (last accessed May 31, 2021); *COVID-19 Hospitalization and Death by Race/Ethnicity*, Ctrs. for Disease Control & Prevention, https://perma.cc/9TNQ-TS9E, (updated May 26, 2021); *see also* Gina Kolata, *Social Inequities Explain Racial Gaps in Pandemic, Studies Find*, N.Y. Times (Dec. 9, 2020), https://www.nytimes.com/2020/12/09/health/coronavirus-black-hispanic.html.

[20] *Quick Figures: Dramatic Decline in Employment Hits Women Even More Severely Than Men*, Inst. for Women's Pol'y Rsch. (2020), https://iwpr.org/wp-content/uploads/2020/05/QF-Breadwinner-Mothers-by-Race-FINAL.pdf.

[21] Dalvin Brown, *Women Take on a Greater Share of Parenting Responsibilities Under Stay-at-Home Orders*, USA Today (May 8, 2020), https://www.usatoday.com/story/money/2020/05/08/women-take-on-more-their-kids-remote-learning-responsibilities/5178659002; Daniel Carlson, Richard Petts & Joanna Pepin, *Changes in Parents' Domestic Labor During the COVID-19 Pandemic*, SocArXiv (May 6, 2020), https://osf.io/preprints/socarxiv/jy8fn; Titan Alon et al., *The Impact of COVID-19 on Gender Equality*, 4 Covid Economics 62 (2020), https://cepr.org/file/9014/download?token=S-8mCQli; Gema Zamarro & Maria J. Prados, *Gender Differences in Couples' Division of Childcare, Work, and Mental Health During COVID-19*, CESR-Schaeffer Working Paper Series 1 (2020), https://cesr.usc.edu/documents/WP_2020_003.pdf.

[22] *Labor Force Statistics from the Current Population Survey, Household Data Seasonally Adjusted: A-3. Employment Status of the Civilian Noninstitutional Population by Sex and Age, Seasonally Adjusted*, U.S. Bureau of Lab. Stat. (July 2, 2021), https://www.bls.gov/web/empsit/cpseea03.htm; Inst. for Women's Pol'y Rsch., Quick Figures: Dramatic Decline in Employment Hits Women Even More Severely Than Men (2020), https://iwpr.org/wp-content/uploads/2020/05/QF-Breadwinner-Mothers-by-Race-FINAL.pdf; Zamarro & Prados, *supra* note 21, at 1.

current study to include a comprehensive analysis of the impacts of COVID-19 on gender disparities in the court and carceral systems in Washington. However, the authors did try to highlight relevant equity impacts of the pandemic for each substantive area of study. These findings are weaved throughout the report in the relevant chapters. Current efforts, such as the work being done by the Board for Judicial Administration's Court Recovery Task Force, and future studies to more comprehensively assess the impacts of COVID-19 on the justice system and on equity, are essential. The pandemic has created unique scenarios that will allow for research that were previously unavailable, such as studying the impacts of decreasing the prison, jail, and juvenile detention populations, or studying how remote court proceedings have impacted equitable access to the courts, court-ordered programs, and outcomes in court. The Gender and Justice Commission supports rigorous research on the impacts of COVID-19 with the goal of informing the development of evidence-based policies and procedures that promote equitable access to justice.

As with any project, we were limited by time and resource constraints. While this report covers multiple topics with significant detail, we also had to scope out important research questions. For example, some important aspects of the justice system that merit focus in future studies on gender inequities include comprehensive analyses of: 1) policing, 2) dependency, 3) immigration status barriers, 4) barriers due to the intersection of age and gender, 5) veteran status barriers, and 6) the impacts of COVID-19 on court access and incarcerated populations.