

Race & Washington's Criminal Justice System

EDITOR'S NOTE

As Editors-in-Chief of the *Washington Law Review*, *Gonzaga Law Review*, and *Seattle University Law Review*, we represent the flagship legal academic publications of each law school in Washington State. Our publications last joined together to publish the findings of the first Task Force on Race and the Criminal Justice System in 2011/12. A decade later, we are honored to join once again to present the findings of Task Force 2.0.

Law journals have enabled generations of legal professionals to introduce, vet, and distribute new ideas, critiques of existing legal structures, and reflections on the development of our field. In the spirit of this tradition, we present this report in all three of our publications. This joint publication represents a unified recognition of the paramount importance of identifying and addressing racial disparities in our state's justice system.

As future legal professionals, we are proud to support this work and to amplify voices seeking to promote fairness and justice.

Sincerely,



Kenneth Nelson
Editor-in-Chief
Washington Law Review



Carly C. Roberts
Editor-in-Chief
Gonzaga Law Review



Jaclyn T. Sakamoto
Editor-in-Chief
Seattle University Law Review

Race and Washington's Criminal Justice System:
 2021 Report to the Washington Supreme Court

*Submitted by the Task Force 2.0 Research Working Group**

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MESSAGE FROM THE TASK FORCE CO-CHAIRS

Chief Justice González and Justices of the Washington Supreme Court:

We are pleased to present the *2021 Report on Race and Washington's Criminal Justice System*, authored by the Research Working Group of Task Force 2.0. The Research Working Group's mandate was to investigate disproportionalities in the criminal justice system and, where disproportionalities existed, to investigate possible causes. This fact-based inquiry was designed to serve as a basis for the Task Force and others to make recommendations for change in order to promote fairness, reduce disparity, ensure legitimate public safety objectives, and instill public confidence in our criminal justice system.

Task Force 2.0 picks up where the previous Task Force on Race and the Criminal Justice System (2010–12) left off. That first task force came into being in 2010 to discuss remarks regarding the purported relationship between race and crime made by two sitting Washington Supreme Court justices. That exploration led to a powerful report presented at an historic symposium held at the Temple of Justice in March 2011. The following year, the Task Force presented a report on juvenile justice and race disproportionality. These reports have been impactful, cited by judges, advocates, and scholars within our region and beyond.

Task Force 2.0 launched in the wake of the protests following the murder of George Floyd, protests that rocked this nation as well as Washington State. The protests served as a reminder that the intersection between race and the criminal justice system remains a critically important issue. We took this moment as a renewed call to examine where things stand in this state with regard to race disproportionality in the criminal justice system.

The Task Force 2.0 membership agreed that we shared a commitment to ensuring fairness in the criminal justice system. We developed working groups, including the Research Working Group, whose *2021 Report* finds that race continues to affect outcomes in the criminal justice system and matter in ways that are unfair, that do not advance legitimate public safety objectives, and that undermine public confidence in our criminal justice system.

We are fortunate to have the formal participation of a broad range of organizations and institutions, as well as many people who are contributing in their individual capacities.

We have come together to offer our time, energy, expertise, and dedication to help achieve fairness in our criminal justice system.

Sincerely,

Deans Mario L. Barnes, Annette E. Clark, and Jacob H. Rooksby
Co-Chairs, Task Force 2.0: Race and Washington's Criminal Justice
System

PARTICIPATING ORGANIZATIONS AND INSTITUTIONS

Access to Justice Board
American Civil Liberties Union of Washington
Asian Bar Association of Washington
Center for Human & Civil Rights—Gonzaga School of Law
Center for Indian Law & Policy—Seattle University School of Law
Civil Survival
El Centro de la Raza
CHOOSE180
Columbia Legal Services
Commission on Asian Pacific American Affairs
Commission on Hispanic Affairs
Community Passageways
The Curtis Firm
Davis Wright Tremaine LLP
Federal Public Defender—Western District of Washington
Galanda Broadman PLLC
Gonzaga University School of Law
Fred T. Korematsu Center for Law and Equality—Seattle University
School of Law
I Did the Time
Indian Law Section, Washington State Bar Association
King County Department of Public Defense
King County Prosecuting Attorney's Office
Korean American Bar Association of Washington
Latina/o Bar Association of Washington
Legal Counsel for Youth and Children
Look2Justice
Loren Miller Bar Association
Mockingbird Society
Northwest Indian Bar Association
Office of Juvenile Justice, Washington State Department of Children,
Youth & Families
Office of Law Enforcement Oversight, King County
Office of Police Ombudsman, Spokane
Pacific Islander Community Association of Washington
Pierce County Minority Bar Association
Pierce County Prosecuting Attorney's Office

Public Defender Association
QLaw Association of Washington
Seattle University School of Law
Snohomish County Prosecuting Attorney's Office
Team Child
Thurston County Prosecuting Attorney's Office
University of Washington School of Law
Vietnamese American Bar Association of Washington
Washington Appellate Project
Washington Association of Criminal Defense Lawyers
Washington Association of Prosecuting Attorneys
Washington Defender Association
Washington Attorney General's Office
Washington State Bar Association
Washington State Gender and Justice Commission
Washington State Minority and Justice Commission
Whatcom County Prosecuting Attorney's Office

ACKNOWLEDGMENTS

This report, submitted by the Research Working Group, is the product of a process initiated and conducted by an ad hoc Task Force on Race and Washington's Criminal Justice System. Called Task Force 2.0, it includes many organizations and individuals who came together to document existing race disproportionalities in the criminal justice system, to identify its causes, and to propose recommendations to reduce and, where possible, eliminate disparities.

Co-chaired by the deans of Washington's three law schools, Task Force 2.0 builds on the work of the 2010–12 Task Force on Race and the Criminal Justice System (Task Force 1.0). The work of Task Force 1.0 and 2.0 builds on decades of work of the Minority and Justice Commission, which carries forward the work of the legislatively created Minority and Justice Task Force that issued its pathbreaking 1990 Final Report.

Task Force 2.0 was initially organized with the following working groups: Oversight, Recommendations, Research, and Community Engagement. A separate group, called the Juvenile Justice Subcommittee, which really was a task force within a task force, addressed the separate issue of the Juvenile Justice System, and will be issuing its report and recommendations later this year. In addition, organically, other teams were created to meet to discuss different topics.

We gratefully acknowledge the members of these different working groups and teams. Given the nature of an ad hoc task force whose work extended over a fifteen-month period, people's active participation at times waxed and waned. We include everyone who participated in some fashion, without making distinctions based on level of contribution. In addition, with such a large group of individuals, we admittedly did not always successfully involve everyone in the work.

Oversight Working Group: Nick Allen, Robert Chang, Diane Clarkson, Adam Cornell, Lisa Daugaard, Judge (ret.) Theresa Doyle, Michele Fukawa, Jason Gillmer, Alexes Harris, Jaime Hawk, Melissa Lee, Christina Miyamasu, and Andrés Munoz.

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Community Engagement Working Group: Sunitha Anjilvel, Lorraine Bannai, Ann Benson, Diane Clarkson, Rosemarie Clemente, James Curtis, Jenna Franklin, Candice Garza, Tony Gonzalez, Darrah Hinton, Amber Letchworth, Noe Merfeld, Alex Narvaez, Andrés Munoz, Christy Peters, Brooke Pinkham, Isabell Rocha, Maria Siguenza, Sandra Simpson, Aileen Tsao, Adrienne Wat, and Sara Zier.

Juvenile Justice Subcommittee: Zubin Abraham-Ahmed, Jo Bechtold, Rosemarie Clemente, Alice Coil, Julian Cooper, Dominique Davis, Koa Derouin, Judge Theresa Doyle (ret.), Krista Elliott, Brianna Fenske, Louisa Florio, Hickory Gateless, Destinee Harris, Jaime Hawk, Vanessa Hernandez, Jimmy Hung, Katherine Hurley, Stephany Inocente, Hazel Kerkemor Johnson, Judge David Keenan, Jr Kiona, Tori Sullivan Lavoie, Anne Lee, Jessica Levin, Mynor Lopez, Atlete Makasini, Desmond Maiava, Jacqui Merrill Martin, Julia Mizutani, Karisa Morikawa, Alex Narvaez, Gloria Ochoa-Bruck, Bailey Michaela Warrior Pahang, Crystal Pardue, Dontay Proctor-Mills, Karen Pillar, Jessica Rock, Nathan Rouse, Judge Averil Rothrock, Matthew Sanders, Joseph Seia, Cameron Sheldon, Patreece Spence, Calson Tiweyang, Bry'Onta Thomas, Claire Thornton, Liz Trautman, Dalia Pedro Trujillo, Tara Urs, Kendrick Washington, and Sara Zier.

Policing Team: Robert Chang, Gabe Galanda, Omana Luvimae, Vivienne Nguyen, Chuck Reasons, Nancy Talner, and Adrienne Wat.

Alternatives to Policing Team: Lisa Daugaard, Prachi Dave, Sahar Fathi, Natasha Hill, Paul Holland, Katherine Hollingsworth, Luvimae Omana, Sarah Max, Karen Pillar, and Brenda Williams.

Prosecuting Team: Brooke Burbank, Robert Chang, Daniel Fulce, Mohammed Hamoudi, Christina Miyamasu, Douglas Shae, Arthur Sepulveda, and Jennifer Wellman.

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Additional Members: Seth Alexander, Jessica Alvarez, Kimberly Ambrose, LaRond Baker, Katherine Beckett, Trey Big, Alexia Diorio, Krista Elliott, Heather Evans, Rya Fishman, Sally Fouché, Emily Geddes, Hannah Godwin, Noelle Green, Lillian Hawkins, Neeka Hodaie, Maria Hodgins, Cassandra Hughes, Emaan Jaber, Alek Johnson, James Johnson, Treja Jones, Karim Jooma, Heather Kelley, Ria Kuruvilla, Pui-Yan Lam, Anne Lee, David Montes, Andrew Newman, Melanie Nguyen, Andrew Pollam, Maya Ramakrishnan, Carly Roberts, Sierra Rotakhina, Mike Russo, Jason Schwarz, Julie Shapiro, Diane Singleton, Ron Slye, Stephanie Smith, Travis Stearns, Cody Stoddard, Marcus Stubblefield, Tori Sullivan Lavoie, Donnell Tanksley, Amanda Tucker, Samuel VanFleet, Jacob Walsh, David Wang, Mike Webb, Mary Whisner, and Rayshaun Williams.

In addition, we acknowledge those members of the Research Working Group who drafted the research memoranda from which the Appendices were drawn. We also make a special acknowledgment to Kate Miller for her work in shepherding the research teams in the Research Working Group.

Appendix A. Race Disproportionality in Policing: Robert Chang

Appendix B. Prosecutorial Decision-Making: Kate Miller

Appendix C. Pretrial Release: Carnissa Lucas-Smith and Matt Jedreski

Appendix D. Confinement Sentencing Outcomes: Roxanne Degens, Bryce Herman, Caitlin Hoerberlein, and Katherine Joseph

Appendix E. Prisons and Jails: Alexandra Chen, Kate Cohn, Louisa Florio, Melissa Lee, and Darrias Sime

Appendix F. Legal Financial Obligations: Israel Carranza, Cynthia Delostrinos, Alexes Harris, Sam Sueoka, and Frank Thomas

Appendix G. DWLS3: Rose McCarty, Carson Nies, and Amanda Ng

Appendix H. Disproportionality Following Conviction and Reentry:
Lorraine Bannai and Sharon Sakamoto

Appendix I. Community Voices: Lorraine Bannai

Appendix J. Native Hawaiian/Pacific Islander (NH/PI) Report:
Lorraine Bannai, George Ka'ai, and Galilee Kama'i

Appendix K. Traffic Stops: Lorraine Bannai, Katie Chan, Ameya Gehi, Josh Halladay, and Cassidy Ingram

Appendix L. Asset Forfeitures: Alexander Hager and Jamie Wilson

Appendix M. Public Defender Report: Robert C. Boruchowitz, Vanesa Hernandez Rodriguez, and Jamie Wilson

Appendix N. Language Access: Lorraine Bannai

Appendix O. Spokane Prosecutor Report: Amy Bolstad, Anna Creed, Sarah Fortier, Michele Fukawa, Jason Gillmer, Russell Lytle, Thiago Marques, Sierra Paola, Shannon Lynch, Danielle Wingfield Smith, Dalia Pedro Trujillo, and Sarah Vatne

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We are also grateful to the *Gonzaga Law Review*, the *Seattle University Law Review*, and the *Washington Law Review* for agreeing to publish this report as a joint project in their respective journals.

We apologize for any omissions or errors in acknowledging any individual or organization.

DEFINITIONS

What We Mean by “Disproportionality” and “Disparity”

Although the terms disproportionality and disparity often are used interchangeably, there is an important distinction between these two concepts. Researchers have found it useful to distinguish between racial inequities that result from differential crime commission rates and racial inequities that result from practices or policies. In this report, we use disproportionality to refer to a discrepancy between reference groups’ representation in the general population and in criminal justice institutions. Disproportionality can be measured relatively or comparatively.

Relative disproportionality. Using data from Washington state in 1980, the Black share of Washington’s incarcerated population was 28%. The Black share of Washington’s overall population was 3%. Relative to their share of the population, Black people are overrepresented in incarceration ($28 \div 3$) by a factor of 9.33x relative to their share of the Black population in Washington.

Comparative disproportionality. If you take the 1980 figures and calculate the incarceration rate for each group,¹ you can calculate comparative disproportionality between groups. White people were incarcerated at a rate of 95 per 100,000 White people in Washington’s general population. Black people were incarcerated at a rate of 1,342 per 100,000 Black people in Washington’s general population. A comparison of Black to White incarceration rates ($1,342 \div 95$) produces a comparative disproportionality ratio of 14.1.

In contrast, we use disparity when there is sufficient evidence to indicate that race accounts at least in part to unequal outcomes for one group when compared with outcomes for another group. For example, disparity exists when a Black capital defendant in Washington is 4.5 times more likely to receive the death penalty than a similarly situated White capital defendant. This difference in outcomes is considered *unequal* because race, and not other differences in case characteristics, accounts significantly for this difference in outcomes.

1. For example, to calculate the White incarceration rate, take the number of White persons incarcerated, divide it by the number of White persons in the relevant general population, and then multiply by 100,000 to determine the number of White persons incarcerated per 100,000 White persons in the relevant general population. Though some organizations make the methodological choice to compute rates using different population groups, such as the number of White persons 18 and older or the number of White persons between 18 and 64 years of age, the Research Working Group has chosen to use total population figures.

What We Mean by “Imprisonment” and “Incarceration”

Imprisonment refers to being held in state prisons. Incarceration refers to being held in state prisons or local jails. Many local jails do not collect and report on ethnicity.

What We Mean by “Race” and “Ethnicity”

One of the most perplexing problems with race is that few people seem to know what “race” means. Widely accepted understandings of race focus on biology, invariably pointing to physical differences amongst humans that are used to define, in genetic terms, different racial groups.² The distinctions that we employ today to categorize humans, such as Black, White, and Latina/o, date back only a few centuries or less.³ These labels do not signal genetically separate branches of humankind. Racial distinctions are largely social constructs based upon perception and history.

Not only are these distinctions socially constructed, but they are also in constant flux, and under perpetual siege by those who dispute the arbitrary lines that they draw. The problem is compounded by the fact that different institutions use the terms differently. This lack of common nomenclature makes some comparisons difficult. When a term like “Asian” may encompass over two billion individuals, its ability to precisely and accurately describe an individual, much less a group of individuals, becomes challenging. Similar difficulties imperil the classifications of “Hispanic” and “Latino,” which are used to describe not only Dominicans whose descendants may be from Africa, but also Argentines whose ancestry may be traced to Italy, and Peruvians whose forefathers may have emigrated from Japan. Additionally, these traditional categories have come under increasing strain because one in seven marriages within the United States are now “interracial” or “interethnic,” rendering single labels less accurate.⁴

In this report, we use “race” to refer to groups of people loosely bound together by history, ancestry, and socially significant elements of their physical appearance.

2. Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.–C.L. L. REV. 1, 5–6 (1994).

3. *Id.* at 7–8.

4. Susan Saulny, *Counting by Race Can Throw Off Some Numbers*, N.Y. TIMES (Feb. 9, 2011), <http://www.nytimes.com/2011/02/10/us/10count.html?scp=1&sq=race%20counting&st=cse> [https://perma.cc/3JCQ-JEM7].

Racial Group Designations

Though people have different views on preferred group designations, for the sake of consistency, the following are the racial group designations used in the report.

Asian and Native Hawaiian or Other Pacific Islander (Asian and NH/PI). At times, “Asian” is used by reporting agencies or groups as an umbrella designation that includes Native Hawaiians and other Pacific Islanders. Where possible, the report disaggregates Native Hawaiians and other Pacific Islanders from the broader “Asian” racial category. Listening sessions held in Washington revealed a preference that “NH/PI” be used instead of “NHOPI” which appears in the literature. Detail on the importance of disaggregating these groups can be found in Appendix J.⁵

Black. We capitalize “Black” unless it appears otherwise in quoted material. Though there are differences between Black persons whose ancestry traces to U.S. slavery and more recent immigrants from Africa and the Caribbean, data collection in the criminal justice system typically does not disaggregate these groups.

Indigenous. Though there are important differences in the histories of groups indigenous to the lower forty-eight in comparison to those indigenous to Alaska, because many reporting agencies combine “Native American” (or “American Indian”) with “Alaska Native,” we use the umbrella term “Indigenous” to describe people who are indigenous to the lands comprising the forty-eight contiguous states as well as Alaska.⁶

Latina/o. For instance, when using the term “Latina/o”—which we will use where possible rather than “Hispanic”—we mean to describe those individuals whose ancestry is traced back to Latin America, Spain, and Portugal. Though “Hispanic” remained an ethnic designation on the 2020 U.S. Census, the Census Bureau in 2017 had

5. The Appendices are available online and are not included in the print version of the Report. TASK FORCE 2.0: RACE AND WASH.’S CRIM. JUST. SYS., RACE AND WASHINGTON’S CRIMINAL JUSTICE SYSTEM: 2021 REPORT TO THE WASHINGTON SUPREME COURT, Appendix J (2021), https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1116&context=korematsu_center [hereinafter TASK FORCE 2.0].

6. “Indigenous” in this report does not include Native Hawaiians or Other Pacific Islanders, who tend to be lumped together under the “Asian” category described above when not appearing as a separate category.

recommended that OMB reassign “Hispanic, Latino, or Spanish origin” to a racial category.⁷

White. We capitalize “White” unless it appears otherwise in quoted material. In the report, “White” sometimes includes “Hispanics” who identify as White. Where possible, the report separates out “non-Hispanic Whites.”

For the most part, the report does not use BIPOC (Black, Indigenous, and People of Color) except when a reporting agency or organization uses that term and the reported data does not allow for easy disaggregation.

These definitions contemplate race and ethnicity as social phenomena, such that race and ethnicity are not objective observations rooted in biology, but rather self-reinforcing processes rooted in the daily decisions we make as individuals and as institutions. Although socially constructed and enacted, race and ethnicity have important consequences for people’s lived experiences.

What We Mean by “Structural Racism”

A structurally racist system can be understood best as a system in which a society and its institutions are embedded, and from which racial disparity results. Within such systems, notions and stereotypes about race and ethnicity shape actors’ identities, beliefs, attitudes, and value orientations. In turn, individuals interact and behave in ways that reinforce these stereotypes. Thus, even with facially race-neutral policies, processing decisions are informed by actors’ understandings (or lack thereof) about race and ethnicity, often leading to disparities in the treatment of people of color. As a consequence, structural racism produces cumulative and persistent racial and ethnic inequalities.

Racism should not be viewed as an ideology or an orientation towards a certain group, but instead as a system: “[A]fter a society becomes racialized, racialization develops a life of its own . . . [and] [a]lthough it interacts with class and gender . . . [race] becomes an organizing principle of social relations itself.”⁸ The persistent inequality experienced by Black persons and other people of color in America is produced by this racial structure. The contemporary racial structure is distinct from the past in that it is covert, is embedded within the regular

7. See *Race/Ethnicity and the 2020 Census*, CENSUS 20/20 (Mar. 23, 2019), <https://www.census2020now.org/faces-blog/same-sex-households-2020-census-r3976> (discussing proposed change and noting that the Office of Budget and Management did not respond to this recommendation). The Census Bureau in 2017 had also suggested new race category for individuals identifying as being of Middle Eastern or North African descent (MENA). *Id.*

8. Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465, 475 (1996).

practices of institutions, does not rely on a racial vocabulary, and is invisible to most White people.⁹ That structural racism exists does not negate the effects of explicit racism, which continues to exist and must also be addressed where evident.

9. *Id.* at 467–68.

EXECUTIVE SUMMARY

At the outset, it is important to make clear what this report is and what it is not. Task Force 2.0 includes many organizations and individuals. It developed a process by which the Research Working Group was tasked with drafting research memoranda to update the work of the previous task force to provide a more complete picture of race disproportionality in Washington's criminal justice system and to identify, where and when it could, the extent to which those observed disproportionalities were not justified by differential involvement of individuals of different racial/ethnic groups in crime commission. The process allowed for input and robust involvement by stakeholders in all of the different working groups, including the Research Working Group.

This report is the product of that process. But at the end of the day, it is the work of the Research Working Group. Thus, the listing of organizations and individuals in Task Force 2.0 does not indicate endorsement of each statement or report finding.

This report was intended to be accompanied by a full set of recommendations from the Recommendations Working Group. It does not. Late in the process, a concern was raised that proposed recommendations should be vetted with more stakeholders. We have extended the process for consideration of recommendations. It is also probable that consensus will not be reached on everything, in which case majority and minority positions may issue for certain recommendations. This process is under way, and Task Force 2.0 is committed to providing its full set of recommendations later this year.¹⁰

This report focuses primarily on the treatment and experience of adults in the criminal justice system. A separate subcommittee, in some ways a task force within the broader task force, examined race and the juvenile justice system and will issue its findings and recommendations later this year.

This report focuses on race and not on the intersection of race and gender. There are important limitations to the chosen focus, including that the experiences of women of color in the criminal justice system may be obscured, and the experiences of certain men of color, for example, Black men, may not appear to be as severe because what they experience is considered relative to the entire Black population instead of to the subset of the Black male population. This report is offered as a complement to

10. The Appendices accompanying this Report are drawn from research memoranda on disproportionality in specific areas or aspects of the criminal justice system. Some appendices include recommendations drawn from that research. These recommendations, as well as others, are undergoing review by the Recommendations Working Group.

the just-released *2021: How Gender and Race Affect Justice Now: Final Report*¹¹ issued by the Washington State Gender and Justice Commission.

The 2011 Preliminary Report, issued by the previous task force, for the most part failed to examine or report disproportionalities as experienced by Indigenous people. Though additional work remains to document and understand fully these disproportionalities, we begin by highlighting our findings of the disproportionalities experienced by Indigenous people.

Indigenous people, in comparison to non-Hispanic White people,

- were killed at a higher rate by law enforcement (3.3x);
- were more likely to have force used against them by law enforcement in 3 of the 4 cities examined (2.9x, 5x, 1.3x – 2x);
- were stopped more frequently by law enforcement in both cities examined (5.8x and 2.6x);
- were searched more frequently in the two cities examined as well as by the Washington State Patrol;
- were arrested more frequently in all four years examined (2017, 2.3x; 2018, 1.7x, 2019, 2.6x; 2020, 2.6x);
- received felony sentences at a higher rate in the three years examined (2018, 1.5x; 2019, 1.5x, 2020, 1.7x);
- bear a disproportionate per capita share of legal financial obligations; and
- are incarcerated at a higher rate (3.7x).

The persistence of this disproportionately through different encounter points in the criminal justice system may come as a surprise to some; to others, these figures may put numbers to what was already well known to Indigenous people and Indigenous communities.

Below are some additional key observations about race disproportionality and disparity in Washington's criminal justice system. The lack of consistent data collection on Latinas/os makes it difficult to determine the existence and extent of disproportionality. Where possible, the Research Working Group reports figures for that population, but with the exception of certain data sets, such as police killings for which there is

11. WASH. CTS., WASH. GENDER & JUST. COMM'N, 2021: HOW GENDER AND RACE AFFECT JUSTICE NOW, (Sept. 2021), https://www.courts.wa.gov/subsite/gjc/documents/2021_Gender_Justice_Study_Report.pdf. The breadth and depth of this report is remarkable. Though the Research Working Group has not had a chance to review this new report closely, it is amply evident that the Commission's report provides a comprehensive examination of the intersection of gender and race in many areas in our legal system, including in the criminal justice system.

more complete and accurate information, we do not have a lot of confidence for most data sets.

Stops. In the jurisdictions examined, racial minorities tend to be stopped disproportionately. Studies of select jurisdictions in Washington have found that certain racial minorities are stopped more frequently than similarly situated White people.

Searches. In the jurisdictions examined, racial minorities tended to be searched disproportionately, even though research shows that racial minorities who are searched are less likely to possess narcotics or weapons than White people who are searched. Because discretionary searches ought to be driven by legitimate criminal justice reasons (likelihood of finding contraband, whether narcotics for drug violations or weapons for officer safety), the fact that disproportionality persists in the face of what is known about “hit rates,” suggests strongly that race is a factor in searches.

Use of Force. In the jurisdictions examined, racial minorities, with the exception of Asian Americans, are more likely to be the victim of police use of force. It is very important to note that with regard to the lethal use of force by police, because disaggregated ethnic information is available,¹² individuals who are Native Hawaiians and Other Pacific Islanders are 3.3 times more likely than a White person to be killed by police.

Arrests. Black and Indigenous persons are consistently arrested disproportionately, whether measured by relative or comparative ratios. This might be expected given the upstream disproportionalities of stops and searches. Observed disproportionality varies in significant ways for different crimes, with disproportionality for Black persons being greatest for robbery and the lowest for drug crimes. Though disproportionality for drug offenses may be lower than for other offenses, it remains high, with Black people arrested for drug offenses at a comparative ratio more than 2 times that of White people, despite consistent findings that Black and White people use and sell drugs at similar rates.¹³

12. More complete and more accurate information on the demographic profile of those killed by law enforcement is available because there are many fewer people killed by police than are stopped by police, and media usually investigates and reports on each police killing.

13. E.g., *Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race*, THE HAMILTON PROJECT, (Oct. 21, 2016), https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice; Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 3 (2005); Katherine Beckett et al., *Race, Drugs and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 1 (2006).

Convictions. As measured by all felony sentences in 2018, 2019, and 2020, Black people were 2.7 times more likely to be convicted than White people in each of those years. Indigenous people in those same years ranged from being 1.5 to 1.7 times more likely to be convicted than White people. There also appears to be additional disproportionality in the punishment given for felony sentences for certain kinds of offenses, where White people are slightly more likely than others to be sent to jail or receive an alternative punishment instead of being sent to prison.

Legal Financial Obligations (LFOs). Black persons, Indigenous persons, and Latina/os are sentenced to LFOs more frequently and at higher rates than White persons and Asian Americans/NHOPIs. Even after controlling for relevant legal factors, Latina/os are sentenced to significantly higher LFOs than similarly situated White defendants.

Incarceration Sentences. An examination of all fiscal year 2019 felony sentences for non-drug offenses revealed that BIPOC defendants on average received longer sentences than White defendants as measured at different offense seriousness levels. For the two most serious offense levels, BIPOC defendants received significantly longer sentences than White defendants. In addition, disproportionality was pronounced for BIPOC defendants with lower criminal history scores who received longer sentences than White defendants for the same offense levels. Stated differently, Black people who commit very serious crimes are treated more harshly than White people who commit very serious crimes; Black people with low criminal history scores are treated more harshly than White people with low criminal history scores.

Death penalty. In Washington, a Black defendant in a capital case was 4.5 times more likely to be sentenced to death than a similarly situated White defendant.

Disproportionate incarceration. When viewed over time, it appears that Black/White comparative disproportionality has improved since 1980 when a Black person was 14.1 times more likely to be incarcerated than a White person. In 2005, this had dropped to 6.4, and in 2020, to 4.7. This looks like great progress. However, it is important to understand how this “improvement” was achieved. From 1980 to 2005, the Black rate of incarceration nearly doubled, from 1,342 Black people incarcerated per 100,000 Black people to 2,522 per 100,000. But the comparative disproportionality ratio dropped because the rate of White incarceration more than quadrupled, going from 95 White people incarcerated per 100,000 White people to 393. Then, from 2005, the drop from 6.4 to 4.7

comparative ratio came about because the Black rate of incarceration dropped from 2,522 to 1,267 per 100,000 Black people, while the White rate dropped from 393 to 269. Because the Black rate dropped more than the White rate, the comparative disproportionality ratio decreased. But this figure, 4.7 times, remains substantially greater than the recent comparative Black/White disproportionality ratios for felony convictions the last few years, 2.7 times.

The 2011 Preliminary Report found that facially neutral policies resulted in disparate treatment of minorities over time. It also found that disproportionality was explained in part by the prevalence of racial bias—whether explicit or implicit—and the influence of bias on decision-making within the criminal justice system. It found that race and racial bias matter in ways that are not fair, that do not advance legitimate public safety objectives, that produce disparities in the criminal justice system, and that undermine public confidence in our legal system.

The Research Working Group of Task Force 2.0 finds, likewise, that facially neutral policies and bias continue to operate to contribute significantly to the observed disproportionalities. Certainly, some things have improved. A bright spot, if it can be called that, is that the Black rate of incarceration has dropped from 2,522 per 100,000 in 2005 to 1,267 per 100,000. But race and racial bias continue to matter in ways that are not fair, that do not advance legitimate public safety objectives, that produce disparities in the criminal justice system, and that undermine public confidence in our legal system.

I. INTRODUCTION

This report is an update on the 2011 Preliminary Report on Race and Washington's Criminal Justice System. This update does not include as context the history of race discrimination in Washington, and readers are encouraged to view the 2011 report for its brief historical overview.¹⁴ The 2011 report began with that historical overview because the criminal justice system does not exist in a vacuum. Instead, it exists as part of a legal system that for decades actively managed and controlled where people could live, work, recreate, and even be buried.

Members of communities impacted by race disproportionality in Washington's criminal justice system were invited to share with the task

14. Research Working Group, *Preliminary Report on Race and Washington's Criminal Justice System*, 47 GONZ. L. REV. 251 (2011–2012), 35 SEATTLE U. L. REV. 623 (2012), 87 WASH. L. REV. 1 (2012) [hereinafter *2011 Preliminary Report*]. Because of the difficulties of providing pinpoint citations to all three journals, page references to this report will be to the PDF of the report released to the public as part of its historic presentation to the Court, available here: <https://perma.cc/6BV4-RBB8>.

force their experiences and perspectives. These listening sessions revealed pain, suffering, and distrust that statistics fail to capture. The listening sessions serve to remind us that lives, families, and communities are torn apart by a criminal justice system that allows for disproportionate incarceration, disproportionate prosecution, disproportionate arrests, and disproportionate stops without examining fully the causes of this disproportionality.

Part II provides a summary of the findings of the 2011 report and includes some key developments that have occurred since that report was issued. Part III provides an updated picture of disproportionality in Washington's criminal justice system. It includes statistics on disproportionalities in policing, which was not surveyed in the 2011 report. Part IV includes perspectives from communities and individuals who directly experience the effects of disproportionality in the criminal justice system. Part V examines proffered causes for the observed race disproportionality.

II. CAPSULE SUMMARY OF 2011 FINDINGS AND SOME KEY DEVELOPMENTS SINCE THEN

A. Capsule Summary of 2011 Findings¹⁵

The 2011 Preliminary Report, for the areas, agencies, and time periods studied, found the following:

- With regard to drug law enforcement, a focus on crack cocaine—a drug associated with Black persons stereotypically and in practice—at the expense of other drugs, resulted in greater disproportionality without a legitimate policy justification.
- This disparity in drug law enforcement informed related asset forfeitures, which involve distorted financial incentives for seizing agencies and facilitate further disparity.
- With regard to the Washington State Patrol, although racial groups were subject to traffic stops at equitable rates, minorities were more likely to be subjected to searches, while the rate at which searches result in seizures was lower for minorities.
- Disparity in traffic law enforcement informed the disproportionate imposition of “Driving While License Suspended” charges, which inflicts disparate financial costs.

15. These are drawn from the 2011 Preliminary Report. *Id.*

- With regard to legal financial obligations, which are now a common though largely discretionary supplement to prison, jail, and probation sentences for people convicted of crimes, similarly situated Latino defendants received significantly greater legal financial obligations than their White counterparts.
- Similarly situated minority juveniles in Washington's juvenile justice system faced harsher sentencing outcomes and disparate treatment by probation officers.
- Disparate treatment existed in the context of pretrial release decisions, which systematically disfavored minority defendants.
- Defendants of color were significantly less likely than similarly situated White defendants to receive sentences that fell below the standard range.
- Among felony drug offenders, Black defendants were 62% more likely to be sentenced to prison than similarly situated White defendants.

The 2011 report identified that disparities resulted in part from facially neutral policies as well as bias, whether explicit or implicit. In response to the specific claim made by a then-sitting state supreme court justice, it found that "the assertion that Black disproportionality in incarceration is due solely to differential crime commission rates is inaccurate." Further, the Report found:

- Facially neutral policies that have a disparate impact on people of color contribute significantly to disproportionalities in the criminal justice system.
- Racial and ethnic bias distorts decision-making at various stages in the criminal justice system, thus contributing to disproportionalities in the criminal justice system.
- Race and racial bias matter in ways that are not fair, that do not advance legitimate public safety objectives, that produce disparities in the criminal justice system, and that undermine public confidence in our legal system.

B. Some Key Court Developments Since the 2011 Report

Task Force 1.0 identified several causes for disproportionate outcomes in Washington's criminal justice system, including that courts typically refuse to grant relief based on racially disproportionate outcomes and instead require proof that an entity was motivated at least in part by improper animus and acted to cause harm to an identifiable victim. This approach led to no relief for Mr. Warren McClesky, a Black man, who was

sentenced to death in Georgia despite uncontroverted statistical evidence that the death penalty was administered in Georgia in a racially disproportionate manner.¹⁶ In refusing to grant relief, the U.S. Supreme Court held that this evidence failed to establish that Mr. McClesky had been the victim of unlawful discrimination by decisionmakers in his case and that evidence regarding disproportionate impact did not render the application of the death penalty to him to be cruel and unusual.¹⁷

In 2018, the Washington Supreme Court in *State v. Gregory* departed from the approach taken in *McClesky* and held that Washington's death penalty violated the Washington constitutional prohibition against cruel punishment because it was administered in an arbitrary and racially biased manner, established by statistical evidence of race disproportionality.¹⁸ Importantly, the Court took "judicial notice of implicit and overt racial bias against black defendants in this state."¹⁹

In addition, in that same year, the Washington Supreme Court adopted a novel approach to peremptory challenges. It adopted GR 37, which moved away from *Batson's* three-step test for intentional discrimination during jury selection.²⁰ The stated purpose of GR 37 is "to eliminate the unfair exclusion of potential jurors based on race or ethnicity." Under the rule, a party (or the court on its own initiative) may object to the use of a peremptory challenge to raise the issue of improper bias. Once an objection is raised, the court must evaluate the reasons given to justify the peremptory challenge using the standard of an objective observer. Importantly, for purposes of GR 37, an objective observer is someone who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington state.²¹ It also requires consideration of whether any proffered reason is disproportionately associated with race or ethnicity, and outlines several reasons as presumptively invalid because historically these reasons have been associated with improper discrimination in jury selection. GR 37 was subsequently constitutionalized in *State v. Jefferson*.²²

In 2021, the Washington Supreme Court in *State v. Blake* held that Washington's simple drug possession statute was unconstitutional.

16. *McCleskey v. Kemp*, 481 U.S. 279, 283–87, 290–91 (1987).

17. *Id.* at 292–93.

18. *State v. Gregory*, 427 P.3d 621, 642 (2018).

19. *Id.* at 635.

20. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

21. WASH. CT. GEN. R. 37(f).

22. *State v. Jefferson*, 429 P.3d 467, 479 (2018).

Though not forming the direct basis for the invalidation of the statute, the Court acknowledged that the enforcement of this statute had a racially disproportionate impact, noting that this statute “affected thousands upon thousands of lives, and its impact has hit young men of color especially hard.”²³

The decision in *Blake* was preceded by a remarkable letter signed by all the justices on the Washington Supreme Court, issued on June 4, 2020, days after the killing of George Floyd and the protests that erupted around the nation. The letter sought to put the killing of Mr. Floyd into its historical context. It said, “The injustices faced by black Americans are not relics of the past.” Rather, the devaluation and degradation of black lives “is a persistent and systemic injustice that predates this nation’s founding.”²⁴ The Court went on to note, “We continue to see racialized policing and the overrepresentation of black Americans in every stage of our criminal and juvenile justice systems.”²⁵ The letter called on the collective legal community to “recognize that we all bear responsibility for this on-going injustice, and that we are capable of taking steps to address it, if only we have the courage and the will.”²⁶

In the next part, we document the “racialized policing and the overrepresentation of black Americans in every stage of our criminal . . . justice system.” The other detail that emerges clearly is that Indigenous people likewise encounter racialized policing and overrepresentation in every stage of our criminal justice system, which was not explored and documented in detail in the 2011 Preliminary Report. Though Latinas/os are overrepresented in Washington prisons and jails, a clear picture of racialized policing and overrepresentation in other stages of our criminal justice system is unavailable because of inaccurate, inconsistent, and/or incomplete data collection with regard to Latinas/os. Similarly, as shown below, Native Hawaiians and Other Pacific Islanders appear to experience racialized policing in certain jurisdictions, but a full picture of their representation in the criminal justice system is unavailable because of inconsistent and/or incomplete data collection or reporting.

23. *State v. Blake*, 481 P.3d 521, 533 (2021) (citing *2011 Preliminary Report*, *supra* note 14).

24. Letter from The Washington State Supreme Court, WASH. CTS. (June 4, 2020), <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf>.

25. *Id.*

26. *Id.*

III. RACE DISPROPORTIONALITY WITHIN
WASHINGTON STATE'S CRIMINAL JUSTICE SYSTEM

It begins with laws passed by the legislature and ordinances passed by counties and municipalities that criminalize certain conduct and, in some instances, status. These laws and ordinances are then enforced by law enforcement, leading to stops and arrests. Charges can lead to detainment pre-trial; those charged can proceed before the tribunal pro se, with publicly paid defense counsel, or with privately paid defense counsel. A conviction can lead to an incarceration sentence, a non-incarceration sentencing alternative, and/or legal financial obligations. In addition, a host of collateral consequences can follow, including loss of housing and employment and adverse immigration consequences.

Though the laws and ordinances themselves are facially neutral, race disproportionalities exist at stops, searches, arrests, charges, convictions, and punishment. The existence of race disproportionality, by itself, does not prove race discrimination. It is critical, though, to understand as best we can where race disproportionality exists so we can examine what is causing it and, where appropriate, recommend changes to ameliorate or eliminate unwarranted race disproportionality.

In reporting rates, relative disproportionality ratios, and comparative disproportionality ratios, the Research Working Group notes that these are approximate measures intended to highlight areas and trends for leaders, policy-makers, criminal justice system (CJS) actors, affected communities, and the general public.²⁷

A. Policing

The murder of George Floyd, the renewed attention it drew to Breonna Taylor and other Black people killed by police, and the protests that erupted across the nation and in Washington state were the immediate impetus for the launch of Task Force 2.0. Though these killings took place in other states, Washington had its own high profile in-custody death of a Black man, Manuel Ellis, in March 2020. However, the details of his death have been slow to emerge. Ellis, before his death, said, "I can't breathe,

27. See *supra* Definitions (definitions of relative and comparative disproportionality ratios).

sir.”²⁸ Criminal charges have been filed against three officers involved in Ellis’s death.²⁹

It is extremely rare for criminal charges to be filed against police officers when a civilian is killed. Typically, accountability must come from internal law enforcement disciplinary proceedings and/or is left to after-the-fact civil lawsuits on behalf of the decedent’s estate. In one unusual example, an Auburn police officer, Jeffrey Nelson did not face criminal charges or face internal discipline and instead received a medal of valor when he killed Isaiah Obet, a Pacific Islander man, in 2017, though the City of Auburn later settled a civil lawsuit in August 2020 for \$1.25 million. The same officer now faces criminal charges after killing Jesse Sarey, a Southeast Asian man, in 2019. When criminal charges were filed against Nelson in August 2020, it “mark[ed] only the third time in forty years a police officer in Washington has been charged for killing someone in the line of duty.”³⁰

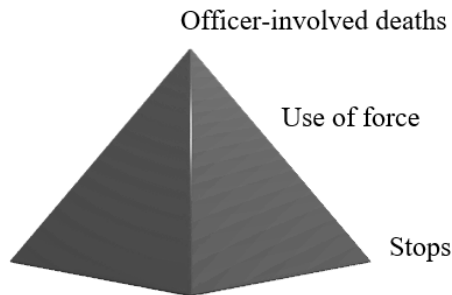
In three other recent killings, of Charleena Lyles, a Black woman, in 2017, of Tommy Le, a Vietnamese American, in 2017, and Renee Davis, a Muckleshoot tribal citizen, in 2016, no criminal charges have been filed, leaving their respective families to seek a measure of accountability in civil proceedings, two of which have been settled for seven-figure amounts paid to their respective families, with one case still proceeding.³¹ Though deaths get the most media and public attention, one way to visualize disproportionality is to consider deaths as the apex of a pyramid with the base of the pyramid being the day-to-day contact that police have with the public. It is critical to document and understand the extent and operation of disproportionality at all stages.

28. Stacia Glenn, *Manuel Ellis Called Tacoma Police “Sir” as He Told Them He Couldn’t Breathe, New Video Shows*, SEATTLE TIMES (June 9, 2020), <https://www.seattletimes.com/seattle-news/crime/manuel-ellis-called-tacoma-police-sir-as-he-told-them-he-couldnt-breathe-new-video-shows/>.

29. *AG Ferguson Charges Three Officers in Killing of Manuel Ellis*, WASH. STATE OFF. ATT’Y GEN. (May 27, 2021), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-charges-three-officers-killing-manuel-ellis>.

30. Sara Jean Green, Mike Carter & Asia Fields, *Auburn Police Officer Charged with Murder in 2019 Shooting*, SEATTLE TIMES (Aug. 20, 2020), <https://www.seattletimes.com/seattle-news/crime/auburn-police-officer-charged-with-murder-in-2019-shooting>.

31. Sara Jean Green, *Appeals Court Rules Charleena Lyles Wrongful-Death Suit Against Seattle Police Can Proceed*, SEATTLE TIMES (Feb. 16, 2021), <https://www.seattletimes.com/seattle-news/crime/appeals-court-rules-charleena-lyles-wrongful-death-suit-against-seattle-police-can-proceed/>; Mike Carter, *King County Sheriff’s Office Will Pay \$5 Million Settlement in Deputy’s Fatal Shooting of Tommy Le*, SEATTLE TIMES (Mar. 24, 2021), <https://www.seattletimes.com/seattle-news/king-county-sheriffs-office-will-pay-5-million-settlement-in-deputys-fatal-shooting-of-tommy-le/>; Mike Carter, *King County to Pay \$1.5 Million in 2016 Shooting Death of Pregnant Muckleshoot Mother Renee Davis*, SEATTLE TIMES (Aug. 4, 2021), <https://www.seattletimes.com/seattle-news/king-county-to-pay-1-5-million-settlement-over-2016-shooting-death-of-pregnant-muckleshoot-mother-renee-davis/>.



Disproportionate deaths. In Washington state, during the period 2013–20, 253 people were killed by police.³² Calculated as a rate based on each group’s relative population, Black people were killed in police civilian killings at a rate that was 3.6 times that of non-Hispanic White people; Indigenous people were killed at a rate 3.3 times that of non-Hispanic White people; Latinos were killed at a rate that was 1.3 times greater than for non-Hispanic White people; and Pacific Islanders were killed at a rate 3.3 times that of non-Hispanic White people.³³

Disproportionate use of force. Consistent with the disproportionate deaths described above, there is strong evidence that non-lethal force is used in a racially disproportionate manner. At present, there is no central repository for use-of-force data in Washington state. A new law that went into effect on July 25, 2021, is intended to create a statewide data collection program.³⁴ Though this program will take time to be implemented, information collected and reported by some law enforcement agencies indicates strongly that non-lethal force is administered in a racially disproportionate manner. The Research Working Group examined data from four cities, Seattle, Spokane, Tacoma, and Vancouver, to determine comparative disproportionality ratios.³⁵

32. See *State Comparison Tool*, MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org/states> (select “Washington”).

33. The Appendices are available online and are not included in the print version of the Report. See TASK FORCE 2.0, *supra* note 5, Appendix A.

34. S. 5259, 67th Leg., Reg. Sess. (Wash. 2021).

35. **Case Study 1: City of Seattle.** A review of 13,240 uses of force by the Seattle Police Department during the period 2014–June 2021 revealed, using the methodology used above, that a Black person was 6.5 times more likely to be the recipient of force than a non-Hispanic White person; Indigenous persons, 2.9 times, and Pacific Islanders, 3.2 times. Asians and Latinas/os were,

A review of these cities reveals that a Black person is more likely to be subjected to force by a law enforcement officer by each of the city police departments reviewed, from a low of 3.9 times (Tacoma) to a high of 10.6 times (Vancouver) in comparison to the likelihood that a White person will be subjected to force. Indigenous people were more likely to be subjected to force in Seattle, Spokane, and Tacoma, but not in Vancouver. Pacific Islanders were more likely to be subjected to force in Seattle, Tacoma, and Vancouver, with no disaggregated information available in Spokane. Latinas/os were as likely in Vancouver and less likely to be subjected to force than White persons in Seattle, Spokane, and Tacoma. It is important to note, though, that the task force does not have confidence in what is reported regarding Latinas/os because of the failure often to collect, accurately or not, information regarding Latina/o identity.

As indicated at the outset of this section, a new law requires all law enforcement agencies to collect data on use of force. Once this information is available, better and, it is hoped, uniform data collection will allow for better analysis of data from all law enforcement agencies.

Disproportionate stops. Though there is no central repository that collects demographic data from all law enforcement agencies in Washington with regard to when law enforcement stops a person, the information available suggests strongly that race disproportionality exists at the level of stops. The task force examined data from Seattle and Spokane.

Data from the Seattle Police Department shows that from the period March 2015 to early June 2021, there were 47,855 Terry stops. These stops

respectively, .4 times and .8 times as likely as a non-Hispanic White person to be the recipient of force. It is important to note, though, that 2,838 uses of force did not include demographic information about the use of force subject.

Case Study 2: City of Spokane. Using data from a recent study commissioned by the Spokane Police Department, and calculating rates and ratios as above, reveals that during the period 2013–19, of 736 uses of force, a Black person was 6.6 times more likely to be the recipient than a non-Hispanic White person and an indigenous person was 5 times. Because Pacific Islanders were not disaggregated, collectively Asian/Pacific Islanders were .6 times as likely; Latinas/os were .5 times as likely.

Case Study 3: City of Tacoma. A recent report reviewing the Tacoma Police Department, for the period 2015–mid September 2020, disaggregated race and gender. Disproportionality ratios were calculated from this information: Black males were 3.9 times more likely to be the subject of use of force than White males; Black females were 4.9 times more likely than White females; Pacific Islander males were 2.3 times more likely than White men; Indigenous men were 1.3 times more likely than White men; Hispanic males and Asian males were less likely, respectively .4 times and .4 times. Indigenous females were nearly 2 times (1.9) more likely than White women.

Case Study 4: City of Vancouver. The Vancouver Police Department reports race independently from ethnicity. For uses of force in 2020, relative to Vancouver City demographics, a Black person is 10.6 times more likely than a White person to be the subject of police use of force; a Pacific Islander is 2.7 times more likely. A Latina/o person is about as likely to be the recipient of force as a White person, and an Asian person and an Indigenous person was .7 times as likely as a White person to be subjected to force.

indicate that, relative to Seattle's population, Black persons are stopped at a rate that is 4.1 times that of non-Hispanic White persons and Indigenous people are stopped at a rate that is 5.8 times that of non-Hispanic White persons. Based on the available demographic information, in comparison to non-Hispanic White persons, Asians, Pacific Islanders, and Latinas/os were less likely than non-Hispanic White persons to be subjected to a Terry stop by the respective factors, .21, .47, and .52. It is important to note, though, that 4,586 Terry stops did not include race demographic information for the person stopped.

The task force's analysis of data in a recent report analyzing the Spokane City Police Department reveals that, for the period 2017–June 30, 2020, of 137,034 stops resulting from Computer Assisted Dispatch, Black people were likely to be stopped at a rate 4.74 times that of non-Hispanic White people. During that same period, Indigenous people were likely to be stopped at a rate 2.61 times that of non-Hispanic White people. Asians and Latinas/os were stopped at a lower rate, respectively .60 and .53. For traffic stops that were officer-initiated, for the period 2014–June 30, 2020, Black people were stopped at a rate 2.65 times that of non-Hispanic White people. Asians were more likely to be stopped at a rate 1.23 times that of non-Hispanic White people. Latinas/os and Indigenous people had rates of .51 and .95 that of non-Hispanic White people. It is important to note that instances when demographic information is missing or not provided were excluded from consideration.

A look at these two jurisdictions reveals that certain racial minority groups are stopped disproportionately compared to non-Hispanic White persons as the reference group. The data from Spokane reveals interesting differences between when stops result from calls to law enforcement and officer-initiated stops.

Disproportionate searches. A subset of those stopped will be searched. Though comprehensive data for all jurisdictions and law enforcement agencies is not available, for agencies for which data was available, racial minorities are searched at disproportionate rates (relative and comparative) and “hit rates,” where weapons were found, are lower for racial minorities than for White persons.

Case Study 1: City of Seattle. During stops, Black persons, Hispanics, and Asian Americans were searched at rates greater than White people were. Even though minorities were searched more frequently than White persons, minorities were less likely to have weapons, with the greatest disparity in hit rates occurring for

Indigenous people.³⁶ A 2021 report on the Seattle Police Department found that White men were the least likely to be stopped, the least likely to be searched, and when searched, were much more likely than other racial minorities to possess a weapon. Importantly, the report stated, “The elevated rates at which Black and Native American men were stopped and searched, then, are not explained by any elevated likelihood that they would possess weapons.”³⁷

Case Study 2: City of Spokane. Though racial disproportionality exists for consent searches following a traffic stop, the small number of these searches makes it difficult to draw any conclusions.³⁸ Searches for officer safety following a traffic stop reveals troubling disproportionalities. Black drivers are twice as likely and Indigenous people were nearly three times more likely to be subjected to a search than would be expected based on their proportion of traffic stops.³⁹

Case Study 3: Washington State Patrol. The 2021 Gender and Justice Study Report notes that “Data from the Washington State Patrol confirms that Black, Latino, Indigenous people, and Native Hawaiian and other Pacific Islander drivers are searched at a higher rate than White motorists. Indigenous people, in particular, are searched at a rate five times higher than White motorists—and these searches appear to be focused along the I-5 corridor and near the Yakima and Colville reservations.”⁴⁰

The jurisdictions and law enforcement agencies for which data is available reveal a troubling consistency with regard to disproportionate searches of racial minorities.

Disproportionate arrests. For each of the past four fiscal years, Black people and Indigenous people have been arrested in Washington state at rates that far exceed their relative population and in comparison to White people. From 2017 through 2020, Black

36. SEATTLE POLICE DEP'T, DISPARITY REVIEW, PART I: USING PROPENSITY SCORE MATCHING TO ANALYZE RACIAL DISPARITY IN POLICE DATA 27–29 (2019), <https://crosscut.com/sites/default/files/files/19718539884.pdf>.

37. CTR. FOR POLICING EQUITY, THE SCIENCE OF JUSTICE: SEATTLE POLICE DEPARTMENT: NATIONAL JUSTICE DATABASE CITY REPORT 15–16 (2021), https://www.documentcloud.org/documents/21015602-spd_cityreport_final_11121-1.

38. POLICE STRATEGIES L.L.C., DEMOGRAPHIC DISPARITY ANALYSIS OF LAW ENFORCEMENT DATA FROM THE SPOKANE POLICE DEPARTMENT 21 n.7 (2021), <https://static.spokanecity.org/documents/opendata/spd/spokane-pd-disparity-report-police-strategies-llc-jan-2021.pdf>.

39. *Id.* at 22.

40. WASH. STATE SUP. CT. GENDER AND JUST. COMM'N, 2021 GENDER JUSTICE STUDY 637 (2021), <https://www.courts.wa.gov/?fa=home.sub&org=gjc&page=exploreStudy&layout=2&parent=study> (citing THE STANFORD OPEN POLICING PROJECT (2021), <https://openpolicing.stanford.edu>; Joy Borkholder & Jason Buch, *Driving While Indian: How InvestigateWest Conducted the Analysis*, INVESTIGATEWEST (Dec. 19, 2019), <https://www.invw.org/2019/12/19/driving-while-indian-how-investigatwest-conducted-the-analysis>).

people had relative disproportionality ratios of 3.0 to 3.1 and comparative disproportionality ratios of 3.0 to 3.2. For Indigenous people, with the exception of 2018 when they were lower,⁴¹ the relative disproportionality ratios ranged from 2.2 to 2.5, and comparative disproportionality ratios ranged from 2.3 to 2.6.

Because the Washington Association of Sheriffs and Police Chiefs (WASPC) does not report arrests by ethnicity, the table below does not include any information on Latinas/os. WASPC, though, has begun reporting disaggregated numbers for Native Hawaiians and other Pacific Islanders (NH/PI), though the research working group is not certain that data collection by law enforcement agencies for arrests is complete or consistent.

Table 1: Relative and Comparative Disproportionality Ratios for Arrests in Washington State by Demographic Group and Year*

	2017		2018	
	Rel. disp. ratio	Comp. disp. ratio	Rel. disp. ratio	Comp. disp. ratio
White (including Hispanic Whites)	1.0	n/a	1.0	n/a
Black	<i>3.0</i>	3.0	<i>3.0</i>	3.0
Indigenous	<i>2.2</i>	2.3	<i>1.7</i>	1.7
Asian	0.3	0.3	0.3	0.3
NH/PI	0.3	0.3	0.3	0.3
	2019		2020	
	Rel. disp. ratio	Comp. disp. ratio	Rel. disp. ratio	Comp. disp. Ratio
White (including Hispanic Whites)	1.0	n/a	1.0	n/a
Black	<i>3.1</i>	3.2	<i>3.1</i>	3.2
Indigenous	<i>2.5</i>	2.6	<i>2.5</i>	2.6
Asian	0.4	0.4	0.4	0.4
NH/PI	0.4	0.4	0.4	0.4

*Bolded figures emphasize comparative disproportionality, italicized figures emphasize relative disproportionality

41. The Task Force did not investigate why the 2018 numbers were significantly lower.

The table above reflects aggregate arrests. Different disproportionalities emerge with regard to arrests for different crimes. For example, arrests for certain crimes, aggravated assault and robbery, have significantly higher disproportionality ratios for Black persons, with the greatest differences for robbery, with comparative disproportionality ratios of 11.8 (2020); 10.7 (2019); 10.3 (2018); and 10.1 (2017). These ratios are starkly different from the disproportionality ratios for Black persons—around 3.0—when examining all crimes in the aggregate during each of those years.

A review of the data consistently shows that Black people and Indigenous people are arrested disproportionately, whether measured by relative or comparative disproportionality. More detail can be found in Appendix A.⁴²

B. Prosecutorial Decision-Making

At the moment, insufficient information is available for the Research Working Group to report on disproportionalities. Based on arrests and sentences, it can be surmised reasonably that disproportionalities exist, but information is not available that indicates whether disproportionalities at arrest are exacerbated or ameliorated at the charging stage. The King County Prosecuting Attorney's Office has developed a data dashboard that includes some demographic information, which indicates that, though there is relative disproportionality for Black persons in felony referrals its office receives, the disproportionality carries forward in its filings without being magnified or exacerbated.⁴³ The data dashboard does not include analysis of the case characteristics of felony referrals and the charges filed.

More on this subject is discussed in Appendix B.⁴⁴ Information on disproportionality with regard to the Spokane County Prosecutor can be found in Appendix O.⁴⁵

42. The Appendices are available online and are not included in the print version of the Report. See TASK FORCE 2.0, *supra* note 5, Appendix A.

43. See *Data Dashboard*, KING CNTY., <https://kingcounty.gov/depts/prosecutor/criminal-overview/CourtData.aspx> (select "Demographics" tab). Though there is a slight difference—30.0% of felony referrals to 31.7% felony filings—for Black people, this difference is attributed to race demographic information that is missing or listed as unknown when referred by law enforcement, which are reduced at filing. The dashboard notes the problems that exist with regard to data collection and emphasizes: "Unfortunately, this results in the PAO having very unreliable and inaccurate race and ethnicity data." *Id.*

44. The Appendices are available online and are not included in the print version of the Report. See TASK FORCE 2.0, *supra* note 5, Appendix B.

45. *Id.* Appendix O.

C. Pretrial Release

At the moment, insufficient information is available for the Research Working Group to identify specific areas or jurisdictions that require additional attention. Washington State's Pretrial Reform Task Force, established on June 22, 2017, issued its Final Recommendations Report in February 2019.⁴⁶ This report stated that one of its guiding principles, "[m]aximize justice for all," includes that "[e]very entity in the criminal justice system should take steps to ensure that the systems in place and the reforms to be implemented do not have a disproportionate impact on a person because of his or her race, ethnicity, gender, socioeconomic position, or otherwise."⁴⁷ Though this report included information on several Washington counties and estimates about the percent of the jail population detained on pretrial status,⁴⁸ it did not include demographic profiles of the pretrial detainee population.

As emphasized by the Pretrial Reform Task Force, data is needed to assess the extent of any disproportionality and, if reforms are made, to assess their impact. A longer discussion of pretrial release, including criticism and caution about the use of pretrial risk assessment tools, can be found in Appendix C.⁴⁹

D. Sentences

The Caseload Forecast Council has been tasked by the Washington Legislature to analyze and issue annual reports on race disproportionality in felony sentencing, which it began doing starting with fiscal year 2018. The Council also provides a separate statistical report. Unlike WASPC, it includes "Hispanic" in its reporting based on race, and it refers to "Caucasians," which the Research Working Group takes as "non-Hispanic White" people. The Council does not disaggregate Native Hawaiians and

46. See INTISAR SURUR & ANDREA VALDEZ, PRETRIAL REFORM TASK FORCE: FINAL RECOMMENDATIONS REPORT (Feb. 2019), <https://www.courts.wa.gov/subsite/mjc/docs/PretrialReformTaskForceReport.pdf>.

47. *Id.* at 8.

48. *Id.* at 18–19. Notably, there are significant differences among counties as to what percentage of their overall jail populations comprise pretrial detainees. For example, King, Pierce, and Spokane had percentages, respectively of 77.7%, 75.5%, and 77%, in comparison to the nationwide average of 65.1%, with Thurston at 57.3% and Whatcom County at 59.3% being lower. *Id.* at 19. The Research Working Groups cautions that not too much be made of these figures because they are provided as percentages relative to the total jail populations and without additional contextual information about what leads to these relative percentages that necessarily are in relation to the percentages serving jail incarceration sentences.

49. The Appendices are available online and are not included in the print version of the Report. See TASK FORCE 2.0, *supra* note 5, Appendix C.

other Pacific Islanders and instead lumps them in the broader “Asian” category. In addition, WASPC reports on arrests for “Aggravated Assault” and “Simple Assault.” The Caseload Forecast Council reports only on assault felony sentences. This creates certain challenges in analyzing arrests and sentences for assault because “Aggravated Assault” does not correlate exactly with assaults that are felonies in Washington.

For fiscal years 2018, 2019, and 2020, a look at aggregate felony sentences in Washington state reveals clear disproportionalities for Black persons and for Indigenous persons.

Table 2: Relative and Comparative Disproportionality Ratios in Washington State by Demographic Group and Year for All Felony Sentences*

	2020		2019		2018	
	Rel. disp. ratio	Comp. disp. ratio	Rel. disp. ratio	Comp. disp. ratio	Rel. disp. ratio	Comp. disp. ratio
Non-Hispanic White	1.1		1.1		1.1	
Black	<i>3.0</i>	2.7	<i>3.0</i>	2.7	<i>3.0</i>	2.7
Indigenous	<i>1.9</i>	1.7	<i>1.7</i>	1.5	<i>1.7</i>	1.5
Asian	0.3	0.3	0.3	0.3	0.3	0.3
Latina/o	0.6	0.5	0.6	0.6	0.6	0.6

*Bolded figures emphasize comparative disproportionality, italicized figures emphasize relative disproportionality

Given the greater disproportionality in arrests for certain crimes, reported above, it ought not to be surprising that there is greater disproportionality in felony sentences for Black persons for assault and robbery. The Research Working Group did identify an additional disproportionality that merits attention and additional study: disproportionality that exists for certain groups with regard to whether a felony sentence results in a prison sentence versus a shorter jail sentence. Curiously, this information is not directly found in Caseload Forecast Council’s annual Adult Disproportionality Reports. This divergence only becomes apparent when looking at the Adult Disproportionality Report in conjunction with the Council’s Statistical Summary of Adult Felony Sentencing.

Table 3: 2020 Felony Assault Sentences with Breakdown of Prison, Jail, or Other Sentences⁵⁰

	Felony Assault Sentences		Prison		Jail		Other	
	#	%	#	%	#	%	#	%
Non-Hispanic White	2683	63.6%	1001	61.1%	1516	64.8%	163	67.4%
Black	77	18.4%	347	21.2%	385	16.5%	43	17.8%
Indigenous	145	3.4%	53	3.2%	82	3.5%	10	4.1%
Asian	147	3.5%	46	2.8%	90	3.8%	11	4.5%
Latina/o	415	9.8%	175	10.7%	230	9.8%	10	4.1%
Total	4166		1622		2303		237	

Of note is that non-Hispanic White persons received 63.6% of the total felony sentences, but received 61.1% of the prison sentences, 64.8% of the jail sentences, and 67.4% of the “other” sentences, whereas Black persons received 18.4% of the total felony sentences, but received 21.2% of the prison sentences, 16.5% of the jail sentences, and 17.8% of the “other” sentences. Relative to their share of overall felony assault sentences, non-Hispanic White persons received a lower share of prison sentences and a higher share of jail and an even higher share of “other” sentences; Black persons received a higher share of prison sentences and lower shares of jail and “other” sentences. Hispanics received a slightly higher percentage of prison sentences and a significantly lower percentage of “other” sentences. Asian offenders received a lower percentage of prison sentences in comparison with their relative share of felony assault sentences. An examination of 2019 and 2018 felony assault sentences reveals similar trends.

These observed disproportionalities are consistent with a 2021 report of the Washington State Institute for Public Policy (WSIPP) that examined race disproportionality based on the seriousness level of offenses and based on an offender’s criminal history.⁵¹ An examination of all fiscal year

⁵⁰ Percentages, when calculated for this table, included “Unknowns” that are not reported in the table.

⁵¹ WASH. STATE INST. FOR PUB. POL’Y, EXAMINING WASHINGTON STATE’S SENTENCING GUIDELINES: A REPORT FOR THE CRIMINAL SENTENCING TASK FORCE (2021),

2019 felony sentences for non-drug offenses revealed that “[o]verall, BIPOC defendants, on average received longer sentences than White defendants.”⁵² The greatest differences, where BIPOC defendants received longer sentences, occurred for the two highest offense seriousness levels.⁵³ In addition, race disproportionality was evident when comparing the sentences of BIPOC defendants with White defendants for those with lower criminal history scores, leading WSIPP to conclude, “Thus, racial disproportionality was higher than average for individuals with lower CHs [criminal history scores].”⁵⁴

A review of felony drug violations reveals similar disproportionalities in sentencing outcomes. Interestingly, the relative and comparative disproportionality ratios for drug arrests for Black persons is significantly lower than it is for total arrests, and much lower than it is for aggravated assault and robbery. But as with felony assault violations, Black persons who receive felony sentences for drug violations receive, comparatively, a greater share of prison sentences and a lesser share of jail and other sentences.

Table 4: Comparative Disproportionality Ratios in Washington State by Demographic Group for Drug Offenses by Arrest, Felony Sentence, and Type of Punishment, FY 2020

	Arrest	Felony Sent.	Prison as Punishment	Jail as Punishment	Other Punishment
Black	2.2	1.9	2.4	1.8	1.4
Indigenous	2.0	1.5	1.4	1.6	1.6
Asian	0.2	0.2	0.2	0.2	0.1
NH/PI	0.4	n/a	n/a	n/a	n/a
Latina/o	n/a	0.5	0.6	0.4	0.4

These observed disproportionalities are troubling and warrant close examination to see if they stem from differences in case characteristics independent of race or if race is playing a role.

Additional information can be found in Appendix D.⁵⁵

http://www.wsipp.wa.gov/ReportFile/1736/Wsipp_Examining-Washington-State-s-Sentencing-Guidelines-A-Report-for-the-Criminal-Sentencing-Task-Force_Report.pdf

52. *Id.* at 21.

53. *Id.*

54. *Id.* at 23.

55. The Appendices are available online and are not included in the print version of the Report. See TASK FORCE 2.0, *supra* note 5, Appendix D.

E. Incarceration

Looking at changes to race disproportionalities since the 2011 report, the disproportionality ratio for Black persons in Washington prisons decreased, and the disproportionality ratio for Latina/o people remained nearly unchanged for prison but significantly decreased for jail.⁵⁶ The previous report only provided statistics for three population groups in prisons—White, Black, and Latina/o. This report includes Indigenous people and Asian and Native Hawaiians or Pacific Islanders (Asian & NH/PI). Indigenous incarceration shows significant disproportionality ratios for both prison and jail.⁵⁷

The 2011 report, for incarceration, used figures from 1980 and 2005 that combined prison and jails. The following table compares directly the 2005 and 2020 combined prison and jail figures.

Table 5: Incarceration Rates and Comparative Disproportionality Ratios, 1980–2020

	1980		2005		2020	
	Incarc. rate (per 100,000)	Comp. disp. ratio	Incarc. rate (per 100,000)	Comp. disp. ratio	Incarc. rate (per 100,000)	Comp. disp. ratio
White	95	n/a	393	n/a	269	n/a
Black	1342	14.1	2522	6.4	1267	4.7
Latina/o	n/a	n/a	527	1.3	302	1.1
Indigenous	n/a	n/a	n/a	n/a	985	3.7
Asian & NH/PI	n/a	n/a	n/a	n/a	134	.5

As the 2011 report discussed, Washington in 1980 had the worst Black/White disproportionality ratio in the country. By 2005, though the comparative disproportionality ratio had decreased significantly, the incarceration rate for White and Black persons increased dramatically. This increase is consistent with the rise of mass incarceration connected with the so-called war on drugs. The rate of Black incarceration between 1980 and 2005 nearly doubled; the rate of White incarceration more than quadrupled. Incarceration rates went up, but the disproportionality ratio

56. The respective disproportionality ratios for 2011 were 6.4 for Black incarcerated individuals and 1.3 for Latina/o incarcerated individuals, compared to 4.64 for Black and 1.24 for Latina/os in 2020.

57. See *supra* Table 2; *infra* Table 5. The Appendices are available online and are not included in the print version of the Report. See TASK FORCE 2.0, *supra* note 5, Appendix E.

went down because the increase in the rate of White incarceration was twice as great as the increase in the rate of Black incarceration.

The numbers from 2005 to 2020 tell a different story, though it is one that will likely require some recalculation that chooses a date pre-pandemic, a date within the pandemic, and then a date at an appropriate distance temporally, post-pandemic. The incarceration rate for Black persons is halved; the incarceration rate for White people decreases, but not by as much, resulting in a decrease in the comparative disproportionality ratio, from 6.4 in 2005 to 4.7 in 2020. The trend data for the incarceration rate for Black persons for jail shows a steady drop, from nearly 900 in 2000 to about 600 in 2018. But as a point of reference, the comparative disproportionality ratio for arrests for Black persons in 2020 was 3.2. It was 3.2, 3.0, and 3.0, respectively, for the years 2019, 2018, and 2017. The comparative disproportionality ratio for incarceration for Black persons in 2020 was 4.7. The persistence of higher imprisonment disproportionality when compared to lower (but still high) felony sentencing disproportionality may reflect the fact that historically, as well as recently, Black people tend to be punished more harshly than White people.⁵⁸

The other key takeaway is the very high comparative disproportionality ratio for Indigenous people. Task Force 1.0 did not research and calculate incarceration rates and disproportionality ratios for Indigenous people in its 2011 Preliminary Report.

F. Legal Financial Obligations

From traffic citations and juvenile misdemeanor and felony convictions, people are charged fines, fees, surcharges, and payment costs related to the violation of the law and costs for court processing.⁵⁹ This system of monetary sanctions, also known as legal financial obligations or LFOs, is a two-tier punishment scheme embedded throughout local, state, and federal courts of the United States criminal legal system. It is a system that on the one hand is a determinate sentence for people with means, and

58. See KATHERINE BECKETT & HEATHER D. EVANS, ABOUT TIME: HOW LONG AND LIFE SENTENCES FUEL MASS INCARCERATION IN WASHINGTON STATE 27 (2020), <https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state> (discussing overrepresentation of Black and Indigenous people receiving long or life sentences); *supra* Part III.D. (discussing race disproportionality in sentences for the most serious offenses as well as for racial minorities with lower criminal history scores).

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

on the other hand, an indeterminate sentence that imposes a longer and disproportionate punishment for people without financial means.⁶⁰

In Washington state, an aggregate analysis was done to specifically examine the racial and ethnic disproportionality in LFOs.⁶¹ The analysis found that Black, Latina/o, and Indigenous people are sentenced to LFOs more frequently and at higher rates than Whites and Asian & NH/PI.

Specifically, Latina/o people are sentenced to significantly higher LFOs than White defendants, even after controlling for relevant legal factors. Latina/o people are sentenced to a median superior court LFO of \$1,500; Indigenous people are sentenced to a median LFO of \$1,100; Whites are sentenced to a median LFO of \$1,000; Asian/Pacific Islanders are sentenced to a median LFO of \$900; and Black people are sentenced to a median LFO of \$850. In addition, Black and Indigenous people, per capita, bore a disproportionate share of LFOs in comparison to White people and to Asian/Pacific Islanders.

Collection trends also suggest that inability to pay LFOs is greater for Black, Latina/o, and Indigenous people.

The overall effect is that LFOs perpetuate poverty and future involvement with the criminal justice system disproportionately for Black, Indigenous, and people of color. One research project underway conducted by Kate O'Neil, Ian Kennedy, and Alexes Harris examines data from the Washington State Administrative Office of the Courts for the years 2000–2014. This ongoing project has found that the observed LFOs per capita are spatially concentrated. Certain census tracts across Washington state carry identifiable amounts of LFO debt compared to other census tracts. Second, the analysis found that neighborhoods with higher poverty rates also tended to have higher per capita LFO debt. Third, LFOs were associated with increases in future poverty rates experienced by certain census tracts in Washington. This association was stronger for non-White neighborhoods.

The analysis led the researchers to an alarming conclusion that LFOs sentenced per capita can predict future shares of residents in poverty. The system of monetary sanctions appears to reproduce the structural conditions that generated these neighborhood conditions in the first place, such as racial differences in access to housing, and the accrual of

60. ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT OF THE POOR (2016).

61. Alexes Harris & Frank Edwards, *Fines and Monetary Sanctions*, OXFORD RSCH. ENCYCLOPEDIA OF CRIMINOLOGY AND CRIM. JUST. (2017), <https://doi.org/10.1093/acrefore/9780190264079.013.228>.

household wealth and community resources.⁶² Carrying court-imposed debt negatively affects people's abilities to access housing, employment, education, and furthers their involvement with the legal system.⁶³

A fuller discussion of LFOs can be found in Appendix F.⁶⁴

G. Third Degree Driving While License Suspended (DWLS3)

Third Degree Driving While License Suspended ("DWLS3") is a misdemeanor crime that has been called "driving while poor."⁶⁵ Under RCW 46.20.342(1)(c)(iv), a prosecutor can charge an individual with DWLS3 if they are driving with a suspended license and that suspension arose because they "failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic infraction or citation (failure to pay)." DWLS3 has become the most frequently charged crime in Washington state.⁶⁶

Between 2010–2020, Black drivers were consistently charged with the crime of DWLS3 at a rate disproportionate to the percentage of Black residents within each county.⁶⁷ In some of Washington's larger jurisdictions, the percentage of DWLS3 charges brought against Black residents in a given year was double or triple the percentage of Black residents in the county's total population. For example, Black residents make up only 7% of King County's population. Yet in 2010, Black residents made up 18.3% of the county's total DWLS3 charges and by 2020 constituted 24.3% of DWLS3 charges in the county.

Latina/o individuals of unknown race⁶⁸ were also disproportionately represented in DWLS3 charges. This was particularly true in Grant County

62. See MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995).

63. See Sarah Shannon, Beth M. Huebner, Alexes Harris, Karin Martin, Mary Patillo, Becky Pettit, Bryan Sykes & Christopher Uggen, *The Broad Scope and Variation of Monetary Sanctions: Evidence from Eight States*, 4 *UCLA CRIM. JUST. L. REV.* 269 (2020).

64. The Appendices are available online and are not included in the print version of the Report. See TASK FORCE 2.0, *supra* note 5, Appendix F.

65. Though there are many ways to be charged with DWLS3, the focus of this research is on charges and convictions based on an underlying suspended license for failure to appear or financial inability to pay.

66. Amy Roe, *It's Time to Stop Wasting Money on Our State's Most Commonly Charged Crime*, ACLU WASH., (Feb. 12, 2018), <https://www.aclu-wa.org/story/it%E2%80%99s-time-stop-wasting-money-our-state%E2%80%99s-most-commonly-charged-crime>.

67. The raw data on DWLS3 charges, outcomes, and race of defendants was obtained from the Administrative Office of the Courts. The Administrative Office of the Courts did not provide any analysis. This raw data is on file with Research Working Group Team Member, Robert Chang. The general population data is from the 2019 U.S. Census population estimates. See *Quick Facts: Washington*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/WA>.

68. Although Latina/o refers to "Hispanic" and "Hispanic of Unknown Race," the numbers for this group are not an accurate reflection of the Latina/o population in Washington State. For purposes

where Hispanic residents represented up to 40.4% of charges but only 8.2% of the population. Hispanic individuals of unknown race also made up a disproportionate percentage of charges in King County, Benton County, Clark County, Snohomish County, Whatcom County, Lynnwood Municipal, Renton Municipal, and Yakima Municipal, though to a lesser extent.

Although Indigenous people made up smaller percentages of the general population, there was particular over-representation in DWLS3 charges in Yakima Municipal, Yakima County, and Whatcom County. More generally, Indigenous people were over-represented in yearly DWLS3 charges in all jurisdictions except Snohomish County, Benton County, Clark County, Cowlitz County, and Pierce County.

Asian residents tended to be disproportionately underrepresented in DWLS3 charges per year, except for Cowlitz County in 2015, 2017, and 2019.⁶⁹

In comparison, the percentage of DWLS3 charges brought against White drivers almost never overtook the percentage of White residents in each county.⁷⁰

Disproportionalities that exist at charging, not surprisingly, persist at convictions. As a simple misdemeanor offense, a conviction for DWLS3 comes with a maximum fine of \$1,000 and a maximum sentence of ninety days.⁷¹ In practice, the monetary impact of a DWLS3 conviction can be much higher than the base penalty set by a judge. Even assuming that a judge imposes a base penalty of \$300⁷² for the DWLS3 conviction, there

of data analysis, the authors have chosen to use the terms “Hispanic of Unknown Race” and “Hispanic” to refer to people who identified as Race: Unknown and Ethnicity: Hispanic. Individuals who identified as Race: White and Ethnicity: Hispanic were counted as White. Accordingly, this data does not correctly capture the percentage of Latina/o individuals residing in each county or the percentage of Latina/o individuals that make up the total DWLS3 charges for each year.

69. In those years, Asian individuals made up 2.0% of DWLS3 charges compared to 1.6% of the county’s total population.

70. The few exceptions are discussed in detail in Appendix G. The Appendices are available online and are not included in the print version of the Report. See TASK FORCE 2.0, *supra* note 5, Appendix G.

71. WASH. REV. CODE § 46.20.342(1)(c) (2015) (providing that DWLS3 is a misdemeanor crime without a specified punishment); WASH. REV. CODE § 9.92.030 (1982) (providing that “[e]very person convicted of a misdemeanor for which no punishment is prescribed by any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than ninety days, or by a fine in an amount fixed by the court of not more than one thousand dollars or both such imprisonment and fine.”).

72. In 2012, the Administrative Office of the Courts produced a fiscal note stating that, based on a past study, “the average penalty assessed per DWLS3 case was \$293 with an average payment of \$91.” See S. 6284, 62nd Leg., Reg. Sess. (Wash. 2012), available at <https://fortress.wa.gov/ofm/fnspublic/FNSPublicSearch/Search/2012/6284> (search under session year 2012, bill number 6284).

are further mandatory and discretionary traffic-based financial obligations authorized under the law, which can add up to a total owed amount of \$708.⁷³ And although Washington no longer allows imposition of interest upon non-restitution penalties, fines, fees, and costs owed from a criminal proceeding,⁷⁴ defendants who had their licenses suspended due to underlying unpaid traffic tickets may continue to owe additional collection fees and accrued interest⁷⁵ on top of the penalties assessed for a DWLS3 conviction.⁷⁶

Even a jail sentence of a few days can impact an individual's employment prospects and a family's ability to pay the bills. In 2009, the Administrative Office of the Courts reported that the average jail sentence for an individual convicted of DWLS3 was 61.9 days, "with all but 3.3 days suspended."⁷⁷ For one twenty-nine-year-old father in Spokane, Washington, the DWLS3 conviction and subsequent sentence of ten days in jail cost him his job.⁷⁸ Another forty-three-year-old father in Spokane reported being imprisoned numerous times for DWLS3.⁷⁹ Over time, he lost his car, his job, and his income.⁸⁰

73. *See, e.g.*, WASH. REV. CODE § 3.62.085 (2018) ("Upon conviction or a plea of guilty in any court organized under this title or Title 35 RCW, a defendant in a criminal case is liable for a fee of forty-three dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c)."); WASH. REV. CODE § 3.62.090 (2019) (providing an additional public safety and education assessment calculated as .70 (base penalty) +.50 (initial public safety and education assessment) which "shall not be suspended or waived by the court"); WASH. REV. CODE § 46.64.055 (2009) ("In addition to any other penalties imposed for conviction of a violation of this title that is a misdemeanor . . . the court shall impose an additional penalty of fifty dollars. The court may not reduce, waive, or suspend the additional penalty unless the court finds the offender to be indigent.").

74. WASH. REV. CODE § 10.82.090(1) (2018) ("[R]estitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations."); WASH. REV. CODE § 3.62.040(5)(b) (2018) ("As of June 7, 2018, penalties, fines, bail forfeitures, fees, and costs imposed against a defendant in a criminal proceeding [in district courts] shall not accrue interest."); WASH. REV. CODE § 10.01.180 (2018) ("As of June 7, 2018, penalties, fines, bail forfeitures, fees, and costs imposed against a defendant in a criminal proceeding [in city cases] shall not accrue interest."). *But see* WASH. REV. CODE § 10.01.180 (2018) (providing that a non-indigent defendant found to have willfully defaulted in the payment of any fine, penalty, assessment, fee, or costs can have the amount sent to a collection agency).

75. *See* WASH. REV. CODE §§ 19.16.500(1)(b)–(2) (2011).

76. The Appendices are available online and are not included in the print version of the Report. *See* TASK FORCE 2.0, *supra* note 5, Appendix G, Diagrams 1, 2.

77. Wash. S. 6284, available at <https://fortress.wa.gov/ofm/fnspublic/FNSPublicSearch/Search/2012/6284> (search under session year 2012, bill number 6284).

78. CTR. FOR JUST., VOICES OF SUSPENDED DRIVERS 14 (2013), <https://www.smith-baerieri.com/wp-content/uploads/2013/01/CFJ-Voices-of-Suspended-Drivers.pdf> (quoting the same twenty-nine-year-old father from Spokane).

79. *Id.*

80. *See id.*

Though a misdemeanor, disproportionalities that exist for DWLS3 have an outside impact because it is, as noted above, the most charged crime in Washington, and the negative impact can have cascading effects that lead to further entanglement with the criminal justice system.

More on this topic can be found in Appendix G.⁸¹

H. Community Supervision and Reentry

BIPOC individuals can be and are disparately impacted after conviction, including (1) in decisions regarding whether they can enter community supervision instead of serving all or part of their sentence incarcerated; (2) in decisions regarding whether they can be released from prison early; and (3) on reentry into the community.

It is impossible to examine in isolation these issues that arise later in processing individuals through the criminal justice system. Disproportionalities at this point are often the result of disparities that begin much further upstream. Other parts of the report explain how BIPOC individuals experience differential treatment that regards them as “bad” from their initial encounters with the system, including that they are stopped, searched, and arrested at higher rates; experience harsher conditions of confinement;⁸² are charged with more serious crimes; are more likely to receive aggravated or enhanced sentences and less likely to receive mitigated sentences;⁸³ and generally receive longer sentences as a result of harsher assessments.⁸⁴ These negative assessments of BIPOC individuals compound as they are processed through the system and have lasting impact. Labeling and presumptions carry forward into the issues in this section—decisions about continued incarceration and early release, as well as the experience of BIPOC individuals on reentry.

For example, in explaining its findings of racial disproportionalities in sentencing, the Washington State Institute for Public Policy explained that

81. The Appendices are available online and are not included in the print version of the Report. See TASK FORCE 2.0, *supra* note 5, Appendix G.

82. See, e.g., GRANT DAILEY, PETER HEINECCIUS, MEGAN KO & BROOKE LEARY, KING CNTY. AUDITOR'S OFF., ADULT JAILS NEED RISK-BASED APPROACH TO IMPROVE SAFETY, EQUITY 27–37 (2021), <https://kingcounty.gov/~media/depts/auditor/new-web-docs/2021/jail-safety-2021/jail-safety-2021.aspx?la=en> [hereinafter KING CNTY. AUDITOR REPORT].

83. WASH. STATE INSTITUTE FOR PUB. POLICY, EXAMINING WASHINGTON STATE'S SENTENCING GUIDELINES: A REPORT FOR THE CRIMINAL SENTENCING TASK FORCE, 32 (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.

84. *Id.* at 21.

[t]hese disproportionalities may be driven, in part, by differences in treatment at earlier stages of the criminal justice system. For example, there may be disproportionality in the likelihood of arrest regardless of differences in actual offending behavior. If people of color are more likely than White people to be arrested, then they may also be more likely to be convicted of an offense. Consequently, differences in sentencing outcomes may represent disparate treatment prior to conviction and/or sentencing.⁸⁵

Further, simply on the basis that members of BIPOC communities are overrepresented in prison and jail populations, they are disproportionately subject to discretionary decisions concerning their eligibility for release to community supervision, dependent on services designed to aid in their reentry, and impacted by collateral consequences of their incarceration. Any bias, explicit or implicit, in discretionary decisions, and any neutral practices, including risk assessment tools that have race disproportionate effects, will negatively impact individuals and communities of color.

Additional discussion, including a longer discussion of risk assessment tools used in this context, can be found in Appendix H.⁸⁶

I. Criminal Justice System Actors

In at least one listening session, community members emphasized that diversity among criminal justice system actors was important. They did not feel that inclusion by itself would be a panacea, as research shows that racial minorities are not immune from harboring explicit and/or implicit bias, including within-group biases. But research shows consistently that diversity improves group deliberation and decision-making, supporting the notion that representation matters.

There is very little systematic collection of race demographic information about criminal justice system actors. With regard to the judiciary, it is relatively easy to determine the demographic profile of the Washington Supreme Court, which went from having no persons of color in 2011 when the first task force presented its first report to now having four persons of color on the Court. The racial diversity on the high court now is much greater than the diversity overall of state court judges in Washington, which in 2016 had 4% women of color with a state

85. *Id.* at 14; *see also* KING CNTY. AUDITOR REPORT, *supra* note 82, at 29 (“Black people in the United States are more likely than White people to be arrested; they are more likely to be charged with crimes that carry heavier sentences; once charged, they are more likely to be convicted; and once convicted, they are more likely to experience lengthy prison sentences. These systemic factors compound on each other to inflate the average criminal involvement score for Black people.”).

86. The Appendices are available online and are not included in the print version of the Report. *See* TASK FORCE 2.0, *supra* note 5, Appendix H.

population share of 15% women of color and 6% men of color with a state population share of 16% men of color, which earned Washington a “D” grade on the Gavel Gap Report Card.⁸⁷

For elected county prosecutors, though the Washington Association of Prosecuting Attorneys does not collect demographic information of its elected prosecuting attorneys, WAPA reports that it believes, based on self-identification, there is one woman of color now serving, and that one other person of color previously served as an elected prosecutor. One was elected in 2014; the other, 2018. That means that before 2015, for the thirty-nine counties in Washington, it is not known if a person of color had ever served as an elected county prosecutor.

The Research Working Group was unable to collect comprehensive data on elected and appointed city attorneys. Further, comprehensive data on the demographics of staff in county prosecutor and city attorney offices is not available.

Though some county defender agencies collect demographic information on their staff, comprehensive data on attorneys who provide public and private defense is not available. Likewise, comprehensive data is not available with regard to law enforcement statewide.

IV. COMMUNITY VOICES

Most are now familiar with “the talk” that is given by Black parents and elders to Black children to prepare them for and to give them tools and strategies to survive encounters with law enforcement.⁸⁸ The need for “the talk” is rooted in the lived experience of those who experience disparate treatment in the criminal justice system.

To understand the disparities that exist for communities of color in the criminal justice system, it is essential to not simply rely on data; it is essential to hear those communities speak about their experiences with the system. Community members and organizations were involved in Task Force 2.0’s workgroups. In addition, the Task Force’s Community Engagement Working Group organized engagement sessions with various

87. Tracey E. George & Albert Yoon, *Gavel Gap: The Differences Between the Race & Gender Composition of the Courts & the Communities They Serve*, AMERICAN CONST. SOC’Y <https://www.acslaw.org/analysis/reports/gavel-gap/> (scroll to “Report Card,” select “Washington”).

88. See, e.g., Geeta Gandbhir & Blair Foster, *A Conversation With My Black Son*, N.Y. TIMES, (Mar. 17, 2015), <https://www.nytimes.com/2015/03/17/opinion/a-conversation-with-my-black-son.html>; Sam Sanders & Kenya Young, *A Black Mother Reflects on Giving Her 3 Sons “The Talk” . . . Again and Again*, NPR (June 28, 2020), <https://www.npr.org/2020/06/28/882383372/a-black-mother-reflects-on-giving-her-3-sons-the-talk-again-and-again>.

individuals and groups around the state to share the Task Force's work and to gain their perspectives on the criminal justice system.

The participants in these sessions addressed a range of issues confronting BIPOC communities:

- Every person participating in the engagement sessions felt that individuals of color are not treated fairly or equitably in the criminal justice system.
- Many participants spoke specifically about how bias and stereotypes criminalize BIPOC individuals.
- Participants said that police seem to escalate and fail to deescalate encounters with BIPOC individuals.
- Participants raised the problem of over-policing and under-policing in their communities.
- Many participants emphasized that one cannot look at racial disparities in the criminal justice system separate from the social and economic inequalities that exist in society as a whole.
- Participants felt that there was a lack of fairness in sentencing.
- Numerous participants, particularly those from the Latina/o community, spoke about how fear of immigration authorities impedes access to justice.
- Numerous participants expressed that access to justice was impeded because of language issues, including a lack of translators, court forms not being translated, and a failure by CJS actors to appreciate cultural differences.

Participants also expressed frustration over what they perceived as a lack of progress in addressing disparities in the criminal justice system and made the following observations about what they perceived as barriers to reform:

- Lack of access to data;
- Lack of disaggregated data for Asian, Native Hawaiian, and Pacific Islander communities;
- Lack of systems of accountability for CJS actors;
- Collective bargaining within police unions as a major impediment to reform and to getting justice;
- Police hiring practices, including the need to see more officers of color and to see better screening of officers;
- Challenges posed by structural racism that infuses the criminal justice system;

- Failure by those seeking reform to recognize and include expertise provided by community.

Finally, participants expressed concerns about reports, including frustration that reports are written, and recommendations are made, but that nothing really changes.

These summary bullet points do not do justice to what participants expressed in the listening sessions. They do not capture fully the pain expressed by participants.

More on what participants expressed in the listening sessions can be found in Appendix I.⁸⁹

V. PROFFERED CAUSES FOR RACIAL DISPROPORTIONALITY

A. Crime Commission Rates

The best available evidence suggests that the disproportionalities discussed in Part III above are only partly attributable to differences in crime commission rates. It is important to note that crime commission rates are difficult to approximate and perhaps impossible to determine accurately. Generally, criminologists use two methods to estimate the level of crime commission among different racial and ethnic groups. Each has its problems.

Some criminologists use household crime victimization survey data in which victims identify the race of their assailant as proxies for differential commission rates by race.⁹⁰ This data reflects victim perceptions of the racial identity of their assailant, and include only non-fatal crimes where there is direct contact between the victim and the perpetrator (e.g., robbery, rape, and assault). Because information about victim perceptions of perpetrators' race is only available for a few violent offenses, crime victimization survey data presents an incomplete picture of crime commission rates by race. In addition, a significant percentage of victims (16% in 2019) of non-fatal violent crimes do not identify the race/ethnicity of their assailant.⁹¹

89. The Appendices are available online and are not included in the print version of the Report. See TASK FORCE 2.0, *supra* note 5, Appendix I.

90. See, e.g., Patrick A. Langan, *Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States*, 76 J. CRIM. L. & CRIMINOLOGY 666 (1985).

91. RACHEL E. MORGAN & JENNIFER TRUMAN, U.S. DEPT. OF JUST., CRIMINAL VICTIMIZATION, 2019, at 19 (2020), <https://bjs.ojp.gov/content/pub/pdf/cv19.pdf>.

Other criminologists use arrests as a proxy for crime commission.⁹² However, this likely presents a distorted picture. First, according to 2019 national data, less than half (41%) of violent victimizations were reported to police, and only about one-third (33%) of property victimizations were reported to the police.⁹³ Second, crimes of violence are committed most often by an offender who is the same race as their victim: most White victims identify their assailants as White (61.6%) and most Black victims identify their assailants as Black (70%).⁹⁴ Third, Black victims (49%) are more likely than White victims (37%) to report their victimization to the police.⁹⁵ Higher reporting rates among Black persons means that crimes involving Black suspects are more likely to come to the attention of the police. Further, the use of arrest data as a proxy for crime commission is problematic when clearance rates (the percentage of crimes that comes to the attention of the police that lead to arrest or are cleared by exceptional means) are low. In 2019, WASPC reports that the clearance rate for “Crimes Against Persons” was 47.2%; the clearance rate for Crimes Against Property was 15.2%.⁹⁶

The use of crime victimization surveys as accurate proxies for differential crime commission among different racial groups is problematic for the reasons identified above. The use of arrests as a measure of differential crime commission among different racial groups is also problematic and will likely overstate the rate of crime commission by Black persons and therefore underestimate race disparity in criminal justice processing. Incomplete or unreported data on other racial groups only supports the conclusion that it is difficult to determine with confidence that either of these proxies are accurate measures of differential involvement in criminal activity.

B. The Interplay of Bias and Facially Neutral Policies

Research shows that bias, whether held consciously (explicit) or unconsciously (implicit), affects behaviors.⁹⁷ It may be difficult, though, to establish when precisely bias affects behavior that impacts a particular

92. See, e.g., Albert Blumstein, *On the Disproportionality of the U.S. States' Prison Population*, 73 J. CRIM. L. & CRIMINOLOGY 1259 (1982).

93. MORGAN & TRUMAN, *supra* note 91, at 8.

94. See *id.* at 19 (Table 17: Percent of violent incidents and percent of the U.S. population, by victim and offender race or ethnicity, 2019).

95. *Id.* at 11.

96. TONYA TODD, BROOK BASSETT & JOAN L. SMITH, WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, CRIME IN WASHINGTON 2019 ANNUAL REPORT 13 (2019), <https://www.waspc.org/assets/CJIS/crime%20in%20washington%202019-small.pdf>.

97. For a fuller discussion of explicit and implicit bias, see 2011 *Preliminary Report*, *supra* note 14, at 17–20.

person. The criminal justice system involves numerous actors—such as police officers, prosecutors, defense counsel, judges, jurors, and eyewitnesses—whose decisions and judgments have a significant impact on the conviction and punishment of criminal defendants.

The 2011 Report discussed existing research that showed that CJS actors, in experimental settings, exhibited bias in ways that affected or could affect outcomes. For example, a juror who associates Black persons (as opposed to White persons) with a particular crime will be more likely to convict Black persons (as opposed to White persons) of that crime on the *same* evidence. In another experiment, police officers tended to associate Black faces with criminality. In yet another experiment, both police and probation officers exhibited a significant influence of race on their judgments of culpability and decisions to arrest and to charge.⁹⁸

The 2011 Report relied on previous research in non-experimental settings that reviewed actual CJS outcomes in Washington that found disparate treatment of racial minorities with regard to prosecutorial decision-making, confinement sentencing outcomes, LFOs, pretrial release, enforcement of drug laws, asset forfeiture, traffic stops, and DWLS.⁹⁹ But conclusions about race disparity when viewing aggregate outcomes do not, in general, provide a remedy in individual circumstances. Remedies in individual circumstances generally require proof of intentional discrimination by particular CJS actors.¹⁰⁰

While traditional models of racism emphasize individual acts of discrimination, structural racism describes the interaction between various institutions and practices that are neutral on their face, but nevertheless produce racially disparate outcomes.¹⁰¹ Facially neutral policies can produce foreseeable, if unintended, race disproportionality.¹⁰² For example, judicial consideration of ostensibly race-neutral factors, such as employment status, when making pre-trial release decisions,

98. These experiments are discussed in detail in the 2011 *Preliminary Report. Id.* Appendix A.8.

99. *See id.* at 13–17.

100. With regard to Black people, Latinas/os, and Indigenous people who are stopped while driving their cars and searched, absent an admission from officers that they were acting based on bias, intentional discrimination will be nearly impossible to prove. Yet even though intentional discrimination cannot be proven, Black people, Latinas/os, and Indigenous people are more likely will be searched, even though, statistically, those individuals are less likely to be in possession of narcotics or weapons. The Appendices are available online and are not included in the print version of the Report. *See* TASK FORCE 2.0, *supra* note 5, Appendix A, Appendix K.

101. *See generally* John A. Powell, *Structural Racism: Building Upon the Insights on John Calmore*, 86 N.C. L. REV. 791 (2008).

102. *Id.* at 794.

disadvantages certain Black and Latina/o defendants because they are less likely than White and Asian defendants to be employed in Washington.¹⁰³

Another example of a facially neutral policy that can produce foreseeable, if unintended, race disproportionality is the provision of publicly funded criminal defense. The Office of Public Defense reports that in 2018 county filings, “courts appointed public defense attorneys to represent approximately 95% of felony defendants, 54% of misdemeanor defendants, and almost 100% of juveniles.”¹⁰⁴ If sufficient resources are not provided for public defense, the burden disproportionately hits Black and Indigenous people especially hard because they are grossly overrepresented at arrest, charging, conviction, and sentencing. In addition, the low rate of assigned counsel for misdemeanors may indicate that insufficient resources are provided to indigent defendants who face what might be considered by some to be less serious jeopardy. This ignores how consequential misdemeanors such as DWLS3 can be in pushing a person into a cycle of poverty and continued entanglement in the criminal justice system. Any criminal conviction can lead to the loss of housing or employment as well as a host of other collateral consequences. Some criminal convictions have immigration consequences.¹⁰⁵ To the extent that public defense is underfunded, race disproportionality at arrest, charging, conviction, and sentencing is likely amplified.

If public defense is underfunded, a question arises as to what role race may play in funding decisions. The level of public defense funding may reflect bias, explicit and/or implicit, based on the population served by public defense. The unknown counterfactual is whether public funding of criminal defense would look different if White people were overrepresented at arrest, charging, conviction, and sentencing.

Consider the way that the opioid crisis, associated more with White people, has tended to be regarded as a public health issue, whereas the earlier crack cocaine crisis, associated more with Black people, was

103. In Washington, in 2020, the Black unemployment rate was 12.7%, the Latina/o unemployment was 9.8%, as compared with the White unemployment rate of 7.9% and the Asian unemployment rate of 6.3%, with Indigenous unemployment not reported. BUREAU OF LAB. STAT., EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION BY SEX, RACE, HISPANIC OR LATINO ETHNICITY, MARITAL STATUS, AND DETAILED AGE, 2020 ANNUAL AVERAGES 71 (2020), <https://www.bls.gov/lau/table14full20.pdf>.

104. WASH. STATE OFF. OF PUB. DEF., 2019 STATUS REPORT ON PUBLIC DEFENSE IN WASHINGTON STATE 20 (July 2020), https://www.opd.wa.gov/documents/00799-2020_StatusReport.pdf. This 95% figure may be inflated because of difficulties in collecting data from different sources.

105. The Appendices are available online and are not included in the print version of the Report. See TASK FORCE 2.0, *supra* note 5, Appendix M (for more detail on delivery of public defense).

addressed largely through criminal justice and carceral approaches.¹⁰⁶ The criminal justice and carceral approach undergirded a facially neutral law that was enforced in a way that the Washington Supreme Court recognized “has hit young men of color especially hard.”¹⁰⁷

If public defense is underfunded and decisions regarding funding are impacted by bias, explicit and/or implicit, this facially neutral policy may turn out not only to exacerbate disproportionality but may stem in part from improper racial considerations. This suggests that there is an interplay between facially neutral policies and bias that requires careful consideration.

Consider the facially neutral policies that exist with regard to juror selection. Prospective jurors can be struck for cause if the judge finds that the juror cannot serve as a juror, including if the juror is unable to be impartial. In addition, the prosecutor and defense counsel may exercise peremptory challenges, where, at least initially, they do not have to provide a reason for striking a prospective juror. The exercise of peremptory challenges has raised serious questions about whether prospective jurors were being struck for improper reasons. Though people may disagree about the extent of race discrimination against potential jurors, there is universal agreement that race discrimination in jury selection is wrong.¹⁰⁸ The challenge, though, has been how to prove when a strike of a prospective juror is motivated by improper race considerations.

Until recently, Washington followed a three-step test that required a finding of invidious (intentional) discrimination by the striking attorney.¹⁰⁹ GR 37, adopted by the Court in 2018, dramatically altered the way peremptory challenges would be tested, including that it was intended to

106. See Helena Hansen & Julie Netherland, *Is the Prescription Opioid Epidemic a White Problem?*, 106 AM. J. PUB. HEALTH 2127, 2128 (2016) (“[w]hen nonmedical opioid use increased in White communities, rather than arresting consumers, regulators” sought to address the problem in ways that did not involve the criminal justice system); Barbara Fedders, *Opioid Policing*, 94 IND. L.J. 389, 426-27 (2019) (discussing how the response to the “crack cocaine crisis” resulted in large numbers of arrests of drug users); Mary Crossley, *Opioids and Converging Interests*, 49 SETON HALL L. REV. 1019, 1027 (2019) (noting difference in public attitudes toward “opioids (drugs that have been racially coded as ‘white’) . . . [and] “crack cocaine (a drug racially coded as ‘black’)”).

107. *State v. Blake*, 481 P.3d 521, 533 (2021) (citing 2011 Preliminary Report, *supra* note 14).

108. See generally *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Batson v. Kentucky*, 476 U.S. 79, 84-87 (1986); *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238-43 (2019).

109. *State v. Saintcalle*, 309 P.3d 326, 333-339 (2013) (recognizing the limitations of *Batson* but adhering to it); see WASH. CT. GEN. R. 37 (setting forth new test for assessing peremptory challenges that includes consideration of implicit bias).

address implicit bias.¹¹⁰ The Court's adoption of GR 37 is an example of reform intended to address the exclusion of jurors of color through the exercise of peremptory challenges, which could, before GR 37, be challenged successfully only through proof of intentional discrimination, which necessarily failed to address or remedy implicit bias. The Court recognized that the facially race-neutral *Batson* test was ineffective in addressing race discrimination in the exercise of peremptory challenges in individual cases and instituted, instead, a test that operated at a systemic level that sought to correct the deficiencies with the previous approach. The Court's new approach to peremptory challenges recognizes the interplay between bias and facially neutral policies and provides a systemic solution intended to protect against the possible operation of bias in individual circumstances.

Solutions, though, even when disparity has been demonstrated, remain elusive. A recent study that examined the treatment of juveniles sentenced as adults in Washington over a ten-year period, from 2009 to 2019, revealed not just that Black and Latina/o children are disproportionately overrepresented among youth convictions, discretionary decline, and auto-decline cases, but also that “[d]ifferences neither in criminal histories nor types of offense explain this disproportional over-representation.”¹¹¹ The disparity that is demonstrated at the aggregate outcome level does not, by itself, prove discrimination in any individual case. Though the disparity in aggregate outcomes is likely the result of the interplay of bias, explicit and/or implicit, operating within the framework of facially neutral laws and policies regarding discretionary decline and auto-decline,¹¹² this study noted that it “cannot speak to the precise mechanisms that produce ethno-racially disparate outcomes.”¹¹³

This last statement presents a conundrum and challenge for those seeking to reduce or eliminate disparity in the criminal justice system. We

110. WASH. CT. GEN. R. 37 was essentially constitutionalized by *State v. Jefferson*, 429 P.3d 467 (2018).

111. HEATHER D. EVANS & STEVEN HERBERT, UNIV. OF WASH., JUVENILES SENTENCED AS ADULTS IN WASHINGTON STATE, 2009–2019, at 4 (2021), https://www.opd.wa.gov/documents/00866-2021_AOCreport.pdf; see also *id.* at 23 (“no evidence that criminal history is a primary driving factor in prosecutors’ decisions to initiate a discretionary decline hearing”); *id.* at 26 (“youth of color are, to an extraordinary degree, disproportionately over-represented among juveniles adjudicated as adults through the discretionary decline process, even when type of offense is accounted for in the analysis”). The researchers also identify very significant disproportionalities with regard to convictions and auto-decline for Indigenous children. *Id.* at 15, 20.

112. *Id.* at 33, 33 n.29 (discussing pervasiveness of implicit bias and noting “ways in which adults such as justice officials may tend to view children of color as products of broken families, less amenable to rehabilitation, more threatening, more adult-like and therefore more culpable for criminal behavior”).

113. *Id.* at 33.

may not always be able to identify with precision the mechanisms that produce disparate outcomes. It does not mean, though, that we cannot act.

Recommendations will be issued later this year from the Recommendations Working Group. These recommendations will propose solutions.

VI. CONCLUSION

As we did in the 2011 Preliminary Report, we have presented evidence of race disproportionality in the criminal justice system. Our examination of the data leads us to repeat the conclusions we reached ten years ago. In 2021, race *still* matters in ways that are not fair, that do not advance legitimate public safety objectives, that produce racial disparities in the criminal justice system, and that undermine public confidence in our legal system.

The question and challenge, then and now, is what will be done to remedy these problems.

CLOSING REMARKS FROM THE TASK FORCE CO-CHAIRS

Unlike our opening remarks which were addressed to the Court, our closing remarks are directed to all criminal justice system actors, policymakers, and to the public.

We know that “the talk” given by Black parents and elders to Black children is meant to equip Black children with tools and strategies to avoid, if possible, and to survive, if confronted, encounters with law enforcement. “The talk” is motivated by fierce love and by terror.¹¹⁴

Can you imagine a world in which Black parents and elders would not have to give “the talk” to Black children?

If you can imagine this world, consider then what we would have to do bring it about.

The picture of the criminal justice system painted by the facts about race disproportionality and disparity is painful to look at. But look we must.

We must learn to talk about it in order to educate ourselves and others.

Then, we must act if we are to bring about this imagined world.

Task Force 2.0 is committed to bringing into being this world.

Join us in this work.

Sincerely,

Deans Mario L. Barnes, Annette E. Clark, and Jacob H. Rooksby
Co-Chairs, Task Force 2.0: Race and Washington’s Criminal Justice System

114. We are unfamiliar if there are versions of “the talk” in Indigenous or other minority communities. We would not be surprised if it existed in some form, where parents and elders teach Indigenous and other minority children about racism and try to equip the children to face it.