



Spring 3-1-1994

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Recommended Citation

Kathleen Daly, *Criminal Law and Justice System Practices as Racist, White, and Racialized*, 51 Wash. & Lee L. Rev. 431 (1994).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol51/iss2/4>

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Criminal Law and Justice System Practices as Racist, White, and Racialized

Kathleen Daly*

I. Race and Gender Together: A Prologue

For close to a decade I have been engaged in research on the ways that gender and race structure the sentencing process in the New Haven felony court.¹ In the early phase of the research, I was particularly interested in how gender structured the court's response to those accused. In time, that question evolved to one that asked how the court's response to accused men and women, most of whom lived at society's margins, varied by race and ethnicity. Today it is difficult for me to think about race without also having in mind black, white, and latino masculinities. It is also difficult to write a sentence about race differences without recalling gender differences within racial and ethnic groups. As we discuss race and class in the criminal justice system, let us not forget that both have a gendered face.

In fact, I want to put the case more strongly. While the story of crime and the justice system is typically one of the disproportionate presence of racial and ethnic minority group members among those arrested, prosecuted, and incarcerated, the gender disproportionalities are as great or greater. Women account for 11% of those arrested for the FBI's violent index offenses,² 13% of those convicted in state felony

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1. See KATHLEEN DALY, *GENDER, CRIME, AND PUNISHMENT* (1994) [hereinafter DALY, *GENDER, CRIME, AND PUNISHMENT*]; Kathleen Daly, *Gender and Punishment Disparity*, in *INEQUALITY, CRIME, AND SOCIAL CONTROL* 117 (George S. Bridges & Martha A. Myers eds., 1994); Kathleen Daly, *Women's Pathways to Felony Court: Feminist Theories of Lawbreaking and Problems of Representation*, 2 *REV. L. & WOMEN'S STUD.* 11 (1992).

2. *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 1991, at 442 (Timothy J. Flanagan & Kathleen Maguire eds., 1992) (1990 data). The violent index offenses are murder and non-negligent manslaughter, aggravated assault, rape, and robbery. The female share of violent index arrests has remained constant at about 10% for the past three decades. See Darrell

courts,³ 5% of the prisoners in the United States,⁴ and 1% of those under penalty of death.⁵ These statistics should give us pause in making claims about how relations of power operate in the broader society and in the criminal justice system. Race and age operate as we might expect: Members of a racial minority group (blacks) and the young are disproportionately represented in arrest, court, and prison populations.⁶ But members of the socially subordinate gender group (women) are disproportionately less likely to be represented in arrest, court, and prison populations. Although the general expectations of power-based theories hold true within gender groups—that is, 60% of women and men imprisoned are members of racial minority groups⁷—such power-based theories cannot explain the disproportionate presence of men under formal criminal justice control. The demography of crime and justice poses challenges for both feminist and nonfeminist theories of social control, crime, and justice. Feminist theorists have yet to explain why, if men have more power than women, men are at greater risk to be under criminal justice control.⁸ Nonfeminist theorists need to be mindful of the gendered dimensions to any claim concerning those at risk to be criminalized.

Steffensmeier & Emilie Allan, *Gender, Age, and Crime*, in *CRIMINOLOGY* 107 (Joseph Sheley ed., 1991).

3. PATRICK A. LANGAN & JOHN M. DAWSON, U.S. DEP'T OF JUSTICE, PROFILE OF FELONS CONVICTED IN STATE COURTS 4 (1990) (1988 data).

4. ALLEN BECK ET AL., U.S. DEP'T OF JUSTICE, SURVEY OF STATE PRISON INMATES, 1991, at 3 (1993) (1991 data).

5. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1991, *supra* note 2, at 705.

6. The black share of violent index arrests is 45%. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1991, *supra* note 2, at 444. Black defendants account for 41% of those convicted in state felony courts. LANGAN & DAWSON, *supra* note 3, at 4. The racial composition of those imprisoned is 46% black, 35% white, 17% Latino, and 2% other (largely Native American and Asian). BECK ET AL., *supra* note 4, at 3.

7. LAWRENCE A. GREENFELD & STEPHANIE MINOR-HARPER, U.S. DEP'T OF JUSTICE, WOMEN IN PRISON 2 (1991) (1985 data). The composition of female prisoners is 40% white, 46% black, 12% Hispanic, and 2% other. For male prisoners, it is 40% white, 45% black, 13% Hispanic, and 2% other.

8. An obvious explanation for why men are at a greater risk of being under criminal justice control, but one that is often missing in the power-based theories, is that because women are subject to heightened forms of informal social control via relations to men and children, they are less likely to be subject to formal social controls. See FRANCES M. HEIDENSOHN, *WOMEN AND CRIME* 163-95 (1985).

If crime and justice system policies in the United States are to move from a largely penalizing, criminalizing, and warehousing model to a more humane system that envisions welfare, restoration, and reintegration as its principles, then we must radically reconfigure conceptions of manhood and masculinity. That could be done by paying closer attention to the circumstances and conditions in women's lives that, for reasons that have yet to be fully appreciated or explained, render women more law-abiding than men and less likely to harm others. While class and race relations are often nominated as the major structural conditions that facilitate pathways to lawbreaking and that target certain groups for state control, we would do well to focus our attention also on the criminalizing consequences of trying to be "a man."

II. *Understanding Race in the Justice System: A Modest Beginning*

My initial plan for this Article was to re-examine the New Haven felony court materials from a "race-first," rather than "gender-first," lens. In saying this, I am aware of arguments by black and multi-ethnic feminist and critical race scholars of the need to conceptualize race, gender, and class together.⁹ That is the goal. Yet it is a formidable goal: we may be able to imagine the simultaneous expression of multiple social relations, but to transform those imagined terms into an explanation of the patterning of social phenomena is a different matter. While it is possible to describe the subjectivity of individuals within a nexus of multiple relations, it is more difficult to describe patterned subjectivities and group-based behavior.¹⁰

A large body of empirical and legal literature exists on race relations and the criminal justice system, but my review of that literature suggests that socio-legal scholars lack an adequate way to *conceptualize* how race operates in criminal law and justice system practices. For example, in the sociological literature on racial disparities in criminal court processes, scholars conceptualize the impact of race on court outcomes as being consistent (or

9. See *infra* notes 23-24 and accompanying text.

10. In another article, I trace the emergence of the class-race-gender construct and suggest how it can change legal and social science inquiry. See Kathleen Daly, *Class-Race-Gender: Sloganeering in Search of Meaning*, SOC. JUST., Spring-Summer 1993, at 56. I have come to think that the tools of social science are ill-equipped to trace the expression and impact of multiple social relations. On the other hand, narrative modes of inquiry, which are more amendable to this project, are ill-equipped to make generalizations, even of a local sort.

inconsistent) with the tenets of two popular power-based theories, labeling and conflict.¹¹ Labeling theory suggests that those with more power or resources are in a better position to resist a criminal label, whereas conflict theory suggests that the larger societal power structures operate in ways that overcriminalize and control members of disadvantaged groups. My criticism of these theories lies not with their initial premises. That is, we *should* expect to see unequal power relations reproduced in social institutions in ways that disadvantage the socially and economically marginalized.¹² Rather, I am critical of the constraints that these theories impose on how race is theorized to work in criminal justice practices, particularly the dominant focus on problems of "equal treatment." Moreover, these theories are unable to deal with a heterogeneous set of findings from court studies: from no apparent "race effects" to strong effects, from variation in outcomes depending on how the sentencing outcome is operationalized to variation depending on urban-suburban-rural court context, geographical location, and time frame.¹³ It is precisely the *heterogeneity* of empirical findings, the different directions that race and ethnicity take in justice system practices, that may provide a more fruitful focus. Meanwhile, researchers continue to debate whether the criminal justice system is racist, with a dichotomous form of thinking that often generates more heat than light.¹⁴

11. For recent examples, see Margaret Farnworth et al., *Ethnic, Racial, and Minority Disparity in Felony Court Processing*, in RACE AND CRIMINAL JUSTICE 54 (Michael J. Lynch & E. Britt Patterson eds., 1991); Kimberly L. Kempf & Roy L. Austin, *Older and More Recent Evidence on Racial Discrimination in Sentencing*, 2 J. QUANTITATIVE CRIMINOLOGY 29 (1986).

12. But as I stated earlier, theoretical approaches that expect to see unequal power relations reproduced in social institutions cannot explain why women, as a socially subordinate group in relation to men, are *less* likely to be subject to criminal justice controls. Moreover, and equally counterfactual, close to one-half of statistical studies show that women are *favored* in sentencing. See DALY, GENDER, CRIME, AND PUNISHMENT, *supra* note 1, at 13. My research suggests that these statistical results are misleading because they have not effectively controlled for the severity of the crime and the defendant's prior record.

13. For my review of the sociological literature on racial disparities, see *infra* notes 43-55 and accompanying text.

14. See WILLIAM WILBANKS, THE MYTH OF A RACIST CRIMINAL JUSTICE SYSTEM (1987); William Wilbanks, *The Myth of a Racist Criminal Justice System*, in RACISM, EMPIRICISM, AND CRIMINAL JUSTICE 1 (Brian D. MacLean & Dragan Milovanovic eds., 1990).

Lacking a conceptual scheme to compare different assumptions that scholars make about race, which in turn guide how scholars frame research and interpret findings, I decided to construct such a scheme. I borrow from a typology that Carol Smart devised to describe feminist analyses of gender and law.¹⁵ Working from gender to race was a comfortable and familiar starting point for me; it reveals an intellectual biography that was schooled in theories of class and gender.¹⁶

Smart identified three phases of critique and development: law as sexist, male, and gendered.¹⁷ Applying this typology to race and the criminal justice system, we can identify these phases: criminal law and justice system practices as racist, white, and racialized. This framework helps to clarify how law and social science, legal and social science scholars, and citizens comprehend and disagree as to how race matters or ought to matter. It may also offer a way to think more imaginatively about race and the criminal justice system.

This Article is organized in eight parts. In Parts I and II, I have noted several problems in conceptualizing "race" in the criminal justice system. Part III continues in that vein by focusing on my role as a white person in the race discussion and the need for research on routine racism. In Part IV, I shift to Smart's arguments concerning three phases of analyzing gender and law. Part V reviews the research literature on race and criminal courts, and Part VI briefly considers gender-race analogies and inter-relationships. I then apply Smart's gender framework to race in Part VII by presenting three approaches to conceptualizing race in criminal law and justice system practices, the strengths and weaknesses of each, and examples of each in action. I conclude by noting the strategic value of each approach as a way for participants to engage one another—rather than talk past each other—in debate.

III. Caveats, Questions, and Theoretical Grounding

Key issues need to be addressed about defining race, my role as a white woman in the race discussion, the impact of black feminist and critical

15. See Carol Smart, *The Woman of Legal Discourse*, 1 SOC. & LEGAL STUD. 29 (1992).

16. For a discussion of my role as a white woman in the race discussion, see *infra* note 22 and accompanying text.

17. Smart, *supra* note 15, at 30.

race theories on my thinking, and a language for and attention to routine racism.

First, what is meant by race or racial difference? As anthropologists have shown, the concept of race as applied to human populations is not meaningful in a biological sense. Rather, the referent is to social categories and socially constructed identities.¹⁸ Neither "whiteness" nor "blackness" can be taken for granted.¹⁹ And, as others suggest, the black-white dualism thwarts an understanding of the broader picture of racial and ethnic relations—for example, the relational histories of Latinos and Latinas, Native Americans, African-Americans, and Asian-Americans to each other in the United States.²⁰ My examples will draw from white-black relations and research that takes a dichotomous view of criminal justice practices, although I am aware of the problems with this view.²¹

Second, some may wonder what a white girl is doing talking about race. I am suspicious when some men assume that they can speak authorita-

18. For a concise review of the meaning of race or racial difference, see Michael J. Lynch & E. Britt Patterson, *in* RACE AND CRIMINAL JUSTICE 1, 5-6 (1991); and CORAMAE RICHEY MANN, *UNEQUAL JUSTICE: A QUESTION OF COLOR* 3-24 (1993). Mann proposes that "minority group" may be a better term (rather than race or ethnicity) when discussing diverse racial and ethnic groupings. *Id.* at 4-5.

19. On "whiteness," see generally RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* (1993); DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991). On "blackness," see generally Daniel E. Georges-Abeyie, *Race, Ethnicity, and the Spatial Dynamic: Toward a Realistic Study of Black Crime, Crime Victimization, and Criminal Justice Processing of Blacks*, SOC. JUST., Winter 1989, at 35; Stuart Hall, *What is This "Black" in Black Popular Culture?*, *in* BLACK POPULAR CULTURE 21 (Gina Dent ed., 1992).

20. See RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA* (1993); Elizabeth Martinez, *Beyond Black/White: The Racisms of Our Time*, SOC. JUST., Spring-Summer 1993, at 22.

21. My reasons for drawing upon black-white relations are that the focus of socio-legal research on crime and the criminal justice system has been on black-white relations; only recently have scholars examined several minority groups. See MANN, *supra* note 18; Kathleen Daly, *Neither Conflict nor Labeling nor Paternalism Will Suffice: Intersections of Race, Ethnicity, Gender, and Family in Criminal Court Decisions*, 35 CRIME & DELINQ. 136 (1989); Farnworth et al., *supra* note 11; Marjorie S. Zatz et al., *American Indians and Criminal Justice: Some Conceptual and Methodological Considerations*, *in* RACE AND CRIMINAL JUSTICE 100 (Michael J. Lynch & E. Britt Patterson eds., 1991); Marjorie S. Zatz, *Pleas, Priors and Prison: Racial/Ethnic Differences in Sentencing*, 14 SOC. SCI. RES. 169 (1985).

tively about gender: they may not be able to recognize their gender loyalties even as they proclaim a pro-feminist stance. The same suspicion applies to me: Can I make reliable or reasonable claims about race when I am on the dominant side of the relationship? I cannot conceptualize race and justice system practices from the same types of experiences as scholars of color, though I would not assume uniformity among that group either. In light of the racial politics in the United States, I assume that there will be some skepticism of what I have to say. But if I allowed that to prevent me from speaking to the race issue, I would be capitulating to the convenience of white silence. Although I opened my Article with a plea to think of race and gender together, it is obvious that we must also think of class and race together. In doing so, we can identify some of the problems that feminist and critical race scholars may share in analyzing crime and justice system practices.²²

Third, the theorists who have guided me in recognizing the distinctive elements and the multiple influences of class, gender, race, and other social relations are feminists of color, especially black feminists, and some critical race theorists. Through the work of Patricia Hill Collins, bell hooks, June Jordan, Audre Lorde, Kimberle Crenshaw, and Deborah King,²³ I learned about the intersecting influences of social relations in personal and political life. The writings of Derrick Bell, Patricia Williams, Regina Austin, Richard Delgado, and Mari Matsuda demonstrate, among other things, the male- and white-centeredness of antidiscrimination law.²⁴ These and other

22. I have benefited greatly from Regina Austin's discussion of the class-race location of knowledge producers and targets of criminal justice control. See Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769 (1992).

23. See generally PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* (1990); BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* (1984); BELL HOOKS, *YEARNING: RACE, GENDER, AND CULTURAL POLITICS* (1990); JUNE JORDAN, *ON CALL: POLITICAL ESSAYS* (1985); AUDRE LORDE, *SISTER OUTSIDER* (1984); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); Deborah King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 SIGNS: J. WOMEN IN CULTURE & SOC'Y 42 (1988). Citations are selectively taken from each author's larger body of work.

24. See generally DERRICK BELL, *AND WE ARE NOT SAVED* (1987); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* (1992); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS—DIARY OF A LAW PROFESSOR* (1991); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539 (1989); Austin, *supra* note 22; Richard Delgado, *Storytelling for*

scholars have crafted arguments about gender, race, and class in ways that those in traditional social science, legal theory, and criminology may find unfamiliar. That "unfamiliarity" fosters a continuing stubbornness by a white-dominated establishment to understand minority group analyses and experiences of race, crime, and justice system practices.²⁵

Fourth, we lack an *honest and open* appraisal of how race and class work in the criminal justice system. The reason in part is that we—that is, everyone—do not know how to talk about racial and ethnic specificity without engaging in racist imagery. We require a way to name and describe differences that offend, that create interpersonal relations of domination, and that ultimately reproduce structures of antagonism and prejudice. If all we are able to say is "that is racist" or "that is not racist," we have not accomplished much. Moreover, it is essential to name and describe the *routine* ways that race works in the criminal justice system. Celebrated cases, such as the police beating of Rodney King or the gang rape of the Central Park jogger, may galvanize public and media attention. But they also set people up to think, wrongly, that race works in dramatic ways. We need to identify and document routine forms and sites of racism (or racializing practices) in criminal law and justice system practices. While I realize that it is not easy to document routine racism, my concern is that celebrated cases should not stand alone in the public's imagination about crime.

Oppositionists and Others: A Plea for Narrative, 87 MICH. L. REV. 2411 (1989); Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988). Citations are selectively taken from each author's larger body of work. For recent symposia on critical race theory, see *Symposium: Criminal Law, Criminal Justice, and Race*, 67 TUL. L. REV. 1725 (1993); *Symposium on Race Consciousness and Legal Scholarship*, 1992 U. ILL. L. REV. 945 (1992).

25. I should point out that while a substantial black, multi-ethnic, and critical race theory scholarship exists, it has not yet been brought into criminology. For example, in an analysis of "cultural literacy" in criminology, Gregg Barak gathered a list of reading material from selected scholars that they thought was "essential for understanding the African-American experience in relationship to crime, control, and justice." Gregg Barak, *Cultural Literacy and a Multicultural Inquiry into the Study of Crime and Justice*, 2 J. CRIM. JUST. EDUC. 173, 184 (1991). With a few exceptions, none of the works cited were by critical race, black, or multi-ethnic feminist scholars. *Id.* at 184-86. Also, in a recent groundbreaking book for criminology, the authors do not address critical race or black feminist theories. See AFRICAN-AMERICAN PERSPECTIVES ON CRIME CAUSATION, CRIMINAL JUSTICE ADMINISTRATION, AND CRIME PREVENTION (Anne T. Sulton ed., 1994). More bridging across these literatures is needed.

IV. *A Typology of Feminist Analyses of Gender and Law*

Smart identifies three phases in analyzing gender and law: law as sexist, law as male, and law as gendered.²⁶ She suggests that while these "levels of argument may be . . . deployed simultaneously," it is helpful to distinguish them to see their "analytical promise."²⁷ I review her argument in some detail because I am indebted to it in sketching my race framework.

A. *Law As Sexist*

In the law-as-sexist phase, the focus is on how, by differentiating men and women, law disadvantages women by allocating them fewer resources, by judging them according to different standards, by denying them opportunities, or by failing to recognize certain harms done to women.²⁸ The term sexist is used to challenge law-as-usual, but apart from pointing out objectionable features of law and legal practices toward women, it lacks analytical bite and may misconstrue the nature of the problem. Although Smart does not disagree with the claim that "law is sexist," she notes several unsatisfactory elements. The "law is sexist" claim assumes that a "corrective could be made to a biased vision" and that this "corrective suggests that law suffers from a problem of perception which can be put right such that all legal subjects are treated equally."²⁹

Smart identifies two major problems with the law-as-sexist position. First, differentiation and discrimination become synonymous terms: Women are treated badly because they differ from men. One way out is to say that women need to be judged by a female standard; however, Smart notes that "if those women who set the standard are white and middle class, . . . we

26. See *supra* notes 15, 17 and accompanying text.

27. Smart, *supra* note 15, at 30. Readers familiar with feminist debates about knowledge will see that the three phases can be linked to those in knowledge production: positive/empiricist, standpoint, and poststructuralist. For elucidation of these questions, see SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* (1986) [hereinafter HARDING, *THE SCIENCE QUESTION*]; SANDRA HARDING, *WHOSE SCIENCE? WHOSE KNOWLEDGE? THINKING FROM WOMEN'S LIVES* (1991) [hereinafter HARDING, *WHOSE SCIENCE?*]; *FEMINISM/POSTMODERNISM* (Linda J. Nicholson ed., 1990). This Article focuses on how race is conceptualized in criminal law and justice system practices; while methodological and epistemological questions cannot be separated from this conceptual scheme, I do not consider them here in depth.

28. Smart, *supra* note 15, at 31.

29. *Id.*

are left with an equally problematic legal system in which sexism is apparently eradicated but other forms of oppression remain."³⁰ Second, proponents may assume that it is possible to "override sexual difference as if it were epiphenomenal rather than embedded in how we comprehend and negotiate the social order."³¹ To eradicate discrimination would mean to eradicate differentiation or to have culture without gender. That would be hard to imagine, although several vaguely defined androgynies may be possible.

B. Law As Male

Law-as-male begins with the observation that those making and interpreting law are male, but moves beyond this observation by suggesting that masculinity or male values need not be anchored to male bodies. Legal ideals of objectivity and neutrality, though framed as universal values, are revealed as masculine values.³² From the law-as-male perspective, the failure of law is not in not applying "objective criteria" to women, but rather in applying reputedly objective criteria that are actually masculine. Thus, law-as-male proponents point out that "[t]o insist on equality, neutrality and objectivity is . . . to insist on being judged by the values of masculinity."³³

Smart's criticisms of the law-as-male position are threefold. First, proponents tend to see coherence and unity in law, when in fact law is more often contradictory. Second, proponents tend to assume "that men . . . either benefit or are somehow celebrated in the rehearsal of values and practices which claim universality while . . . reflecting a partial position or world view."³⁴ Third, arguments that give priority to a binary division, such as male-female, ignore other differentiations; thus, divisions such as class, race, and age become additive to the analysis.³⁵

30. *Id.*

31. *Id.* at 31-32.

32. *Id.* at 32. Many readers will immediately recognize that a good deal of feminist legal theory has been working within this position.

33. *Id.*

34. *Id.*

35. *Id.* at 33. For a discussion of additivity as a problem for feminist theory, see ELIZABETH SPELMAN, *INESSENTIAL WOMAN* (1988); Crenshaw, *supra* note 23; King, *supra* note 23. It is revealing that while gender-first theorists have been dealing with the problem of additivity and intersectionality for some time, race-first theorists have yet to do so. Black

C. Law As Gendered

In the law-as-gendered phase, we can imagine legal processes operating in varied and cross-cutting ways: "[T]here is no relentless assumption that whatever [law] does exploits women and serves men."³⁶ Proponents assume that legal practices operate through a gendered, and thus differentiated, discursive lens. Thus, one need not necessarily claim that a practice is harmful to women because it is applied differently in relation to men. Here, Smart offers the example of prisons: "[W]e can assess practices like imprisonment without being forced to say that the problem of women's prisons is that they are not like men's."³⁷ Moreover, Smart proposes that in viewing the law as gendered, there need not be a fixed category or empirical referent of Man and Woman.³⁸ These now are "gendered subject position[s] . . . [that are] not fixed by either biological, psychological or social determinants to sex."³⁹

With a law-as-gendered approach, scholars can analyze how "law insists on a specific version of gender differentiation" and how it may only be able to "see and think a gendered subject."⁴⁰ Thus, "[i]nstead of asking, 'How law can transcend gender?,' the . . . question . . . become[s], 'How does gender work in law and how does law work to produce gender?'"⁴¹ With this approach, the goal of gender neutrality is set aside. Law no longer is defined as a system that can impose gender neutrality, but rather as one that produces gender difference and "is seen as bringing into being . . . gendered subject positions" and perhaps also subjectivities or identities with which individuals are associated.⁴²

and multi-ethnic feminists typically begin their arguments by suggesting the need to critique and transform gender theory rather than doing the same from race theory.

36. Smart, *supra* note 15, at 33.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 34.

41. *Id.*

42. *Id.* When elaborating on her analysis of law-as-gendered, Smart offers an historical sketch of how "Woman is a gendered subject position which legal discourse brings into being." *Id.* She argues for the importance of seeing a "symbiotic relationship" between *types* of Woman (e.g., female criminal, unmarried mother) and the *idea* of Woman in contrast to Man. *Id.* at 36. Here Smart makes the intriguing observation that Woman is a more elastic

V. *A Short Review of Empirical Studies of
Race and Criminal Courts*

My review of the literature will focus on race in criminal courts⁴³ and the stage of court decision-making that has been the most highly studied: sentencing.⁴⁴ Major reviews of the race and noncapital sentencing literature through the early 1980s conclude that statistically significant race effects showing greater leniency toward white defendants are not frequent.⁴⁵ The finding of "no difference" in race-based treatment is also evident in studies of accused women,⁴⁶ although it should be underscored that research on race and the criminal justice system has overwhelmingly centered on the differential treatment of men. More recent appraisals of race in justice system practices have produced scholarly contention about the quality and the interpretations of evidence.⁴⁷ Marjorie Zatz places the

concept, capable of being stretched across a range of types of women, whereas the concept of femininity presupposes a particular race (white) and class (middle) location. *Id.* at 43 n.18. However, she does not say how race and class relate to her claim that the "discursive construct of modern Woman is mired in [the] double strategy" of the *idea* and *types* of Woman. *Id.* at 36.

43. I do not consider empirical studies of race relations in policing. But see MANN, *supra* note 18, at 115-65, for a review of such studies.

44. Scholars have noted that the cumulative effects of race from arrest to later stages of criminal justice processing need to be examined; moreover, the last stage of court decision-making is likely to have a more homogeneous composition than earlier stages. Hence, sample selection bias may attenuate racial variation at this more advanced stage of court decision-making. For an accessible review of these statistical problems, see Marjorie S. Zatz, *The Changing Forms of Racial/Ethnic Biases in Sentencing*, 24 J. RES. ON CRIME & DELINQ. 69 (1987).

45. See John Hagan & Kristin Bumiller, *Making Sense of Sentencing: A Review and Critique of Sentencing Research*, in 2 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 1 (Alfred Blumstein et al. eds., 1983); Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783, 798-801 (1981).

46. For a review of race and noncapital sentencing literature, see Daly, *supra* note 21.

47. Wilbanks, MacLean, and Milovanovic provide a flavor of the "is the criminal justice system racist?" controversy. See *supra* note 14. Kempf and Austin are critical of some earlier interpretations of "no race effect" in literature reviews. See *supra* note 11. Samuel L. Myers, Jr., is critical of the statistical methods used in volumes one and two of *Research on Sentencing: The Search for Reform* to assess racial disparity. See Samuel L. Myers, Jr., *Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment?*, 64 U. COLO. L. REV. 781, 787-91 (1993); see also RESEARCH ON

research literature of the past and present in historical perspective.⁴⁸ She suggests that there have been four waves of research: studies conducted up to the mid-1960s (Wave 1); those in the late 1960s and 1970s (Wave 2); studies in the 1970s and 1980s (Wave 3); and those in the 1980s (Wave 4).⁴⁹ Wave 1 was characterized by findings of "overt discrimination against minority defendants."⁵⁰ However, re-analysis of the studies during Wave 2 showed that except for the "use of the death penalty in the South," initial findings of discrimination resulted from poor research analyses.⁵¹ Wave 3 research used data from the late 1960s and 1970s and, with more sophisticated data analyses, found evidence of "both overt and more subtle forms of bias against minority defendants . . . in some social contexts."⁵² In Wave 4, studies may not have shown overt forms of bias, but subtle forms were apparent.⁵³ Zatz's review may be updated by noting that in the late 1980s and early 1990s, the increasing rate of incarceration of black men and women could be traced to the heightened enforcement and more severe punishment for drug offenses.⁵⁴ One of Zatz's major points—that court processing today may be "systematically biased due to institutionalized discrimination"⁵⁵ so that the effect of race may be "indirect" or "subtle" (rather than overt) through routine court practices—anticipates a line of analysis that I shall consider in my race framework.

Another of Zatz's major points—that studies of court processing may themselves be biased against a finding of discrimination—can be summarized here. In brief, the argument is that statistical analyses may do a poor job of

SENTENCING: THE SEARCH FOR REFORM (Alfred Blumstein et al. eds., 1983).

48. See Zatz, *supra* note 44.

49. *Id.* at 69-70.

50. *Id.*

51. *Id.* at 70.

52. *Id.*

53. *Id.*

54. For analysis of incarceration for drug offenses, see Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 751-53, 756-59 (1993); Barbara S. Meierhoefer, *The Role of Offense and Offender Characteristics in Federal Sentencing*, 66 S. CAL. L. REV. 367, 388-91 (1992); Myers, *supra* note 47, at 790. For discussion of drug law from a more legal and policy perspective, see *A Symposium On Drug Decriminalization*, 18 HOFSTRA L. REV. 457 (1990).

55. Zatz, *supra* note 44, at 81.

modeling the adjudication process and of revealing both overt and subtle forms of racial discrimination. These analyses focus on discrete decision outcomes rather than the cumulative effects of disadvantage. The subjectivities of those accused are not considered: there is scant new research that examines how the accused experience or negotiate the justice system—that is, a "bottom-up" view of the system. Statistical analyses fail to examine the disparate impact of reputedly "race-neutral" policies.

To summarize the body of statistical research on race and sentencing, overt or "direct effects" of race may not be commonly found. But studies probing "indirect effects," contextual effects, or subtle influences of presumptively race-neutral laws and policies may find racial differences. Scholars have challenged research studies in part for ignoring the racial composition of those brought into the system and in part for how scholars measure disparity or bias in a statistical sense.

VI. *Applying the Gender and Law Typology to Race and Criminal Justice*

In applying the gender and law typology to race and criminal justice, I am mindful that although it is possible to replace the term gender with race, the referent meanings are not the same. Thus, we should expect to see an analogous, though not identical, set of issues and questions. For example, Carol Smart draws from Elizabeth Spelman's observation that additive analyses of gender and race miss the mark when they assume that "all women are oppressed by sexism; some women are further oppressed by racism."⁵⁶ Such an approach ignores "differences [in] the contexts in which Black women and white women experience sexism."⁵⁷ Imagine that we switched terms to elucidate the race-additive problem and said: "All black people are oppressed by racism; black women are further oppressed by sexism." For feminist scholarship in recent years, there has been a claim of equivalence of race and gender; the one relationship is not viewed as trumping the other, or the two are viewed as too deeply enmeshed to make additive claims possible. I wonder whether a similar move could be made as easily from critical race theory to gender, or from the experiences of minority group women, who point out that racial oppression is the more potently experienced oppression in their lives. Put another way, specifying

56. Smart, *supra* note 15, at 33 (quoting SPELMAN, *supra* note 35, at 125).

57. *Id.* (quoting SPELMAN, *supra* note 35, at 125).

the racialized context to sexism may not mean the same thing as specifying the gendered context to racism. And whether participants wish it or not, there may be a hierarchy of "isms" involved in the analysis, even if these may shift in specific social contexts.

VII. *Race and Criminal Law and Justice System Practices*

Using Smart's typology,⁵⁸ I will sketch analogous developments in analyzing race and criminal law and justice system practices. For ease of reference, I will abbreviate the latter term to justice system practices.

A. *Justice System Practices Are Racist*

With a justice system practices-as-racist approach, the focus is on how criminal law disadvantages minority group members by differentiating people according to race and ethnicity. Minority group members may be allocated fewer resources, may be judged by different standards, may be denied opportunities, or may not be recognized as affected by certain harms. Evidence of racist practices would include the following:

Over- and under-zealous policing. Over-zealous policing is seen in profiling drug offenders, in police harassment of street groups, and in police shakedowns and beatings.⁵⁹ Under-zealous policing is seen in responses to calls for domestic violence.⁶⁰

Over- and under-zealous prosecution. Over-zealous prosecution is evident in denying lower bail or release on recognizance, in seeking convictions more strenuously against minority group defendants, and in

58. In this section, I shall be using Smart's phrasing and words without necessarily putting quotes around them. For referent pages, see *supra* notes 26-42.

59. For a review of the "war on drugs," see Dwight L. Greene, *Drug Decriminalization: A Chorus in Need of Masterrap's Voice*, 18 HOFSTRA L. REV. 457 (1990); Michael Z. Letwin, *Report From the Front Line: The Bennett Plan, Street Level Drug Enforcement in New York City and the Legalization Debate*, 18 HOFSTRA L. REV. 795 (1990). In another article, Dwight Greene provides examples of and commentary on the over-zealous policing of black men in drug profiling and police stops, among other indices of judicial "pluralistic ignorance." See Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in Bostick v. Florida*, 67 TUL. L. REV. 1979, 2022-33 (1993) [hereinafter Greene, *Justice Scalia and Tonto*].

60. See AMINA MAMA, *THE HIDDEN STRUGGLE* (1989); Kathleen J. Ferraro, *Policing Woman Battering*, 36 SOC. PROBS. 61 (1989).

pushing for incarceration or longer terms.⁶¹ Under-zealous prosecution is seen in not treating certain forms of violent crimes with minority member victims as seriously as crimes with white victims.⁶²

Words, actions, or inactions. Certain words, actions, or inactions suggest the superiority of majority group members and the inferiority of minority group members or use negative group characteristics as a general rule to describe individuals and to make inferences on their motives, behavior, or potential danger to society.⁶³

One problem in documenting justice system practices-as-racist is the presence of both over- and under-zealous (or indifferent) behavior by officials. If both types of behavior are occurring, then "on average" there may appear to be no difference in officials' responses as the one may cancel the other.⁶⁴ More problematically, as William Wilbanks suggests, any result may be defined as racist. As an example, he notes that:

[A] lower percentage of blacks (than whites) being convicted has been interpreted by accusers as racist in that this result indicates that charges against blacks were often without substance. On the other hand, if more blacks were convicted, this result would also be viewed by accusers as being indicative of racism, since black defendants were treated more harshly.⁶⁵

As contentious as Wilbanks's analyses can be to critics, this may be one area in which an anti-racist analysis is most vulnerable to criticism.

For me, this problem is most evident in race-of-victim discrimination claims. As documented by David Baldus and colleagues and by Gary

61. Several recent studies that follow defendants through these stages evince one or more of these "over-zealous" prosecutorial actions. See ROGER HOOD, RACE AND SENTENCING (1992); Joan Petersilia, *Racial Disparities in the Criminal Justice System: A Summary*, 31 CRIME & DELINQ. 15 (1985).

62. See DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY (1990); GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT (1989).

63. See Farnworth et al., *supra* note 11, at 56-57 (Latinos); Zatz, *supra* note 44, at 83-84 (general images of "danger"); Zatz et al., *supra* note 21, at 107-09 (Native Americans); see also Sheri L. Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739 (1993).

64. Research studies rarely examine the form of canceling out that I am referring to here. They more frequently focus on finding race effects when samples are disaggregated by judges; by smaller geographical units; or by urban, suburban, and rural areas.

65. Wilbanks, *supra* note 14, at 6-7.

LaFree,⁶⁶ some violent crimes (murder and rape) with white victims receive a more active prosecutorial response and a more severe sentence than those with black victims. In the aggregate, this means that white defendants are subject to harsher punishment than black defendants since most violent crimes are intraracial. The problem then is how to redress the devaluation of black bodies. The answer, it appears, is to increase the punishment of black defendants.

Whatever the wisdom of using race-of-victim discrimination arguments to challenge the constitutionality of the death penalty,⁶⁷ an even more immediate issue is the lose-lose situations of sentencing officials in black (or minority group) intraracial cases. Here, I wish to draw from my New Haven study by giving an example of a case that, however a judge were to decide it, would be criticized.

The case is that of Barry, a young black man in his early twenties, who beat his uncle, a man in his early forties, to death one evening. The incident occurred when Barry returned to a room he shared with his uncle in a rooming house and found his uncle on the floor, apparently drunk. He later told the police that he slapped his uncle a few times to wake him. Regarding the incident, Barry's mother, the victim's sister, said:

[My brother] must have provoked [Barry]. Maybe they were out drinking and hanging out. Maybe they were arguing. I know my son didn't kill him. I don't feel bad about my brother. He was always getting into fights. He was not a nice sight to see. He was a drug addict. There was no sorrow when he died.

Barry pled guilty to first-degree manslaughter and received a ten-year term. (Note that ten years was the maximum term that defendants in my sample received in this court when pleading guilty to manslaughter.)

What should court officials do in these cases? They can agree with Barry's mother that the victim was a less than fully "worthy" person and reduce Barry's sentence. Conversely, they can argue that "we value all lives equally" and sentence Barry's crime as severely as other homicides. In New Haven, the court took the latter approach, but I am not convinced that this approach was just, either to Barry and his family members or to other

66. See *supra* note 62.

67. I see race-of-victim discrimination arguments as a way to challenge the death penalty, and in that context, they have strategic value. However, advocates should also begin to consider what factors, ideally, ought to be considered in nondeath penalty cases.

defendants and their families who appealed to court officials to understand the situational contexts giving rise to conflicts ending in death. It is important to note that while race of victim arguments give attention to the differential value placed on minority group victims' lives, a victim's class also plays a role.

The preceding examples of under- and over-zealous policing and prosecution demonstrate why it can be difficult to identify and specify racist practices and responses when such actions are moving in different directions. A general problem with the justice system-as-racist stance is its assumption that it is possible to correct these problems of "racial bias" by treating those accused of crime equally. But what is "equal justice" exactly? And is "equal justice" the goal? In light of the history of race relations and justice system practices (as well as those outside law) in the United States, equal justice is not an unreasonable goal. It suggests that minority group members be permitted the same legal protections as majority group members: it is a commitment to notions of procedural equality. For noncapital sentencing, so long as judges exercise discretion in a manner that does not exceed prescribed statutory or guideline sentences, and for capital sentencing, so long as judges or jurors do not intentionally discriminate, the sentencing decision will likely withstand any review.

With respect to empirical studies of policing and the adjudication process, equal justice is restricted to the claim that, "all else equal," minority group defendants ought to be treated the same as majority group defendants. For example, minority group defendants should have the same legal protections; they should not be subjected to higher bail setting or to more severe sentences. Every study of racial disparity in court processes is framed with the preceding assumptions of "equal justice" in mind. After entering many variables into regression equations—essentially bleaching out the race relations in crime—scholars try to determine if there is any residual "race effect" in justice system practices.

The idea that justice should be race-blind is encapsulated in Roger Hood's discussion of the implications of his research on race and sentencing in England. In light of officials' "duty to avoid discriminating against any persons on the grounds of race or sex or any other improper ground," Hood notes that judges' decisions may have to be monitored.⁶⁸ Thus, in his view, the goal is to treat all defendants before the court equally. Such a goal assumes that it is possible (to use Smart's terms) to "override [racial]

68. HOOD, *supra* note 61, at 191.

difference as if it were epiphenomenal rather than embedded in how we comprehend and negotiate the social order."⁶⁹

Neither traditional social science research nor legal arguments may be able to go beyond the restrictions that liberal law places on proving disparities of treatment. Such proof normally assumes that different treatment and discrimination are the same thing. However, I can imagine a system of justice in which racial differences were not denied, but instead were brought forth explicitly as a dimension to decision making.⁷⁰ Indeed,

69. Smart, *supra* note 15, at 31-32. A judicial appearance of evenhandedness is crucial, especially for judges who are members of minority groups. For example, Bruce Wright, a black judge, writing in his autobiography about his time on the criminal bench, said: "[When] I considered race, it was to make certain that neither white nor black skin would be discriminated against in my court." BRUCE WRIGHT, *BLACK ROBES, WHITE JUSTICE* 202 (1987). In examining the decision to incarcerate, one study found that black judges were more likely than white judges to sentence white defendants than black defendants to prison. See Susan Welch et al., *Do Black Judges Make a Difference?*, 32 AM. J. POL. SCI. 126, 131-33 (1988). However, upon closer examination, the authors found that black judges were more inclined to sentence both black and white defendants to incarceration and were more "even-handed" than white judges, who sentenced more black defendants than white defendants to incarceration. *Id.* at 132-33.

70. Richard Delgado develops a compatible argument that focuses on "severe environmental deprivation" as a criminal defense. See Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. J. 9 (1985). However, Delgado is careful to point out that the defense of "rotten social background" is "individualized and subjective" and that the determination is made about a "particular defendant's case [that has] a particular excusing condition." *Id.* at 66. Myers takes issue with Charles Ogletree's proposal that "judges should be given discretion to take into account an offender's race as a mitigating factor." Myers, *supra* note 47, at 792 (citing Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1960 (1988)). Myers asks, "What does this mean? That black crooks will be excused for being crooks because of the legacy of slavery and racism that may help explain why they and their ancestors have been denied opportunities and thus were thrust into crime?" *Id.* While acknowledging the merits of Ogletree's critique of the federal sentencing guidelines, Myers suggests that:

[It] falls into the same trap into which many of the attempts to deal with racial disparities in employment or other economic areas fall. If there are gaps, we need to have 'affirmative action' to eliminate them. In the instance of sentencing reforms, it is not clear that taking into account race or other characteristics of the offender will do anything except lead to reestablishment of the pre-reform disparities in sentencing.

Id. Gary Peller argues that substantive criminal law itself "could be read as embodying a culturally particular way of ascribing responsibility and punishment." Gary Peller, *Criminal*

it is as much the "denial of difference,"⁷¹ racial or otherwise, as it is majority group negative prejudice against minority group members that can be the source of the problem.

Drawing from critical race theory, we learn that racial dominance can be achieved in at least two ways: the older form, by overtly racist practices, and the newer form, by practices that are ostensibly race-neutral. As Anthony Cook explains, the former "predicate[s] subordination on difference," and the latter "predicate[s] subordination on sameness."⁷² Elaborating, Cook says:

In [an earlier period], the White standard was a "my" standard to which Blacks were thought incapable of conforming because of natural inferiority. In the [later period], the White standard was recast as an "our" standard to which Blacks were invited to conform against the backdrop of undisturbed allocations of wealth and power created by a racist history that made conformity, for most, practically impossible.⁷³

Therefore, from a critical race theory perspective, eliminating overt racism, though a worthy goal, is certainly not sufficient. So called race-neutral or race-blind approaches promote new forms of racial oppression.

B. Justice System Practices Are White

Extending on Smart's terms, one need only visit any urban police station, criminal court, jail, or prison and observe the racial composition of those enforcing criminal law and those who are its subjects. On this issue, Judge Bruce Wright asked:

Do white judges ever [wonder] why there are so many black defendants in criminal cases? Do white judges ever wonder about why there are so few black lawyers appearing before them? Do they ever inquire about the history of bar associations that used to exclude Jews

Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties, 67 TUL. L. REV. 2231, 2252 (1993).

71. AUDRE LORDE, *Age, Race, Class, and Sex: Women Redefining Difference*, in SISTER OUTSIDER 115, 122 (1984) (refusal to recognize differences).

72. Anthony E. Cook, *The Spiritual Movement Towards Justice*, 1992 U. ILL. L. REV. 1007, 1010.

73. *Id.*

and blacks? Do they ever ponder . . . the reasons that there are so few black judges?⁷⁴

In addition to Judge Wright's comments, observe the racial and class composition of the producers of knowledge about crime and the justice system and those who are its subjects.

Having noted this color-coded (and class-compounded) organizational scheme, we need to take a step beyond it by identifying how majority whiteness and middle class values are structured in criminal law and justice system practices. The precise elements of a "white point of view" (what is often referred to as institutionalized racism) have not been clarified for criminal law and justice system practices to the extent that the "male point of view" has. One problem is that "white" has both class and cultural dimensions. It includes notions of what constitutes appropriate dress, demeanor, ways of speaking, and child-rearing practices; it means believing that existing rules and authorities are legitimate and fair; and it implies trust that schooling is related to paid employment and that decisions in schools and work sites are based on meritocratic principles of ability and discipline.

As applied to criminal law and justice system practices, there are many historical examples of white justice: the forced removal of Native Americans from their lands and the forced enrollment of Native American children in white schools, the holding of Japanese-Americans in internment camps during World War II, the shifting and selective focus on particular racial minority groups in enforcing drug laws, and the criminalizing of labor and political protest in the late nineteenth and early twentieth centuries and again in the 1950s and 1960s, among others.⁷⁵ Each example speaks to majority citizen and state demands for "order" or for the control of unruly or dangerous groups, typically constructed as "other" or as threats to public safety.

Is it possible to see a similar logic in contemporary justice system practices? We can begin by observing, as British scholar Barbara Hudson does, that "[w]hatever criminal justice policies and institutional arrangements are adopted . . . the poor, the disturbed, the migrant, disadvantaged ethnic minorities are consistently overpenalised and overimprisoned."⁷⁶ Hudson discusses why this is the case and argues that the problem lies in legal theory

74. WRIGHT, *supra* note 69, at 13.

75. See TAKAKI, *supra* note 20; Frankie Y. Bailey, *Law, Justice, and "Americans": An Historical Overview*, in RACE AND CRIMINAL JUSTICE, *supra* note 11, at 10.

76. BARBARA A. HUDSON, PENAL POLICY AND SOCIAL JUSTICE 3 (1993).

itself, which cannot appreciate the fact that "the world as an arena for the [expression] of free choices is a perspective of the privileged and . . . is far from apparent to those whose lives are constricted by material and ideological handicaps."⁷⁷ "Legal ideology" has been able to successfully enforce "equality of obligation in a materially unequal society."⁷⁸ Against a "unitary, objective, rationally superior perspective," the constituents of the legal or juridical voice, Hudson argues for a plurality of perspectives. This approach would translate to the same act meaning different things to people acting from different motives, social situations, or degrees of power in social relationships.⁷⁹ The assumption of an abstracted, equally responsible, equally able individual is at the heart of contemporary liberal law. Yet, whatever autonomy and dignity such a view may invest in individuals, it denies the existence of structured inequalities based on class and caste.

We may wonder, what *should* be the relationship of historical and contemporary inequalities to definitions of crime, criminal responsibility, and punishment? For example, as Andrew von Hirsch, a well-known desert theorist, asks, "to what extent [should] social injustice diminish criminal actors' responsibility for their conduct?"⁸⁰ Furthermore, he notes that "it may be worth worrying about the implications of denying fault for the deprived," which suggests that those seen to be less than responsible for their actions are also viewed as less than fully adult.⁸¹

These are profound questions—more than I can consider wisely or adequately here—about the relationship of social and economic inequalities to crime, criminal responsibility, and punishment.⁸² But we could take a step back and note that when we say criminal law and justice system practices are white, we are noting that law (and its agents) have a "point of view." We would expect that our claim would be denied by law and its

77. *Id.* at 195.

78. *Id.* at 197.

79. *Id.* at 195; see also Greene, *Justice Scalia and Tonto*, *supra* note 59.

80. Andrew von Hirsch, *The Politics of "Just Deserts"*, 92 CANADIAN J. CRIMINOLOGY 397, 408 (1990).

81. *Id.* at 409.

82. See *supra* note 70 for a related discussion of these issues by Delgado, Myers, Ogletree, and Peller.

agents as outside the realm of acceptable legal discourse.⁸³ So too for the traditional social sciences.⁸⁴ Thus, within the parameters of normal science or law, one may not be permitted to make an argument that law and legal practices are white (or male) because this would undermine the very principles upon which these systems of knowledge are built: objectivity and neutrality—the reputedly unbiased "view from nowhere."⁸⁵

The indeterminacy of this position should be plain; it may not be possible to challenge justice system practices with the claim that they are white because clashing epistemological principles may not permit such challenge or dialogue. The proof of the claim must be within law's terms or those of positive social science. There can be several ways to start the conversation, however: by demonstrating that (1) white justice cannot "hear" or empathize with the stories of crime involving minority group members, (2) white justice overcriminalizes minority group members in policing and justice system responses, and (3) white justice expects lawbreakers to become conventional and "straight" with ease and does not recognize the barriers to achieving this status that minority group members face. In each area, apparently neutral rules or policies in law enforcement and justice system practices can be shown to have a disparate impact.⁸⁶

When considering these areas, we should be mindful of divisions within "the black community" (or other minority group communities) on

83. The argument that law's "point of view" is male is explicitly developed in Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN IN CULTURE & SOC'Y 635 (1983).

84. For a discussion of the instabilities that arise in science when traditional notions of neutrality are called into question, see HARDING, *THE SCIENCE QUESTION*, *supra* note 27.

85. See Susan Bordo, *Feminism, Postmodernism, and Gender-Scepticism*, in FEMINISM/POSTMODERNISM, *supra* note 27, at 133.

86. I take it as axiomatic that the lawbreaking of the more marginal is more likely to be strongly condemned and treated as "more serious" than that of the more affluent. Further, I take it as axiomatic that the selective enforcement and crackdowns on alcohol, drugs, prostitution, gangs, and the like are attempts to regulate largely minority group (or immigrant) populations. These general themes are part of the coda of critical criminology. See RICHARD QUINNEY, *CRITIQUE OF LEGAL ORDER: CRIME CONTROL IN CAPITALIST SOCIETY* (1974); *CRIMINAL JUSTICE IN AMERICA* (Richard Quinney ed., 1974), for arguments in this tradition. Moreover, as Zatz points out for the criminal court, cumulative disadvantages to more marginal defendants (such as the inability to secure freedom in the pretrial period and the impact of previous arrests) escalate the apparent "seriousness" of their cases. Zatz, *supra* note 44, at 75-77.

the proper role of law enforcement and priorities for justice system practices.⁸⁷ Disagreements over drug legalization, housing policy evictions, and the prosecution of pregnant drug-using women, among other areas, reveal strong conservative and liberal ideological stances.⁸⁸ Hence, to say that justice system practices are "white" does not imply that there is a coherent or unified "black" or "multi-ethnic" justice waiting in the wings.

1. White Justice Cannot "Hear" or Empathize With Stories of Harm

In writing about the kinds of stories told by black (or other minority) legal scholars that white scholars will listen and respond to, Jerome McCristal Culp identifies two types of stories that can be heard: the color blind story ("[w]e wouldn't need to be race conscious if we could simply become blind to racial difference"),⁸⁹ and the religious redemption story ("any current evil will ultimately be eliminated by [the] natural processes [of culture]").⁹⁰ A third story is not heard. This story "attempts to use the observation of one black life to change the way we look at the world"⁹¹ in a manner that "demand[s] attention from those in authority who often ignore the pleas at the margin."⁹² How might these insights on the voices of black intellectuals and law scholars apply to those accused of crime?

When analyzing the New Haven court materials, I discovered a race and gender patterning in the defendants' social histories in the pre-sentence investigation reports (PSI).⁹³ For more women than men, the PSI writers depicted the criminalization process as containing explicit links to victimiza-

87. See Austin, *supra* note 22, at 1770-71.

88. Elijah Anderson also describes the ideological differences among the black residents in the Philadelphia neighborhoods that he studied. See ELIJAH ANDERSON, *STREETWISE* (1990).

89. Jerome M. Culp, Jr., *You Can Take Them to Water But You Can't Make Them Drink: Black Legal Scholarship and White Legal Scholars*, 1992 U. ILL. L. REV. 1021, 1027.

90. *Id.* at 1029.

91. *Id.*

92. *Id.* at 1039.

93. A PSI is a document that a probation officer writes to guide the judge at sentencing. In Connecticut, it is a confidential state document, normally three to four single-spaced pages in length. It contains sections describing the offense; the victim's and defendant's versions of the offense; the victim's desires in sentencing the defendant; the defendant's social history and prior record; the defendant's current work and family situation, mental health history, and drug or alcohol problems; and the probation officer's sentence recommendation.

tion, whether from growing up in violent households or in adult relations with abusive or dominating men. Thus, the boundaries between victim and offender were blurred more often in the women's social histories. An image of blurred boundaries allows a defendant to incorporate a victimized status within a criminalized status. Such a construction can render a defendant's crime less blameworthy and more a product of past or current problems than a chosen course of action.

Of all the race and gender groups, black men's social histories were least likely to be constructed with this blurred boundaries theme. Black men were more likely to be categorized as committed to the street life, and they were least likely to be seen as reformable. I found greater class and racial differences among the men than among the women in this area. One reason, I suspect, is the set of social relations—and the knowledge produced from them—between probation officers and defendants. I learned from interviews with the probation officers that they found it easier to elicit information from the women defendants than the men. They found the women to be more "self-analytical" and to give more information about themselves; the men seemed to be "more guarded," and the probation officers did not probe further on their experiences with victimization, whether at home or in street settings. The women defendants, both minorities and whites, seemed better able to negotiate their subordinated, deviant status with state officials than the minority group men, who more often contested their deviant status and seemed to be recalcitrant.⁹⁴ This is an instance in which white justice has a gendered face: both minority group and white women's stories of harm apparently could be heard, but men's, especially black men's, could not.

A defendant's discussion of his or her social history with a court official is one thing, but what about the story of the crime? Does white justice not hear that story? There are several genres of stories that seem to be difficult to hear. They include the reasonableness of using violence to settle disputes between gang members and to establish one's honor and reputation. They may also include the reasonableness of selling small quantities of drugs as a way to make a living. While lawbreakers use any number of "techniques of neutralization,"⁹⁵ including "everyone's doing it" and "the crack made me do it," white justice could begin to hear law-

94. For further discussion, see DALY, GENDER, CRIME, AND PUNISHMENT, *supra* note 1, at 83-88.

95. See Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOC. REV. 664 (1957).

breakers' stories by listening to their families and community members or those they victimized. For example, women, like Barry's mother, whose sons have been involved in serious and deadly assaults should be listened to with care.

One case that exemplified the inability of white justice to hear the story of the crime was Andrew's assault of two police officers. Andrew was going to meet his friend Bo to play basketball when he saw two police officers beating Bo. He jumped in and began fighting, kicking one officer in the face and striking the second with a blunt instrument. At his sentencing, Andrew told the judge, "I had seen that two police officers had picked [Bo] up and slammed him on the ground. And started beating on him. I came over and asked them to let him up, and they did not do that. So I jumped in at that time." Andrew's case was sensitive and celebrated, and respected members of the community planned to speak on his behalf on the day of sentencing. His behavior seemed out of character in light of his performance in school, his extracurricular activities (for example, he sang in the choir), and the fact that he had never been in trouble before. From Andrew's point of view, he believed the police were assaulting his friend. From the state's point of view, represented in the words of the judge sentencing Andrew, the assault was "an absolutely vicious, unjustified, inexcusable assault." (Apparently, the police were attempting to arrest Bo for a robbery he had allegedly just committed.) The judge was not swayed by the community members who spoke on Andrew's behalf (nor did he allow the sentencing to be postponed to another day when more people would be able to speak). Rather, he said to Andrew's defense attorney, "I would listen to these distinguished people, [but] the likelihood of their influencing a decision with respect to sentence, it just does not exist."⁹⁶ Thus, part of the power of white justice is the refusal to listen to minority group lawbreakers' or community members' stories of crime and victimization.

2. *White Justice Overcriminalizes*

I shall consider two areas: drug law enforcement and hustling in the informal economy.

Drug Enforcement. Contemporary law enforcement and court practices have focused intensively on the sale and possession of drugs. During my research, drug offenses were the modal conviction for women, even

96. Excerpt from the sentencing transcript.

more so than for men; drug offenses were, however, a higher share of the convictions for black and Latino men than for white men.⁹⁷ Race and ethnicity seemed to play a more overt role in the felony court's handling of drug cases than in the robbery, larceny, and interpersonal violence cases. This is because "drug harms"—which are amorphous, but which are typically measured by the amount and types of drugs sold—are decoupled from the punishment. New Haven felony court officials based the seriousness of drug cases on the quantity of previous lawbreaking—that is, evidence of prior arrests or convictions for drug selling—more than on the quantity of drugs sold, unless the quantity was very large. Minority group members are put at a particular disadvantage when prior records are used in these cases.

Research by Ruth Peterson and John Hagan on the handling of drug offenses in several New York State courts during the late 1970s suggested that a portion of minority group drug users, those with minimal or no previous arrests, were viewed as "victims" and treated more leniently, while those with more developed records were viewed as "villains" and responded to harshly.⁹⁸ It is important to see that "more developed records" are a consequence, in part, of pro-active police policies that focus on certain parts of cities, on certain residences, or on certain people. Thus, a minority drug-using victim in New Haven can easily be transformed into a more loathsome entity: a drug seller who is viewed as "unreformed, unrepentant." Those words were delivered by the presiding judge when he sentenced Mary, a black woman in her early fifties, who pleaded guilty to one count of selling narcotics. The judge knew Mary from previous court appearances and noted that she had been convicted for selling narcotics twenty years earlier.

Rennie's drug case is another example. When the police executed a search warrant of his apartment, they found less than five grams of heroin and cocaine, a relatively small quantity. However, Rennie was on parole at the time, and this status appears to have caused him to receive a sentence of five years, the longest sentence for any defendant convicted of drug charges in this court.

97. Of defendants convicted in the New Haven felony court over a five-year period (1981-1986), the share of convictions for sale or possession of drug offenses for each race-ethnicity and gender group was as follows: 38% for white women, 33% for Latina women, 31% for black women, 20% for black men, 17% for Latino men, and 11% for white men.

98. See Ruth D. Peterson & John Hagan, *Changing Conceptions of Race: Towards an Account of Anomalous Findings of Sentencing Research*, 49 AM. SOC. REV. 56, 59 (1984).

Research on the impact of mandatory sentences for drug sale and possession in the federal court system suggests that such schemes have increased the proportion of black defendants incarcerated to a greater degree than the proportion of white defendants;⁹⁹ the same pattern is seen in state systems.¹⁰⁰ Whether it is an ostensibly neutral law about getting tough on certain drug offenders (such as users of crack cocaine rather than powdered cocaine), or whether it is using previous convictions or parole status as a measure of the seriousness of the prosecuted offense, the criminalizing of certain drugs and the enforcement of drug laws is one example of the disparate impact of white justice on minority group members.

Hustling in the Informal Economy. Regina Austin calls for "a legal praxis" rooted in "folk law" which assesses, on the basis of survival, "what laws must be obeyed and what laws may be justifiably ignored."¹⁰¹ She is particularly concerned that informal economy activities not be criminalized unless they "destroy[] communal life or exploit[] a part of the population that cannot be protected informally."¹⁰² Such informal economic activities—or hustling—can be the start of a "more self-reliant black urban communit[y]."¹⁰³

An example of criminalizing entrepreneurial efforts is renewed efforts to ban unlicensed vendors from city streets. In New York City, for example, where there is a ceiling of about 850 licenses for general vendors (that is, nonfood vendors), there are an estimated 8,000 to 10,000 unlicensed general vendors.¹⁰⁴ Store owners complain of lost revenue, unfair competition, and congestion and noise in front of their shops, and the City estimates that \$300 million is lost in uncollected sales taxes.¹⁰⁵ The street vendors argue that peddling offers one way to gain an economic toehold: "To climb the entrepreneurial ladder."¹⁰⁶

99. See Meierhoefer, *supra* note 54, at 388-92.

100. See Blumstein, *supra* note 54, at 754-56.

101. Austin, *supra* note 22, at 1816.

102. *Id.*

103. *Id.* at 1803.

104. *Giuliani Expands Policy to Ban Illegal Vendors*, N.Y. TIMES, May 9, 1994, at B1.

105. *Id.*

106. *Id.* at B4.

3. *White Justice Expects Lawbreakers to Become Conventional and "Straight" with Ease*

One of the more striking conditions of probation that judges imposed on defendants in the New Haven court was to "seek employment" or "find a job." Such a response suggests a denial of the particular conditions in which many young, urban, largely minority group men live. While most such men are law-abiding, the chances that someone convicted of crime can "find a job" are not as likely as the New Haven judges imagine. One wonders if these judges have read recent accounts of young men attempting to seek jobs;¹⁰⁷ if they understand the meaning of gang affiliation in men's and women's lives;¹⁰⁸ or if they are aware of the difficulties in negotiating one's way around welfare agencies, housing offices, unemployment agencies, and the justice system.¹⁰⁹ The individual, self-help, work-ethic approach denies the structural barriers to successfully seeking employment, remaining employed, and becoming more conventional, particularly when one has a criminal record, which makes finding a job even more difficult.

As Regina Austin reports, the irony is that there is no end of a well-established work ethic in studies of welfare women and that "[p]oor and working class enclaves have an abundance of workers unskilled except in the hard work of hustling."¹¹⁰ Moreover, some young black men may "spurn the injunctions of parents, police, teachers, and other authorities, but they embrace the entrepreneurial and consumption cultures of mainstream America."¹¹¹

In pointing out that justice system practices are white, a point of view becomes visible and its consequences can be documented. However, just as Smart critiques the law-as-male position, we can see similar problems in characterizing justice system practices as white. Foremost, it may be mis-

107. See, e.g., JOHN M. HAGEDORN, *PEOPLE AND FOLKS* 124-27 (1988); MERCER L. SULLIVAN, "GETTING PAID": YOUTH CRIME AND WORK IN THE INNER CITY (1989); William Finnegan, *Out There* (pts. 1 & 2), *NEW YORKER*, Sept. 10, 1990, at 51, *NEW YORKER*, Sept. 17, 1990, at 60.

108. See ANNE CAMPBELL, *THE GIRLS IN THE GANG* (2d ed. 1990); JOAN W. MOORE, *GOING DOWN TO THE BARRIO: HOMEBOYS AND HOMEGIRLS IN CHANGE* (1991).

109. See PAT CARLEN, *WOMEN, CRIME AND POVERTY* (1988).

110. Austin, *supra* note 22, at 1806.

111. *Id.* at 1786 (quoting Jefferson Morely, *Contradictions of Cocaine Capitalism*, *NATION*, Oct. 2, 1989, at 344).

leading to assume (using Smart's words) that white people benefit or are celebrated in a rehearsal of practices that claim universality. In addition, the justice system practices-as-white stance gives priority to one division while overlooking other sources of difference along the lines of class, age, or gender. Finally, in analyzing justice system practices as white, we may be unduly color-coding practices that are equally linked to nation, culture, and class. If, however, "white" stands as a metaphor for the dominant cultural or class point of view, the justice system practices-as-white position may be able to withstand these criticisms.

C. Justice System Practices Are Racialized

When we say that justice system practices are racialized, we upend the race and criminal justice system relationship. Rather than analyzing sources of racial and ethnic variability in justice system outcomes, the focus instead is on how race and ethnicity are brought forth as racialized subject positions by criminal law and justice system practices. One need not assume that justice system practices invariably exploit minority groups and serve the majority group. Such practices are assumed to operate through a racializing differentiated lens. Injustice can be identified without necessarily having to compare minority groups to majority groups. In taking this approach, scholars analyze how criminal law and justice system practices may only be able to "see and think a [racialized] subject."¹¹² Rather than asking how justice system practices can transcend race, they ask: "'How does [race] work in law and how does law work to produce [race]?'"¹¹³

Such an approach seems antithetical to several centuries of political struggle and thousands of pounds of research papers and legal briefs on racial discrimination, criminal law, and the justice system. And it *is*. Although there is disagreement among black Americans on this issue, the prevailing approach to the eradication of majority group racial prejudice has been to remove racial considerations by attempting to ignore color and cultural differences. Moreover, if we say that racializing discourses are everywhere apparent and move in cross-cutting ways, not always to the benefit of a majority group, then they will be difficult to "capture" or to document with conventional legal arguments or positive social science.

112. Smart, *supra* note 15, at 34 (substituting race for gender).

113. *Id.* (substituting race for gender).

From a practices-as-racialized position, it will be difficult to show a uniformly or consistently disadvantaging impact of "white justice."

However, by contemplating the idea that justice system practices are racialized, we have new ways of seeing how race matters, in both its fluidity and obdurateness. We should expect to find racial dominance flourishing in the newer regime of race neutrality as it did under the older regime of white superiority. We may be able to speak more openly about racial and ethnic differences.

Those working in a racializing framework argue for moving "beyond the illusory poles of black and white,"¹¹⁴ even as race continues to be constructed with these terms. High-profile cases that have received the greatest analytical attention, using a racializing frame, are the New Bedford Gang Rape, the Central Park Jogger Case, the Tawana Brawley Case, the Senate Confirmation Hearings for Clarence Thomas, and the police beating of Rodney King. I shall give an example from the Thomas hearings.

In analyzing the Clarence Thomas hearings, Wahneema Lubiano argues that "a specifically nuanced 'blackness' was constructed and strengthened by narratives pre-existing in the national historical memory around two figures, the 'black lady' and the 'welfare mother' or 'queen'"¹¹⁵ (referring to Anita Hill and to Thomas's sister, respectively). Later, Lubiano suggests that when:

[B]lackness from [the] commonsense perspective [that is, "whites are out to get us"] equals only black *manhood*, Hill's race becomes both hypervisible and invisible at the same time. That it "disappeared" and "reappeared" is important, but more important is how it disappeared and reappeared at the same time. With no check on Thomas's evocation of his blackness, with no real check by Democrats or the mainstream press, Hill got whiter.¹¹⁶

Lubiano's essay shows that race is not simply attached to people's bodies as a natural or stable characteristic; rather, the terms of a dispute can color the authenticity and believability of disputants and their claims. Moreover, the contemporary enactment of race in the Thomas hearings drew from historical

114. GINA DENT, *BLACK POPULAR CULTURE* 6 (1992).

115. Wahneema Lubiano, *Black Ladies, Welfare Queens, and State Minstrels: Ideological War by Narrative Means*, in *RACE-ING JUSTICE, ENGENDER-ING POWER* 323, 330 (Toni Morrison ed., 1992).

116. *Id.* at 348-49.

images and metaphors about "blackness" and "whiteness." While we can learn a good deal using the justice system practices-as-racialized approach from analyses of high-profile cases, there is a downside to this focus: We may overlook how justice system practices are racialized in *routine* ways.

In addition to attending more carefully to the common cases and the routinization of justice practices, another fruitful area of inquiry is the mental processes of members of sentencing commissions or legislative bodies while they are setting penalties for crimes. That is, what particular victim-offender relations (stranger? interracial? the "black stranger predator?") is in their imagination? Samuel Myers has called attention to the ways in which the federal sentencing guidelines may have "unintentionally institutionalize[d] prior racial discrimination" by using parole board criteria.¹¹⁷ If apparently objective scoring criteria mask racializing elements, it would be important to peel back the layers of such constructions.

If justice system practices may "call forth" race, including subjectivities or identities of individuals, another research angle is how lawbreakers themselves take on an "outlaw" status and, by resisting state authority, affirm in their own way lawbreaking images and practices. For example, Timothy Simone suggests that some adolescent minority males "are so thoroughly constituted as victims that they resist cooperation with any person who talks about their victimage. They demand to be viewed as the hunters and 'savages' that the general population, preoccupied with crime and safety, is more than willing to see them as."¹¹⁸ Rap lyrics can be another instance of this phenomena.¹¹⁹

The major problem with the justice system practices-as-racialized position is that its emphasis on the multiple lines of racial construction and the racialized constituents of criminal law and justice system institutions may produce knowledge that appears useless for changing policy or for social change more generally. It is one thing to appreciate how people and texts are drenched in racializing codes and metaphors, but quite another to know what to do with that knowledge. And if the past three centuries of United States history are a guide, it will require deft arguments and politics to work

117. Myers, *supra* note 47, at 807.

118. TIMOTHY M. SIMONE, ABOUT FACE: RACE IN POSTMODERN AMERICA 160 (1989).

119. Regina Austin suggests that "[r]ap music is the paradigm for the praxis of a politics of identification." Austin, *supra* note 22, at 1812. She views it as serving a bridge between "street and straight cultures." *Id.*

with explicit racialized imagery as a means to transform relations of racial domination.

VIII. Conclusion

I have presented three ways of conceptualizing the relationship of race to criminal law and justice system practices. Justice system practices-as-racist focuses on ways of exposing differential treatment and eradicating it. The goal is equal justice and a race-neutral or color-blind society. Most social science scholarship has been framed within this position, and virtually all legal arguments (except those centering on disparate impact) are made from this position.

Justice system practices-as-white assumes that the point of view of criminal law and justice system practices is white and middle class. Neutral and objective standards and policies are shown to be systematically skewed against the poor, minority group members, and others at society's margins. The goal is a multicultural (or perhaps radically pluralist) justice.

Justice system practices-as-racialized assumes that racial and ethnic relations structure criminal law and justice system practices so profoundly that legal subjects can be expected to be saturated with racializing qualities. Majority group members may not always benefit from a position of dominance, nor are minority group members always subordinated. The goal is to show how discursive practices of criminal law and the justice system produce race and ethnicity.

These arguments about race in the criminal justice system can sometimes be used at the same time. However, it is useful to see the different emphasis each takes—which position activists, practitioners, and scholars take, and what assumptions we work from—when discussing race, criminal law, and justice system practices.¹²⁰

120. Recall my earlier concern with the limits of the conflict and labeling perspectives. Using the race scheme, we can see that conflict theory is most congenial with a justice system practices-as-white position and labeling is most congenial with a justice system practices-as-racist position. However, scholars use both (often interchangeably) to predict unequal outcomes of court decisions, in which minority group members will get the least favorable outcome. Were a conflict analysis to analyze the disparate impact of reputed neutral rules, it would be closer to its orienting assumptions. Because researchers use both theories in the service of "equal treatment" studies, they are unable to deal with heterogeneous findings of no race difference, differences in the expected direction, and differences in the unexpected direction.

The justice system practices-as-racist adherents will search for a variety of overt forms of differential racial treatment, although they may be stymied by how to represent some differences as acceptable and others as "racist" or discriminatory. Proponents of this group are less concerned with the broader question of achieving social justice (or a more substantively than procedurally centered notion of justice); they work instead on insuring that minority group members receive the same treatment as those in the majority group.

The justice practices-as-white advocates will identify the systemic or institutionalized forms of a "white and middle class point of view," whose laws and policies may appear to be race-neutral, but are not in practice. Proponents of this group are impatient with the limits of equal treatment studies. They are critical of empirical work that does not address the historical and social structural dynamics of race and ethnic relations, and they work to transform the apparatus of a white-dominated power structure.

The justice system practices-as-racialized advocates are interested in how race is fractured and socially constructed within and from criminal law and justice system practices. Race is not only separated from a biological body (as the justice system practices-as-white position suggests); it also has no fixed social determinants. Moreover, because proponents do not assume that a white-dominated power structure can operate in ways that consistently disadvantage minority group members, there is an openness toward seeing how minority group members can construct racialized identities that challenge and confirm dominant group members' expectations.

As socio-legal scholars, activists, and practitioners move toward a common goal of eradicating sources of racial (and other) oppression, we may move in different directions, and for practical reasons, we may need to argue from different assumptions. Those differences ought not to divide us. After acknowledging the strategic value in each of the three positions, we may be better able to listen to each other, debate differences wisely, and move toward social change.