WOMEN OF COLOR AND CRIME: A CRITICAL RACE THEORY PERSPECTIVE TO ADDRESS DISPARATE PROSECUTION

Molly A. Schiffer*

This Note seeks to acknowledge, explain, and offer a remedy to the problem of disparate prosecution of women of color. Women of color are disproportionately arrested and prosecuted for felonies around the country, and are overrepresented in the criminal justice system compared to their white women counterparts. Black and Native women are prosecuted at higher rates than white women for felonies in general, and domestic violence in particular. The problem of disparate prosecution is portrayed through a critical race feminist theoretical framework, focusing on stereotypes of the two groups. After arguing that traditional legal remedies are ultimately doomed to fail, this Note presents a remedy aimed at criminal defense attorneys, who can bring race to the forefront of jurors' minds and help jurors look past latent personal prejudices.

TABLE OF CONTENTS

---

* J.D. Candidate, University of Arizona James E. Rogers College of Law, 2015. I would like to specially thank my faculty advisor, Professor Robert Williams, who helped me to develop the topic and thesis of this Note, as well as directing me to sources throughout the writing process. His contributions were invaluable. Judge Peter Eckerstrom also deserves appreciation for discussing the practical limitations of the remedy I propose; he provided a much needed perspective. Finally, this Note would not have been possible without the years of intellectual guidance provided by Joel Olson, may he rest in power.

INTRODUCTION

Racial disparities in the criminal justice system are widely acknowledged in the United States, but continue to persist. Women of color are disproportionately prosecuted for felonies around the country and are overrepresented in the criminal justice system in comparison to their white counterparts.[1] Black[2] women and Native women are more likely to be arrested and prosecuted in general, and as offenders of domestic violence more specifically.[3] This Note seeks to explain the discrimination through the theoretical framework and basic precepts of critical race theory and critical race feminism, using stereotype theories of both Black and Native women to show potential causes of racial discrimination. Defense attorneys can fight the effects of discrimination by employing confrontation theory as a part of their trial strategy.[4] In this way, they can shift the remedial focus from racial discrimination claims to the hands of the jury, which may prove to be more effective. Attorneys can remind jurors of the ordinary, everyday nature of racial discrimination in the United States to allow them to address racial implications of the trial.[5]

This Note is divided into four sections. Part I presents the problem of disparate prosecution—Black and Native women are prosecuted at higher rates than white women for felonies in general, and domestic violence in particular. Part II seeks to explain why those disparities continue to exist in the context of critical race theory and critical race feminism, explaining stereotypes concerning Black and Native women and how they affect these groups in the criminal justice system. Part III will explain why the traditional methods of confronting racial discrimination cannot remedy the problem. Part IV will then offer a practical remedy for use by defense attorneys representing clients of color at trial to mitigate the effects of racial discrimination. In order to reduce the impact of jurors' subconscious racial and gender biases during trial, criminal defense attorneys can employ confrontational theory to minimize the effects of racial discrimination in domestic violence cases with offenders who are women of color.[6]

---

1. Donna Coker, *Race, Poverty, and the Crime-Centered Response to Domestic Violence*, 10 VIOLENCE AGAINST WOMEN 1331, 1332–33 (2004).

2. I capitalize "Black" and do not capitalize "white" because "Blacks, like Asians, Latinos and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, n.6 (1991).

3. Coker, *supra* note 1; Kris Henning & Brian Renauer, *Prosecution of Women Arrested for Intimate Partner Abuse*, 20 VIOLENCE & VICTIMS 361, 368 (2005).

4. *See* JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 139–53 (1997).

5. *Id.*

6. *See id.*

A. Then to Now: Racial Discrimination in the Criminal Justice System

Racial discrimination perpetrated in the criminal justice system is not new in the United States. After slavery ended, whites sought to maintain the racial social order and economy by implementing black codes.[7] Black codes were laws that criminalized vagrancy, and resulted in convicting freedmen, forcing them back on to plantations to provide free labor for white owners.[8] The conviction and incarceration of African Americans continued through the Jim Crow Era, and at the time, convicts had no meaningful legal rights.[9] When the Jim Crow Era came to an end, disparate incarceration and conviction rates continued, but white rhetoric that sought to continue the racial order changed from "segregation forever" to "law and order," a seemingly race-neutral mantra.[10] While the "law and order" mantra originated from the intent to discriminate against African Americans, it disparages Native Americans as well.[11]

Today, racial minorities are more likely than whites to be arrested.[12] After arrest, they are also more likely to be charged and convicted,[13] and are even more likely than whites to be imprisoned after conviction.[14] African Americans make up 13% of the population, 28% of all persons arrested, 40% of inmates currently in prison and jail, and 42% of inmates on death row.[15] Over 60% of those who are incarcerated in the U.S. are racial minorities.[16] To put this in perspective, one in every ten Black men in his thirties is in prison right now.[17]

Although the numbers are not as overwhelming as they are for African Americans, Native Americans are also overrepresented in the criminal justice system.[18] Native Americans are among the poorest and most deprived racial groups in the U.S., rendering them least able to effectively resist the disparate application of the law.[19] Native Americans typically receive longer sentences than

---

7. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 27–29 (2012).

8. *Id.*

9. *Id.* at 31–32.

10. *Id.* at 35, 40.

11. Marianne O. Nielsen & Robert A. Silverman, *Preface to* CRIMINAL JUSTICE IN NATIVE AMERICA viii (Marianne O. Nielsen & Robert A. Silverman eds., 2009).

12. BRENNAN CTR. FOR JUSTICE & NAT'L INST. ON LAW & EQUITY, RACIAL DISPARITIES IN FEDERAL PROSECUTIONS ii (2010) [hereinafter RACIAL DISPARITIES].

13. *Id.*

14. *Id.*

15. *Id.* at 20.

16. *Racial Disparity*, SENTENCING PROJECT, http://www.sentencingproject.org/template/page.cfm?id=122 (last visited Oct. 7, 2013).

17. *Id.*

18. Marianne O. Nielsen, *Introduction to the Context of Native American Criminal Justice Involvement*, *in* CRIMINAL JUSTICE IN NATIVE AMERICA 5 (Marianne O. Nielsen & Robert A. Silverman eds., 2009).

19. Ronet Bachman, Alexander Alvarez & Craig Perkins, *Discriminatory Imposition of the Law: Does It Affect Sentencing Outcomes for American Indians?*, *in* NATIVE AMERICANS, CRIME, AND JUSTICE 198 (Marianne O. Nielsen & Robert A. Silverman eds., 1996).

those received by whites who committed the same offense, and generally serve a longer portion of their sentence than whites.[20]

Minority women statistically fare better than minority men, but still suffer the overall effects of a racially discriminatory criminal justice system.[21] Racial minorities are less likely to receive charge reductions than whites.[22] Additionally, the likelihood that a white woman would spend any time in prison during her life is 1 in 118.[23] Conversely, Black women have a lifetime likelihood of 1 in 19.[24] Black women are five times more likely to be incarcerated than white women in the United States.[25] Native women are similarly disparaged.[26] Native women have higher incarceration rates and worse treatment once imprisoned.[27] In prison, Native American men are more likely than Native women to receive culturally appropriate services.[28] Additionally, 90% of imprisoned women were victims of abuse before incarceration.[29] In Montana, for example, Native Americans only make up 6% of the general population, but Native women comprise 25% of the female prison population.[30]

B. Critical Race Theory and Critical Race Feminism: An Introduction

Disproportionate minority representation in the criminal justice system can be explained by critical race theory and critical race feminism. Critical race

---

20. *Id.* at 200. There is some variation depending on the state and the type of crime. Generally, Native Americans are given longer sentences than whites for interracial crimes—meaning Native American perpetrators with non-Native victims—but are given similar sentences to the white majority for predominantly intraracial crimes. For example, in Arizona, Native Americans serve longer sentences for robbery and burglary, which are both interracial crimes. *Id.* at 201–02, 206. This specific study looked to four different states. In Minnesota, Native Americans are given longer sentences than whites and serve more of their sentences for every crime except for sexual assault and larceny. In North Carolina, the law is consistently applied more severely to Native Americans for every crime except burglary, and in North Dakota, Native Americans serve longer sentences for all crimes but robbery and drug trafficking. In Arizona, the sentences are only longer for robbery and burglary. *Id.* at 201–02.

21. *Incarcerated Women*, SENTENCING PROJECT 2 (2012), *available at* http://www.sentencingproject.org/doc/publications/cc_Incarcerated_Women_Factsheet_Dec2012final.pdf [hereinafter *Incarcerated Women*].

22. *Id.*

23. *Id.*

24. *Id*.

25. Coker, *supra* note 1.

26. *See Words from Prison: Did You Know . . . ?*, ACLU (June 12, 2006), https://www.aclu.org/womens-rights/words-prison-did-you-know# [hereinafter *Words from Prison*]. There are fewer studies concerning their rates, and the information is sparse because many researchers lump Native women into the category of "other," rather than allocating them to an independent category. Mary Jo Tippenconnic Fox, *Criminal Justice Challenges for Native Women*, *in* CRIMINAL JUSTICE IN NATIVE AMERICA 53 (Marianne O. Nielsen & Robert A. Silverman eds., 2009).

27. Fox, *supra* note 26, at 55.

28. *Id.* at 56.

29. *Id.* at 55.

30. *Words from Prison*, *supra* note 26.

feminism is a part of critical race theory—an analytical framework that begins from the foundational reality that race is an ordinary and fundamental part of all areas of American society.[31] While shocking expressions of racism occur less frequently,[32] every social indicator shows that racial discrimination continues to thwart the lives of people of color.[33] Critical race theorists question the foundations of seemingly neutral principles of the law, rather than providing incremental changes to existing law, like the traditional civil rights movement generally aims to do.[34] Critical race theory instead seeks to analyze the fundamental relationship between race and power.[35]

Critical race theory has a set of basic tenets on which all theorists in the field tend to agree. First, racism is the usual way society does business; it is ordinary, common, and an everyday experience.[36] Second, existing white dominance is preserved by not acknowledging the racism, which makes it difficult to address, much less fix.[37] Third, color-blind remedies only repair obvious and blatant instances of race discrimination, while preserving the everyday actions that reinforce existing power structures.[38] Fourth, white dominance is in the interest of all whites, across class boundaries, creating a large population uninterested in any power changes.[39] Fifth, critical race theory and especially critical race feminism, reject essentialism in all categories, meaning they analyze a person as not only a Black person, but also as a woman, a mother, and a lesbian.[40] Lastly and perhaps most importantly, critical race theorists start from the foundation that racial groups are categories that "society invents, manipulates, or retires when convenient."[41] Racial groups do not create inherent or fixed, intelligence levels; moral decisions; or biological or genetic personalities.[42]

Most landmark critical race theory literature focuses on the perpetrator as a young Black man, and the victim as a woman.[43] This Note focuses instead on women of color offenders of domestic violence crimes.

---

31. Adrien K. Wing, *Introduction to* CRITICAL RACE FEMINISM: A READER 2–4 (Adrien K. Wing ed., 1997).

32. This is not to assert that shocking displays of racism do not occur. The current unrest in Ferguson, Missouri, for example, shows such an assertion would be without merit. *See Ferguson, Missouri Community Furious after Teen Shot Dead by Police*, HUFFINGTON POST (Sept. 9, 2014 11:46 PM), http://www.huffingtonpost.com/2014/08/09/ferguson-teen-police-shooting_n_5665305.html.

33. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 10–11 (2d ed. 2012).

34. *Id.* at 3.

35. *Id.*

36. *Id.* at 7.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 9.

41. *Id.* at 8–9.

42. *Id.*

43. *See, e.g.*, ALEXANDER, *supra* note 7 (arguing the mass incarceration of young Black men as a result of the war on drugs has continued the effects of Jim Crow legislation); *see generally* JODY ARMOUR, NEGROPHOBIA AND REASONABLE RACISM (1997) (arguing

C. Domestic Violence in the United States

Intimate partners physically assault approximately 1.3 million women and 835,000 men every year.[44] Almost all research on women in domestic violence contexts focuses on the woman as victim.[45] Most of the existing literature center on men controlling or assaulting women in intimate relationships,[46] and research portrays women as victims and men as perpetrators.[47] While this is understandable considering that more serious injuries arise when men are violent with women, it also leaves a gap in the research concerning the instances where women are the offenders.[48] Federal crime reports tend to separate statistics showing the racial breakdown of all offenders and the gender breakdown of all offenders, which makes it nearly impossible to see the racial differences in women offenders.[49]

There is plenty of data concerning the race of female domestic violence victims.[50] In general, women in lower socioeconomic groups are more likely to be victims of domestic violence.[51] Native women are most likely to be victims of domestic violence, as 31% of them have been or presently are victims.[52] Native women's domestic and sexual violence victimization is so profound that Congress added a specific section to the Violence Against Women Act in early 2013 to address this disparate victimization.[53] According to Michael P. Johnson and Kathleen J. Ferraro, 26% of Black women have been victims of domestic violence, and 21% of white women have been victims.[54]

---

presumed criminality is the tax Blacks pay in their interactions with whites); KATHERYN RUSSELL-BROWN, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS (2d ed. 2008); Crenshaw, *supra* note 2.

44. Patricia Tjaden & Nancy Thoennes, U.S. DEP'T OF JUST., NCJ 183781, *Full Report of the Prevalence, Incidence, and Consequences of Intimate Partner Violence Against Women: Findings from the National Violence Against Women Survey*, at iv (2000), *available at* http://www.ojp.usdoj.gov/nij/pubs-sum/183781.htm.

45. *See, e.g.*, Jyl Josephson, *The Intersectionality of Domestic Violence and Welfare in the Lives of Poor Women*, *in* DOMESTIC VIOLENCE AT THE MARGINS 83–101 (Natalie J. Sokoloff & Christina Pratt eds., 2005); Michael P. Johnson & Kathleen J. Ferraro, *Research on Domestic Violence in the 1990s*, 62 J. MARRIAGE & FAM. 948 (2000); Comm'n on Domestic & Sexual Violence, *Domestic Violence Statistics*, A.B.A., http://www.americanbar.org/groups/domestic_violence/resources/statistics.html; Bureau of Justice Statistics, *Family Violence Statistics*, U.S. DEP'T OF JUSTICE 65, 69 (2005), http://www.bjs.gov/content/pub/pdf/fvs02.pdf [hereinafter *Family Violence Statistics*].

46. Johnson & Ferraro, *supra* note 45.

47. *Id*.

48. *Id.* at 952.

49. *See, e.g*., *Family Violence Statistics*, *supra* note 45.

50. Johnson & Ferraro, *supra* note 45, at 953.

51. *Id*.

52. *Id.* (Native women statistics inclusive of "Native American and Alaska Native women")

53. Kavitha Chekuru, *Violence Against Women Act Includes New Protections for Native American Women*, HUFFINGTON POST (Mar. 10, 2013, 6:21pm), http://www.huffingtonpost.com/2013/03/10/violence-against-women-act-native-americans_n_2849931.html.

54. Johnson & Ferraro, *supra* note 45, at 953.

I. DISPROPORTIONATE ARREST & PROSECUTION OF BLACK AND NATIVE WOMEN

Women of color are disproportionately arrested and prosecuted in the United States criminal justice system.[55] Male arrests for assault declined 2002–2011 by 4%, while female arrests for assault have increased in that time period by 15.2%.[56] Women now account for a significantly increasing proportion of offenders charged with domestic violence.[57] The general consensus in existing research is that mandatory arrest policies are the cause of the distinct increase in women arrested for domestic violence.[58] Once arrested, race is a reliable predictor of prosecution.[59] Prosecutors are significantly more likely to drop the charges of white women who have been arrested for domestic violence than to drop the charges for women of color in similar circumstances.[60] A prior criminal record—more prevalent in women of color—also makes prosecution more likely.[61] Though there is a shortage of data regarding the racial disparities of women offenders, existing research paints a picture of continual racial discrimination against women of color.

Criminal convictions have real, hard consequences on people, especially on the poorest populations in the country. When a person is released from prison after serving her time, she is met with a lifetime of shame, scorn, contempt, and legitimized exclusion.[62] Criminals are not entitled to any respect or concern.[63] Housing discrimination against felons and criminals is legal, including restrictive

---

55. *See* Fox, *supra* note 26, at 55; *Words from Prison*, *supra* note 26; *Incarcerated Women*, *supra* note 21; RACIAL DISPARITIES, *supra* note 12, at 10, 20.

56. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT (2011).

57. Brian Renauer & Kris Henning, *Investigating Intersections Between Gender & Intimate Partner Violence*, 41 J. OFFENDER REHABILITATION 99, 112 (2005).

58. Michelle Carney et al., *Women Who Perpetrate Partner Violence: A Review of the Literature with Recommendations for Treatment*, 12 AGGRESSION & VIOLENT BEHAVIOR 108, 112 (2007); *see, e.g.*, ARIZ. REV. STAT. ANN. § 13-3601(B) (2014) (requiring arrest in cases of domestic violence involving the infliction of physical injury or involving the discharge, use, or threatening exhibition of a deadly weapon or dangerous instrument); WASH. REV. CODE ANN. § 10.31.100(2)(C) (West 2014); CONN. GEN. STAT. ANN. § 46b-38b(a) (West 2014) COLO. REV. STAT. ANN. § 18-6-803.6(1) (West 2014); Little Traverse Bay Bands of Odawa WOTCL § 9.704(D)(1) (2014) (Criminal Penalties And Procedures); 9 GTBC § 325(a) (2012) (Mandatory Arrest); AST DOM VIOL Code § 4, Absentee Shawnee Domestic Violence § 4(a); OHIO REV. CODE ANN. § 2935.032(A)(1)(a)(i) (West 2014); N.J. STAT. ANN. § 2C:25-21(a) (West 2014); ALASKA STAT. ANN. § 18.65.530(A)(1) (West 2014); CTC Code 5-5-12(a), Colville Confederated Tribes Code 5-5-12. For a comprehensive chart of arrest policies, see Comm'n on Domestic Violence, *Domestic Violence Arrest Policies by State*, A.B.A. (June 2011), http://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/statutorysummarycharts/2014%20Domestic%20Violence%20Arrest%20Policy%20Chart.authcheckdam.pdf.

59. Henning & Renauer, *supra* note 3.

60. *Id*.

61. *Id.* at 367–68.

62. ALEXANDER, *supra* note 7, at 142.

63. *Id.* at 141.

lease agreements and exclusions from public housing after a conviction.[64] On the vast majority of job applications, there is a section requiring disclosure of any criminal conviction, which greatly reduces the chance for an interview, much less a job offer.[65] Along with the inability to provide for her general well-being, a person with a felony conviction often loses the right to vote for either the term of parole or, in some cases, life.[66] Of those who are eligible to vote after release, some can be barred for bureaucratic reasons, including outstanding fines or court fees.[67] Sometimes a prisoner is released with a strong communal support system, including an involved group of family and/or friends, therefore having a place to stay and perhaps job opportunities. Many prisoners simply do not have those resources, though; instead, they face roadblocks at every turn.

Erma Faye Stewart, a Black single mother, faced those barriers.[68] A confidential informant, who was later deemed unreliable, told police that Stewart and Regina Kelly, another young Black single mother, were involved in a major drug distribution operation.[69] Despite having claimed their innocence, both were charged with felony drug distribution charges, arrested, and placed in jail, subject to a $70,000 bond, which, of course, neither could pay.[70] Stewart did not have anyone to care for her two young children.[71] Her lawyer told her that she would be released from jail and receive only probation if she pleaded guilty, or, if she did not take the plea, that she would stay in jail to await a trial, after which she could be sentenced to 5–99 years.[72] Needing to take care of her children, she took the plea.[73] Now, because of the high fines, court costs, and probation fees required by the plea, she is destitute.[74] She was evicted from public housing for not paying rent, and is ineligible for food stamps and federal grant money for education.[75] Her children stay at various homes while she is homeless and working as a cook for $5.25 per hour.[76] She uses almost all of her money to pay back her fees.[77] She said, "I already told them, I'm having a hard time buying my son medicine. I have to have his medicine for his asthma. They don't really care about that."[78] In contrast, Kelly was released on bail after getting it lowered, and charges were dropped

64. *Id.* at 144–45.
65. *Id*. at 149.
66. *Id.* at 158.
67. *Id.* at 159.
68. *Frontline: The Plea* (PBS television broadcast June 17, 2004), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/plea/view/.
69. *Id*.
70. *Id*.
71. *Id*.
72. *Id*.
73. *Id*.
74. *Id*.
75. *Id*.
76. *Id*.
77. *Id*.
78. *Id*.

against her due to lack of evidence.[79] Because Stewart entered a guilty plea, the repercussions have not waned.[80]

In the context of domestic violence, women offenders face an extra roadblock. When women are arrested for domestic violence and prosecuted, they lose access to victim services.[81] Only one-tenth of women who are arrested for domestic violence are the primary aggressor, perhaps showing that, in many circumstances, when women act violently towards a partner, they may be acting in self-defense.[82] Women offenders are also significantly less likely to recidivate than men.[83] In fact, if the same woman offender is featured again in reports of domestic violence, it is more likely that, this time, she will be the victim rather than the offender.[84] This information suggests that many cited women were primarily victims, who lost services necessary to protect themselves.[85] When victimized women are unable to utilize necessary services, such as law enforcement protection and access to social services, they are more vulnerable to future abuse by their partners.[86] When they are arrested and prosecuted in a time of need, they are more likely to be skeptical of the system that is presumably meant to protect them.[87]

Racial discrimination in this area may seem minimal considering that affected populations are smaller than those affected by the "War on Drugs"[88] or other monumental racially discriminatory uses of the criminal justice system, but the effects on the lives of those individuals make it a worthwhile and necessary topic of discussion.

II. THEORETICAL FRAMEWORK

The criminal justice system generally operates within a set of facially race- and gender-neutral laws, policies, and discretions. Critical race feminism becomes important, then, because a theoretical framework can help to explain why, with such facially neutral policies, there continues to be a disparate impact on Black and Native women.[89] The framework is comprised of antiessentialism, intersectionality, stereotypes and stereotype threat, and the explanation of common stereotypes threatening Black and Native women.

In order to analyze the implications of disparate arrests, prosecutions, and convictions of Black and Native women, it is important to look beyond race and gender alone. Domestic violence is a gendered crime, as it generally happens

---

79. *Id.*
80. *Id.*
81. Renauer & Henning, *supra*, note 57, at 113.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *See generally* ALEXANDER, *supra* note 7.
89. *See* JULIE BETTIE, WOMEN WITHOUT CLASS: GIRLS, RACE, AND IDENTITY 210, n.8 (2003) (explaining that critical race feminism seeks to expose the maintenance of white privilege through race-neutral policies).

within intimate partner relationships.[90] Traditional feminist legal theory, dominant cultural feminism, and dominant antiracism politics tend to essentialize gender and race.[91] When feminists talk about "women," they universalize the experience of all women.[92] Using "women" without differentiating experiences seems to claim universality, but generally it is actually reciting the experience of only white, privileged women.[93] This is considered gender essentialism.[94]

Just as gender essentialism acts to universalize the experience of the white woman, race essentialism universalizes the experience of people of color.[95] There is no monolithic Black or Native experience, but it is common to act as though there is one.[96] Essentialism serves to subvert the narrative of the experiences of those who feel multiple oppressions at one time.[97] When race and gender are analyzed separately, it ignores women of color from the analysis and only shows slices of their experiences, not their totality.[98] Angela Harris, a critical race feminist author and Black woman wrote, "As long as feminists, like theorists in the dominant culture, continue to search for gender and racial essences, [B]lack women will never be more than a crossroads between two kinds of domination, or at the bottom of a hierarchy of oppression; we will always be required to choose pieces of ourselves to present as wholeness."[99]

Intersectionality is a closely related thesis to the antiessentialism thesis.[100] Intersectionality recognizes the intersectional experience of multiple oppressions, but it does not mean to rid the world of identity politics.[101] While categorizing people into groups is an exercise of power, it does not mean that identity politics should be disbanded.[102] Instead, it reconceptualizes the politics by creating coalitions within races, making intersectional voices key instead of silencing them through essentialism.[103]

Categorization is important because power produces reality and the objective truths of a society.[104] Exclusion, repression, and oppression are just

---

90. *See, e.g.*, NAT'L INST. OF JUSTICE, MEASURING INTIMATE PARTNER VIOLENCE (May 12, 2010), http://www.nij.gov/topics/crime/intimate-partner-violence/Pages/measuring.aspx. Of course not all intimate partner relationships are heterosexual, and domestic violence occurs in same-gender relationships as well. However, because most victims are women and most perpetrators are men, a feminist analysis is instructive.

91. Angela Harris, *Race and Essentialism in Feminist Legal Theory*, *in* CRITICAL RACE FEMINISM: A READER 11 (Adrien K. Wing ed., 1997); *see, e.g.*, SHERYL SANDBERG, LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD (2013).

92. Harris, *supra* note 91.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 12

100. Crenshaw, *supra* note 2, at 1296.

101. *Id.* at 1299.

102. *Id.* at 1297.

103. *Id.* at 1299.

104. JOEL OLSON, THE ABOLITION OF WHITE DEMOCRACY 37 (2004).

pieces of the story of racial discrimination in the United States.[105] Michel Foucault theorized that power does not merely operate in the negative; it is a form of productivity.[106] Institutions, like prisons, serve to create politically docile and economically useful portions of the populous.[107] These powerful institutions and their effects organize time and space, which creates a method of ordering people within a society.[108] For example, the use of slavery in the colonial and early post-revolution period of the United States took away the threats of servant insurrection when the African and European servants were working together and outnumbering the ruling class.[109] Likewise, the modern day criminal justice system that produces racial disparities is productive. It keeps whites in power, out of jail, and employed, and justifies a division between coalitions within the races and within genders.[110] When there is a history of violence against groups of people within a society, like there is for African-American and Native-American groups, it helps to mask that violence in order to maintain white privilege.[111] Portraying Black and Native peoples as criminals maintains the view of white superiority, and that white people are naturally and intrinsically law-abiding.[112]

Stereotypes largely maintain the allocation of power in the United States, especially within the criminal justice system. Stereotypes invade the minds of people in power that have discretion within the criminal justice system and affect the way groups who traditionally have been subject to negative stereotypes act.[113] As W.E.B. Du Bois wrote, "One ever feels his two-ness, - an American, a Negro; two souls, two thoughts, two unreconciled strivings."[114]

"Stereotype threat" seems to come from this tradition of thought. Stereotype threat occurs when people within threatened groups see their image from the way the powerful groups view their race or gender—through the lens of stereotypes—creating a heightened level of apprehension.[115] According to Cynthia Najdowski, a professor of psychology, "Stereotype threat is the apprehension one experiences when at risk of being perceived in light of a negative stereotype that applies to one's group."[116] Stereotype threat inadvertently makes it more likely for

---

105. *Id*.
106. *Id*.
107. *Id*.
108. *Id*. at 15.
109. *Id*.; *see generally* THEODORE W. ALLEN, THE INVENTION OF THE WHITE RACE, VOLUME TWO: THE ORIGINS OF RACIAL OPPRESSION IN ANGLO AMERICA (1997) (explaining the historical background of slavery and the racial order in the United States).
110. *See generally* ALEXANDER, *supra* note 7.
111. Steven R. Morrison, *Will to Power, Will to Reality, and Racial Profiling: How the White Male Dominant Power Structure Creates Itself as Law Abiding Citizen Through the Creation of Black as Criminal*, 2 NW. J. L. & SOC. POL'Y 63, 97 (2007).
112. *See id*.
113. *See* ARMOUR, *supra* note 4, at 13; Cynthia J. Najdowski, *Stereotype Threat in Criminal Interrogations: Why Innocent Black Suspects are at Risk for Confessing Falsely*, 17 PSYCHOL. PUB. POL'Y & L. 562, 564 (2011).
114. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 2 (Dover Publ'ns, Inc. 1994) (1903).
115. Najdowski, *supra* note 113.
116. *Id.*

a person to act in conformity to the negative stereotype perpetuated against her group.[117] An example of stereotype threat comes in the form of Black suspects falsely confessing more often than white suspects.[118] The criminality stereotypes of African Americans create an apprehension in Black suspects when talking to the police.[119] That apprehension tends to increase the likelihood of Black suspects acting in a way police see as demonstrating guilt or dishonesty.[120] That then makes police officers use more coercive tactics in interrogations with those suspects, thereby producing more false confessions.[121]

Stereotype imagery is pervasive in the criminal justice system. Different imageries are regularly used in criminal trials and research generally focuses on women of color as victims.[122] For example, white women are more sympathetic rape victims because, according to predominant stereotypes, they are more valuable than Black women.[123] When it comes to perpetrators, intersectional stereotypes are important because they inform the continuance of the "Black tax."[124] The "Black tax" is the "price Black people pay in their encounters with whites (and some Blacks) because of Black stereotypes."[125] Like a tax, many see racial discrimination as unchangeable and permanent.[126] According to this theory, most racial discrimination is rooted in unconscious mental reflexes rooted in the stereotypes of minority communities.[127] The theory of Black tax is not just persuasive when discussing the African-American community; it should be applied to all minority groups that have felt the disparate effects of the criminal justice system. The remainder of this Part delves into the pervasive, intersectional stereotypes affecting Black and Native women as perpetrators of gendered crimes in the criminal justice system.

A. Stereotyping Black Women

The construction of stereotypes affecting Black women in the criminal justice context is based on the history of Black enslavement in the United States.[128]

---

117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 562.
121. *Id.* Another example manifests in the school setting, when African-American kids underperform academically after being confronted with the stereotype of African Americans being intrinsically less intelligent than whites. Stereotype threat invades interactions between groups in all facets of society. *Id.* at 564.
122. Linda L. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1006.
123. *Id.*
124. ARMOUR, *supra* note 4, at 13.
125. *Id.* This tax is present when police officers stop African Americans in predominantly white neighborhoods and when "upscale" shops accuse African Americans of theft. *Id.* at 14.
126. *Id.* at 13.
127. *Id.* at 14.
128. Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 24–25 (1998).

Due to the history of slavery and its implications, Black women are unable to fit within the "good girl" or "victim" stereotypes.[129] While slavery applied to both genders of African Americans, there are specific stereotypes that are solely pervasive in the experience of the Black woman. The stereotypes covered in this subsection are: the jezebel, the angry Black woman, and the mammy. These three stereotypes are intersectional, as they only apply to Black women, and are pervasive enough to mold the subconscious of decision-makers in the criminal justice system.

The jezebel stereotype is one of a hypersexual seductress. It comes from the violent past of slavery in the United States.[130] Saidiya Hartman's theory of seduction critically informs the history of the stereotype analysis. Hartman's theory rests on the idea that enslaved women could not be raped, for rape of a slave was not against the law or recognized as an offense.[131] The crime of rape relies on the basic premise that a person can consent to sexual activity, therefore criminalizing nonconsensual sexual contact.[132] Enslaved women did not have the right to consent, so they were presumed to always be willing.[133] As Hartman wrote, "Lasciviousness made unnecessary the protection of rape law, for insatiate [B]lack desire presupposed that all sexual intercourse was welcomed, if not pursued."[134] Instead of being a rape victim in situations that would now be nonconsensual in all other contexts, the enslaved woman became a seductress, seducing white men into sexual conduct.[135]

Acting to defend oneself during what was usually brutally violent sexual aggression from a white man or slave owner was a crime, punished with further violence.[136] "White culpability was displaced as Black criminality, and violence was legitimated as the ruling principle of the social relations of racial slavery."[137] Whites assumed perfect submission from enslaved women, presuming mutual feelings and mutual benevolence in times of violent sexual aggression.[138] This dark history of violence and presumed sexual willingness is not so far in the past as to be irrelevant. It is, in fact, the very foundation of the continuing stereotype of the hypersexualized Black woman.[139] The jezebel is animalistic and sexual, free from the sexual restraints that apply to white women, but is isolated from Black men.[140] Through the lens of jezebel imagery, Black women are viewed as innately

---

129. *Id.*

130. *See* SAIDIYA V. HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 79–112 (1997).

131. *Id.* at 79.

132. *Id.* at 80.

133. *Id.* at 81.

134. *Id.* at 86.

135. *Id.* at 87.

136. *Id.* at 82.

137. *Id.* at 83.

138. *Id.* at 88.

139. *See* Regina Austin, *Sapphire Bound!*, *in* CRITICAL RACE FEMINISM: A READER 293 (Adrien K. Wing ed., 1997); HARTMAN, *supra* note 130, at 79.

140. Austin, *supra* note 139.

lascivious and sexually predatory.[141] The stereotype is particularly prevalent when viewing unmarried Black mothers, as if their pregnancies emerge from a degenerate moral code.[142]

The stereotype of the angry Black woman, or the Black bitch, is also prevalent.[143] The stereotypical angry Black woman is emasculating, tough, domineering, strident, and shrill.[144] She is "the sort of person you look at and wonder how she can possibly stand herself. All she does is complain. Why doesn't that woman shut up?"[145] No privilege can protect a Black woman from the stereotype—even First Lady Michelle Obama must defend herself from the vicious image.[146] When responding to rumors that she regularly sits in on President Obama's meetings, she said, "I guess it's just more interesting to imagine this conflicted situation here. That's been an image people have tried to paint of me since the day Barack announced [his bid for presidency], that I'm some kind of angry [B]lack woman."[147] Many theorists hold that this stereotype is cyclical, in that the anger present within Black women is generated from unrelenting stories of oppression within their community.[148]

Both of these stereotypes stand in sharp contrast to the other slavery-created image of "Mammy."[149] When Black women are being typed as modern day jezebels or angry Black women, they are really being criticized for not acting the part of a mammy.[150] Mammies are maternal, deeply religious, and asexual.[151] They are self-sacrificing, nurturing, and generally overweight and either middle-aged or old.[152] During slavery, the enslaved mammy's purpose was running the household and caring for her master's children.[153] The stereotype served to protect the myth that white men did not find Black women attractive.[154] The mammy always followed white-approved standards of behavior, had only white friends and no

---

141. David Pilgrim, *Jezebel Stereotype*, JIM CROW MUSEUM OF RACIST MEMORABILIA (Nov. 11, 2013, 5:12 PM), http://www.ferris.edu/jimcrow/jezebel.htm.

142. Austin, *supra* note 139.

143. *Id.* at 289. The image is so pervasive that when one types "angry black woman" into the Google search engine, the first suggested phrase is "angry black woman syndrome."

144. *Id.*

145. *Id.*

146. *Michelle Obama Tired of 'Angry Black Woman' Stereotype*, HUFFINGTON POST: BLACKVOICES (Nov. 11, 2013), http://www.huffingtonpost.com/2012/01/11/michelle-obama-tired-of-angry-black-woman-stereotype_n_1198786.html.

147. *Id.*

148. Amy C. Wilkins, *Becoming Black Women: Intimate Stories and Intersectional Identities*, 75 SOC. PSYCHOL. Q. 173, 174 (2012).

149. Austin, *supra* note 139.

150. *Id.*

151. *Id.*

152. *Id.* at 294; *Caricatures of African Americans: Mammy*, AUTHENTIC HISTORY (Nov. 11, 2013, 6:31pm), http://www.authentichistory.com/diversity/african/1-mammy/ [hereinafter *Mammy*].

153. Austin, *supra* note 139.

154. *Mammy*, *supra* note 152.

Black friends, and always "knew her place" in the household.[155] She is the only acceptable form of Black womanhood in the U.S.; Black women are generally supposed to become a mammy by letting go of the sexual vices and anger associated with the jezebel and the angry Black woman.[156] In mainstream culture, the mammy is still pervasive—appearing on syrup bottles as Aunt Jemima and as the maids in the critically acclaimed, bestselling book and major motion picture *The Help*.[157] These stereotypes work together to make it very difficult for a realistic Black woman to be "ordinary" in any sense of the word; her social position will always be marked and categorized by the interactions of these stereotypes.[158]

B. Stereotyping Native Women

The stereotypes of Native women have been similarly influenced by the violent past of interactions with colonizing Europeans. This subsection will explore the drunk Indian, the squaw, and the Indian princess stereotypes that are subconsciously present when police officers make their arrests and county attorney offices decide whether or not to prosecute.

The stereotype of rampant alcoholism stems from America's colonial past. During the colonial period, Native communities were ravaged by alcohol.[159] Capitalizing on Native Americans' inexperience with the substance, colonists traded alcohol in exchange for large profits, and then perpetuated the image of a drunk Indian.[160] The image of a drunk Indian infiltrates the judgment of those looking into Native communities.[161] For example, the Tenth Circuit Court of Appeals heard a case where the prosecutor said in his closing arguments, "I believe the evidence shows that you have got a fellow—and it isn't unusual—you know, it is sad to see, but when you see an Indian that drinks liquor, you see a man that can't handle it."[162] If the stereotype were not such a pervasive image in the community, the prosecutor would not have used that language in a trial. The stereotype of the drunk Indian portrays Native Americans as naturally inferior, and lacking self-respect, self-control, dignity, and morality.[163] The drunk Indian woman is perceived as dirty, and as not taking good care of her family.[164]

---

155. Austin, *supra* note 139; *Mammy*, *supra* note 152.

156. Austin, *supra* note 139, at 294.

157. *Mammy*, *supra* note 152; *see also* KATHRYN STOCKETT, THE HELP (2009); THE HELP (Dreamworks 2011).

158. Wilkins, *supra* note 148, at 175.

159. *The Ignoble Savage: The Drunk Injun*, AUTHENTIC HISTORY (Nov. 12, 7:03 PM), http://www.authentichistory.com/diversity/native/is2-drunk/index.html [hereinafter *Drunk Injun*].

160. *Id*.

161. *See, e.g.*, Soap v. Carter, 632 F.2d 872, 878 (10th Cir. 1980) (Seymor, J., dissenting).

162. *Id.*

163. *Drunk Injun*, *supra* note 159.

164. *Id.*

The squaw stereotype also perpetuates an image of a dirty woman.[165] The image of the squaw is primitive, ugly, and lacks all sense of grace.[166] She is unattractive and asexual, much like the African-American mammy.[167] "The 'squaw' is the dirty, subservient, and abused tribal female who is also haggard, violent, and eager to torture tribal captives."[168] It is unclear exactly from where this stereotype originated.[169] The basic definition of a squaw is a Native-American woman or wife, but it has regularly been used to mean a Native-American woman prostitute or harlot.[170] She is an enslaved, demeaned, voiceless bearer of children in the Native-American community.[171]

The squaw is the opposite of the image of the Indian princess. The Indian princess is perhaps the most popular caricature of Native women, since it was portrayed in the Disney movie, *Pocahontas*, and is taught in school by describing the role of Sacajawea in U.S. colonial history.[172] The Indian princess is the "noble savage"—a caricature of a Native-American woman in a state of nature.[173] The Indian princess is defined in terms of her relationships with white men; she must be wild, exotic, and collaborationist.[174] In order for a Native-American woman to be considered a princess, she must give aid to white men.[175] The archetypal example of the Indian Princess actually helped whites defeat and subdue her own people.[176] While the Indian princess is theoretically considered a positive stereotype, this ubiquitous image is now used to demean the experiences of Native women,[177] and encourages everyone to ignore the plight of Native women in modern-day United States's cultures and institutions.[178] These stereotypes of Native women come from a white colonist view of history, rather than from a history informed by Native women experiences.[179]

---

165. *The Ignoble Savage: The Squaw*, AUTHENTIC HISTORY (Nov. 12, 7:05 PM), http://www.authentichistory.com/diversity/native/is4-squaw/index.html.

166. *Id.*

167. *Id.*

168. DEVON ABBOTT MIHUSUAH, INDIGENOUS AMERICAN WOMEN: DECOLONIZATION, EMPOWERMENT, ACTIVISM 102 (2003).

169. Debra Merskin, *The S-Word: Discourse, Stereotypes, and the American Indian Woman*, 21 HOW. J. COMM. 345, 348 (2010).

170. *Id.*

171. *Id.*

172. POCAHONTAS (Disney 1995); *Sacajawea*, HISTORY CHANNEL (Nov. 12, 2013 7:10 PM), http://www.history.com/topics/native-american-history/sacagawea; *see also* PETER PAN (Disney 1953) (portraying an Indian Princess in the character "Tiger Lily").

173. *The Noble Savage: Indian Princess*, AUTHENTIC HISTORY (Nov. 12, 2013 7:17 PM), http://www.authentichistory.com/diversity/native/ns2-princess/ [hereinafter *Indian Princess*].

174. Denise K. Lajimodiere, *American Indian Females and Stereotypes: Warriors, Leaders, Healers, Feminists; Not Drudges, Princesses, Prostitutes*, 15 MULTICULTURAL PERSPS. 104, 105 (May 2013).

175. *Id.*

176. *Id.*

177. *Indian Princess*, *supra* note 173.

178. *Id.*

179. Lajimodiere, *supra* note 174, at 105–06.

Women of color are subject to stereotypes that are based on their histories of oppression in the United States. The public views Black women through the lens of the jezebel, the angry Black woman, and the mammy. The public also views Native women through the lens of the drunk Indian, the squaw, and the Indian princess. These stereotypes obfuscate the seemingly rational, discretionary minds of the criminal justice system and contribute to the disparate arrest, prosecution, and conviction of women of color.[180] Even when state actors and juries have the best intentions, the lens of the stereotype is overwhelming and contributes to racial discrimination.

III. WHY TRADITIONAL LEGAL METHODS FAIL

When a defense attorney sees a racial issue in a client's case, the traditional method is to make a case for discriminatory prosecution or enforcement of the laws under the Equal Protection Clause of the Fourteenth Amendment. While these claims are typical, they almost always fail.[181] The defendant has the "heavy burden" of proving two elements in order to get relief under selective prosecution.[182] First, the defendant must prove that other offenders who were similarly situated were not prosecuted for the same offense; second, the defendant must prove that the prosecution was based on an impermissible motive, or discriminatory intent.[183]

In *United States v. Estrada-Plata*, the Ninth Circuit Court of Appeals upheld a district court's decision to deny relief under selective prosecution.[184] The defendant, Estrada, was convicted of being a deported immigrant present in the United States after a felony conviction, and made two separate claims under selective prosecution.[185] First, he claimed that he was not offered the same fast-track plea that other defendants were offered after violating the same statute; this resulted in him receiving a sentence of 4.75 years rather than 2 years, per the plea.[186] The fast-track plea that the U.S. Attorney's Office for the Southern District of California offered to all defendants in 1993 charged under the statute stipulates a two-year sentence.[187] The plea requires that:

> [T]he defendant waive indictment, enter a guilty plea at the first appearance before the district court, waive appeal of all sentencing issues, stipulate that the applicable guideline range exceeds the 2-

180. *See, e.g.*, Robert J. Smith & Justin D. Levinson, The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion, 35 SEATTLE U. L. REV. 795, 797 (2012).

181. Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605, 605 (1998).

182. United States v. Estrada-Plata, 57 F.3d 757, 760 (9th Cir. 1995); Minnesota v. Fellegy, 819 N.W.2d 700, 705 (Minn. Ct. App. 2012).

183. *Estrada-Plata*, 757 F.3d at 760.

184. *Id.* at 759.

185. *Id.* at 760.

186. *Id.*

187. *Id.* at 759.

> year statutory maximum, stipulate to the 2-year sentence, and agree not to seek any downward adjustments or departures.[188]

This argument was unsuccessful because prosecutors, in fact, did offer him the plea, but he rejected it; it did not matter to the court that the prosecutors offered the plea later than they had for other defendants.[189] The court held that there was no evidence that the prosecution had an intent or purpose to discriminate against this particular defendant.[190]

Estrada's second claim concerns the same type of issue plaguing racially disparate prosecution of domestic violence claims. Estrada claimed that this particular district used the fast-track pleas to prosecute more Hispanics than any other group, which deprives Hispanic defendants of effective assistance of counsel.[191] However, the Ninth Circuit Court of Appeals held that discriminatory effect is not enough to prove selective prosecution.[192] Effectively, the numbers showing the disparate impact of the law did not rise to an equal protection claim.[193] Instead, Estrada needed to prove that those particular prosecutors acted with a discriminatory purpose.[194] The court found that the prosecutors were simply trying to conserve resources by offering the fast-track pleas; it had nothing to do with race or intent to racially discriminate.[195] The court did not look to whether others similarly situated were not prosecuted because the defendant could not pass the intent prong.[196]

This outcome is typical of selective prosecution claims in the United States. In *Wayte v. United States*, the Supreme Court articulated the policy behind the steep hurdles, holding that the prosecutor has wide discretion as to whom to prosecute.[197] That discretion is only limited by constitutional constraints, which is why a defendant must bear the heavy burden of showing discriminatory effect and definitive proof of a discriminatory effect.[198] According to the Court, the government is entitled to implement crime-control policy, and it is not the role of the courts to intervene, supervise, or analyze the policy.[199] Therefore, the motivation or intent requires more than awareness or knowledge of the disparate consequences of their enforcement.[200] The prosecutor must choose the particular course of action "because of" unconstitutional reasons, not "in spite of" unconstitutional reasons.[201] While a prosecutor may know that there is a possibility

---

188. *Id.*
189. *Id.* at 760.
190. *Id.* at 761.
191. *Id.* at 760.
192. *Id*. at 761.
193. *See id.*
194. *Id*. (citing United States v. Redondo-Lemos, 955 F.2d 1296, 1301 (9th Cir. 1992)).
195. *Id.*
196. *Id.*
197. Wayte v. United States, 470 U.S. 598, 607 (1984).
198. *Id.* at 608–09 (citing United States v. Batchelder, 442 U.S. 114, 125 (1979)).
199. *Id.* at 607.
200. *Id.* at 610.
201. *Id.*

that a conviction will result in a burden on protesting, which is protected activity, it does not meet the defense's burden because the prosecutor did not initiate prosecution "because of" the protected activity.[202] It is no wonder so few defendants are successful with this type of claim, as it is the policy of courts to stay out of the business of the prosecutor absent clear personal prejudice.

Before a defendant can even attempt to make a case for selective prosecution, she must first show that the "government declined to prosecute similarly situated suspects of other races" in order to get discovery.[203] In *United States v. Armstrong*, it was not enough that the defendants showed that every one of the 24 closed cases in 1991 under the statute prohibiting crack cocaine involved a Black defendant.[204] A preliminary showing of a discriminatory effect does not even allow defendants to obtain the information necessary to prove discriminatory intent.[205]

This direction of the law has prompted valid criticism from academics.[206] Richard McAdams wrote, "Equal protection claims thus rise or fall on whether one proves a motive known only to actors who wish to conceal it. Mostly they fall."[207] Alan David Freeman wrote, from the voice of the law speaking to an African American in the United States, "[Y]ou can't assert your claim against society in general, but only against a named discriminator, and you've got to show that you are an individual victim of that discrimination and that you were intentionally discriminated against."[208] Essentially, Freeman argues that Black people can legally be without jobs, have kids at poorly funded schools, and suffer numerous other disadvantages because of their race without there being any violation of an antidiscrimination law.[209] The case law concerning selective prosecution claims makes it virtually impossible for defendants to obtain relief, and it certainly does not provide an incentive for prosecutors to act to rectify racial disparities from convictions in their jurisdictions.

IV. CONFRONTATION THEORY IN COURT

Because traditional methods have proven to preserve existing power structures that produce racial disparities in criminal convictions, defense attorneys must look elsewhere for relief. I suggest that defense attorneys should put confrontation theory, as articulated by Jodi Armour, into practice as a way to bring racial issues to the minds of the jurors.[210]

---

202. *Id.*
203. United States v. Armstrong, 517 U.S. 456, 458 (1996).
204. *Id.* at 459.
205. *See id.*
206. *See, e.g.*, McAdams, *supra* note 181; Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1049 (1978); Yoav Sapir, *Neither Intent nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L. J. 127 (2003).
207. McAdams, *supra* note 181.
208. Freeman, *supra* note 206.
209. *Id.* at 1050.
210. *See* ARMOUR, *supra* note 4.

Juries are a powerful force in the criminal justice system because the jury can acquit even when they believe the defendant is legally guilty.[211] This power comes from the prohibition against double jeopardy and the refusal to question the reasons for the jury's decision.[212] It is an important power in the system—creating a safety valve that allows the conscience of the community to dictate the role of the criminal justice system.[213] Arie M. Rubenstein wrote that jury nullification "can assist the disempowered in resisting majoritarian control. While nullification is a tool that can be used for undesirable purposes, when properly regulated its benefits substantially outweigh its detriments."[214] Most courts do not instruct the jury as to the possibility of jury nullification, and virtually no appellate court finds error when the jury is not instructed.[215]

It is a common oral argument technique to call the jury's attention to the seriousness of the offense and to ask them to look past the emotionally charged nature of the crime to make a rational decision. Similarly, Armour offers a theoretical framework that should be examined and implemented to combat the jurors' racial and gender prejudices.[216] Armour starts from the position that there is a "Black tax," and her remedy, then, aims to counteract the tax.[217] I would argue that her remedy can be applied beyond just the African-American community and could also help other minority groups.

The fundamental premise of confrontation theory is that colorblindness cannot remedy racial discrimination.[218] Armour writes, "Justice often will be better promoted if we consciously confront stereotypes than if we take a colorblind, ostrich-head-in-the-sand approach."[219] It is necessary to get our heads out of the sand and start talking about race and gender prejudice, and discrimination in order to begin remedying the disparate effect of the criminal justice system on African-American and Native women offenders. Currently, American society as a whole does just the opposite, by promoting the colorblind state of mind.[220] This means that people are encouraged to disregard another's race, and the goal is to be able to get to the point of never even noticing the race of another person in the first place.[221] Simply ignoring race or gender, however, does not rectify the discriminatory effects of exercises of power in the United States. In order to

---

211. Robert F. Schopp, *Verdicts of Conscience: Nullification and Necessity as Jury Responses to Crimes of Conscience*, 69 S. CAL. L. REV. 2039, 2044 (1996).

212. *Id.*

213. Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959, 993 (2006).

214. *Id.*

215. *Id.* at 970–71.

216. *See* ARMOUR, *supra* note 4.

217. *Id.* at 115.

218. *Id.* at 153.

219. *Id.*

220. *Id.* at 115.

221. *Id.*

combat disparate prosecution of women of color, then, a remedy must acknowledge racial disparities.[222]

Because the American "cultural belief system" includes and perpetuates pervasive minority stereotypes, virtually everyone in the United States has internalized and repeated some sort of prejudice.[223] Prejudicial personal beliefs, which come from the acceptance of negative cultural stereotypes, however, are declining.[224] Armour groups the public into two groups: highly prejudiced and low prejudice.[225] People with high prejudice know of stereotypes and endorse and accept them as true, while people with low prejudice have thought about the stereotypes, know they are invalid, and deliberately reject them.[226] Armour argues, "Because stereotypes are established in children's memories at an early age and constantly reinforced through the mass media and other socializing agents, stereotype-congruent responses may persist long after a person has sincerely renounced prejudice."[227] People, then, can have nonprejudicial personal beliefs and also act in ways that reinforce stereotypes, meaning the way a person acts may conflict with how a person thinks one should act.[228]

The remedy of confrontation theory seeks to illuminate the possible stereotype-congruent response.[229] This is because stereotype-congruent responses are much like habits; they survive personal beliefs that are not prejudicial.[230] It is useful to think of stereotype-congruent responses in the same way as a habit, such as biting nails or twirling hair.[231] From that foundation, the remedy follows. "To control a bad habit, a person first must recall it consciously, and then intentionally inhibit it."[232] Therefore, it is the job of the attorney to bring the habit to the attention of the juror in order to make sure the juror does not subconsciously use negative stereotypes of Black and Native women in their determination of guilt.[233]

Being conscious of race in a jury trial does not mean that all references to race are appropriate. The references must be "rationality enhancing" in order to actually help the jury determine the verdict.[234] "Rationality subverting" group

---

222. Acknowledging the race of the defendant along with instructing the jury to be mindful of prejudice and not let it into the decision-making process has been shown to reduce racial bias because expressions of racism are more likely in ambiguous or seemingly neutral situations. *See, e.g.*, Jeffrey E. Pfeifer & James R. P. Ogloff, *Ambiguity and Guilt Determinations: A Modern Racism Perspective*, 21 J. OF APPLIED SOC. PSYCHOL. 1713, 1720–21 (1991).

223. *See* ARMOUR, *supra* note 4, at 118–19.

224. *Id.* at 119, 121.

225. *Id.* at 122.

226. *Id.*

227. *Id.*

228. *Id.* at 123.

229. *Id.* at 124.

230. *Id.* at 124, 139.

231. *See id.* at 139.

232. *Id.* at 151.

233. *See id.* at 124, 139.

234. *Id.* at 149.

references are actually more harmful than no discussion of race at all.[235] Rationality-subverting group references are those that exploit and exacerbate existing stereotypes.[236] For example, bringing up stereotypes of jezebel or squaw when the woman of color is the victim of an offense would be completely inappropriate.[237] Not all references are rationality subverting. Rationality-enhancing group references are necessary to call into question the habits of the jury.[238] When the reference helps to challenge the fact finders to monitor their stereotype-congruent responses, it is rationality enhancing.[239] The attorney must always have a good-faith belief that the reference would actually be rationality enhancing to introduce it.[240]

In order for the remedy to be the most effective for defendants who are women of color, the attorney should reference race and gender issues and stereotypes three times during trial.[241] First, defense should bring it up during voir dire, with two goals in mind.[242] In voir dire, the attorney can both weed out highly prejudiced people from prospective jurors, and also signal to prospective jurors to become more conscious of racial and gender issues in the case.[243] This way, jurors are primed to monitor their stereotype-congruent responses to the case.[244] Next, the attorney should bring up the issues in her opening statement and then again during the closing, to continue the thread of thought throughout the whole trial.[245] Voir dire and opening statements are the most important times, because jurors generally know what their verdict will be before closing statements.[246] The effective use of this remedy could help a defendant convince a jury to nullify the verdict, either by a full acquittal or by limiting a guilty verdict to a lesser-included offense.

---

235. *Id.*

236. *Id.*

237. This implies something important. Confrontation theory is not only applicable to the defense in criminal jury trials. The prosecution should also put this theory to practice in cases of women of color as victims of gendered crimes, like sexual assault and domestic violence. Also, if the defense encourages the use of coded stereotypes, the prosecution should be ready to combat them. Because this paper focuses on criminal defendants, the remedy will be specifically geared to defense attorneys.

238. ARMOUR, *supra* note 4, at 150.

239. *Id.*

240. *Id.*

241. *Id.* This is subject to local trial practice and evidentiary rules. Courts are wary in general of lawyers talking about race for too long in statements to the jury. *See, e.g.*, *id.* at 152–53. If it is able to help combat the discriminatory effects of the criminal justice system, courts may see it as an important policy. Defendants in criminal trials also regularly have some more latitude than parties in civil trials, which may make it easier to implement this theoretical framework in criminal trials.

242. *Id.* at 151.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

CONCLUSION

Women of color, specifically Native Americans and African Americans, experience disparate prosecution for domestic violence cases. In this Note, I have presented the problem of disparate arrest and prosecution of women of color and offered a theoretical framework to help explain why the discrimination exists.[247] Further research is needed to accumulate data on women of color offenders because the existing information is scarce. Currently, the federal and state crime reports are only divided by race and gender separately, and most other studies do the same, ignoring intersectional analysis.[248] Access to current, broad data on the race of women offenders would paint a more accurate and revealing picture of the state of the U.S. incarceration system. By knowing the stereotypes and how they can infiltrate a criminal trial, a defense attorney is more capable of using confrontation theory to obtain a favorable verdict.[249] Because the jury is used as the conscience of the community and as a protector of democratic principles, a defense attorney likely has a better chance at relief by bringing the issue of racial discrimination before the jury.[250] Juries can help to rectify issues that a selective prosecution claim would not be able to remedy, therefore, defense attorneys should utilize them to help combat pervasive race and gender stereotypes that disadvantage women of color offenders.

247. *See supra* Parts II & III.

248. *See, e.g.*, *Family Violence Statistics*, *supra* note 45; FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT (2011).

249. *See supra* Part IV.

250. *Id.*