

# I. 2021: How Gender and Race Affect Justice Now

The main job of the courts is to resolve disputes – and to resolve them peacefully, fairly, and in accordance with the law and with justice. When we are at our best, we accomplish that by providing a fair and open forum, using neutral rules of procedure and equal application of the law, while ensuring respectful treatment of all participants.

But our courts have not always been at our best.

## Early History of Gender Bias in Washington

Beginning with Washington’s statehood, our law officially excluded women, Black people, Native Americans, and others from full participation in the courts. The same was true across the United States: women, Black people, Native Americans, naturalized immigrants from China, and others, were all officially excluded from full participation in the court system. This exclusion was clear from laws as varied as those that excluded these groups from jury service, to laws that refused to provide a legal remedy for harms – such as rape – to some of these groups. Even after official, legally sanctioned, exclusion ended, it remained the rule in practice. For example, although Congress passed “woman’s suffrage” in 1919, it left out a lot of women: Black people including women, were still barred from full participation by slavery’s legacy and Jim Crow laws; Native Americans including women, Chinese Americans including women, Japanese Americans during World War II including women, were all barred from full participation by both official laws and exclusionary practices. And the list of excluded groups goes on. In other words, historically, courts were biased against women; the bias was not always as apparent for white women; but it was very apparent for Black, Indigenous, and women of color.

## The 1989 Study of Gender Bias in the Judicial System in Washington

So in 1989, Washington’s predecessor to the Gender and Justice Commission conducted a study of how our courts were progressing on the historical exclusion and devaluation of women. That study was one of the first of its kind in the nation, and it offered a model for other jurisdictions to follow. The Washington State Legislature funded that study, and scores of volunteers from lawyers, judges, and academics, to legislators, statisticians and justice system partners,

researched the status of women in Washington’s courts. On the substantive law side, those researchers clearly heard the voices of women who had suffered from the courts’ treatment of domestic violence and rape; of women who had received unjust decisions in family law matters including child support, maintenance, property division, and child custody cases; and from women who felt they were denied full recovery of damages and fees in discrimination cases. On the procedural side, those researchers heard the voices of women whose credibility and dignity were insulted when they came to court as litigants, experts, witnesses, or legal professionals. As a result, that study focused on those “gendered” areas of the law. The study concluded that the courts were biased against women in those areas and concluded with recommendations for change. The Supreme Court established a permanent Gender and Justice Commission to continue this important work.

More than 30 years have passed. As then-Chief Justice Madsen said when she passed the torch of leadership of our Commission on to Justice Gordon McCloud and Judge Paja, it’s time to reassess.

### This 2021 Study of Gender Bias in the Judicial System in Washington, and Our Focus on Race

We still hear those same voices. But now we also hear additional voices. For example, we hear the voices of missing and murdered Indigenous women and people; we hear the voices of domestic violence victims who have difficulty getting legal help, navigating the court system, and waiving legal fees; we hear the voices of those burdened with legal financial obligations and years of compounded interest from long past criminal matters, especially voices from the families of Indigenous, Black, and other people of color who bear a disproportionate burden of those obligations; we hear the voices of those remaining in prison due to increased convictions and harsher sentencing laws; and we hear voices from the LGBTQ+ community. So when we reassessed, we addressed not just whether the clearly “gendered” laws, but also whether other “non-gendered” laws – such as those concerning access to the courts, navigating the court system, user fees, legal financial obligations, bail, trials, and sentencings – nevertheless had a gendered impact.

This report is a data-based study of those questions, focusing on the 30 years since our last report. Once again, we are pathbreakers: this is one of the first such follow up studies in the nation. Once again, we benefitted from the work of hundreds of lawyers, judges, law students, social scientists, and community groups, and we came to terms with critical review by experts from multiple disciplines and all branches of government. We heard from stakeholders on terminology choices. We struggled with research showing that highlighting disparities in the justice system can unintentionally emphasize stereotypes rather than disrupt them. We acknowledged the significant overlap among the study topics, and concluded that someone navigating the justice system most likely experiences those overlaps as compounded barriers to justice. And of course, in the middle of our research, pilot projects, and writing, the COVID-19 pandemic hit in early 2020. The data on the impacts of COVID-19 is still developing, but it is already clear that this event impacted every aspect of life, including the justice system. You can read more about our processes in Section V.

Once again, we sought the best data possible to capture this moment in time. Here's what the data tells us – and what it doesn't tell us.

### **The Data Shows That Gender Impacts Outcomes in Washington Courts – and That Impact Is Most Clear for Black, Indigenous, and Other People of Color**

Some themes arise from multiple sections. First, the data shows that there have been several major changes for the better over the last 30 years. The Washington State Legislature has changed laws concerning domestic violence, commercial sexual exploitation, and marriage dissolutions; the people have changed the law on marriage equality; prosecutors' offices have changed their approach to domestic violence and sexual assault; judicial education on gender and race bias has dramatically increased, and rules for lawyers and judges about treating women and other populations with respect have been adopted; and the diversity of the bench has grown.

But other gender-based disparities remain or have increased. And these gender disparities have their harshest impacts on Black, Indigenous, and other people of color, as well as members of the LGBTQ+ community.

This is a brief summary of some of our key factual findings:

## Gender, The Legal Community, and Barriers to Accessing the Courts

- The costs of accessing Washington courts—such as user fees, childcare, and lawyers—create barriers. This has the greatest impact on single mothers; Black, Indigenous, and women of color; LGBTQ+ people; and those with disabilities.
- Lack of affordable childcare limits the ability of low-income women to get to court, underscoring the need for flexible court schedules and online access to court.
- Lack of court interpreters and translated materials disadvantages people with distinct communication needs. This is a particular concern for those seeking protection from domestic violence, including immigrant women and families.
- Black, Indigenous, and women of color are not well represented in jury pools. Higher juror pay and research on challenges for female jurors are needed.
- Women, particularly Black, Indigenous, and other women of color, continue to face bias and pay disparities in the legal profession. Women and men of color are also underrepresented in judicial and law firm leadership positions.

## Gender, Civil Justice and the Courts

- The highest rates of workplace discrimination and harassment affect Black, Indigenous, and women of color; women doing farm work, domestic labor, and hospitality work; people with disabilities; and LGBTQ+ workers.
- Those most impacted by workplace discrimination and harassment have difficulty reporting incidents and finding lawyers. They may receive unequal court outcomes by gender, race, and ethnicity.
- A 2021 workplace survey of employees in Washington courts, superior court clerks' offices, and judicial branch agencies found that employees who identified as American Indian, Alaska Native, First Nations, or other Indigenous Group Member (86%), bisexual (84%), gay or lesbian (73%), and women (62%) reported the highest rates of harassment.
- Current practices for valuing life for wrongful death and other tort claims devalue the

lives of women and Black, Indigenous, and people of color.

- Data suggests that gender and other biases in family law proceedings can impact custody, child support, and maintenance decisions.

## Gender, Violence, Youth and Exploitation

- Domestic violence and sexual assault mostly harm women and LGBTQ+ people—particularly those who are Black, Indigenous, people of color, immigrants, or living in poverty. They face barriers to reporting such gender-based violence.
- Despite improvements in the law and its enforcement, barriers to justice remain for victims of gender-based violence. The large numbers of missing and murdered Indigenous women and people remain a key concern.
- The law requiring mandatory arrests in domestic violence cases may have unintended adverse effects on women, people of color, immigrants, those living in poverty, and LGBTQ+ people.
- Girls, LGBTQ+ people, and youth with disabilities take different pathways into the juvenile justice system than youth who are not a part of these populations, and have different needs inside the system.
- Boys are targeted for commercial sexual exploitation in larger numbers than previously known. But women, youth of all genders, LGBTQ+ people, those in poverty, and Black, Indigenous, and communities of color are the main targets.
- The justice system response to commercial sexual exploitation has greatly improved but still treats many in the sex industry, including exploited populations, as criminals.

## The Gendered Impact of the Increase in Convictions and Incarceration

- While men of color have suffered the brunt of mass incarceration, the number of women incarcerated in Washington grew exponentially and largely in the shadows between 1980 and 2000. Their numbers continue to increase while the very high incarceration rates for men decrease.

- Our pilot project found that Black, Indigenous, and women of color are convicted and sentenced at rates two to eight times higher than white women.
- Jail and prison programs and policies are developed for men and often do not meet the needs of women or transgender and gender-nonconforming people.
- Incarcerated mothers are more likely than fathers to be primary caregivers. Mothers are thus more likely to lose their children to out-of-home care during their incarceration.
- Racial disparities in arrests negatively influence pretrial bail decisions, which influences plea deals, affects charging decisions, and creates a higher likelihood of incarceration and longer sentences for both men and women of color.
- There is little data on the gender impacts of legal financial obligations (LFOs). The available research suggests that while men face higher LFOs, women face greater challenges trying to pay both their own LFOs and those of people close to them.

In sum, the high-quality data that we gathered and developed sometimes clearly shows, and sometimes suggests, that gender affects justice system outcomes. Specifically, we conclude that in general, in Washington, Black, Indigenous, and other women of color suffered more from unequal treatment and outcomes than did white women.

### Trustworthy Factual Data Is Lacking or Hidden

But that quality of data was not available to us in many critical areas.

For example, national and state reports show that Latinx prison and jail populations are disproportionately high. But those numbers include all genders combined. We were unable to draw conclusions about how pervasive that effect was in Washington for Latinx men or women in particular. In fact, certain Washington data improperly suggested that the incarcerated Latinx population was not disproportionately high.

Similarly, there is little to no accessible Washington data on whether gender and other demographic factors impact prosecutors' exercise of discretion in charging and plea bargaining or on bail and sentencing recommendations. And even though the Washington State Legislature charged state agencies with collecting certain data on rates of convictions, length of sentences,

use of sentence enhancements, and related matters, the quality of the data collected was, in our opinion, poor. The data was not gathered in a uniform manner, based on a uniform way; it was not clearly coded and explained; and it seemed to confuse race with ethnicity in a way that dramatically undercounted certain ethnic groups, particularly Latinx and Native Hawaiian and Other Pacific Islanders. We therefore conclude: (1) the trustworthy factual data that does exist and that is accessible shows that gender impacts the availability and quality of outcomes in Washington courts; (2) but trustworthy data on gender, particularly for Black, Indigenous, other people of color; LGBTQ+ people; and people in poverty, is often limited, low quality, and hard to access, even when it is held by public agencies; (3) the data we could find and could depend upon shows that gender bias usually, but not always, has its most adverse impact on women; and (4) that adverse impact is not always apparent unless you disaggregate the data by subpopulations such as race, ethnicity, women in poverty, etc.

### There is a Pressing Need for More Washington-Specific Data

This shows that we need more standardized, accurate, and consistent data collection in Washington State for all the topics covered in this report. Throughout this report we supplemented the often-limited Washington-specific research and data with national sources. It is not always clear if national sources are generalizable to Washington. Collecting and analyzing local data would be more accurate and meaningful in advancing equity in Washington.

We undertook our own pilot projects, designed specifically for this study, to try to fill some of these gaps. We surveyed employees at all levels of the judicial branch about their experience with discrimination and harassment, including sexual harassment, in the workplace. Results show that a large percentage of respondents report such continuing discrimination, and that the majority of it was on the basis of race, LGBTQ+ status, and gender. We disaggregated jury pool data, and found that jury service was far more limited for Black, Indigenous, and women of color. We conducted a study of the effectiveness of a domestic violence treatment method that did not rely on a high fee for service model – and we concluded that this less expensive model, called Domestic Violence – Moral Reconciliation Therapy (DV-MRT), is effective and sustainable. We examined the accessible data on incarcerated women in Washington and concluded that the

numbers were growing, and that women of color bore the brunt of that growth. And we studied two courthouse childcare centers set up to serve those attending court and determined that they aided accessibility. Specifically, that evaluation found that women were more likely than men to say that the childcare program improved their access to the courts. We also concluded that the childcare centers could have a larger impact with increased capacity and outreach.

The results of this research and these pilot projects reinforced our conclusions that gender, combined with race, ethnicity, and poverty, adversely impacts outcomes in our court system. Those results also influenced our proposed recommendations.

## Proposals for the Future

We believe, based on the limited data we found, when evaluated in light of historical injustices against women, particularly Black, Indigenous, and other women of color and LGBTQ+ people, that these are not isolated problems. They are remaining systemic problems.

That means they call for systemic solutions.

And certain solutions did emerge from our research and our pilot projects. Some even emerged unexpectedly, due to lessons learned from the trial courts struggling to keep their doors open and their courts accessible during the COVID-19 pandemic. Those solutions are our five overarching goals, listed at the beginning of this report. The path to those solutions are the specific recommendations that we listed at the end of each substantive chapter.

Many of these recommendations pose little to no costs to the justice system. They include: improving data collection; ensuring clear and transparent coding and comparisons of collected data; making such data accessible to researchers; allowing remote access to court proceedings through computer- and cell phone-based programs; giving clear directions about how to access courts, in person or virtually, particularly for often-overlooked matters such as protection orders; creating more flexibility in court hours to allow access without missing work; and changing certain forms to get more high-quality data in the near future while undertaking the task of developing more accurate, trustworthy, and transparent data sharing overall.



Some of our recommendations are likely cost-neutral, for example: expunging uncollectible debt; increasing opportunities for pre-arrest diversion and post-arrest deferrals; allowing remote access for many court proceedings; recognizing that caregiving can be considered a mitigating factor at sentencing; and discontinuing the use of certain non-violent victimless crimes in criminal history at sentencing.

Some of our recommendations will carry a noticeable financial cost: reducing court dependence on user fees; making all legal financial obligations discretionary; and considering elimination or reduction of the use of collection agencies.

And many will take a long time. For example, we recognize that our key recommendation, about making data collection mandatory, high quality, and transparent across all branches and agencies, means taking a big step. But we want to start that journey.

### Lifting As We Climb

In the late 1800's, the National Association of Colored Women – a coalition of local groups – formed to fight for gender equality. They focused on the impact of gender disparities, particularly on Black women. And they developed a platform that addressed the issue directly, by fighting for the right to suffrage for all women. They also adopted a slogan that was as forward-thinking and inclusive as it was defiant: Lifting As We Climb. They obviously recognized that expanding justice for all would necessarily include justice for the most deprived. Thank you; we build on your successes.

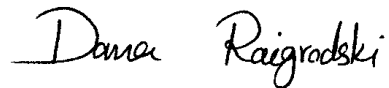
We assembled hundreds of volunteer lawyers, judges, law students, professors, experts from multiple disciplines and all branches of government, social scientists, community groups, and stakeholders with lived experience in the subjects studied to lift the accessibility and quality of justice in Washington for all women. We placed an emphasis on women who are Black, Indigenous, other people of color, immigrants, in poverty, and on people in the LGBTQ+ community. Those volunteers have devoted thousands of hours to the legal and social science research that went into this report. Justice partners have opened themselves up to rigorous analysis of, and potential criticism of, current practices from existing childcare facilities at courthouses, to searching inquiries about harassment in employment within the judicial branch

to domestic violence perpetrator treatment. Representatives from the Executive, Legislative, and Judicial branches, the law schools, legal professionals, and others volunteered their time to our oversight Advisory Committee. We celebrated our joys at the depth of the research produced, our principled differences about how to address the problems that the research highlighted, and our attempts to draw conclusions only from the trustworthy and accessible data. Together, we continue to lift as we climb.

Sincerely,



Justice Sheryl Gordon McCloud  
Washington Supreme Court  
Gender and Justice Commission  
Co-Chair and Gender Justice Study  
Co-Chair



Dr. Dana Raigrodski  
Washington State Supreme Court Gender and  
Justice Commission, Gender Justice Study Co-  
Chair