

“Toughen Up, Buttercup” versus #TimesUp: Initial Findings of the ABA Women in Criminal Justice Task Force

Maryam Ahranjani*

“Practicing criminal law as a woman is like playing tackle football in a dress.” Andrea George, Executive Director of the Federal Public Defender for Eastern Washington and Idaho, began her testimony to the American Bar Association’s Women in Criminal Justice Task Force with that powerful observation. In the wake of the #MeToo movement, the ABA has focused on ways to enhance gender equity in the profession and in the justice system. The Criminal Justice Section of the ABA has invested significant resources in the creation of the Women in Criminal Justice Task Force (WCJ TF), which launched its work in January 2019. Written by the WCJ TF Reporter, this Article describes the current status of women criminal lawyers by situating the Task Force’s research within the larger literature on gender equity in the legal profession and in criminal law in particular, sharing unique original qualitative data from the project’s listening sessions, and proposing solutions and next steps for supporting women who choose the important societal role of criminal attorney.

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* Associate Professor and Don L. & Mabel F. Dickason Professor, University of New Mexico School of Law. I express my deepest gratitude to my fantastic research assistants Kristen Edwards and Nat Saing, former faculty assistant Sila Manahane, the co-chairs and members of the Women in Criminal Justice Task Force for their individual and collective support, and colleagues Nathalie Martin and Marc-Tizoc González for their thoughtful edits and enthusiasm for this project. The piece also benefitted from feedback following presentations to CJS’s 2019 Fall Institute in Washington, D.C. and to faculty colleagues at a January 2020 colloquium. I also am grateful to the BJCL student editors and staff who worked on this piece while juggling the unique challenges presented by the global COVID-19 pandemic. Finally, I express immense respect for the brave women who participated in our listening sessions.

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INTRODUCTION

Like many mothers, Marta wants to provide breast milk for her

baby and needs to pump that milk at work. For Marta, current policy has her leaving her office in the district attorney's office on the third floor and going through a series of steps to be able to get to the secure second floor room designated the lactation room. Marta is a young prosecutor in an urban area who recently returned from parental leave after having a baby. Mothers who are lactating have the right to use the file room on the second floor of a building that is leased by both the district attorney's office and public defender's office. The file room is located inside the public defender's office. To access the room, Marta must notify security, walk outside (sometimes through rain and snow) and around the building, and then wait for the security guard to let her into the room, which contains locked client files.

The room used to be a clerk's office, so although there are blinds, there is a glass window with an opening at the bottom. People walking by the office hear the whirring of Marta's pump. While the head prosecutor has worked to improve the situation, the administrative office for the state government said there is no other room available to convert into a lactation room. The head public defender did not object to prosecutors using the space.

Marta's story is just one among many stories shared with the American Bar Association Criminal Justice Section Women in Criminal Justice Task Force (ABA CJS WCJ TF). Marta's story exemplifies the institutional barriers that women criminal lawyers face. The ABA CJS is dedicated to telling these stories in order to expose and eliminate such barriers.¹

The ABA is the world's largest voluntary professional association, with a membership of 365,000 attorneys.² It plays an important role in the profession and in society. It accredits law schools, promotes fairness in the profession and society, and weighs in on high-impact issues such as judicial appointments, lawmaking, and systemic reforms in the U.S. and abroad.³

One of the behemoth organization's four core goals is to eliminate

¹ Past chairs Lucian Dervan and Kim Parker, as well as current chair April Frazier Camara have all pledged to and actually offered critical support.

² *ABA Timeline*, AM. BAR ASS'N, https://www.americanbar.org/about_the_aba/timeline (last visited Jul. 12, 2020).

³ *See Rule of Law Initiative*, AM. BAR ASS'N, https://www.americanbar.org/advocacy/rule_of_law (last visited Dec. 11, 2020); *see also American Bar Association*, WIKIPEDIA, https://en.wikipedia.org/wiki/American_Bar_Association (last visited Jul. 12, 2020).

bias and enhance diversity in the justice system and in the legal profession.⁴ The ABA defines diversity broadly, and recent efforts include the creation of new professional groups such as the Coalition on Racial and Ethnic Justice, Commission on Disability Rights, Commission on Hispanic Legal Rights & Responsibilities, Commission on Racial and Ethnic Diversity in the Profession, Commission on Sexual Orientation and Gender Identity, Commission on Women in the Profession, Council for Diversity in the Educational Pipeline, and ABA Diversity and Inclusion Advisory Council.⁵

When CJS staff member Emily Johnson discovered that only 26% of the approximately 16,000 members of the CJS are women, she wondered whether that number reflected the total population of criminal lawyers or merely the Section membership. She raised her questions with CJS Director Kevin Scruggs and Section Chair Professor Lucian Dervan. Given the organization's core goal of eliminating bias and enhancing diversity, Lucian created the TF to investigate Emily's question. He appointed Carla Laroche, a clinical professor at Florida State College of Law, and Tina Luongo, chief defender at the Legal Aid Society of New York City, to co-chair the TF. The WCJ TF⁶ was charged through the TF with exploring issues related to hiring, retention, and promotion of women in criminal law.⁷ Carla and Tina envisioned—and created—a vibrant Task Force of women with diverse lived and professional experiences.⁸ This TF engaged in an eighteen month-long series of listening sessions.⁹ The Section's magazine dedicated a regular column to the TF to share its progress.¹⁰

⁴ AM. BAR ASS'N, *supra* note 3.

⁵ *Id.*

⁶ While the Task Force recognizes that its name reinforces a false binary gender identity, it has strived to be inclusive of gender non-conforming individuals by inviting "women and gender non-conforming people" to testify. The Task Force has narrowed its scope to women and gender non-conforming lawyers who either work in traditional criminal litigation roles (prosecutors, defense lawyers, judges at the state and federal levels) or those who work on criminal justice issues through non-profit organizations, government (legislatures, city and municipal government, etc.), and private foundations.

⁷ *See infra* Part II.

⁸ *See infra* Appendix A for a list of Task Force members.

⁹ *See infra* Part IV.

¹⁰ *See* Carla Laroche & Tina Luongo, *Task Force Launches*, CRIM. JUST. MAG., https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2019/spring/task-force-launches (Spring 2019); Maryam Ahranjani, *Listening Session Participants Express Feelings of Isolation—and Demonstrate Resilience*, CRIM. JUST. MAG. (Nov. 1, 2019),

Through the simple, but incredibly powerful, qualitative methodology of providing safe spaces for women to talk and for TF members to listen, in 2019 and 2020 the Task Force heard from women all over the country about institutional and individual barriers. The reported barriers included challenges related to re-entry to work after giving birth, lack of transparency around promotion, significant secondhand trauma, inadequate training of supervisors regarding race and gender issues in the workplace, objectification, and more.¹¹

This article reports on the original data that came from these listening sessions and is the first to report on actual conditions for women criminal lawyers in the United States. Part II describes why gender (and other) diversity matters in the legal profession, why it matters in criminal law in particular, and how the TF set up its listening sessions. Part III situates the research on women in criminal justice in the context of relevant literature. Part IV describes the original qualitative findings from the WCJ TF’s listening session tour. Part V explores next steps to promote systemic reforms that will better protect women criminal lawyers.

I. THE ROLE AND VOICES OF WOMEN CRIMINAL LAWYERS

There are a number of reasons why it is important to have a well-trained, well-supported body of women criminal lawyers. The first major reason is to promote the rule of law. Many studies indicate that the presence and leadership of women in criminal justice reduce corruption.¹² Female victims often feel more comfortable with female attorneys.¹³ Child victims feel more comfortable with female attorneys.¹⁴ When

https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2019/fall/listening-session-participants-express-feelings-isolation-demonstrate-resilience/; Maria Carmen Hinayon, *Who Needs the Old Boys’ Club? Let’s Make Our Own—Highlights from the WCJ Bay Area Listening Session*, CRIM. JUST. MAG. (Jan. 21, 2020), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2020/winter/who-needs-old-boys-club-lets-make-our-own-highlights-the-wcj-bay-area-listening-session.

¹¹ See *infra* Part IV.

¹² See generally The American Judicature Society, *Different Voices, Different Choices? The Impact of More Women Lawyers and Judges on the Justice System*, 74 JUDICATURE 138 (1990).

¹³ See generally Debbie Leacock, *Professional Females: Are There Enough Available? Gender Bias of Female Victims*, 6 MOD. PSYCHOL. STUD. 18, Article 4 (1998), <https://scholar.utc.edu/mps/vol6/iss2/4>.

¹⁴ Telephone Interview with Kyle T. Nayback, Head of the Indian Country Crimes

people feel more comfortable with their attorneys, they are likely to feel more confident in the system and in the rule of law.

Representation matters to the rule of law. It also matters to people's perceptions of and buy-in to the justice system.¹⁵ Representation matters to victims. It matters to defendants. It matters to jurors. Victims, defendants, and jurors from marginalized groups are more likely to participate in the system in a positive way when they perceive that the attorneys reflect their own social identities and believe that they can understand their experiences and empathize with them.¹⁶

Second, achieving gender equity and equality¹⁷ is important because women have worked incredibly hard—in many cases against societal and familial expectations—to earn their rightful, equal space in the field.¹⁸ If we want such victories as increased enrollment in law school and increased participation in the highest levels of the profession to remain and expand, we must expose the obstacles and work together—those affected and allies¹⁹ alike—to eliminate them.

There are different ways to assess the current landscape. On the one hand, there are signs of progress. Progressive prosecutors, including women of color, have been elected all over the country.²⁰ There are more

section of the Criminal Division in the U.S. Attorney's Office, District of New Mexico (February 2019).

¹⁵ See generally Robert J. Aalberts et al., *Do Race/Ethnicity and Gender Influence Criminal Defendants' Satisfaction with Their Lawyers' Services? An Empirical Study of Nevada Inmates*, 2 NEV. L.J. 72 (2002).

¹⁶ Jill L. Cruz, Melinda S. Molina & Jenny Rivera, *Hispanic National Bar Association Commission on the Status of Latinas in the Legal Profession, Study on Latina Attorneys in the Public Interest Sector, La Voz De La Abogada Latina: Challenges and Rewards in Serving the Public Interest*, 14 CUNY L. REV. 147, 190–91 (2010) (discussing Spanish-speaking clients favorable response to Latina attorneys who resemble them and also speak Spanish).

¹⁷ Gender equality refers to equalizing *access* to the same opportunities to people of all gender identities whereas gender equity refers to widespread changes in *outcomes* that uplift historically marginalized people. See Agnes Binagwaho, *The Difference Between Gender Equity and Equality—and Why It Matters*, FORTUNE (Mar. 25, 2020, 12:30 PM), <https://fortune.com/2020/03/25/gender-equality-and-equity-iwd-womens-education/>.

¹⁸ See Jane R. Wettach, *Women in the Practice: The Struggle Continues*, 37 N.C. ST. B. Q. 18 (Summer 1990) (discussing the various obstacles women lawyers have overcome striving for equal treatment).

¹⁹ Allyship is a major focus of the Task Force. While the early stages have involved primarily women—and, to a lesser extent, gender non-conforming individuals—there has been a recognition since the beginning of the importance of building allies, including men.

²⁰ See Lauren-Brooke Eisen, *The Big Winners in DA Races: Women and Black*

female judges on the federal bench than any other time in American history.²¹ Women have outnumbered men in law school classrooms across the country for the past four years in a row.²² Dynamic new groups such as the Black Public Defender Association, co-founded and chaired by CJS chair and TF member April Frazier Camara, are gaining traction and influence.²³

Both state and federal legislation and policies also show signs of hope. For example, although the future of the Equal Rights Amendment is uncertain, Virginia recently became the thirty-eighth state to ratify it.²⁴ The Florida Supreme Court recently passed a new rule creating a presumption that attorneys arguing lawsuits are entitled to continuances to accommodate parental leave when they give birth or adopt.²⁵ The federal government recently announced paid family leave for federal workers, which certainly will influence private employers and more states to follow suit.²⁶

On the other hand, despite these signs of progress, progress seems

Candidates, BRENNAN CTR. FOR JUST. (Nov. 12, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/big-winners-da-races-women-and-black-candidates>.

²¹ *40 Years Later, Pioneering Women Judges Savor Place in History*, U.S. CTS. (Aug. 14, 2019), <https://www.uscourts.gov/news/2019/08/14/40-years-later-pioneering-women-judges-savor-place-history>.

²² *Where Do Women Go to Law School? Here Are the 2018 Numbers*, ENJURIS: BEFORE THE BAR BLOG, (Feb. 28, 2019), <https://abaforlawstudents.com/2019/02/28/where-do-women-go-to-law-school-2018-numbers/>.

²³ See Press Release, National Legal Aid & Defender Association, *NLADA Announces New Section-Black Public Defenders Section* (Oct. 29, 2018), <http://www.nlada.org/node/20886>.

²⁴ Bill Chappell, *Virginia Ratifies the Equal Rights Amendment, Decades after the Deadline*, NPR (Jan. 15, 2020), <https://www.npr.org/2020/01/15/796754345/virginia-ratifies-the-equal-rights-amendment-decades-after-deadline>.

²⁵ Michael Moline, *A Change in Florida's Rules of Court Just Made Work Life Easier for Women*, FLORIDA PHOENIX (Feb. 3, 2020), <https://www.floridaphoenix.com/2020/02/03/a-change-in-floridas-rules-of-court-just-made-work-life-easier-for-women/>.

²⁶ See Joe Davidson, *Federal Workers Will Get 12 Weeks of Paid Family Leave. Should Everyone?*, WASH. POST (Dec. 20, 2019), https://www.washingtonpost.com/politics/federal-workers-will-get-12-weeks-of-paid-family-leave-should-everyone/2019/12/19/b9e9c502-228b-11ea-9c2b-060477c13959_story.html; *Family Medical Leave*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx> (last visited Dec. 1, 2020) (including a comparison of family medical leave laws by state).

stalled.²⁷ Barriers stubbornly persist, particularly for women with intersectional identities. In recent years women lawyers and law professors have filed numerous lawsuits against major law firms, law schools and other legal employers alleging unequal pay and discriminatory treatment.²⁸ Part II examines these lawsuits as part of a larger analysis of the research related to hiring, retention, and promotion of women criminal lawyers.

II. SITUATING QUALITATIVE DATA AMONG (LIMITED) RELEVANT LITERATURE

While there is no clear source showing how many women criminal lawyers are in the United States and the unique challenges they face, this section attempts to situate the oral accounts within the existing research. After a brief overview of women in the legal profession, this section describes five major sources of data: ABA/CJS data, the Women of Color study done by NALP and the Center for Women in Law, the Canadian Bar Association Study, the LAPIS study, a report issued by the ABA Commission on Women in the Profession, and research from other professional fields traditionally dominated by men.

A. Overview of the Relevant Literature on Women in the Law and in Criminal Law

As a general matter, women face barriers in the workforce. Black and Hispanic²⁹ women face even greater barriers. The Bureau of Labor Statistics provides valuable annual information regarding unemployment rates, types of work, salaries, disparities across racial/ethnic groups, and legal protection for workers' caregiving responsibilities. With regard to

²⁷ See *Equal Pay & the Wage Gap*, NAT'L WOMEN'S L. CTR. (last visited Feb. 14, 2020), <https://nwlc.org/issue/equal-pay-and-the-wage-gap/>.

²⁸ See Rebecca Sha, *The Persisting Gender Pay Gap: Recent Developments in the Law that Address Gender Pay Disparities*, ABA J. (May. 16, 2019), <https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2019/spring2019-gender-pay-gap-recent-developments/>; Stephanie Francis Ward, *Recent Equal Pay Lawsuits Filed by Female Law Professors has Shined a Light on Academic Compensation Process*, ABA J. (Oct. 1, 2020), <https://www.abajournal.com/magazine/article/a-recent-spate-of-gender-discrimination-and-equal-pay-lawsuits-filed-by-female-law-professors-has-shined-a-light-on-the-otherwise-opaque-academic-compensation-process>. See also *infra* Part II, Section G.

²⁹ While recognizing the relevant sensitivities, for simplicity, the author primarily uses the terms "Black" and "Hispanic." To the extent that "African American," "Latino" or "Latinx" are used in the text, they are used interchangeably with "Black" or "Hispanic," respectively, because of the outside source's usage.

unemployment, Hispanic women and Black women have much higher rates than Asian and white women.³⁰ Asian and white women are more likely to work in higher paying management, professional, and related occupations (53 percent and 45 percent, respectively) than were Black (36 percent) and Hispanic women (27 percent). Hispanic (31 percent) and Black women (28 percent) were more likely than Asian and White women (21 percent and 20 percent, respectively) to work in lower paying service occupations.³¹

Women who work full time in wage and salary jobs earn 81 cents for every dollar earned by men.³² Asian and white women earn significantly more than Black and Hispanic women.³³ More women workers than men live below the official poverty level.³⁴ Again, Black and Hispanic women are “much more likely to be among the working poor than white or Asian women.”³⁵

In terms of working women who are mothers, Black and Hispanic women—who are more likely to work in hourly and low-wage jobs covered by the law—are more likely than White and Asian women to be protected by the Nursing Mothers law. However, more than 1 million Black women and nearly 1 million Hispanic women are not covered.³⁶ Also, the Center for WorkLife Law, which monitors laws and cases related to gender discrimination, reports that family responsibilities discrimination is compounded by race/ethnicity and/or national origin. For example, Black caregivers report that compared to white co-workers, they are more often denied leave, given schedules incompatible with childcare in retaliation for complaining about race discrimination, and disciplined when family responsibilities make them late or require them to miss work.³⁷

³⁰ *Women in the Labor Force: A Databook*, U.S. BUREAU OF LAB. STAT. (Dec. 2019), <https://www.bls.gov/opub/reports/womens-databook/2019/home.htm> (providing data from 2018, the most recent year for which data is available).

³¹ *Id.* at Table 12.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ LIZ MORRIS, JESSICA LEE & JOAN C. WILLIAMS, UNIV. OF CAL., HASTINGS COLL. OF THE LAW, EXPOSED: DISCRIMINATION AGAINST BREASTFEEDING WORKERS, <https://www.pregnantatwork.org/wp-content/uploads/WLL-Breastfeeding-Discrimination-Report.pdf>.

³⁷ CYNTHIA T. CALVERT, UNIV. OF CAL., HASTINGS COLL. OF THE LAW, CAREGIVERS IN THE WORKPLACE: FAMILY RESPONSIBILITIES DISCRIMINATION LITIGATION UPDATE 2016, <https://worklifelaw.org/publications/Caregivers-in-the-Workplace-FRD-update->

Moving from workers in general to lawyers in particular, discrimination against women in the practice of law is a relatively well-studied area. Since Arabella Mansfield became the first woman admitted to the bar in 1869, observers have tracked women's representation in the law.³⁸ The roots of the "toughen up, buttercup" mentality for women as lawyers run deep. In the 1920s, the President of the Women's Bar Association reportedly told recently admitted women to never let anyone refer to them as a "woman lawyer" because that in and of itself is an obstacle to practice.³⁹ The idea was to mimic men as much as possible in order to fit in. Both men and women adopted and adopt the "toughen up, buttercup" mindset.⁴⁰ The use of the term in this article refers to the idea that women criminal lawyers must mimic masculine norms to be successful in the field.

When men went off to fight in World War II, new opportunities for women to self-actualize and support themselves and their children arose. There was a significant increase in female law student enrollment during the war.⁴¹ After the war, however, female enrollment in law schools dropped. In the 1950s, many law schools enrolled only one female student.⁴²

Enrollment again increased during the civil rights era of the 1960s. The Women's Law Caucus was created during this period, and the organization advocated not only for equal treatment and pay for women practicing law, but also for the Equal Rights Amendment.⁴³ Although women still accounted for less than 10% of law students in 1970,⁴⁴ increases in women's enrollment in law schools during this era

2016.pdf.

³⁸ See generally Doris L. Sassower, *Women in the Law: The Second Hundred Years*, 57 AM. B. ASS'N J. 329, (1971); see also Catharine V. Waite, *Admission of Women to the Bar*, 1 CHI. L. TIMES 76 (1887), <http://wlh.law.stanford.edu/wp-content/uploads/2011/01/waite-adminssiontobar1887.pdf>.

³⁹ Evelyn H. Larson, *Women in the Law*, 6 STUDENT L.J. 21, 22 (1960).

⁴⁰ Jim Tankersley, *How Sexism Follows Women from the Cradle to the Workplace*, N.Y. TIMES (Aug. 19, 2018), <https://www.nytimes.com/2018/08/19/business/sexism-women-birthplace-workplace.html>; Fiona Kay & Elizabeth Gorman, *Women in the Legal Profession*, 4 ANN. REV. OF LAW. & SOC. SCI. 299, 315–20 (2008) (describing the dangers of internalized misogyny).

⁴¹ Larson, *supra* note 39.

⁴² *Id.*

⁴³ Sassower, *supra* note 38.

⁴⁴ SUSAN E. MARTIN & NANCY C. JURIK, *DOING JUSTICE, DOING GENDER: WOMEN IN LEGAL AND CRIMINAL JUSTICE OCCUPATIONS* 113 (SAGE Publications, 2nd ed. 2006). According to Los Angeles-based civil rights lawyer Mia Yamamoto, ten percent of her

were viewed as a major accomplishment of the feminist movement.⁴⁵

A broad summary of the studies done during the 1980s and 1990s is that while women, almost exclusively white, were entering law school in higher numbers, they failed to thrive in the profession. Entry may not have been as much of a challenge in the same way that it was in earlier decades,⁴⁶ but during this period, women still faced challenges in pay equity, promotion opportunities, and other opportunities to excel in the legal profession.⁴⁷ The studies often cautioned that if some of the obstacles were not addressed, women would not achieve true equality of representation and retention.⁴⁸

Despite the civil rights era increases in women's enrollment in law schools, later in their careers women left the profession at very high rates. The phenomenon of women's "flight from law" garnered much notice and was the subject of numerous studies in the late 1980s and early 1990s.⁴⁹ One such study was done by the Gender Bias Task Force (GBTF) created by the Ninth Circuit to uncover data relating to women in the federal court system.⁵⁰ This study showed that, of all practice areas, women were least represented in the area of private criminal law, accounting for only 11% of the practicing attorneys in that area.⁵¹ The GBTF report discussed explanations for this low number:

We heard from many Federal Public Defenders that male defense attorneys operate a "closed, 'old boy' network" described by one woman as "a glass wall around the federal criminal defense bar that excludes women." This exclusive "old boys club" attitude results in not referring cases to women attorneys; not seeking the advice of women Public Defenders; and not treating women defense lawyers with any respect unless they are extraordinarily talented (whereas men of ordinary talent are respected). As one

UCLA class in 1971 was women, and this percentage was the highest enrollment of women of any law school in the country that year (notes on file with the Author).

⁴⁵ Mabel C. McKinney-Browning, *Don't Call Me Madam - The Personal Side of the Law, from Women Who've Made it to the Top*, 5 UPDATE ON L. RELATED EDUC. at 27 (1981).

⁴⁶ MARTIN & JURIK, *supra* note 54.

⁴⁷ *Id.*

⁴⁸ See generally JOAN C. WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (Oxford University Press, 2000).

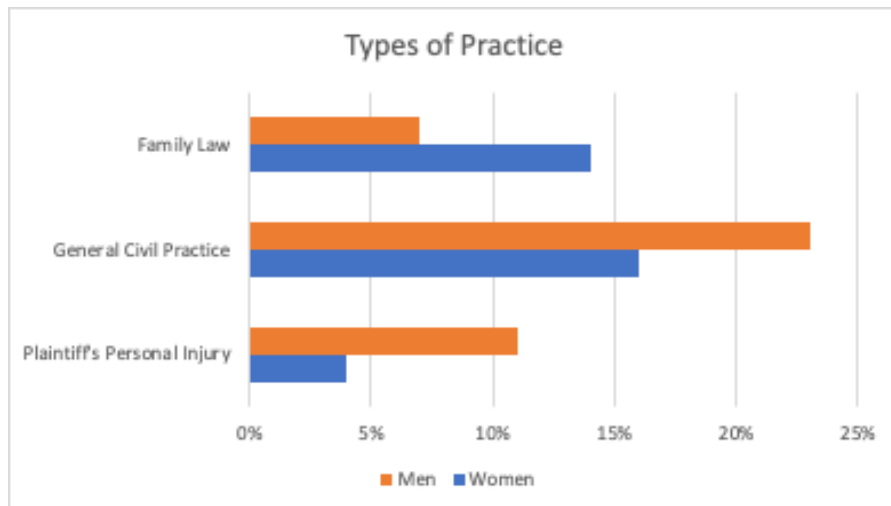
⁴⁹ See generally Fiona M. Kay et al., *Undermining Gender Equality: Female Attrition from Private Law Practice*, 50 LAW & SOC'Y REV. 766 (2016).

⁵⁰ Judith M. Bilings & Brenda Murray, *Introduction to the Ninth Circuit Gender Bias Task Force: The Effects of Gender in the Federal Courts*, 67 S. CAL. L. REV. 745 (1993).

⁵¹ *Id.* at 778.

male respondent reported, he was at an advantage by being male in the “macho world of criminal defense work.” As jobs themselves gain gender attributes, women become perceived as “naturally” unable to perform as well as men.⁵²

Similarly, the State Bar of New Mexico commissioned a task force to investigate gender bias in 1987. Publishing its findings in 1990, that task force identified issues with pay equality, child-care responsibility, the struggle for a flexible, stigma-free work schedule, and partnership opportunities.⁵³ This study examined whether certain practice areas were predominately male or female. It found that only general civil practice, family law, and plaintiff’s personal injury practice areas showed discrepancies among genders. Notably, the study found a relatively equal percentage of male and female attorneys practicing criminal law.



In terms of law school enrollment, in the 2000s, the number of female law students eventually grew to make up roughly half of all law students. However, women have not caught up to men in terms of representation in the highest spheres of influence, salary, and equal treatment. In 2016 and every year since, women represented a slight majority of entering law students in the United States.⁵⁴ However, women

⁵² *Id.* at 807–08.

⁵³ SARAH M. SINGLETON, TASK FORCE ON WOMEN AND THE LEGAL PROFESSION, FINAL REPORT OF THE NEW MEXICO STATE BAR TASK FORCE ON WOMEN AND THE LEGAL PROFESSION 7–16 (1990).

⁵⁴ Elizabeth Olson, *Women Make Up Majority of U.S. Law Students for First Time*, N.Y. TIMES (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law->

still represent a small percentage of leaders in the profession. For example, less than 20% of all law firm partners are women.⁵⁵ Some data indicate that even the women who make partner at large firms earn much less than their male counterparts.⁵⁶

Even among rank-and-file attorneys, women's attrition rates have been a concern for some time. Women start out strong, representing nearly half of recent law school graduates, but many studies, including another one released in December 2019, show that the percentage of working female attorneys declines significantly with time in practice.⁵⁷ Also, notably, nationwide roughly 31% of law students are people of color but 85% of lawyers are white.⁵⁸

More studies address the issue of women leaving the practice of law in general than specifically address women leaving the practice of criminal law.⁵⁹ The Task Force members wanted to know early on what data exists on what percentage of criminal lawyers are women, what percentage of those in senior positions in criminal law are women, and whether there are gender representation differences in various types of criminal law (e.g. public defense offices versus district attorney offices). Unfortunately, that data does not currently exist. However, a few recent studies provide some insights shaping the Task Force's efforts to gather its own data.

students-first-time.html.

⁵⁵ Jacqueline B. Helfgott et al., *BADASSES: The Rise of Women in Criminal Justice*, 28 *WOMEN & CRIM. JUST.* 235, 237 (2018).

⁵⁶ ROBERTA D. LIEBENBERG & STEPHANIE A. SCHARF, *WALKING OUT THE DOOR: THE FACTS, FIGURES, AND FUTURE OF EXPERIENCED WOMEN LAWYERS IN PRIVATE PRACTICE*, 1 (Am. Bar Ass'n., 2019), https://www.americanbar.org/content/dam/aba/administrative/women/walkoutdoor_online_042320.pdf.

⁵⁷ *Id.* at 3.

⁵⁸ *Compare* AM. BAR ASS'N, *ABA LAW SCHOOL DATA: JD TOTAL FY CLASS ENROLLMENT DATA, AGGREGATE, FALL 2019* (2019), *with* AM. BAR ASS'N, *ABA NATIONAL LAWYER POPULATION SURVEY* (2019), https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2009-2019.pdf.

⁵⁹ *See* Joan C. Williams, *Canaries in the Mine: Work/Family Conflict and the Law*, 70 *FORDHAM L. REV.* 2221 (2002) (discussing the issues facing women in the practice of law generally, such as parental leave and need for flexible schedules); *see also* Deborah L. Rhode, *ABA COMMISSION FOR WOMEN IN THE PROFESSION, BALANCED LIVES: CHANGING THE CULTURE OF LEGAL PRACTICE* (2001) (discussing how women in the profession brought the issues of work-life balance to the surface).

B. ABA and CJS Data Provide Insights but Research Gaps Remain

While more research is needed into the area of women in criminal law, the American Bar Association recently provided some insightful data on the diversity of the profession generally in the 2020 *ABA Profile of the Legal Profession*.⁶⁰ This report is a lengthy compilation of statistics and trends related to the demographics of lawyers, women lawyers, pay, legal education, federal judges, legal technology, lawyer well-being, and lawyer discipline, and includes data from the early 1900s up through 2020.⁶¹ The report noted that while in the past few years the number of women lawyers has barely increased, the overall population of female lawyers increased by 6% between 2010 and 2020.⁶² In 2019, 53.3% of law students were women,⁶³ and about 37% of all lawyers in the United States were women.⁶⁴

By comparison the number of lawyers who identified as a person of color only increased 3% in the past decade, from 11.4% to 14.1%.⁶⁵ While no reliable data about LGBTQ lawyers across the entire profession are available, from the over 900 law firms that participated in a 2018 survey, less than 3% of lawyers identified with the LGBTQ community.⁶⁶ Interestingly, nearly 6% of summer associates identified as LGBTQ.⁶⁷

It is encouraging that the overall percentage of women federal judges has increased to 27.6% in 2020.⁶⁸ The number of minority judges appointed to the federal bench has also increased but remains very low. It appears that the overwhelming majority of sitting federal judges confirmed by the Senate are still white men.⁶⁹ Even though men federal judges still greatly outnumber women federal judges, the number of women federal judges has steadily increased, including at the United States Supreme Court, where three of the nine justices have been women

⁶⁰ AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION (2020), <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf>.

⁶¹ *Id.* at i–ii.

⁶² *Id.* at 32.

⁶³ *Id.* at 58.

⁶⁴ *Id.* at 32.

⁶⁵ *Id.* at 33.

⁶⁶ *Id.* at 39.

⁶⁷ *Id.*

⁶⁸ *Id.* at 66.

⁶⁹ *Id.*

since 2010.⁷⁰ In 2020, 41% of law school deans are women.⁷¹ The percentage of women in the role of general counsel for Fortune 500 companies increased to one-third in 2019.⁷²

However, even with the increase of women enrolled in law schools, in the profession, on the bench, and in some leadership positions, pay equity remains a challenge, and law firms struggle with gender diversity. In the past fifteen years, women partnership in law firms has only increased by 5%, and the percentage of female associates has remained fairly stagnant.⁷³ Also, women associates, non-equity partners, and equity partners earn significantly less than their male colleagues.⁷⁴ While all of this information illuminates the current state of the legal profession, it does not specifically address the drop in women from the practice of criminal law.

While only a percentage of criminal lawyers in the U.S. are members of the ABA, CJS senior public relations specialist Emily Johnson provided the TF with relevant CJS data. There is a total of 116,704 women within the ABA’s Sections, Divisions, Forums, etc.⁷⁵ CJS appears to be one of the entities with the lowest number of women, as its 1,704 women members make up just 1.46% of all women in the ABA.⁷⁶ The entity with the highest number of women is the Young Lawyers Division with 36.02% (42,035 women) and the entity with the least amount of women is JD National Conference of Specialized Court Judges with .09% (101 women) of all women in the ABA.⁷⁷

Additionally, under the leadership of then-ABA President Hilarie Bass, the ABA has been focused on how to retain more women in the profession.⁷⁸ The ABA Commission on Women in the Profession

⁷⁰ Linda Lowen, *Meet the Female Supreme Court Justices*, THOUGHTCO. (last updated Oct. 2, 2019), <https://www.thoughtco.com/history-of-women-on-the-supreme-court-3533864>.

⁷¹ AM. BAR ASS’N, *supra* note 60, at 140.

⁷² *Women Held a Third of Fortune 500 GC Spots in 2019*, *Law360* (Jan. 22, 2020), <https://www.law360.com/articles/1236839/women-held-a-third-of-fortune-500-gc-spots-in-2019>.

⁷³ AM. BAR ASS’N, *supra* note 60, at 140.

⁷⁴ *Id.* at 80.

⁷⁵ Provided by CJS Staff Emily Johnson.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See *Why Women Leave the Profession*, AM. BAR ASS’N (Dec. 2017), <https://www.americanbar.org/news/abanews/publications/youraba/2017/december-2017/aba-summit-searches-for-solutions-to-ensure-career-longevity-for/>.

recently published two studies on the topic.⁷⁹ However, the focus on a small slice of the legal profession (i.e. women in large law firms) is a major limitation to their work.

In December 2019, the Commission released *Walking out the Door*, which reported that 50% or more of experienced women lawyers cited caretaking commitments, level of stress at work, emphasis on marketing or originating business, and number of billable hours as “very” or “somewhat” important reasons for leaving private practice.⁸⁰ As for caretaking commitments, the study found striking differences between how women and men lawyers perceive their caretaking duties. Experienced women lawyers are more likely than experienced men lawyers to arrange for childcare, leave work for childcare and tend to their children’s extracurricular activities.⁸¹ These responsibilities adversely impact the time and effort needed to maintain a successful law practice.⁸²

A recent article pointed out that while the issue of women in leadership positions in the legal profession receives attention, the issues facing women of color in similar positions are glossed over.⁸³ Attempting to address this critique, in June 2020, the Commission released *Left Out and Left Behind: The Hurdles, Hassles, and Heartaches of Achieving Long-Term Legal Careers for Women of Color*. This study—which gathered information from focus groups and online surveys from 103 self-identified women of color working in the large firms across the United States. Women of color continue to experience barriers and bias, resulting in isolation within an infrastructure that refuses to acknowledge the influence of stereotyping of women of color, which is then exacerbated by microaggressions.⁸⁴ For one Black participant, the “black tax” was an immovable barrier, whereby one has to demonstrate outsized achievements in order to obtain the same opportunities as everyone else

⁷⁹ See, e.g., LIEBENBERG & SCHARF, *supra* note 56; DESTINY PEERY, PAULETTE BROWN, & EILEEN LETTS, *Left Out and Left Behind: The Hurdles, Hassles, and Heartaches of Achieving Long-Term Legal Careers for Women of Color* (2020), <https://www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf>.

⁸⁰ LIEBENBERG & SCHARF, *supra* note 56, at 11.

⁸¹ *Id.* at 12.

⁸² *Id.*

⁸³ Andrea L. Sanders, *Alawfultruth: Black Girl Magic and the Toll it Takes*, PHILA. SUNDAY SUN (May 10, 2019), <https://www.philasun.com/commentary/alawfultruth-black-girl-magic-and-the-toll-it-takes/> (describing her own experiences and those of other Black women leading organizations of two people to five hundred or more people).

⁸⁴ PEERY, BROWN, & LETTS, *supra* note 79, at 7.

(i.e. Black associates having two Ivy League degrees).⁸⁵ There continues to be a persistent preference for white men, who monopolize access to prime work, the best mentors or sponsors, and insider information in typically male-dominated spaces (i.e. the golf course).⁸⁶ While the women of color in this study largely considered leaving the legal field, most decided to stay because they enjoy the work, it makes financial sense, and their personal and familial lives require or encourage it.⁸⁷

C. The National Association of Law Placement and Center for Women in Law Study Provides Important Insights into Law Student Experiences⁸⁸

In June 2020, the National Association of Law Placement (NALP) and the Center for Women in Law at the University of Texas School of Law released a study called *Women of Color: A Study of Law School Experiences* that explores the experiences of women students of color. Below are some relevant highlights and charts.

- A total of 4,084 students from 46 law schools across the United States participated including 2,682 women, of whom 773 were women of color;⁸⁹
- Only 82% of women of color report that they are “satisfied” with their law school experience, compared to 89% of white women;⁹⁰
- Likewise, 31% of women of color considered leaving law school compared to 24% of white women and 22% of white men;⁹¹
- About 52% of women of color reported comments or interactions with other students or faculty that negatively impacted their academic performance, compared to 21% of white men;⁹²
- While over 50% of women of color seek help from the Career Services Office, a lower percentage of women of color seek out guidance on judicial clerkships from the Career Services Office;⁹³

⁸⁵ *Id.* at 13.

⁸⁶ *Id.* at 9–10.

⁸⁷ *Id.* at 13.

⁸⁸ See THE NALP FOUND. FOR L. CAREER RSCH. & EDUC., THE CTR. FOR WOMEN IN L., WOMEN OF COLOR: A STUDY OF LAW SCHOOL EXPERIENCES (2020), <https://www.nalpfoundation.org/uploads/products/WomenofColor-AStudyofLawSchoolExperiencesReport.pdf>.

⁸⁹ *Id.* at 17.

⁹⁰ *Id.* at 28.

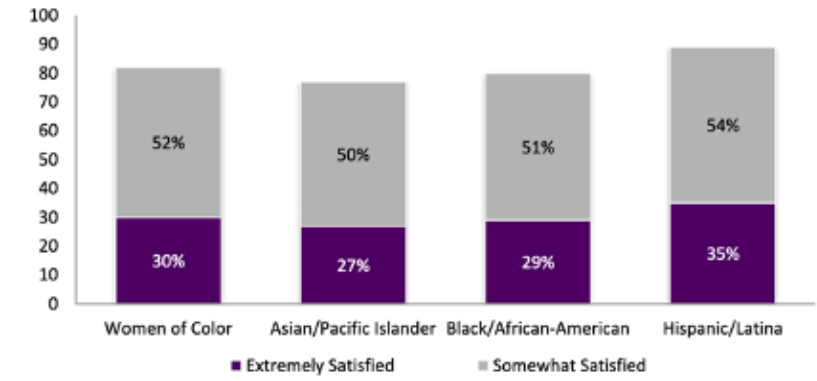
⁹¹ *Id.* at 18.

⁹² *Id.* at 47.

⁹³ *Id.* at 95.

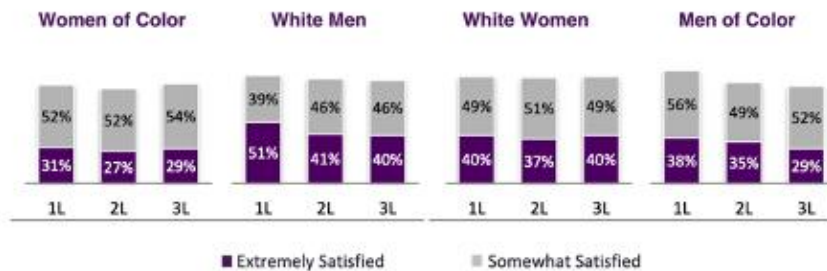
- A higher percentage of women of color report considering work in public interest than men of color, white women and white men;⁹⁴
- Students of color are far less likely to apply for judicial clerkships;⁹⁵
- A higher percentage of women of color report considering work in legal services or as a public defender than all other groups.⁹⁶

CHART 3: OVERALL SATISFACTION WITH LAW SCHOOL EXPERIENCE AMONG WOMEN OF COLOR



Note: On a 5-point scale where 5 equals "extremely satisfied" and 1 equals "extremely dissatisfied."

CHART 4: OVERALL SATISFACTION WITH LAW SCHOOL EXPERIENCE BY YEAR IN SCHOOL



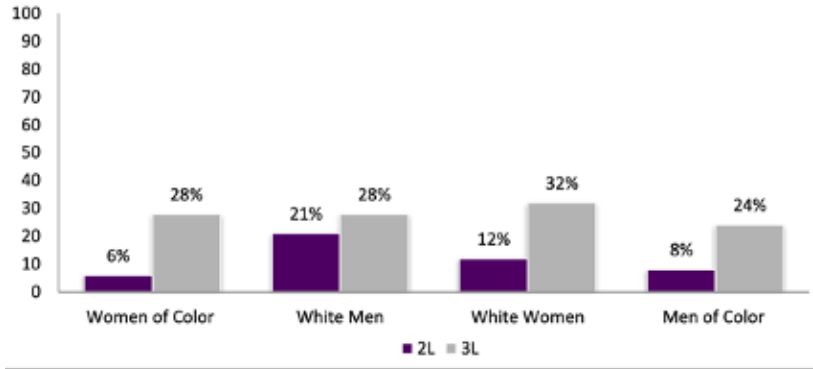
Note: On a 5-point scale where 5 equals "extremely satisfied" and 1 equals "extremely dissatisfied."

⁹⁴ *Id.* at 127.

⁹⁵ *Id.* at 64.

⁹⁶ *Id.* at 127.

CHART 30: STUDENTS WHO APPLIED FOR A POSTGRADUATE JUDICIAL CLERKSHIP
 – By Year in School



There are some significant limitations of the study. In terms of methodology, it is not clear which schools were surveyed. The study explains that most of the schools surveyed are small (less than 500 students total) or mid-sized (500–900 students), and that 42% of the schools are private and 58% are public.⁹⁷ It is not clear whether any Historically Black Colleges and Universities and/or Hispanic Serving Institutions participated, where students of color likely report very different experiences. Also, indigenous women were excluded from the survey,⁹⁸ which created an immediate outcry.

Further, important terms such as “of color” and “multi-racial” are not described in detail. A higher percent (6%) of the women of color respondents are F-1 visa holders compared to white men (<1%), white women (1%), and men of color (5%),⁹⁹ but no explanation was provided about how their experiences compare to those of the other women of color.

Another omission was the opportunity to explore intersectionality. For example, women of color who also identify as LGBTQ may report exacerbated challenges. Along the lines of student identity and intersectionality, there does not seem to be any attempt to

⁹⁷ *Id.* at 156.

⁹⁸ Angelique W. EagleWoman (Wambdi A. Was'te Winyan), *Native Women Law Students Excluded From So-Called “Women of Color in Law Schools” Study*, INDIAN COUNTRY TODAY (Jun. 26, 2020), <https://indiancountrytoday.com/opinion/native-women-law-students-excluded-from-so-called-women-of-color-in-law-schools-study-ICrOQBx3UEux6kqr2kGxbw>.

⁹⁹ THE NALP FOUND. FOR L. CAREER RSCH. & EDUC., THE CTR. FOR WOMEN IN L., *supra* note 88, at 155.

identify how such factors as socioeconomic backgrounds, parents' income and education levels, first generation college graduate and immigration status might affect responses. In terms of addressing root issues, exploring intersectionality would be helpful.

Finally, the survey attempted to assess students' interest in different areas of practice, but the categories were both overinclusive and underinclusive. The work categories included: solo practitioner, private law firm-small/medium, private law firm-large, academic, business/corporation, judicial clerkship, government, legal services, public defender, and public interest. These are awkward categories for criminal law. For example, students may have checked "government" or "public interest" who did not check "public defender" because they thought one or both categories included "public defender."¹⁰⁰ Additionally, there is a lack of clarity as to why certain categories were included or left out. For example, if "public defender" was a separate category, seemingly "prosecutor" should have been an option. So, in fact, the study is not conclusive in terms of what percentage of white women and women of color are interested in criminal law as a practice area.

D. Canadian Criminal Lawyers' Association Study Foreshadows Listening Session Reports

A study commissioned in 2016 by the Criminal Lawyers' Association of Canada appears to be the most recent comprehensive study regarding women leaving the practice of criminal law.¹⁰¹ The study is relevant and instructive to the Task Force's work, but its applicability is limited since it surveyed women in Ontario, Canada, there *have* been some positive changes in terms of federal leave in Canada since the study was completed,¹⁰² and it only included women engaged in the private practice of criminal law. However, there is no parallel study done to date in the United States, so its findings provide some useful insights that ultimately mirror what the Task Force has heard in its listening sessions.

With regard to whether women are leaving the practice of criminal

¹⁰⁰ See generally *id.* at 128–29.

¹⁰¹ NATASHA S. MADON, PH.D., THE RETENTION OF WOMEN IN THE PRIVATE PRACTICE OF CRIMINAL LAW: RESEARCH REPORT, CRIM. LAWS.' ASS'N (Mar. 2016), <https://criminallawyers.ca/wp-content/uploads/2016/03/CLA-Womens-Study-March-2016.pdf>.

¹⁰² See John Paul Tasker, *Parental Leave Being Extended 3 Months Earlier Than Planned*, CBC (Sept. 26, 2018, 12:54 PM), <https://www.cbc.ca/news/politics/parental-ei-leave-benefit-march-2019-1.4839097>.

law, the study suggests that women experience unique gender-based challenges and do appear to be leaving the practice of criminal law at higher rates than are men, demonstrating that "there does appear to be an issue in the retention of women in this area of law."¹⁰³ Women were 141% more likely to leave the private practice of criminal law than women working in other private practice areas.¹⁰⁴ The Canadian study indicates that women are leaving the practice of private criminal law due to pay and benefit inequities as well as lack of respect.¹⁰⁵ This study also showed that while working in criminal law had a major effect on the attrition of women, it did not have this impact on men.

The gender-based obstacles reported by study participants include financial and logistical difficulties associated with taking time off to have a child, the financial challenge associated with being in private defense practice, the unpredictability of income and the difficulties of building a business on one's own, heavy reliance on "legal aid certificates" (the equivalent of court-appointed cases in the U.S.), and gendered differences in treatment by judges and other court actors which "make an already challenging career all the more difficult."¹⁰⁶

In terms of sex-based differences respondents reported that judges appear more amenable to men than women when asking to leave court for family purposes such as getting a child from school.¹⁰⁷ Further, men take the lead with some client interactions, "presuming that their female counterparts would not want to and/or would have difficulties dealing with male clients."¹⁰⁸ Senior lawyers (usually male) do not refer clients to female lawyers unless the clients need a "softer" approach and "hand-holding."¹⁰⁹ Women are sometimes viewed as assistants or students rather than lawyers, and given work commensurate with those views.¹¹⁰ Also, subjects reported that male clients often asked personal and inappropriate questions of their female counsel, or broached subjects they would never discuss with male lawyers.¹¹¹

In terms of the pipeline to criminal law practice, similar to the

¹⁰³ MADON, *supra* note 101, at 9.

¹⁰⁴ Kay, *supra* note 49, at 787 (providing an update to the previous research on Canadian women criminal lawyers' experiences).

¹⁰⁵ MADON, *supra* note 101, at 8.

¹⁰⁶ *Id.* at 7.

¹⁰⁷ *Id.* at 12.

¹⁰⁸ *Id.* at 13.

¹⁰⁹ *Id.* at 15.

¹¹⁰ *Id.* at 13.

¹¹¹ *Id.*

body of work done in the United States in the 1980s and 1990s,¹¹² the study warned that “there may be a number of women who are making the decision during law school or articling¹¹³ not to go into the practice of criminal law because of their concerns over balancing growing a career with starting/caring for a family.”

In terms of support and retention, women who participated in the study shared ideas for improving retention, including:¹¹⁴

- Continued and expanded mentorship from senior female lawyers;
- Fixed court end times to ease the stress of uncertain work hours;
- Greater financial support for maternity leave;
- Promotion of collectives of defense lawyers working together;
- Improved financial support for women to take maternity leave;¹¹⁵ and,
- Greater education of the judiciary to minimize gender-based differences in the courtroom.

The Canadian study’s findings and recommendations closely align with those of the TF’s recommendations.¹¹⁶

E. Latina Attorneys in the Public Interest Sector Study (LAPIS) Bridges Some Gaps in Data

Another important piece of the puzzle is the Hispanic National Bar Association (“HNBA”)’s research on the issue of Latina attorneys working in the public sector.¹¹⁷ Since most criminal law jobs would be considered public sector jobs and women of color are a major focus of the TF’s work, this study—coupled with the findings from the CLA study—provides important context and grounding for the TF’s work.

The HNBA Commission on the Status of Latinas in the Legal Profession (“Commission”) was initiated in January of 2010 to study the

¹¹² See *supra* Part III, Part A.

¹¹³ Articling refers to the experiential component of legal education in Canada where law students are placed at a firm or organization to learn the substantive and practical aspects of being a lawyer. See *Articling and Law Practice Program*, LEGALLINE.CA (last visited Jul. 17, 2020), <https://www.legalline.ca/legal-answers/articling-program/>.

¹¹⁴ MADON, *supra* note 102, at 9.

¹¹⁵ Notably, maternity leave for women in Canada is far more robust than in the United States. See Angie Mohr, *U.S. v. Canada: Maternity Leave Differences*, INVESTOPEDIA (updated May 7, 2019), <https://www.investopedia.com/financial-edge/0512/maternity-leave-basics-canada-vs.-the-u.s..aspx>.

¹¹⁶ See *infra* Part IV.

¹¹⁷ Cruz, et al., *supra* note 17, at 151.

challenges facing Latina public interest lawyers.¹¹⁸ This effort was an extension of the 2009 HBNA report on Latina attorneys in different areas of legal practice.¹¹⁹ The 2010 study is referred to as the study on Latina Attorneys in the Public Interest Sector (“LAPIS”). This study was done in response to the lack of research on retention of Latina attorneys in the public sector practice of law.¹²⁰

The LAPIS study used both qualitative and quantitative data.¹²¹ For the qualitative data, focus groups were held wherein Latina attorneys were interviewed based on questions raised by the 2009 HNBA study.¹²² For the quantitative data, a series of surveys were sent out across the nation.¹²³ However, by the authors’ own admission, the information obtained was limited because there is no national information on the number of Latina attorneys in the public sector and therefore all conclusions and recommendations are based on the surveys returned.¹²⁴ Furthermore, based on U.S. Census data from 2008, while the U.S. population was roughly 15% Latinx, only 1% of practicing attorneys were Latina.¹²⁵

The LAPIS study found that Latina attorneys work in public interest because of a strong commitment to social and economic justice, particularly in Latino communities.¹²⁶ Participants reported that their employers are more accommodating of family commitments than law firms.¹²⁷ Latina lawyers face negative stereotypes due to their gender and ethnicity despite having qualifications that are equal to or better than the qualifications of other lawyers.¹²⁸ The study also reveals that Latina lawyers express frustration because even though their employers express a commitment to diversity, they experience discrimination.¹²⁹ The low pay of public sector jobs creates concern that young Latina lawyers will not enter public sector practice given their high student loan debt.¹³⁰

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 152.

¹²¹ *Id.* at 154.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 156.

¹²⁵ *Id.* at 159.

¹²⁶ *Id.* at 183.

¹²⁷ *Id.* at 188.

¹²⁸ *Id.* at 193–94.

¹²⁹ *Id.* at 196–97.

¹³⁰ *Id.* at 199.

According to participants, there is little room to move up as supervisory positions are limited and the turnover is very low for those leadership positions.¹³¹ However, the study did note that mentorship, support from leadership within the attorney's respective organization, and support from community organizations such as local bar associations, positively affect the retention of Latina attorneys in public sector positions.¹³²

The study emphasized the importance of public sector work and the concern that inadequate pay creates a larger gap between legal need and available assistance.¹³³ While there was some research on the pay disparity between public and private sectors being a cause for attorneys leaving the public sector, there was not research on the other factors affecting Latina attorneys' decisions to leave the public sector.¹³⁴

The study did note that research shows that of all areas of law, female attorneys make up the majority of public sector attorneys.¹³⁵ The study further noted that Black and Latina/o/x attorneys worked in public sector jobs at a higher rate than white attorneys.¹³⁶ Some characteristics of respondents include:

- Women generally around age 40 and under, most were married, but most did not have kids living at home.¹³⁷
- While over half of the participants never practiced in the private sector, over 75% of those who did left after less than five years for the public sector.¹³⁸
- Of the public sector jobs, the survey participants reported mostly working for non-governmental public sector employers with legal services accounting for 35.4% of the current employers.¹³⁹
- In terms of supervisors, 36.9% of the respondents reported having white male supervisors, and 29.8% reported having white female supervisors.¹⁴⁰
- Similarly, Latino attorneys made up 12.1% of the supervisors while

¹³¹ *Id.* at 198.

¹³² *Id.* at 200–01, 208.

¹³³ *Id.* at 160–61.

¹³⁴ *Id.* at 159–60.

¹³⁵ *Id.* at 158–59.

¹³⁶ *Id.* at 159.

¹³⁷ *Id.* at 162, 166–68.

¹³⁸ *Id.* at 176.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 178.

Latinas made up only 8.6%.¹⁴¹

- Most participants also reported a great disparity in the number of attorneys of color in their offices.¹⁴² Notably, half of the participants reported five or fewer of the total employees in their offices were attorneys of color.¹⁴³
- Close to a third of participants reported earning between \$50,000 and \$69,000 annually while over a quarter of their supervisors earned over \$100,000.¹⁴⁴
- Most participants did not have parents who were attorneys or went to law school.¹⁴⁵ However, several participants shared that they were inspired by a mentor either in school or in a work setting that led them to law school to make a change in communities in need.¹⁴⁶
- Many participants reported that they worked in the public sector because of a commitment to social justice and a strong family moral upbringing.¹⁴⁷
- Respondents also noted the importance of giving back to their communities by providing a familiar face and language to someone in need who may not speak English.¹⁴⁸ However, they also noted that this motivation places a burden on them to provide translation services generally for their employer and other attorneys and staff.¹⁴⁹

In terms of the substantive findings, respondents reported facing outright discrimination and harassment.¹⁵⁰ They noted mistreatment

¹⁴¹ *Id.*

¹⁴² *Id.* at 170–179.

¹⁴³ *Id.* at 179.

¹⁴⁴ *Id.* at 180–81.

¹⁴⁵ *Id.* at 169–170.

¹⁴⁶ *Id.* at 186.

¹⁴⁷ *Id.* at 184.

¹⁴⁸ *Id.* at 184, 190.

¹⁴⁹ *Id.* at 191. Invisible labor refers to devalued labor imposed as expectations on women of color in academia to serve—not only as professors—but as mentors and guides to the racial conscience of institutions and students of color. See Patricia A. Matthew, *What is Faculty Diversity Worth to a University?*, THE ATLANTIC (Nov. 23, 2016), <https://www.theatlantic.com/education/archive/2016/11/what-is-faculty-diversity-worth-to-a-university/508334/>; see also Michelle A. Holling, May C. Fu & Roe Bubar, *Dis/Joined Appointments: Solidarity amidst Inequity, Tokenism, and Marginalization*, in PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA 250, 255 (Gabriella Gutiérrez y Muhs et al. eds., 2012).

¹⁵⁰ Cruz, et al., *supra* note 16, at 192–93.

based on their position as a public sector employee, a female, and a Latina.¹⁵¹ Participants reported being looked down upon because they worked in public service.¹⁵² They reported receiving comments regarding why they had not yet left their jobs and implying that public service jobs should only be a “steppingstone.”¹⁵³ Some reported receiving “compliments” from judges on how well they speak English.¹⁵⁴ They also reported receiving comments from other attorneys implying that their accomplishments were made possible by affirmative action.¹⁵⁵ There was also a wide reporting from participants of being mistaken for support staff.¹⁵⁶

In addition to incorporating the recommendations from the 2009 HNBA study,¹⁵⁷ the LAPIS study additionally recommended that there be, *inter alia*, a mentorship program for Latina attorneys in the public sector field, better diversity training, better pay and/or loan repayment options, more support for translation services, and that the stigma that public sector jobs are less prestigious be addressed.¹⁵⁸

In sum, Latina attorneys in the public sector widely report being highly satisfied with their careers. However, they face unique obstacles, including the stigma that public sector employees are less competent, leadership opportunities equal to men, and that stereotypes such as not speaking English proficiently or being mistaken for support staff. With respect to language proficiency, it is worth noting that not all Latina attorneys are fluent in the Spanish language and any expectation otherwise is driven by an entrenched social structure of racism that operates on a black/white binary, where other groups falling outside of this binary are treated as monolithic.¹⁵⁹ It is also essential to note the

¹⁵¹ *Id.* at 193–95.

¹⁵² *Id.* at 194–95.

¹⁵³ *Id.* at 195.

¹⁵⁴ *Id.* at 192–93.

¹⁵⁵ *Id.* at 193.

¹⁵⁶ *Id.* at 195.

¹⁵⁷ Jill L. Cruz & Melinda S. Molina, *Hispanic National Bar Association Commission on the Status of Latinas in the Legal Profession, Few and Far Between: The Reality of Latina Lawyers*, HISPANIC NAT’L BAR ASS’N 9 (Sept. 2009) (recommending mentoring programs for Latina lawyers, increasing representation and visibility of Latina lawyers, conducting early outreach to Latina youth, and encouraging Latina-based support networks, among others).

¹⁵⁸ Cruz, et al., *supra* note 16, at 210–13.

¹⁵⁹ See Cleo Hernandez, *Latina Lawyers: Underrepresented and Overqualified*, MICH. J. OF RACE & L. (Mar. 16, 2018), https://mjrl.org/2018/03/16/latina-lawyers-underrepresented-and-overqualified/#_ftn9; see also Alfredo Mirandé, “*Light but Not*

social capital that is concomitant with being a light-skinned¹⁶⁰ Latina attorney, who may have different experiences with discrimination based on language than dark-skinned Latina attorneys.

Notwithstanding these challenges, Latina attorneys report wanting to remain in the public sector.

F. There is a Dearth of Research on Women of Color in the Criminal Justice Field but Some Recent Elections Provide Valuable Insights

The studies analyzed in Part II, Sections A through E provide some insights but do not *directly* address hiring, retention, and promotion of women criminal lawyers. With regard to women of color, there are data about their participation in the legal profession generally,¹⁶¹ but there do not appear to be any that focus exclusively on the criminal justice field.

In the federal government, only seven of the 93 U.S. Attorneys are women, and only two are Black (men).¹⁶² Approximately one-third

White”: A Race/Plus Model of Latina/o Subordination, 12 SEATTLE J. FOR SOC. JUST. 947 (2014).

¹⁶⁰ The Author uses the term “light-skinned” here as it is used by the primary source from the LAPIS study. Cruz, et al., *supra* note 18, at 193.

¹⁶¹ See Joan C. Williams, et al., *You Can’t Change What You Can’t See: Interrupting Racial and Gender Bias in the Legal Profession*, AM. BAR ASS’N (Nov. 1, 2018), <https://www.americanbar.org/groups/diversity/women/publications/perspectives/2018/october-november/new-you-cant-change-what-you-cant-see-interrupting-racial-gender-bias-the-legal-profession>; Lauren S. Rikleen, *Closing the Gap: A Road Map for Achieving Gender Pay Equity in Law Firm Partner Compensation*, AM. BAR ASS’N (2013), https://www.americanbar.org/content/dam/aba/administrative/women/closing_the_gap.athcheckdam.pdf; Janet E. Gans Epner, *Visible Invisibility: Women of Color in Law Firms*, AM. BAR ASS’N (2006), [https://www.americanbar.org/products/ecd/ebk/217591/Visible Invisibility: Women of Color in Fortune 500 Legal Departments](https://www.americanbar.org/products/ecd/ebk/217591/Visible%20Invisibility%20Women%20of%20Color%20in%20Fortune%20500%20Legal%20Departments), AM. BAR ASS’N (2012), <https://nextions.com/wp-content/uploads/2017/05/aba-visible-invisibility-study-legal-departments.pdf>. However, there are studies that focus on women of color in the criminal justice system and as victims. See Carmen Rios, *Criminal Injustice: 5 Disturbing Facts About Women of Color and the Prison Industrial Complex*, EVERYDAY FEMINISM (Mar. 10, 2015), <https://everydayfeminism.com/2015/03/woc-prison-industrial-complex/> (discussing the school-to-prison pipeline and over-sentencing for women of color); see also Maya Salam, *Native American Women Are Facing a Crisis*, N.Y. TIMES (Apr. 12, 2019), <https://www.nytimes.com/2019/04/12/us/native-american-women-violence.html> (discussing the largely ignored issue of missing and murdered indigenous women).

¹⁶² Zoe Tillman, *There are 93 U.S. Attorneys. Seven are Women and only Two are Black*, BUZZFEED NEWS (Jun. 28, 2020, 1:01 PM), <https://www.buzzfeednews.com/article/zoetillman/trump-us-attorneys-lack-diversity->

of the Federal Defenders are women.¹⁶³ Those are *appointed* leadership positions. In terms of high-level *elected* office, a close look at the experiences of the record numbers of women of color running for and winning high-profile District Attorney races and the greater numbers of women appointed and elected to the federal and state benches, many of whom have criminal dockets, provides more pieces of the puzzle.¹⁶⁴

To contextualize the amazing feat of running for and serving in elected office as a woman of color, reports of women of color in leadership roles indicate that they experience numerous microaggressions including not being spoken to directly by peers and subordinates and having their ideas ignored during meetings only to see someone else bring up the same ideas and later take credit for them.¹⁶⁵ Challenges range from microaggressions to outright death threats.¹⁶⁶

Even when a person of color obtain a prestigious leadership position, there is a concern among the underrepresented legal community regarding how long they can maintain these positions. A recent article discussed that more women of color are being elected as District Attorneys (DAs) but addressed concerns about how long these women would remain in office.¹⁶⁷ While most DAs are white males, more women of color, like Kim Foxx (the Black State's Attorney in Chicago), are being elected into DA positions. However, it does not appear that the standards are the same.¹⁶⁸ For example, Ms. Foxx recently received public backlash from DA associations for negotiating a plea deal in a media case when this type of commentary is normally reserved for DAs who are convicted

justice-department.

¹⁶³ E-mail from Juval Scott, Federal Public Defender for the Western District of Virginia, to author (Dec. 1, 2020, 5:11) (on file with author).

¹⁶⁴ See Melba Pearson, *More Women of Color Are Getting Elected as District Attorneys, but Can They Stay There?*, ESSENCE MAG. (Jun. 24, 2019), <https://www.essence.com/news/politics/women-of-color-district-attorneys/>; see also Andrew Schneider, *Meet 'Black Girl Magic,' the 19 African-American Women Elected as Judges in Texas*, NAT'L PUB. RADIO (Jan. 16, 2019, 4:17 PM), <https://www.npr.org/2019/01/16/685815783/meet-black-girl-magic-the-19-african-american-women-elected-as-judges-in-texas>.

¹⁶⁵ Sanders, *supra* note 84 (explaining hateful behavior toward Kim Foxx, the State's Attorney for Cook County, Illinois).

¹⁶⁶ Karma Allen, *State Attorney Kim Foxx Gets Death Threats After Dropping Jussie Smollett Charges* (Apr. 23, 2019), <https://abcnews.go.com/US/state-attorney-kim-foxx-death-threats-dropping-jussie/story?id=62568123>.

¹⁶⁷ Pearson, *supra* note 164.

¹⁶⁸ *Id.*

of criminal conduct.¹⁶⁹

Marilyn Mosby, the Black Baltimore City State’s Attorney, received death threats for prosecuting the police for the death of Freddy Gray.¹⁷⁰ In stark contrast, Larry Krasner, a progressive white male and former defense lawyer, ran for Philadelphia District Attorney on a criminal justice reform agenda and was elected by a wide margin.¹⁷¹ While Krasner has faced some challenges to his reform agenda, they pale in comparison to the serious violent threats received by Black women DAs.¹⁷²

The concern is that implicit bias and overt acts of discrimination and hostility will deter women and women of color from pursuing and remaining in leadership roles, not to mention the role of implicit biases. Kim Foxx recently ran for and was reelected as Cook County’s State’s Attorney, but Aramis Ayala, the first African-American state attorney in Florida, did not seek re-election in 2020,¹⁷³ at least partly due to the vitriolic backlash to her opposition to the death penalty.¹⁷⁴ Nonetheless, Ms. Ayala’s service as state attorney was a progressive step for diversity in the office and for legal practice in the state of Florida.¹⁷⁵

While not focused on women prosecutors, a survey was conducted in 2017 to shed light on the mystery surrounding prosecutorial discretion.¹⁷⁶ The survey aimed to uncover what motivated prosecutors to prosecute certain crimes since prosecutorial discretion is one of the

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Akela Lacy & Ryan Grim, *Pennsylvania Lawmakers Move to Strip Reformist Prosecutor Larry Krasner of Authority*, INTERCEPT (Jul. 8, 2019, 2:55 PM), <https://theintercept.com/2019/07/08/da-larry-krasner-pennsylvania-attorney-general/>.

¹⁷² See Eli Hager & Nicole Lewis, *Facing Intimidation, Black Women Prosecutors Say: “Enough”*, THE MARSHALL PROJECT (Jan. 16, 2020, 2:00 PM), <https://www.themarshallproject.org/2020/01/16/facing-intimidation-black-women-prosecutors-say-enough>.

¹⁷³ Monivette Corderio & Jeff Weiner, *Aramis Ayala Won’t Seek Re-Election as Orange-Osceola State Attorney; Belvin Perry May Enter Race*, ORLANDO SENTINEL (May 28, 2019, 5:40 PM), <https://www.orlandosentinel.com/news/breaking-news/os-ne-aramis-ayala-no-re-election-run-orange-osceola-state-attorney-20190528-z65rv7rmqjdqfoyxsd6rp6junu-story.html>.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Johanna Wald, *What’s Inside the Prosecutorial ‘Black Box’?*, THE CRIME REP. (Mar. 22, 2018), <https://thecrimereport.org/2018/03/22/whats-inside-the-prosecutorial-black-box/>.

driving forces in the prison population increase.¹⁷⁷ Notably, the results indicated that Black prosecutors had a difficult time placing other Black people behind bars, while white prosecutors did not report initial discomfort with racial disparity in prosecutions.¹⁷⁸

The survey findings implied that this hesitation was not necessarily a bad thing and reported that prosecutors would like to receive better training, including a familiarization with the impact of incarceration on the local community.¹⁷⁹ Many prosecutors reported feeling an expectation to be hard on crime and that this expectation affected their decision-making.¹⁸⁰ The study also suggested that if the prosecutors were not only more in tune with the impact of incarceration on their local community but also were evaluated on more than convictions alone, their personal mental health and job satisfaction would improve.¹⁸¹ Prosecutors' job satisfaction and positive mental health means sounder exercise of discretion, and communities would benefit from less incarceration.¹⁸² The positive feedback loop would mean prosecutors would have more flexibility in addressing crime in the community.¹⁸³ If prosecutors were evaluated less on convictions, and more on holistic justice actions, all prosecutors, including women—especially women of color—might find more breathing room as DAs.

G. Lawsuits Filed by Women Lawyers Illuminate Systemic Issues in Criminal Law

Although the aforementioned findings are helpful for framing women's issues in the profession broadly, the studies did not explain whether/why women were leaving *criminal* law at higher rates than men in the practice and women in other practice areas. However, while it has been difficult to find conclusive studies explaining this flight of women from criminal law, some recent lawsuits alleging gender discrimination have shed some light on why at least some women are leaving.

Women all over the country, including women practicing criminal law, are embracing the “MeToo” and “TimesUp” themes.¹⁸⁴ Undoubtedly

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ See Rebecca Everett, *Women Suing Prosecutor Describe Retaliation, 'Culture of Cronyism and Sexism'*, NJ ADVANCE MEDIA (Jan. 10, 2019),

countless women have contemplated legal action, and some particularly brave women have actually filed discrimination suits.

A major cause of the increase in discrimination suits is the #MeToo movement.¹⁸⁵ The Me Too campaign was founded in 2006 by Tarana Burke as an expression of solidarity by survivors of sexual assault, harassment, and discrimination. In 2006, activist Tarana Burke heard repeated reports of sexual violence in her work with girls through a nonprofit she had co-founded called Just Be Inc.¹⁸⁶ Ms. Burke started the Me Too campaign that year "to spread a message for survivors: You're heard, you're understood."¹⁸⁷ The hashtag #MeToo rose to greater prominence in October 2017 when allegations against film producer Harvey Weinstein went public.¹⁸⁸

Ai-jen Poo, executive director of the National Domestic Workers Alliance and an award-winning activist, describes the #MeToo movement as one "of survivors and their supporters, powered by courage, determined to end sexual violence and harassment We prioritize the leadership and healing of survivors, especially the least visible, most vulnerable among us. And we are growing in our power."¹⁸⁹ The #MeToo movement inspired many women to say enough is enough. Created by 300 women in entertainment, #TimesUp and TIME'S UP, Now grew out of the #MeToo movement and support concrete legal and public relations action in favor of gender equality and equity.¹⁹⁰

One recent lawsuit was filed by a former female shareholder in Ogletree Deakins Nash Smoak & Stewart P.C., a defense-side labor and employment law firm, against the firm, alleging a culture of systematic pay discrimination wherein women are consistently paid less than men

<https://www.nj.com/news/2019/01/women-suing-prosecutor-describe-toxic-culture-of-discrimination-harassment.html>; see also *Duffin et al. v. D'Antonio et al.*, ACLU OF N.M. (last visited Jul. 16, 2020), <https://www.aclu-nm.org/en/cases/duffin-et-al-v-dantonio-et-al>.

¹⁸⁵ Susan Saltzstein & Jocelyn Strauber, *#MeToo Litigation: The Changing Landscape, A Year Later*, N.Y.C. L.J. (Mar. 27, 2020), <https://www.law.com/newyorklawjournal/2020/03/27/metoo-litigation-the-changing-landscape-a-year-later/>.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Anna North, *The #MeToo Movement and its Evolution, Explained*, VOX (Oct. 11, 2018), <https://www.vox.com/identities/2018/10/9/17933746/me-too-movement-metoo-brett-kavanaugh-weinstein>.

¹⁸⁹ *Id.*

¹⁹⁰ *Our Story*, TIME'S UP, <https://timesupnow.org/about/our-story/> (last visited Dec. 11, 2020) (describing the origins of this new civil rights organization).

and financially punished if they speak out against the discrimination.¹⁹¹ Women criminal lawyers are also filing discrimination suits across the country.¹⁹²

Another suit was filed on January 10, 2019, by current and former female prosecutors and a female investigator in the Atlantic City Prosecutor's Office against the District Attorney and the Atlantic City Prosecutor's Office ("ACPO"). The plaintiffs' complaint alleges pay inequities and an office culture that "favored men over women, turned a blind eye to instances and reports of sexual harassment and gender discrimination, and permitted retaliation."¹⁹³ The complaint further alleges a history of discrimination against women in the ACPO, citing the fact that there have only been male District Attorneys since 1985 and there has never been a Chief Female Detective in the ACPO.¹⁹⁴

A similar lawsuit was filed in Doña Ana County, New Mexico in April 2019.¹⁹⁵ The complaint alleges that not only were the women in the Doña Ana County DA's office not given equal compensation or job advancement, they were subjected to blatant sexual harassment. One female prosecutor reported that she was told to sit on a highly publicized murder trial because her superiors wanted a "pretty, young prosecutor" sitting at the prosecution table.¹⁹⁶ These lawsuits provide a detailed account of what some women are experiencing in criminal law.

Women are suing some of the most powerful actors in the criminal justice system. Approximately two hundred public defenders in Chicago recently filed suit against the head public defender (a woman named Amy Campanelli)¹⁹⁷ and Sheriff Tom Dart, alleging that their inaction resulted in worsening sexual harassment by male detainees.¹⁹⁸ And they are

¹⁹¹ Complaint for Penalties and Injunctive Relief at 23-24, *Warren v. Ogletree*, (Cal. Super. Ct. Jan. 23, 2019) (No. 37-2019-00004519), 2019 WL 329444.

¹⁹² See Kate Bieri, *2016 Lawsuit Against DA Alleges Discrimination*, KVIA.COM (Sept. 14, 2017) (describing one such lawsuit).

¹⁹³ Plaintiffs' Complaint at 5, *Ruberton v. Tyner*, No. LCV201959304, (N.J. Super. Ct. Law Div. Jan. 10, 2019).

¹⁹⁴ *Id.* at 12.

¹⁹⁵ See Katie Hoepfner, *ACLU Files Lawsuit Against Third Judicial District Attorney's Office for Sex Discrimination, Retaliation, and Violating Female Attorneys' Free Speech Rights*, ACLU OF N.M. (Apr. 29, 2019), <https://www.aclu-nm.org/en/press-releases/aclu-files-lawsuit-against-third-judicial-district-attorneys-office-sex>.

¹⁹⁶ See Plaintiff's Complaint at 18, *Duffin v. D'Antonio*, No. D-101-CV-201901169 (N.M. Apr. 29, 2019).

¹⁹⁷ It is important to note that women report discrimination not only from men but also from other women.

¹⁹⁸ Megan Crepeau, *Detainees Regularly Expose Themselves to Female Public*

getting results. For example, in 2019, Federal Judge Carlos Murguia was sanctioned by the Judicial Council for the 10th Circuit Court of Appeals for sexual harassment and other offenses.¹⁹⁹

H. "Push" and "Pull" Factors Explored in Other Male-Dominated Professions

Research from other male-dominated professional fields provides valuable insights. In an article examining what holds women back in business, Harvard Business School professor Robin Ely and Florida State University professor and sociologist Irene Padavic describe "pull" factors and "push" factors.²⁰⁰ "Pull" factors are a woman's own reasons to lean out of work, such as changing interests or a desire to spend more time at home, among others. "Push" factors might include inadequate work or family accommodations, the pressure to conform to the "masculine style" preferred by employers in dealing with clients, and the poor reputation of highly successful businesswomen who have had children. Professors Ely and Padavic conclude that "[w]hat holds women back at work is not some unique challenge of balancing the demands of work and family but rather a general problem of overwork that prevails in contemporary corporate culture."²⁰¹ Of course, Americans in general work longer hours and take less vacation time than workers in peer nations.²⁰² While a complete normative shift in balancing work and personal life would be beneficial for all women, as described below, the listening sessions indicate that other gender-related challenges still remain in criminal justice careers.

Similar "push" and "pull" factors are driving women to leave the medical field as well. Upwards of 40% of women physicians transition to part-time or leave the field within six years of completing their residencies. This is due primarily to familial commitments in addition to

Defenders, Suit Alleges, CHI. TRIB. (Nov. 9, 2017, 7:04 AM), <https://www.chicagotribune.com/news/breaking/ct-met-sex-harassment-public-defenders-lawsuit-20171108-story.html>.

¹⁹⁹ Joshua Bote, *Kansas Federal Judge Rebuked for Sexual Harassment and Illicit Affair with Convicted Felon*, USA TODAY (Oct. 1, 2019, 5:25 PM), <https://www.usatoday.com/story/news/nation/2019/10/01/kansas-federal-judge-reprimanded-sexual-harassment-felon-affair/3828593002/>.

²⁰⁰ Robin J. Ely & Irene Padavic, *What's Really Holding Women Back?*, HARV. BUS. REV. (Mar.-Apr. 2020), <https://hbr.org/2020/03/whats-really-holding-women-back>.

²⁰¹ *Id.*

²⁰² Derek Thompson, *Workism is Making Americans Miserable*, ATLANTIC (Feb. 24, 2019), <https://www.theatlantic.com/ideas/archive/2019/02/religion-workism-making-americans-miserable/583441/>.

experiencing discrimination related to pregnancy or breastfeeding.²⁰³ Notably, even if women who leave choose to return to the profession, reentry itself poses additional barriers like exams and evaluations for measuring continued competency.²⁰⁴

Realizing there was no definitive relevant literature, TF co-chairs Carla Laroche and Tina Luongo, they designed the TF's work to occur in two stages: first to listen to women who have not been heard before by the ABA and next to gather quantitative data. The next section describes in detail the qualitative data gathered in the listening sessions between November 2018 and June 2020.

III. ABA WCJ TF LISTENING SESSIONS ADD POWERFUL VOICES TO EXISTING LITERATURE

While identifying and reviewing the relevant literature, the author simultaneously collaborated with TF co-chairs and members to host listening sessions. In January 2019, the author created—with input from TF co-chairs and members—a survey based on the questions asked in the CLA and LAPIS studies.²⁰⁵ The survey questions were designed to prepare women for their “testimony” before the Task Force. Co-chairs Carla and Tina organized an initial pilot listening session in Washington, D.C. during the ABA CJS Fall Institute. Following this, the author coordinated listening sessions across the country with significant assistance from ABA staff, Sila Manahane, Kristen Edwards, and TF members.

The author and TF member Professor Barbara Creel worked together to design the format of the listening sessions. Creating safe and supportive spaces was of utmost importance. TF members worked hard to listen and learn, rather than share and teach. We identified capable and discreet law students to serve as notetakers at each session, both to allow TF members to focus on what they were hearing rather than notetaking and to promote opportunities for mentorship among law students, TF members and participants. The author also took detailed notes, and after each session sent hers and the notetakers' to all TF members.

²⁰³ Amy Paturel, *Why Women Leave Medicine*, ASS'N OF AM. MED. COLL. (Oct. 1, 2019), <https://www.aamc.org/news-insights/why-women-leave-medicine>; see also Elena Frank et al., *Gender Disparities in Work and Parental Status Among Early Career Physicians*, JAMA NETWORK (Aug. 2, 2019), https://docs.wixstatic.com/ugd/3fdf20_b47503c5516f4b61b42dc04b94605f15.pdf.

²⁰⁴ *Id.*

²⁰⁵ See *infra* Appendix B.

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Participants were assured their participation and comments would remain confidential. The author maintained consistent and ongoing contact with participants after their listening sessions. Members of the TF invited participants to various CJS events, including to serve as panelists, to help them feel included in the Section and to bring greater attention to participants' valuable expertise.

The details of these listening sessions were as follows:

<u>Listening Session Details</u>	<u># of non-TF Participants</u>	<u>Surveys Collected</u>
11/18: ABA CJS Fall Institute, Washington, D.C.	10	N/A ²⁰⁶
1/19: ABA Midyear Meeting, Las Vegas, NV	17	N/A ²⁰⁷
3/19: University of New Mexico, Albuquerque, NM	17	10
4/19: ABA CJS Spring Meeting, Nashville, TN	5	N/A ²⁰⁸
6/19: Seattle University School of Law, Seattle, WA	5	3
6/19: Gonzaga University School of Law, Spokane, WA	19	14
7/19: NBA Annual Convention, New York City, NY	12	0 ²⁰⁹
8/19: UC Hastings College of the Law, San Francisco, CA	20	10

²⁰⁶ The author, who wrote the survey instrument, had not yet been hired.

²⁰⁷ The author had just been hired and sent the survey out to participants with little notice.

²⁰⁸ The format of hearing from these women was to meet in small groups with TF members. The author was unable to be present and did not collect surveys because of the more informal format (supper clubs where TF members met with participants at various local restaurants in small groups).

²⁰⁹ Almost all the participants in this session were Black judges from around the country and, while surveys were not submitted by any participants, the conversation lasted several hours and included meaningful reflections that were written down by the author.

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9/19: HNBA Annual Convention, NYC, NY	3	1
11/19: Howard University School of Law, Washington, D.C.	33	15
3/20: FSU College of Law, Tallahassee, FL	10	4
6/20: Experienced Women, Zoom	13	11
TOTALS	164	68

Listening sessions were closed, invitation-only events whose participants include women and gender non-conforming lawyers with diverse lived and professional experiences who were recognized as leaders in criminal justice. These participants are nominated by Task Force members, CJS leaders, and nominees from local and national lawyers' associations. To better contextualize the sentiments expressed, a brief description overall and description of each session is provided.

Participating women were invited to share information about their backgrounds both in the surveys and during their presentations. Many chose to share their racial, ethnic, and cultural backgrounds, as well as their gender identity and orientation, but some did not. Locations were chosen based on a number of variables, including geographic diversity, presence of a Task Force member or members in the city, ability to find a law school host (inclusion of women law students was important to the TF), whether the ABA CJS had recently held events in the city, and ability to draw diverse participants. In terms of diversity, the ideal locations could attract both urban and rural lawyers, lawyers who are members of underrepresented racial, ethnic, and cultural groups, and lawyers with diverse gender identities and orientations.

The sessions included women working in rural towns in New Mexico and Washington; Native American, Black, and Hispanic judges from all over the country; cisgender and transgender women lawyers and judges; current law students, women who had just graduated from law school and women who have been practicing for nearly fifty years; lesbian and bisexual women; women from religious minorities. These women worked at the county, state, and federal levels as prosecutors, public

defenders, private criminal defense lawyers, and judges. Also represented were analysts and advocates working in state and local government, non-profit organizations, and private foundations.

All decisions about where to host sessions were made by the co-chairs and reporter, with input from TF members. Prior to most sessions, the author produced written briefs for TF members on the local and state demographic context. Five sessions²¹⁰ were held in conjunction with regular ABA meetings because most Task Force members' travel was covered to those meetings. Two sessions—both in New York City—were held in conjunction with the annual conventions of the largest associations of Black and Latinx lawyers. Lawyers came from around the country and world to attend these conventions.²¹¹ The TF hosted four sessions at law schools to which one or more TF members had connections. Finally, one session was held via Zoom during the COVID-19 pandemic.

A number of common threads emerged from the sessions including the following: challenges relating to salaries, gendered expectations, lack of respect for and devaluing of women, lack of flexibility, stage-of-life issues, allyship, generational challenges, juggling work/life commitments, compassion fatigue/vicarious trauma/burnout, and resilience/survival. Women with intersectional identities reported exacerbated challenges. After a brief summary, the author provides direct quotes from participants that illustrate these themes in their own powerful words. The comments come from younger and older women, women with significant experience and new attorneys, women who are first-generation college graduates and women who grew up with significant resources, and women from different racial and ethnic groups. The fact that women from all different backgrounds shared at least some similar experiences indicates the pervasive sexism in criminal law.

Many of the statements reflect overt mistreatment. Even more frequent than reports of overt mistreatment were reports of microaggressions,²¹² such as not having their ideas credited or being

²¹⁰ November 2018 in DC, January 2019 in Las Vegas, April 2019 in Nashville, August 2019 in San Francisco, and November 2019 in DC were all held in conjunction with ABA/CJS events.

²¹¹ *94th Annual Convention & Exhibits*, NAT'L BAR ASS'N, https://www.nationalbar.org/NBA/NBA_Annual_Convention.aspx?WebsiteKey=0131bda0-b8d6-42ea-88ce-2447f3c18193 (last visited Jul. 24, 2020); *2019 Annual Convention*, HISPANIC NAT'L BAR ASS'N, <https://hnba.com/2019-annual-convention/> (last visited Jul. 24, 2020).

²¹² Microaggressions refer to the “everyday slights, indignities, put-downs and insults that members of marginalized groups experience in their day-to-day interactions with

presumed to be the one to sacrifice professionally for their home lives. Recent listening sessions from the Task Force revealed that microaggressions towards women and other underrepresented populations are ubiquitous.

At one listening session, a participant described how being a woman practicing criminal law in a leadership role is challenging because of interactions with peers and clients alike. She described how she was repeatedly told by male colleagues to “calm down” and not be too aggressive. She described this experience as “tone policing.” Additionally, she faced sexual harassment by defendant clients who made comments on her body. She also noted that working in criminal defense is challenging for any person, but as a woman she has the additional pressure to “shave yourself down” to fit a particular societal norm.

Other women shared experiences that did not seem to qualify as overt harassment or explicitly discriminatory, but they nonetheless felt disturbed enough to remember the experiences in great detail. The cumulative impact of these disturbing experiences over time seems to tip the scale toward harassment and discrimination. These interactions that women described are examples of microaggressions, implicit bias, stereotyping, and stereotype threat²¹³ that are well-documented in the literature.²¹⁴

Many women shared experiences of disparate treatment and other negative reactions when it came to parental leave after the arrival of a new baby. Women reported that they were often asked if they were coming back, while men did not appear to be asked this question because it was presumed that they would return. For women who were as committed to their work as their male counterparts, such questions led them to feel devalued.

Further, women were often expected to be the ones to take time off from work. One participant noted that women employed as attorneys in her office often had spouses with similarly demanding jobs, while their

individuals who are often unaware that they have engaged in an offensive or demeaning way.” Hahna Yoon, *How to Respond to Microaggressions*, N.Y. TIMES (Mar. 3, 2020), <https://www.nytimes.com/2020/03/03/smarter-living/how-to-respond-to-microaggressions.html>.

²¹³ Stereotype threat is the risk of confirming a negative stereotype about one’s social group. See Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. OF PERSONALITY & SOC. PSYCH. 797, 797 (1995).

²¹⁴ See *supra* Part II for studies.

male counterparts often had spouses who stayed at home or worked part time.

Particularly poignant are the experiences shared by women from diverse ethnic and racial backgrounds. For example, Native American women shared unique experiences coming from traditionally matriarchal societies on which patriarchy was imposed by Anglo and Spanish colonists. As a traditionally matriarchal society, one woman felt her role as a judge was restoring her cultural traditions to their natural order. This particular judge shared that she too experienced voicing a decision or opinion that went ignored until the very same idea passed through the lips of a white man. Women of color—in particular, Black women—reported a high prevalence of discriminatory treatment from everyone in the criminal justice system, including judges, bailiffs, security guards, opposing counsel, colleagues, and even clients and clients’ families. Notably, however, quite a few women of color public defenders reported feeling supported at work by colleagues and supervisors, with a few exceptions. In contrast, many of the white women at the listening sessions shared that *overt* discrimination and harassment is not common, but that it does still occur.

Relatively Low Salaries in Criminal Law Serve as a Challenge, Particularly for Women of Color and First-Generation Lawyers

- “The salaries are low. Many of us don’t have trust funds or parents that will pay off our student loans. Our check is not our own. It is also going to someone else. It is the family check. It is hard to live on the salaries.”
- “[In my role in hiring,] a woman with three children, very well qualified, declined the prosecutor position. It didn’t pay well enough to even cover the childcare.”
- “My [immigrant] parents were so upset I went into criminal law.”
- “I am 58, and I didn’t have loan debts, which were a major factor in deciding what I was going to do.”
- “As a supervisor, I know that we lost women lawyers because of salaries. Recently however there was an increase for PDs and DAs, so now their starting salary is \$50,000.”
- “Everyone runs to me when they need a translation, but my Spanish language skills are not taken into account in my pay.”
- “As the executive director of my office and a first-gen Latina lawyer, I know what a supportive work environment looks like.

We have created flexible work schedules [e.g. working from home, even before the COVID-19 pandemic]; salary transparency and a salary ceiling where no one can earn more than 2.5 times what the lowest paid individual in the office makes; we pay all our interns; and we cover 100% of mental health care costs.”

Discrimination Based on Gendered Expectations of Women in Criminal Law, Particularly Challenging for Women of Color and LGBTQ Women

- “Very often we [judges] see male attorneys treating female attorneys in a way that is disrespectful and unacceptable in the court system and in society.”
- “Men try to intimidate you through intimations of incompetence and sometimes blatant overtures of incivility.”
- “I have been called or seen other women called, ‘honey,’ ‘sweetie,’ ‘eye candy,’ ‘cutie.’”
- “If women have to work twice as hard as men to be recognized as competent, Black women have to work four times as hard.”
- “I am routinely called by my first name when male attorneys are called ‘Mr. So-and-so.’”
- “I spent 27 years as a man in my office before transitioning almost five years ago. The horrible things you hear that men say about women actually happen.”
- “There’s a fine line between aggressive and bitch. I was called a chihuahua by a judge once; management said to ‘let it go.’”
- “I get called ‘little lady,’ and people said, ‘people will vote for you [for elected public defender] because you are hot.’”
- “I was introduced by my supervisor to a judge as a ‘spicy little Latina.’”
- “I have been told I don’t look or act feminine enough.”

Lack of Respect for and Devaluation of Women

- “I have been told by more than one judge that I remind him of his daughter.”
- “I’ve had a male judge say to me, ‘Counsel, school your features,’ when I was frowning at him when he ruled against me.”
- “I had a male attorney call a female witness a ‘whore for the government.’ The female judge just said his name. We have thick skins, but that’s not good enough.”
- “I asked my office for a mentor and they assigned someone who

was a year older than me, a white man. How could he be my mentor?"

- "Sometimes I feel like an imposter, like I'm not a real attorney. No matter how long I do this, there is some disbelief in me deep down."
- "[I'm so tired of] 'he-peating.'"²¹⁵
- "No one thinks I am the attorney. They assume I'm the secretary or sister or auntie."
- "As women in the profession, we tend to undervalue ourselves."
- "People don't expect Black women to read and write well. God forbid I have a typo because the assumption [is] that it is my intelligence and not the speed of my typing."

Women Are Not Necessarily Other Women's Allies

- "I've had a female judge say, 'When you're in my courtroom I expect you to dress like ladies . . . no skin. If I see skin, you're out.' I've seen female judges being harsher to female attorneys."
- "[Even as a woman, I acknowledge] the elephant in the room is women having babies [and what that means for their productivity]."
- "If it weren't for men who looked out for me along the way, I would not be where I am today."
- "I have benefitted from great men bosses who supported me every step of the way."

"Toughen Up, Buttercup" vs. #TimesUp

- "We need to address the generational problem of entitlement and other generational differences."
- "If you can't eat a bologna sandwich while you're reading an autopsy report, you shouldn't work for me."
- "I have seen a lot in my nearly forty years in the same government agency. I have seen sex discrimination and the problems with "boy's club" behavior (i.e. having to drink, use certain language, partake in the same behavior). I have seen women getting scolded or even demoted for calling out sexism in the office."
- "If my employer can't meet my needs or mistreats me, I will not

²¹⁵ This term refers to the phenomenon when a woman voices an idea, which a man repeats without attributing to her, and then he gets credit for the idea.

stick around.”

- “The new generation forces us to look in the mirror. I had my two children 14 months apart and was back to work within three days. I have always advocated for and supported women. But when I hired a young associate to work at my small firm who got married shortly after she started and then wanted a three-week honeymoon, I reluctantly said, ‘okay.’ Then she was pregnant and wanted three months of paid leave [which is not required because of the employer size]. I even more reluctantly said, ‘okay.’ And then she wanted to talk about *transitioning* back to work, and I nearly lost it because I needed her back full-time. Then she was breastfeeding in the office! The male attorneys had no problem with it. I was the one with the problem, and I realized maybe I wasn’t as progressive as I thought and needed to change. She’s a good lawyer and employee. I want to keep her.”
- “Women who succeeded *in spite* of the many obstacles to their advancement are naturally inclined to tell younger women to suck it up as they did. They may even view their success as deriving in part from their ability to overcome those obstacles. (*See* “What-doesn’t-kill-you-makes-you-stronger.”) Tempting though this approach is, it is wrong. Simply because women have been impeded in their progress for centuries is no reason to perpetuate the practice. Just because a woman learned to ‘deal with’ sexual harassment in the workplace is no reason her daughter should have to do so.”
- “No one (male or female) leaves law school with a guarantee of professional success or even an ideal work schedule. Ours is a labor-intensive profession ... any woman who expects to excel will have to demonstrate her competence. If a woman believes her family responsibilities require a fixed number of hours between certain times of day, after which she is “off the clock,” she may find employment, but her choices will be limited, because practicing law is not factory work that ends when the bell rings. If, instead, she wants a more flexible work schedule than most employers now provide, that goal is realistic, achievable, and critical to promoting the ascension of women to positions of authority in the legal profession.”

Systemic Obstacles to Juggling Work-Life Commitments and the Need for Greater Flexibility in Criminal Law Jobs

- "When I started out, all the male prosecutors I worked with had stay-at-home wives or were unmarried, so they could stay late, work on weekends, and celebrate victories in court."
- "Our office absolutely will not allow job sharing. When I came back from having my baby, that was all I wanted."
- "I would love to work part-time, but I'm not aware of many part-time opportunities in the public sector."
- "I was lucky to hire an over-qualified woman to work for me as my judicial clerk. After giving birth, her main priority was her child and she said she was tired of working for men who just didn't understand her needs."
- "I literally pumped in the bathroom, with a shower curtain for cover. I should have advocated for myself and the people coming behind me because there's not an adequate space. We have space in the office to have one, but they didn't want to spend the money to have one. They turned the filing cabinet room into the pumping room for the defenders and the prosecutors."
- "I stopped breastfeeding because I knew they didn't have the room ready and I refused to pump in the bathroom."
- "I sometimes don't reveal that I'm a mom. I don't want people to have lower expectations of me."
- "Having to be in court until 5 PM or later means never being able to pick your children up from school."
- "There is no chance of retaining quality women attorneys if there has to be a choice between families or work; families will always be chosen."
- "They say every crisis is an opportunity. The current pandemic is surely the former and should serve as the latter. If we in the legal profession have learned nothing else, it is how much more can be done remotely than anyone thought possible. My hope is that employers, private and public, will internalize these lessons, and that both women and men will use this experience to advocate for flexible work hours that allow them to accommodate the ever competing needs of family maintenance, child rearing, and work."

Stage-of-Life Issues

- “With respect to retention and promotion, [the question] is how you make it there and still have a family . . . what’s often overlooked is fertility stuff and IVF and freezing your eggs. I don’t want to have children until I’ve done a homicide.”
- “I do not have children. I chose not to have kids. I have never had to explain to someone that I have to leave because I have to pick up my kid. That was indeed a significant factor in my opportunity to make choices.”
- “Another problem is menopause. What do you do when you have a hot flash in the courtroom? Or what happens if you can’t wait two hours to go to the bathroom?”
- “I feel like I get assigned more work since I’m single to make up for people in my office who have children.”

Compassion Fatigue/Vicarious Trauma/Burnout

- “I left criminal law because I couldn’t stand seeing so many young black men go to prison.”
- “Looking young [and being a minority] has caused . . . [me] to come in overly prepared and organized to be taken seriously. I grew up with a single mom, was the first to go to college. I came in with a different perspective: I’ve had people in my family incarcerated. I became a prosecutor to help people. However, being one is hard—from all sides: defense says you’re too aggressive, victim saying not aggressive enough, cops not wanting to come in.”
- “They [men and women] bully and intimidate to evoke anger and then we get labeled as the ‘Angry Black Woman.’”
- “We bury these things [sexism, racism] because if we don’t, we can’t continue to work.”
- “This job requires that I have regular therapy.”

Resilience/Survival

- “There will always be people in your life who will treat you wrong. Be sure to thank them for making you strong. Tap them on the shoulder and thank them.”
- “Failure is very important for your career success. You need to embrace failure as a trial attorney. For those who want to be litigators and as an attorney in general, failure is part of life. You

have to learn how to embrace it.”

- “Just because I don’t have debt or I didn’t have kids, doesn’t mean I shouldn’t be working to deal with this system and trying to make this system and workplaces better.”
- “Lawyers perform. Everywhere you are, you’re in a performance space.”
- “If we have a platform and seats at the table, we need to use those voices.”

The last in-person listening session occurred on March 6, 2020, just days before the pandemic forced widespread shutdown of courthouses and other public spaces. The shutdown and the focus on racial justice in the aftermath of the George Floyd murder have affected the pace of the TF’s work, but these conditions have only heightened members’ passion for criminal justice. The listening sessions established powerful relationships between the women involved, and many expressed a desire to stay connected to one another and to the TF. The TF is exploring ways to maintain and expand on those new relationships. For example, the widespread use of Zoom invited the opportunity for the TF to pivot from its work for a bit to check in with women who previously presented to see how COVID-19 and calls for racial justice are affecting their work.

IV. SOLUTIONS TO CHALLENGES FACED BY WOMEN CRIMINAL LAWYERS

Since February 2019, the TF has held monthly conference calls and in-person meetings twice a year. During these calls and in-person meetings, members debrief listening sessions and discuss potential remedies. While the final recommendations have not been drafted, potential remedies identified by the TF and indicated in the literature include meaningful mentorship, more flexible workplace policies, better training (particularly in rural and underfunded jurisdictions), more transparency and accountability, and better tracking of relevant data.²¹⁶ These remedies are described in greater detail here.

A. Mentorship

To date, mentorship is the most commonly cited remedy in both the literature and the listening sessions to mitigate women leaving criminal law. Many women are hesitant even to apply to some of the

²¹⁶ See Cruz et al., *supra* note 16, at 200–01; see also MADON, *supra* note 101, at 8–9.

senior positions. One woman at the Albuquerque listening session shared that there has never been a female U.S. Attorney in New Mexico and that this phenomenon was a result of women not applying.²¹⁷ She expressed that if more women encouraged each other to apply to leadership positions, there would likely be more women in these roles.²¹⁸

Recently retired longtime Alexandria (Virginia) Public Defender Melinda Douglas provides a great example of the power of mentorship.²¹⁹ Ms. Douglas is widely regarded as having mentored countless female criminal lawyers by example and by actions. In an in-depth interview upon her retirement, she noted that as a public defender she was free to focus solely on defending her clients, rather than on making money or putting another person in jail or prison.²²⁰ A frequently articulated request by listening session participants was access to mentorship programs that pair new attorneys with persons similar to them who are in some sort of leadership or advanced role to ease feelings of isolation. The ABA offers numerous mentoring opportunities through its various sections, but it is clear that there are tens of thousands of women criminal lawyers and law students who are not ABA members. The TF is thus investigating ways to amplify existing mentoring opportunities through the ABA, local and state bar associations, law schools, and other groups. In the short term, the TF includes mentoring opportunities for law students in our listening sessions, and students report gratitude for these opportunities.²²¹

B. More Flexible Workplace Policies May Address Drift and Dissatisfaction

Greater work schedule flexibility also would support women and decrease the likelihood that they decide leave criminal law or, in some cases, law altogether. This issue has been studied in other contexts, particularly in private sector legal jobs. Even in workplaces that allow some flexibility, women and men report a stigma attached to working

²¹⁷ Memoranda from Albuquerque Listening Session, Maryam Ahranjani [March 1, 2019] (on file with author).

²¹⁸ *Id.*

²¹⁹ Rachel Weiner, 'I Defend: It's What I Do.' *Public Defender in Virginia Retires Decades After Founding Office*, WASH. POST (Nov. 1, 2019, 10:03 AM), https://www.washingtonpost.com/local/legal-issues/i-defend-its-what-i-do-public-defender-in-virginia-retires-decades-after-founding-office/2019/11/01/5f028a46-fb23-11e9-8906-ab6b60de9124_story.html.

²²⁰ *Id.*

²²¹ Author's and TF members' notes and emails (on file with the Author).

part-time or alternate schedules.²²² However, in the listening sessions, women expressed—quite emotionally, in some cases—how juggling all their responsibilities was met with a “toughen up, buttercup” mentality, which felt like an affront to their professional identity and personal dignity.

Litigators reported that they would like the opportunity to job share or work from home on non-court days upon return from parental leave, while caring for elderly relatives, or just in general to strike a balance between work and home commitments.²²³ Women in the listening sessions talked about how much the opportunity to save the commuting and preparation time (meals, clothing, etc.) by working from home whenever possible would make a significant difference, but they reported that government policies remain largely inflexible.²²⁴

Advocates of balance programs argue approval for them should come from the highest level of an organization, should be in writing, and information about them should be widely circulated.²²⁵ In addition to top-down support in writing, there should also be support in the form of opportunities offered. That is, those who participate in balance programs should not be penalized by being given low-profile work or denied opportunities for advancement.²²⁶ While this literature addresses some important work-place concerns, it does not address the issues in working in a criminal law environment specifically.

Even pre-COVID, some jurisdictions are exploring systemic change. Proponents of the new rule in Florida argue that it will allow more women to take on lead counsel roles and keep them from being sidelined.²²⁷ While the rule is not limited to criminal law matters, it is predicted to have a positive effect on women in the practice of criminal law as criminal law matters are often adjudicated in court proceedings.

²²² LIEBENBERG & SCHARF, *supra* note 56; *see also* Joan C. Williams, Aaron Platt & Jessica Lee, UNIV. OF CAL., HASTINGS COLL. OF THE LAW, *DISRUPTIVE INNOVATION: NEW MODELS OF LEGAL PRACTICE* (2015), <https://worklifelaw.org/publications/Disruptive-Innovations-New-Models-of-Legal-Practice-webNEW.pdf>.

²²³ Author’s notes from Spokane listening session (on file with the Author).

²²⁴ Notes from Albuquerque, Spokane and San Francisco Listening Sessions (on file with the Author).

²²⁵ Steven K. Berenson, *Creating Workplace Solutions for Women Attorneys: Report of the Lawyers Club of San Diego Balance Campaign*, 28 T. JEFFERSON L. REV. 449, 468–69 (2005).

²²⁶ *Id.* at 471–73.

²²⁷ Moline, *supra* note 25.

C. Better Training Opportunities, Particularly for Women in Rural and Under-Resourced Jurisdictions on Wellness, Diversity and Inclusion, Professional Development and Other Challenges

The literature and information gathered in listening sessions indicate a need for creating and amplifying existing training opportunities for employees and law students on a number of challenges. These challenges include the pernicious effects of implicit and explicit bias;²²⁸ vicarious and secondary trauma and burnout;²²⁹ diversity and inclusion; and gender-based and intersectional issues. Better training has been raised as a particular concern by women in rural communities and in places that do not have adequate funding for ongoing training.²³⁰ Many bar associations have recommended addressing these issues by providing awareness training for unconscious bias in law schools and in practice.²³¹

Since the #MeToo Movement, many laws have been passed to require diversity and inclusion training.²³² Testimony and other evidence presented to local legislative bodies provide some insight into what underrepresented persons face in the workplace. In her testimony before the Oregon legislature, Maya Raghu, Director of Workplace Equality & Senior Counsel for the National Women's Law Center, expressed that anti-discrimination policies should provide sanctions for those who aid or conceal harassment.²³³ Additionally, Ms. Raghu points out that reformed legislation in many states now does not allow for non-disclosure agreements precluding women from speaking out about harassment they suffered.²³⁴ Ms. Raghu co-authored a study providing guidance for developing effective sexual-harassment policies with a focus on prevention.²³⁵ This study suggests that an important element, inter alia, is

²²⁸ JUDICIAL DIV., AM. BAR ASS'N, ENHANCING JUSTICE: REDUCING BIAS (Sarah E. Redfield, 2017); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

²²⁹ *The Vicarious Trauma Toolkit*, OFFICE FOR VICTIMS OF CRIME, <https://ovc.ojp.gov/program/vtt/what-is-vicarious-trauma> (last visited Jul. 16, 2020).

²³⁰ Notes from Albuquerque and Spokane Listening Sessions (on file with the Author).

²³¹ *Id.*

²³² See *Workplace Protection Act: Hearing on LC 1170 Before the Senate Workforce Comm.*, 80th Leg. Assemb. (Jan. 22, 2019) (testimony of Maya Raghu Director of Workplace Equality & Senior Counsel National Women's Law Center), <https://nwlc.org/wp-content/uploads/2019/02/NWLC-Testimony-on-Oregon-Workplace-Harassment-Legislation.pdf>.

²³³ *Id.* at 7.

²³⁴ *Id.* at 4.

²³⁵ Maya Raghu & Joanna Suriani, *Workplace Justice #MeTooWhatNext: Strengthening*

being allowed to report misconduct anonymously.²³⁶

A number of women identified—and TF members agree—that training must start in law school, and it must exist in the mandatory curriculum so that *all* law students know about potential gender-related and intersectional challenges and know how to respond when and if they experience or witness discriminatory behavior.

Such training aligns with the recent attention paid to law student wellness and well-being. The ABA itself has launched a wellness pledge that encourages law schools to commit to certain core principles.²³⁷ Legal scholars Nathalie Martin, R. Lisle Baker, Larry Krieger and others have argued persuasively that more attention must be paid to lawyers’ and law students’ emotional health, pursuit of happiness, and search for meaning in the profession.²³⁸ Professor Martin’s book, *Lawyering from the Inside Out* inspires law students to develop a professional identity as a lawyer through mindfulness and emotional intelligence practices. Professor Baker offers a convincing case for developing a positive psychology course for lawyers and law students with the goal of helping law students to develop skills such as resilience, character, positive values, and enhancing relationships, in order to buttress the emotionally taxing work of lawyering.

The author suggests developing a brief guidance document to send to all law school deans and associate deans for curriculum that could be embedded in required 1L criminal law courses, a course that uses Professor Martin’s book or a similar text, a positive psychology course such as the one Professor Baker designed, and any other relevant course. The document would address how bias and trauma affect criminal lawyers and how women and gender nonconforming individuals (especially those with intersectional identities) may experience such challenges. The goal

Workplace Sexual Harassment Protections and Accountability, NAT’L WOMEN’S LAW CTR. (Dec. 2017), <https://nwlc.org/wp-content/uploads/2017/12/MeToo-Strengthening-Workplace-Sexual-Harassment-Protections.pdf>.

²³⁶ *Id.*

²³⁷ *Working Group to Advance Well-Being in the Legal Profession*, AM. BAR ASS’N, https://www.americanbar.org/groups/lawyer_assistance/well-being-in-the-legal-profession/members/ (last visited Feb. 12, 2020).

²³⁸ NATHALIE MARTIN, *LAWYERING FROM THE INSIDE OUT: LEARNING PROFESSIONAL DEVELOPMENT THROUGH MINDFULNESS AND EMOTIONAL INTELLIGENCE* (Cambridge University Press 2018); R. Lisle Baker, *Designing a Positive Psychology Course for Lawyers*, 51 SUFFOLK U. L. REV. 207 (2018); Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy? A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554 (2015).

of the document would be to specifically describe the rewards and challenges inherent in the practice of criminal law for women and gender nonconforming individuals.

D. Gathering More Data on Hiring, Retention, and Promotion of Women in Criminal Law

Based on the lack of directly relevant literature, the TF plans to collect and recommends ongoing collection of more data to help address the perceived flight of women from the practice of criminal law. Interestingly, such a simple recommendation will not be simple to implement for a number of reasons, including potential backlash²³⁹ and the lack of one governing body to conduct the data gathering. With regard to backlash, which as noted earlier sometimes even comes from women,²⁴⁰ in a recent piece in the *New York Times*, the writer suggested that it would be less arduous to let equality work itself out naturally.²⁴¹ History is replete with instances of powerful people failing to cede power voluntarily to marginalized groups. The piece, however, reflected the “toughen up, buttercup” mentality that certainly occupies space in this conversation.

Collecting data and keeping track of the number of women in various roles seems like a simple first step. The roles of women and women of color in the practice of criminal law have not been widely tracked. Getting more data on what roles women fill and what these women are experiencing is the first step in addressing the perceived flight of women from the practice of criminal law. However, while the Task Force has identified the importance of gathering raw data on the number of women in the practice of law from federal, state, and local agencies, it also has realized what an enormous undertaking that would be given its limited resources and staffing. In an effort to at least begin to collect useful data, over the next year, it will be working with allies—including the ABA’s Center for Innovation and the American Bar Foundation—to survey leaders across the field and begin collecting data on the hiring, retention, and promotion of women in criminal justice.

In sum, there is a dearth of information on the perceived flight of women from the practice of criminal law and their lack of representation

²³⁹ Katherine Mangu-Ward, *Stop Counting Women: Quotas and Tallies Won’t Bring Real Progress on Gender Parity*, N.Y. TIMES (Feb. 23, 2019), <https://www.nytimes.com/2019/02/23/opinion/sunday/women-directors-quotas.html>.

²⁴⁰ See *supra* Part III.

²⁴¹ *Id.*

in leadership positions in the field. The research that is available indicates that while some women experience overt discrimination, most suffer from regular microaggressions in the workplace that over time are likely to lead to burnout and dropout.

It is clear that system-wide change is needed to retain women—especially women with intersectional identities—in criminal law. Although the TF recognizes all women's experiences, there can be no doubt that women with intersectional identities seem to experience all the challenges to a more intense degree than white middle-to-upper-middle class cisgender women. To that end, we have a special focus on supporting and elevating women with intersectional identities.

CONCLUSION

To the extent that one agrees there are obstacles to equality/equity for women in hiring, promotion, and/or retention in criminal law, there are two polar opposite responses: "Toughen up, buttercup!" and #TimesUp. This article previously described both responses in Parts III.A. and III.G., respectively. The latter view is reflected by some of the DC-area law students with whom the TF met in November 2019 at Howard University Law School. Several young women said they simply would not apply to work somewhere that they hear is a toxic work environment. One woman described setting up an informational interview with a male attorney with the hope that he might lead her to a job prospect, but when he continued hitting on her during the meeting, she left disgusted and completely unwilling to consider any advice or information provided by him.

There may be generational, cultural, experiential, and other differences embedded in the two polar extreme views of the status of women in criminal law. The author recommends recognizing both but also recognizing the space in-between. The space in-between includes supervisors and women criminal lawyers alike being willing to engage in hard conversations, being willing to adapt, standing up for one another whenever possible, and acknowledging that sometimes change happens slowly.

Much work lays ahead for the TF.²⁴² Balancing a full caseload with the intensive demands of a baby, women like Marta simply are not in the best position to effectively advocate for themselves. TF members

²⁴² Maryam Ahranjani, *Looking Back, Looking Forward*, CRIM. JUST. MAG. 65–66 (Fall 2020).

feel committed to shining a bright light on Marta's and others' challenges. The TF wrapped up listening sessions in June 2020 and moved into the quantitative data-gathering stage. The global COVID-19 pandemic has caused the TF to slow down its work for the time being since some members have school-age children and other caretaking responsibilities that have intensified. To the maximum extent possible, some aspects of our work continues.

The first effort to gather quantitative data is the administration of a survey based on the survey in Appendix B to women who have testified to memorialize their experiences and hear how COVID-19 has affected them. While the TF has secured valuable assistance from the ABA Center for Innovation to administer this follow-up survey, an important next step will be to engage in the next quantitative data-gathering effort, which will be a multi-state survey administered to all licensed women criminal attorneys within two or more states, again aimed at gathering information about barriers to hiring, retention and promotion. The TF will need significant resources, including funding for a research team, to engage in the multi-state survey.

After qualitative data-gathering is complete, the advocacy stage will begin. This stage will include drafting a resolution related to its findings for the CJS to present to the ABA House of Delegates, the powerful policy-making arm of the ABA.²⁴³ The TF also plans to elevate progressive and responsive policies, laws, and information by creating an online toolkit of resources. For example, a number of influential women criminal lawyers have already volunteered to record trainings on how to run to be a District Attorney, how to get elected to state courts, implicit bias, legal requirements for lactation rooms, etc.

The author and members of the TF have received countless emails and calls from law students, women criminal lawyers, allies, and others thanking us for giving them a platform to reflect and for really *listening* and *hearing* them. Of course, those of us involved in the project feel incredibly hopeful because women are standing up and motivating others to speak and stand up for themselves.

There are reasons for hope. The likelihood for improvements for women in criminal justice is relatively high in the current social climate, including the COVID-19 pandemic and calls for racial and criminal

²⁴³ ABA House of Delegates, AM. BAR ASS'N, https://www.americanbar.org/groups/leadership/house_of_delegates/ (last visited Feb. 10, 2020).

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justice reform in the wake of George Floyd's death at the hands of Minneapolis police officer Derek Chauvin. Societal values around gender norms, balancing work and personal lives, and overall wellness are changing. The ABA—and the CJS WCJ TF in particular—recognizes those changes and has committed to long-term and systemic reform, so hopefully we are moving in the right direction.

APPENDIX A

Women in Criminal Justice Task Force American Bar Association Criminal Justice Section

Co-Chairs:

Carla Laroche Clinical Professor Director, Gender and Family Justice Clinic Florida State University College of Law Public Interest Law Center (FL)	Tina Luongo Attorney-in-Charge of the Criminal Defense Practice of The Legal Aid Society (NY)
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Reporter:

Maryam Ahranjani
Associate Professor of Law and Don L. & Mabel F. Dickason Professor,
University of New Mexico School of Law (NM)

Members:

Lara Bazelon
Professor of Law
Director of the Criminal & Juvenile Justice and Racial Justice Clinics
University of San Francisco School of Law (CA)

Gloria Ochoa-Bruck
Attorney, Former Director of Local Government and Multi-Cultural
Affairs, City of Spokane (WA)

Barbara Creel
Karelitz Professor of Evidence Law and Procedure
University of New Mexico School of Law (NM)

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April Frazier Camara
Chief of Lifelong Learning, National Legal Aid and Defender Association
(DC)

The Honorable Bernice Donald
Judge, U.S. Court of Appeals for the Sixth Circuit (TN)

Daniela Donoso
Equal Justice Fellow, Legal Services of North Florida (FL)

Maria Carmen Hinayon
Narayan Travelstead PC (CA)

The Honorable Denise Langford-Morris
Judge, Oakland County Circuit Court (MI)

Ann Ratnayake Macy
Founder & Executive Director, National Center for Child Abuse Statistics
and Policy (DC)

The Honorable Rachel Pickering
Judge, 3rd Judicial District (KS)

Sarah Redfield
Professor of Law (emerita), University of New Hampshire School of Law
(NH)

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Command Judge Advocate, U.S. Marine Corps (VA)

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Kim Parker

Immediate Past Chair, ABA Criminal Justice Section (MO)

Melba Pearson

Policy and Programs Director, Center for the Administration of Justice,
Florida International University (FL)

Yaamini Rao

Deputy Public Defender, Santa Clara County (CA)

Camelia Valdes

District Attorney, Passaic County (NY)

Ellen Yaroshefsky

Professor of Law, Hofstra Law School (NY)

APPENDIX B

ABA Women in Criminal Justice Task Force (WCJ TF)

Survey for Listening Session Participants

Thank you for helping us gather information to inform our upcoming report on Women in Criminal Justice. Our Task Force has several goals, including to highlight the challenges facing women attorneys practicing in the criminal legal system and the unfortunate trend of women leaving the profession; provide recommendations to address the concerns specific to women in the criminal legal profession; and increase the membership of diverse women practitioners in the Section; ensure the Section’s policies and practices are inclusive; , and raise the influence and profile of women practitioners in the Section.

Please complete and submit this survey to WCJ TF Reporter Maryam Ahranjani at Maryam.Ahranjani@law.unm.edu prior to your participation in the listening session.

The identity of those participants who volunteer for the interview and provide their personal contact information will be only known to the researchers. Data from their interviews may be shared in professional conference presentations or publications, but the identity of those interviewees will not be revealed (a pseudonym will be used instead of the person’s name) without express permission.

The questions that follow are designed to help capture relevant information. If you feel comfortable, please provide your contact

information (which we will keep confidential if asked) for further follow-up.

Part One: Biographical Information

1. If you feel comfortable sharing your name and contact information, please do so here.
2. If you feel comfortable describing your background (racial/ethnic/gender identity/etc.), please do so here.
3. How long have you been practicing law – broadly defined to include academic, policy, and other work that involves using your law degree – overall?
4. Are you currently employed?
5. Have you practiced criminal law?
6. If so, in what capacity (please explain and list all, including amount of time in each role and location) For example, Public defender, Memphis, 3 years; private criminal defense, Nashville, 4 years; trial court judge, Nashville, 5 years (to present)
7. Are you currently a member of the American Bar Association?
8. If not, have you ever been a member of the ABA?
9. If you previously were an ABA member but are no longer a member, why are you no longer a member?
10. If you have never been an ABA member, would you kindly explain why not?

Part Two: Retention of Women Criminal Lawyers

Please answer these questions only if you are a woman who has practiced or is practicing criminal law.

1. What challenges, if any, have you personally experienced with regard to hiring, retention, and promotion in criminal law-related positions?
2. What challenges have you observed *others* experience?
3. Were the hiring, promotion and retention issues better, worse, or the same as they are in your current location? Please explain.
4. If you currently practice criminal law, do you see yourself staying in practice for the foreseeable future?
5. Why or why not?
6. When gender issues arise in the workplace, do you have a source of support (informal or formal)?
7. If so, to whom do you go for support? We're not asking for specific names as much as roles.

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Part Three: Solutions**Please focus on your experience as a criminal law practitioner unless the question indicates otherwise.**

1. As a criminal law practitioner, what do you feel you need(ed) to be successful?
2. Have these needs changed as you have progressed in your career? If yes, how so?
3. As a criminal law practitioner, what do you feel you need(ed) to remain in the criminal justice practice?
4. Do you think the need to be successful and remain in the field differed between you and your women colleagues?
5. If you have experience practicing in other areas, during your time in those other field(s), do you think these needs to be successful and remain in the field differed between you and your other women colleagues?
6. As a criminal law practitioner, were you provided with what you needed to be successful and remain in the field? Why or why not?
7. What has or did your employer do to promote retention of female criminal lawyers?
8. Of those policies and practices, how effective did you find them? Were there policies or practices that were more effective than others?
9. What could your employer do or could your employer have done to improve retention of women criminal lawyers?
10. How receptive do you think your employer is or would have been to implementing these recommendations?
11. What would it take for your employer to provide those things?
12. Is there any other information you would like to share regarding women practicing in the criminal justice profession?