

HOW “CHARACTER EVIDENCE” ACCELERATES THE USE OF BIAS AND PROPENSITY TO PROVE PARENTAL UNFITNESS AT TRIAL

**WDA DEFENDER CONFERENCE 2025
SUN MOUNTAIN LODGE
WINTHROP, WASHINGTON
26 APRIL 2025**



Roadmap

- Who We Are
- Why We Do What We Do
- What We Do
- What is Bias & Who Has Bias
- Noticing Bias, Addressing Bias, Disrupting Bias
 - Ideas for Defenders
 - Questions/Discussion



Mission Creek Corrections Center (Belfair, WA)



Courtesy of WA DOC Family Services Division, 2018

Who We Are

WDA is the voice of the
public defense
community providing
support for zealous and
high-quality legal
representation
across Washington



Who We Are

WDA IPP works to end family separation caused by parental incarceration in Washington



A photograph of a person's arm holding a child's hand. The person is wearing a plaid shirt and jeans. The child is wearing a blue backpack. The background is a blurred outdoor setting.

Why We Do What We Do

Incarcerated parents are
twice as likely to lose their
children forever.



Incarcerated Parents Matter

- Relief from the Stigma from Conviction/ Incarceration
- Uplift Value of Incarcerated Parent-Child Relationships
- Keep Incarcerated Parents Meaningfully Connected to their Children
 - Restore Respect Given Families Where Parent is Incarcerated
 - Keep Families Together



CASE SUPPORT

HOME > CASE SUPPORT > INCARCERATED PARENTS PROJECT

What We Do

- DEATH PENALTY ASSISTANCE PROJECT
- FELONY CASE CONSULTATION
- IMMIGRATION ATTORNEY REFERRALS
- IMMIGRATION PROJECT
- IMMIGRATION RESOURCES
- INCARCERATED PARENTS PROJECT**
 - ABOUT WDA'S INCARCERATED PARENTS PROJECT
 - IPP NEED HELP
 - IPP RESOURCES
 - IPP RESOURCES FOR LAWYERS
 - VISITING INFORMATION (WA STATE ONLY)
- MISDEMEANOR CASE CONSULTATION
- RESENTENCING AND POST

INCARCERATED PARENTS PROJECT



Need Help



- Why Staying Connected Matters?
- What's the Research Saying
- Encouraging the Parent-Child Bond
- Accessing Community Supports
- ★ Champion Keeping Families Together
- Caring for Children While Incarcerated
- Planning for Return to Community



Monroe Corrections Complex (Monroe, WA)



Courtesy of WA DOC Family Services Division, 2018



A lawyer, as a member of the legal profession, is a representative of clients, an officer of the court and a public citizen having special responsibility for the quality of justice.

WASHINGTON GENERAL RULE
RULES OF PROFESSIONAL CONDUCT
PREAMBLE: A LAWYER'S RESPONSIBILITIES [1]

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

WASHINGTON GENERAL RULE
RULES OF PROFESSIONAL CONDUCT
PREAMBLE: A LAWYER'S RESPONSIBILITIES [6]

It's Simply Not Justice

“If justice is not equal for all, it is not justice.”

-State v. Monday, 171 Wn.2d 667, 680 (2011)

“Whether explicit or implicit, purposeful, or unconscious, racial bias has no place in a system of justice. If racial bias is a factor in the decision of a judge or jury, that decision does not achieve substantial justice, and it must be reversed.”

*-Henderson v. Thompson, 200 Wn.2d 417, 421–22 (2022),
cert. denied, 143 S. Ct. 2412 (2023)*

Administering Justice Without Pernicious Bias

- Injecting racial bias in a criminal or civil jury trials violates jury trial right.

Peña-Rodriguez v. Colorado, 580 U.S. 206, 209 (2017)

Henderson v. Thompson, 200 Wn.2d 417, 434 (2022)

State v. Monday, 171 Wn. 2d 667, 676 (2011)

“Denial of the constitutional right to a fair tribunal is a structural error that requires reversal regardless of prejudice.”

-Matter of Dependency of A.N.G.,
12 Wn. App. 2d 789, 796 (2020)



Stafford Creek Corrections Center (Aberdeen, WA)



Courtesy of WA DOC Family Services Division, 2018

What is Bias?

Understanding Bias: Stereotypes vs. Prejudice

- Stereotype is an illusory correlation
- Prejudice is a set of one's personal beliefs, but it need not be congruent with stereotypes
- Looking for a chance to disrupt decisionmaking based on the illusory correlation or based on one's personal beliefs



• Example: Gender, Gender & Race

Witness Competence & Credibility

- Religion
- Marital Status
- Sexuality/Chastity



The Mechanics of Bias

- Intuition & Deliberation
 - Intuitive processes (System 1 process) are spontaneous, automatic, effortless, fast, heuristic-based, vulnerable to emotional influences, and which require “relatively undemanding of computational capacity.
 - Deliberative processes (System 2 process) require effort, motivation, concentration, slow, effortful, rule-governed, and associated with controlled processing.
- Implicit biases have real-world consequences. Jerry Kang, Trojan Hores of Race (2005)

Who has bias?

Biased thinking affects most human beings.

It affects lay (including professional) and expert witnesses, jurors, lawyers, and judges.

Educating judges may be challenging and requires humility and creativity.



Bias & Judicial Decisionmaking

- Availability heuristic
- Statistical inferences or the Representativeness heuristic
 - Framing effects
- Premature closure
 - Anchoring
 - Hindsight bias

Some Concerns About Judge's Intuition

- Intuitive judgments are flawed ***more often*** than deliberative judgments
- Intuition is used precisely **when it shouldn't** be used
 - Intuition is the ***gateway*** to pernicious bias (Race, Gender, Sexuality, Class)
- The ease and celerity of **intuition deceives the person** and is present even when objectively wrong

Washington Corrections Center (Shelton, WA)



Courtesy of WA DOC Family Services Division, 2018

What is a Character Trait?

Is it “a stable and permanent disposition by means of which one individual may be distinguished from another?”

Examples of what is likely not a character trait include:

- Habit (observable, regular, repeated response to same situation)
- Mental conditions and genetic attributes (lacks moral connotation)
- Skills and abilities (intelligence, physical strength, clumsiness)



Bias & Negative Character Evidence

- Asking the trier of fact to make a decision based on stereotype or prejudice and not the evidence
- Propensity evidence is also strictly prohibited.

Bias & Negative Character Evidence

- Historically, **stereotypes** and **prejudice**
- determined *Witness Competency* and *Credibility*
- Social traits were assigned to character traits:
Honesty, Morality, Respect/Integrity

What correlations remain today?

Noticing Bias

Observe Impact of Bias

Social norm theory impacts how we view BIPOC parents and parenting practices.

-Dorothy E. Roberts,

Race, Vagueness, and the Social Meaning of Order Maintenance Policing (1999)

What does that mean?

Over-regulation of Black or Indigenous parents “tells” society at large that Black and Indigenous parents aren’t safe and need intervention



Notice Bias When Discretion Is Used

- Notice the use of stereotype or prejudice especially by judges, agency workers, and VGALs/CASAs
- Notice use of intuition or shortcuts by judges, agency workers, and VGALs/CASAs

Addressing Bias



Addressing Bias in Courts

What to do:

Use due process vagueness doctrine

When to argue:

- The Laws are Vague
- Broad discretion given to decisionmaker
- Undefined or ill-defined legal standard
- Lessened burden of proof

Addressing Bias in Courts

- Make record of explicit bias
- Prevent admission of stereotypes as character trait
- Gather evidence of racial and other bias
- Restrict use of “other acts” evidence

Washington Corrections Center for Women (Gig Harbor, WA)



Disrupting Bias



Ideas for Defenders

- Time for Deliberation
- Opinion Writing
- Bench Cards or Checklists
- Divided Decisionmaking
- Empirical Advocacy, When Needed

Washington State Penitentiary (Walla Walla, WA)



Courtesy of WA DOC Family Services Division, 2018

Questions/Discussion



Thank You!

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