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Gimme Some More: Centering Gender and Inequality in Criminal Justice and Discretion Discourse

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GIMME SOME MORE: CENTERING GENDER AND INEQUALITY IN CRIMINAL JUSTICE AND DISCRETION DISCOURSE

SHAUN OSSEI-OWUSU*

I. Introduction	608
II. Understanding Discretion	612
A. Discretion as Discreetness	612
B. Widening Our Lens	613
III. Sites and Stages of Discretion	614
A. Understanding Institutional Fields and Bureaucratic Patriarchy.....	614
B. Police Practices and Preemptive Investigations	616
C. Arrests	619
D. Charging.....	620
IV. Conclusion.....	622

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"I've always met more discrimination being a woman than being black."
Shirley Chisholm¹

I. INTRODUCTION

Criminologists, critical outsider theorists,² and socio-legal scholars have scratched the surface, but need to do more excavating on the role of *discretion* in the criminal justice system. Much of the literature on the criminal justice system focuses on criminality (putative or actual) and examines how discriminatory practices and policies disproportionately impact Blacks and Latinos. These emphases have undoubtedly been important to our understandings of crime and inequality, but they neglect the role of bureaucratic discretion, which is an important site of inequality in the criminal justice system. When discretion is considered, analysts typically focus on individual or clustered stages (e.g. charging and plea bargaining), but fail to think about discretion more broadly. What happens when we begin to think about criminal justice discretion more expansively and widen our gaze?

This question was the focus of a paper I presented at the Fourteenth Annual LatCrit Conference as well as the theoretical and empirical plea I offered to my audience. I had the privilege of presenting my paper on a panel with my Berkeley colleague, Trevor Gardner, who gave a presentation on policing and immigration,³ while having Paul Butler and Pamela Bridgewater as our respective discussants. In my presentation I argued that discretionary stages in the criminal justice system serve as key sites of race, class, and gender subordination. I also argued for a more *cumulative* approach to discretion as opposed to the predominant socio-legal approach of focusing on stages exclusively.

I received positive feedback on my analytical treatment of gender, despite my own consternation of my gender analysis—a product of the inherent difficulties of doing empirically-informed work on

1. Shirley Chisholm, *Nation's First Black Woman to Serve In Congress, Dies*, JET MAG., Jan. 24, 2005, at 16.

2. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 (1989) (defining outsider jurisprudence as the various strands of literature associated with critical legal studies such as critical race theory, feminist legal studies, LatCrit, and critical race feminism).

3. Trevor Gardner, Presentation at LatCrit XIV Conference: Prudent Profiling: The Legal and Normative Orders at the Intersection of Immigration and Street Policing (Oct. 2009).

interdisciplinarity.⁴ Post-panel discussions with Professor Butler, Professor Bridgewater, and other colleagues served as an impetus for a more robust discussion on discretion and gender subordination, which will be the conceptual focus of this symposium article.

The conference underlined the importance of “reading feminist” and critically considering how the criminal justice process substantively influences how we think about gender. This is particularly important because even when race, class, gender, and other axes of difference are considered in analyses, one or more of these categories may end up at the forefront of the analyses while others are given short shrift. This is often the case with gender, and my article seeks to invert traditional socio-legal approaches to crime by making gender, along with race and class, the main targets of inquiry, with a clear understanding that these classifications interlock and intersect with other systems of discrimination, while emphasizing that no individual category has full explanatory power in understanding inequality in the criminal justice system.⁵

The organization of this article is straightforward. Part II deals with semantics and offers a theoretical framework for thinking about discretion in the criminal justice system. The framework offered here corresponds with the four important points I emphasized at LatCrit. Firstly, *cumulative* approaches to discretion offer a more expansive way to understand inequality in the criminal justice system. Secondly, discretion must be understood as the *capacity to determine dispositional outcomes* and as *discreetness*.

Part III offers insight into gender discrimination by looking at specific sites and stages in the criminal justice system and offers an additional item to this framework. Thirdly, I argue that to investigate discretion, the analyst must look at *institutional fields/structures* and how they influence an actor’s *patterned ways of thinking and behavior*. My main intervention here is to suggest that gender discrimination becomes more pronounced when the conceptual lens expands from a focus on a single stage to multiple phases. There are a plethora of stages and sites in the criminal justice system where discretion is deployed, indeed, too many to capture in

4. See, e.g., Ange-Marie Hancock, *When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality as a Research Paradigm*, 5 PERSP. ON POL. 63, 64-65 (2007) (discussing the challenges to identity politics posed by intersectionality); Leslie McCall, *The Complexity of Intersectionality*, 30 SIGNS: J. WOMEN CULTURE & SOC'Y 1771, 1771-73 (2005) (suggesting that intersectionality has created significant methodological problems for women's studies which are difficult to overcome).

5. This is one of the key premises of intersectionality theory. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244-45 (1991) (articulating intersectionality as a concept and arguing against assumptions that gender and race are essentially separate categories).

one essay. Some of these include police practices and preemptive investigations; actual investigations, arrests, and police reports; interrogation; the decision to prosecute and whether to do so in adult or juvenile court; prosecutorial charging and plea bargaining; conviction, sentencing, probation, and parole; and finally, the decision to implement the death penalty.⁶ While I do not offer an exhaustive list of stages in the criminal justice system, my intention is to sketch a general conceptual framework that subsequent analyses could deploy to obtain more substantive insight on discretion and discrimination in the criminal justice system. Many broader societal problems and bureaucratic shortcomings have been characterized by abuses of discretion⁷ and it is imperative for scholars to focus their theoretical and doctrinal gaze on *cumulative discretion*—especially in a post-intent moment where an ungenerous American judiciary only recognizes purposeful discrimination.⁸

The final part of this article suggests that analyses on discretion must look at *institutional cleavages* and use *interdisciplinary* insight to offer policy and theoretical recommendations. The brunt of incarceration significantly impacts women inside and outside of prisons. When men are imprisoned, women typically take care of the children and when women are imprisoned, other females often assume custody responsibilities.⁹ Two-thirds of the women in prison are mothers who have children under the age of eighteen and were often the heads of single parent households prior to

6. See DEPT. OF JUST., BUREAU OF JUSTICE STATISTICS, CRIMINAL JUSTICE SYSTEM FLOWCHART, <http://bjs.ojp.usdoj.gov/content/largechart.cfm> (last visited March 4, 2010) (presenting a useful diagram that captures many of these stages).

7. See generally ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007) (analyzing various aspects of prosecutorial discretion and abuse of discretion and proposing reforms to ensure prosecutorial accountability); STEVEN MAYNARD-MOODY & MICHAEL MUSHENO, COPS, TEACHERS, COUNSELORS: STORIES FROM THE FRONT LINES OF PUBLIC SERVICE 3-50 (2003) (discussing how “street-level” state agents exercise discretion differently); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 7-25 (2001) (illustrating how the discretion given to child welfare professionals leads to racially discriminatory outcomes and inferior treatment, particularly for African-Americans); CELESTE WATKINS-HAYES, THE NEW WELFARE BUREAUCRATS: ENTANGLEMENTS OF RACE, CLASS, AND POLICY REFORM 33-34 (2009) (examining the interchange between professional identity and discretion to explain the distribution of bureaucratic resources).

8. See *McCleskey v. Kemp*, 481 U.S. 279, 312-13 (1987) (buttressing the effect and intent template and holding that statistical evidence of racial disparities in the application of the death penalty is insufficient on its own); *Washington v. Davis*, 426 U.S. 229, 239-40 (1976) (holding that racial discrimination must exhibit a racially disproportionate impact and a discriminatory motivation on the part of the state actor).

9. See MEDA CHESNEY-LIND, THE FEMALE OFFENDER: GIRLS, WOMEN, AND CRIME 158 (1997) (contrasting the disparate impacts on families of female versus male incarceration); Phyllis Goldfarb, *Counting the Drug War's Female Casualties*, 6 J. GENDER RACE & JUST. 277, 295 (2002) (noting that children of incarcerated women are often placed in foster care if female relatives are unavailable or unable to care for them).

2010]

GIMME SOME MORE

611

their incarceration.¹⁰ Many of these women are convicted of non-violent drug and property offenses and return to communities with weak human and social capital. They have no access to welfare benefits, public housing, and educational loans. The absence of these civic goods ultimately impacts mothers' ability to demonstrate that they are responsible parents, which leaves their children particularly vulnerable to a dysfunctional and biased child welfare system.¹¹ Women who are not incarcerated or convicted of crimes often fall victim to a different kind of inequality caused by non-transparent policing and prosecution as well as abuses of discretion—making the relationship between gender and the criminal justice system integral to our broader understandings of social inequalities.¹² Interdisciplinary analyses and examinations of institutional cleavages can help effectively address many of these social problems.

Before proceeding, I must offer some important caveats. First, my treatment of gender is focused particularly on women as opposed to men. While I do engage issues surrounding masculinity, it is important to not fall into the all-too-common trap of Black/Latino “racial victimhood”—where Black and Latino men are perceived as being most vulnerable to and endangered by crime and the criminal justice system.¹³ It is equally important to heed the insights of feminist criminologists who have illuminated the andocentric nature of mainstream criminology—a field of study that often treats men as the norm and women as the anomalies. When the experiences of females are recognized, criminologists often “add women and stir” but neglect to engage in a substantive analysis of gender.¹⁴

10. MARC MAUER ET AL., GENDER AND JUSTICE: WOMEN, DRUGS AND SENTENCING POLICY 2 (1999).

11. See ROBERTS, *supra* note 7, at 208-10 (describing the negative effects of the stigma of conviction and incarceration on families).

12. See, e.g., JODY MILLER, GETTING PLAYED: AFRICAN AMERICAN GIRLS, URBAN INEQUALITY, AND GENDERED VIOLENCE 41-48 (2008) (describing specific incidents of violence against women and explaining how police discretion often leads to underenforcement of domestic violence laws, resulting in disproportionately severe impacts on poor and minority women and a perception among those women that police will not protect them from abuse).

13. See Devon Carbado, *Black Male Racial Victimhood*, 21 CALLALOO 337, 337-38 (1998) (arguing that Black men occupy a privileged victim status in antiracist discourse and in the Black community).

14. See Jeanne Flavin, *Feminism for the Mainstream Criminologist: An Invitation*, 29 J. CRIM. JUST. 271, 273 (2001) (discussing alternative analytical approaches to the unique experiences of women in the American criminal justice system). See generally Dana M. Britton, *Feminism in Criminology: Engendering the Outlaw*, 571 ANNALS AM. ACAD. POL. & SOC. SCI. 57, 58-59 (2000) (explaining that mainstream criminology is largely masculinized, resulting in resistance to feminist analysis); Hillary Potter, *An Argument for Black Feminist Criminology: Understanding African American Women's Experiences with Intimate Partner Abuse Using an Integrated Approach*, 1 FEMINIST CRIMINOLOGY 106 (2006) (examining domestic partner abuse to illustrate how intersections of race and gender lead to better understandings of feminist criminology).

612 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 18:3

My intention here is to offer a useful model that links discourse around gender and discretion and deviates from traditional approaches to crime and inequality.

It is also worth noting that discretion does not fully explain the bewildering rates of American incarceration, but it is an area of inquiry that sheds light on administrative rulemaking, street-level bureaucracies, and the production of social inequalities. Discretion is inherently necessary for an efficient criminal justice system where one accepts both the reality that individual cases are unique and the pesky fact that discretion is often the source of ambiguous rulemaking. Sometimes the civic and social cost of bringing a lawbreaker into the criminal justice system may exceed the benefit. Moreover, the cascade of crimes and criminals that enter the system make it impossible to investigate and prosecute all cases. Thus, it is important not to designate this administrative device as “good” or “bad.” Abuse of discretion is the imperative problem and this discussion seeks to show how these misuses are a byproduct of the *discreet* nature of this necessary bureaucratic feature.

II. UNDERSTANDING DISCRETION

A. Discretion as Discreetness

Roscoe Pound identifies discretion as “an authority conferred by law to act in certain conditions or situations in accordance with an official’s or an official agency’s own considered judgment and conscience.”¹⁵ Pound is pointing to *discretionary power* and the ability of state actors to determine legal outcomes, which is the popular understanding of discretion often used in law, criminology, and socio-legal scholarship. But we must append to this definition a conceptualization of discretion that points to the *discreet* nature of decision-making in the criminal justice system. This discreetness entails non-transparency and is best exemplified by the “blue wall of silence” among police officers and the opaque nature of prosecutorial discretion by which prosecutors are exempt from the typical restraints, limitations, and reviews on administrative discretion that apply to other governmental actors.¹⁶

This understanding of discreetness is imperative to understanding

15. Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925, 926 (1960).

16. See JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 39 (2007) (explaining that the political nature of the prosecutor’s official position and America’s emphasis on the war on crime has led to prosecutors’ unlimited discretion to choose whether to bring criminal charges and select who will be exposed to criminal penalties).

2010]

GIMME SOME MORE

613

discretion because the power to conceal (intentionally and unintentionally) fundamentally guides and changes legal outcomes. There is a hefty body of scholarship that highlights discrimination in the criminal justice system.¹⁷ There is less discussion on discretion, which is important because the lack of transparency in the criminal justice system (especially for police and prosecutors) creates veiled and often illicit spaces where disparate impact and disadvantage are salient, but dismissed by American jurisprudence's rigid impact and intent template.¹⁸ I call these veiled spaces the *interstices of discretion*—seemingly race- and gender-neutral stages where discretion can have a detrimental impact on women, the poor, and racial minorities. Understanding these discreet sites and stages is important to gaining a deeper understanding of gender discrimination.

B. Widening Our Lens

As noted earlier, discussions on discretion tend to focus exclusively on one or a cluster of stages. These approaches are animated by institutional and intellectual constraints. Police chiefs, prosecutors, judges, and other actors are often overwhelmed by their professional duties and have little time for substantive intercommunication. In contrast, academics overspecialize, which leads experts on racial profiling to be unknowledgeable about prosecutorial charging or plea bargaining.¹⁹ Related to this overspecialization is disciplinary sectarianism, a feature salient in academia despite the vogue of interdisciplinarity; scholars often become invested in their disciplines and methodologies and their explanatory value, which often limits what we can learn about bureaucratic decision-making.

But if we look at discretion more expansively, then we begin to see larger systemic problems as opposed to individual instances of misused discretion. In fact, one of the more vexing challenges of addressing misused discretion is getting people to recognize that problems lie not only in the occasional bad behavior or poor judgment of institutional actors, but in entire institutionalized systems of police and prosecutorial training,

17. E.g., JOANNE BELKNAP, *THE INVISIBLE WOMAN: GENDER, CRIME, AND JUSTICE* (3d ed. 2007); MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995); see BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006) (synthesizing multiple perspectives on the source and perpetuation of discrimination in the criminal justice system based on race, social status, and the nature of the crime, and describing how such discrimination produces a disparate impact on the incarceration and rehabilitation processes for minorities and women).

18. E.g., *McCleskey v. Kemp*, 481 U.S. 279, 312-13 (1987); *Washington v. Davis*, 426 U.S. 229, 239-40 (1976).

19. See SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950-1990* 13 (1993) (articulating that fragmentation exists among intellectuals and institutional actors alike, where isolation in both proximity and field of expertise creates problems in the criminal justice system).

614 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 18:3

management, and culture.²⁰ Adopting a more expansive vision of discretion allows analysts to account more properly for structure and agency and allows us to see that issues of discretion are core problems in the criminal justice system.

III. SITES AND STAGES OF DISCRETION

A. Understanding Institutional Fields and Bureaucratic Patriarchy

My third suggestion is that investigations of discretion must examine *institutional fields/structures* and interrogate how they influence an actor's *patterned ways of thinking and behavior*. Institutional structures and individual action reciprocally influence each other, a claim central to the discipline of sociology.²¹ The insights of Pierre Bourdieu are useful because his concepts of field and habitus can help us understand how gender operates in the criminal justice system. A field is loosely defined as a setting where different positions are grounded in relationships of power (e.g., the cop and the offender in the apprehension stage) that are professionally and disciplinarily defined.²² Habitus consists of acquired dispositions, behaviors, learned habits, attitudes and/or tastes developed by institutional structures and fields.²³ Habitus leads people to recreate the social order consciously and unconsciously through discourses, practices, and dispositions that are often uncritically acknowledged.²⁴ This is particularly important because gender bias can be produced intentionally or unintentionally, as gender is implicated in criminal justice discretion as soon as an individual joins the police academy.

The academy is where students learn practices, rules, and procedures of

20. See REGINA G. LAWRENCE, *THE POLITICS OF FORCE: MEDIA AND THE CONSTRUCTION OF POLICE BRUTALITY* xii (2000) (proposing that it is difficult to generate serious and sustained attention to police brutality because the public does not understand the full impact of police culture's influence on the criminal justice system).

21. E.g., PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966); PIERRE BOURDIEU & RICHARD NICE, *OUTLINE OF A THEORY OF PRACTICE* (1977); MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* (1976); ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION* (1986).

22. See generally BOURDIEU & NICE, *supra* note 21, at 21 (describing the concept of a structured social space with its own rules, schemes of domination, and legitimate opinions); PIERRE BOURDIEU & LOÏC J.D. WACQUANT, *AN INVITATION TO REFLEXIVE SOCIOLOGY* 102 (1992).

23. See BOURDIEU & NICE, *supra* note 21, at 17-21, 76-88 (defining the term as the strategy-generating principle that enables agents to predict and adapt to an environment in constant flux).

24. See generally *id.* Bourdieu's concepts are much more rich and entail a complexity beyond what can be offered here, but most broadly, they offer a useful starting point for considering how structure and bureaucratic discretion relate to each other.

police work. Attention to the training academy offers useful insights into the patriarchal socialization of law enforcement agents and highlights the reality that men have historically had a monopoly on organized violence (e.g., policing, the military, and the mafia).²⁵ Anastasia Prokos and Irene Padavic's ethnographic research shows how the academy simultaneously produces an explicit and hidden curriculum, with the former operating under a seemingly gender-neutral organizational logic and the latter valorizing masculinity while degrading women.²⁶ This hidden curriculum consisted of highly gendered language, resistance to powerful women's authority, the belittling of women's issues (e.g., women's victimization, domestic violence, and rape), and the instructional material that engages these topics. Masculine culture is so hardwired into policing that it is often the main impetus for the early resignation of female police officers.²⁷

This male-dominated culture is even more prominent in police departments, as empirical data has overwhelmingly documented the sexist nature of policing.²⁸ Various forms of gender discrimination—such as occupational segregation (e.g., relegating women to paperwork), innuendoes about policewomen's sexuality (e.g., the use of the terms “dyke” and “whore”), and most notably sexual harassment—occur within police departments, but are rarely exposed out of fear of public relations nightmares.²⁹ In departments where corruption, use of extralegal force, and bureaucratic malfeasance are prevalent, men are especially resistant to

25. See RAEWYN CONNELL, *GENDER AND POWER: SOCIETY, THE PERSON, AND SEXUAL POLITICS* 187 (1987) (characterizing the traditional differences between themes of masculinity and femininity, notably the much lower level of violence between women than between men).

26. See Anastasia Prokos & Irene Padavic, “*There Oughtta Be a Law Against Bitches*”: *Masculinity Lessons in Police Academy Training*, 9 *GEN., WORK & ORG.* 440, 443-44 (2002) (distinguishing the overt insults male officers direct at female officers from the more implicit gender stereotypes reinforced in school in order to analogize these phenomena to the discrimination found in police academy curricula).

27. See Robin N. Haarr, *Factors Affecting the Decision of Police Recruits to “Drop Out” of Police Work*, 8 *POLICE Q.* 431, 446 (2005) (pointing to the significant influence of traditional masculine values in the police force, which lead to antagonism and harassment of female officers, and influence women's decisions to self-initiate resignation from the force).

28. See, e.g., SUSAN EHRLICH MARTIN, *BREAKING AND ENTERING: POLICEWOMEN ON PATROL* (1980); SUSAN EHRLICH MARTIN & NANCY C. JURIK, *DOING JUSTICE, DOING GENDER: WOMEN IN LEGAL AND CRIMINAL JUSTICE OCCUPATIONS* (2006) (evincing various data on the interplay between gender and race and its influence on the perspectives of policewomen and women working in criminal justice occupations in the male-dominated working environment at the police station, on patrol, in corrections, and in court); Mary Thierry Texeira, “*Who Protects and Serves Me?*”: *A Case Study of Sexual Harassment of African American Women in One U.S. Law Enforcement Agency*, 16 *GENDER & SOC'Y* 524 (2002).

29. See Prokos & Padavic, *supra* note 26, at 443 (presenting evidence that resistance from male officers to women's roles in the force manifests itself in multiple layers of physical and verbal abuse, that go beyond preventing female encroachment and that cross the line into intimidating existing officers into quitting).

female integration. Since women are considered “outsiders” and scrupulous, male officers and supervisors suspect women of exposing misconduct and try to temper female integration by reinforcing male bonds and further concealing sexist practices.³⁰ This *discreetness* is very much related to the “code of silence” or the “the informal prohibition within police culture of reporting misconduct by fellow officers.”³¹

Gendered discrimination *within* policing institutions does not precisely get at police discretion in terms of determining legal outcomes for lay citizens, but it is instructive for several reasons. On a rudimentary level it helps us understand how gender is considered (or not considered) in organizational settings within the criminal justice system. It helps illuminate the cultural-institutional landscape that officers operate in, which fundamentally informs how they perform their duties. Gender discrimination *within* police culture also helps us think about discretion as *discreetness* via bureaucratic inertia (e.g., the persistence of sexism in police culture despite modest female integration) and through the lack of transparency in police institutions (e.g., the veiled sexism). The police academy and department are where the social power of men and masculine norms are expressed, and the work environments often reflect those norms.³²

B. Police Practices and Preemptive Investigations

Preemptive police practices and investigations are an important site of analysis because they entail crime prevention. “Racial profiling” is a term that has become common in our national lexicon on crime, but less critical attention has been given to “gender profiling” and the gendered element of preventative policing. The landmark case *Terry v. Ohio* is useful to consider here as the United States Supreme Court held that the Fourth Amendment is not violated when police stop and frisk someone for weapons as long as they have a reasonable suspicion that the suspect is armed and has committed a crime or will commit a crime.³³ *Terry* expands

30. See Jennifer C. Hunt, *The Logic of Sexism Among Police*, 2 WOMEN & CRIM. JUST. 3, 10, 12 (1990) (illustrating the perception that female officers threaten the cultural domain of male police officers’ collective corruption and violence, because women, consistent with their putatively domestic and virtuous impulses, will expose and clean males’ moral transgressions on the job).

31. SANJA KUTNJAK IVKOVIĆ, *FALLEN BLUE KNIGHTS: CONTROLLING POLICE CORRUPTION* 8 (2005).

32. See Kathryn Abrams, *New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1210 (1999) (noting that common male behaviors like roughhousing or having lewd images of women in the workplace are deemed normal practices rather than male-dominated influences).

33. See 392 U.S. 1, 30 (1968) (permitting stop and frisks based solely on an officer’s reasonable suspicion and to protect the safety of the officer or the surrounding public).

2010]

GIMME SOME MORE

617

police discretion and has significant race and class undertones, as poor Black and Latino neighborhoods will be the spaces where police can use subjective perceptions of danger or potential criminal activity as subterfuge to assert authority.³⁴ Women of color are often presumed to be peripheral or central actors in the informal drug economy, and their categorization as drug couriers leaves them especially vulnerable to abuses of *Terry*.³⁵ Socially stigmatized women such as the mentally ill, homeless, immigrants, transgendered women, domestic violence survivors, sex workers, and female drug users are specific targets of police misconduct via preemptive discretionary power.³⁶ These women are less likely to report misconduct because of a general fear or warranted distrust of the police, language barriers, and fear of being deported or arrested for prior criminal conduct. When these women report the crimes they are often unlikely to be believed,³⁷ which reduces our ability to grasp fully the problem of police misconduct and gender discrimination. In this interstice of discretion we see how the discreet nature of police decision-making, coupled with state-sanctioned power, can produce gender inequality that can often go unnoticed.

Over-policing and profiling dominate the discussion on race, class, gender, and crime, but underenforcement of the law is an equally, if not more egregious, phenomenon.³⁸ Specifically, underenforcement is not subject to review;³⁹ formal statistics of underenforcement are not kept;⁴⁰

34. See *id.* at 39 (Douglas, J., dissenting) (arguing that the majority's holding allows police officers to "search" and "seize" individuals at the officers' discretion if they simply do not like the individual's appearance or mannerisms).

35. See Tammy L. Anderson, *Dimensions of Women's Power in the Illicit Drug Economy*, 9 THEORETICAL CRIMINOLOGY 371, 381-89 (2005) (suggesting that women are powerful actors in the drug world and that their work is central to the drug economy). But see Goldfarb, *supra* note 9, at 291-92 (arguing that women maintain subsidiary roles in the drug economy and that they are connected through relationships with drug dealers).

36. See Andrea J. Ritchie & Joey L. Mogul, *In the Shadows of the War on Terror: Persistent Police Brutality and Abuse of People of Color in the United States*, 1 DEPAUL J. SOC. JUST. 175, 220 (2008) (determining that officers tend to prey on these groups of vulnerable women since these women would have less credibility if they were to report the abuse).

37. See *id.* (citing the example of Latina immigrants, documented and undocumented, repeatedly reporting rapes by local law enforcement agents along the U.S.-Mexico border).

38. RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 19 (1997) (arguing that the principal injury suffered by African-Americans in criminal law is not overenforcement, but underenforcement of the law).

39. See Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process; Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 552 (1959) (observing that unless police officers commit a "gross failure of service," neither the community nor state agencies are aware when officers are not properly doing their jobs).

40. See Richard H. McAdams, *Race and Selective Prosecution: Discovering the*

618 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 18:3

underenforcement decreases the amount of crime that is officially recognized;⁴¹ and it increases real crime by giving some offenders solace in knowing that certain crimes won't be investigated rigorously.⁴² Underpolicing is also a feature of preventative policing that reproduces gender subordination. Underpolicing is manifested through unsolved homicides, slow or nonexistent 911 responses, as well as the tolerance of open-air drug markets, violence, property crimes, and public disorder. It often occurs because of lack of political will (malign neglect or the tendency to underserve the politically weak) and poor police-community relations.⁴³ Underpolicing in poor neighborhoods corresponds to the disinvestment and erosion of social welfare institutions in marginalized communities—institutions that are presumed to satisfactorily provide civic goods and services (e.g., welfare, education, housing, and health care), but often fail in their goals.⁴⁴ This failure often leads residents to rely on their own informal institutions (e.g., gangs, friendships, and kin ties) to achieve some semblance of public safety.⁴⁵ The discreet nature of underenforcement and police discretion is further veiled by the Supreme Court, whose holding in the recent *Castle Rock v. Gonzales* case asserts that a police

Pitfalls of Armstrong, 73 CHI.-KENT L. REV. 605, 641 (1998) (drawing inferences from the lack of statistical data that many cases are simply dismissed when they should not be).

41. See Barry Goetz, *Organization as Class Bias in Local Law Enforcement: Arson-for-Profit as a "Nonissue,"* 31 LAW & SOC'Y REV. 557, 565 (1997) (using the example of arson-for-profit as exemplifying a nonissue to law-enforcement).

42. See Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715 (2006) (citing the story of Angela Dawson, whose death was the result of police inaction as she was eventually killed by the drug dealers against whom she had continually filed police reports); see also Jeffrey Gettleman, *Fire Kills Mother and Children at Home*, N.Y. TIMES, Oct. 17, 2002, at A22; Del Quentin Wilber, *Recordings, Court Documents Show Dawson Family's Battles: 911, 311 Requests For Help Made One Month Before Fire Show Fear, Frustration*, BALT. SUN, Feb. 17, 2003, available at http://articles.baltimoresun.com/2003-02-17/news/0302170024_1_dawson-family-recordings-carnell.

43. See Natapoff, *supra* note 42, at 1723-24 (comparing police action in affluent neighborhoods with low crime rates to police action in minority neighborhoods with higher crime rates).

44. See Loïc J.D. Wacquant, *Negative Social Capital: State Breakdown and Social Destitution in America's Urban Core*, 13 J. HOUSING & BUILT ENV'T 25, 29 (1998) (detailing the lack of adequate funds to support much needed aid programs and police protection in poor minority neighborhoods in Chicago); see also Natapoff, *supra* note 42, at 1729 (contrasting the types of services people in affluent neighborhoods of Boston expect from the police with how people in poorer neighborhoods accept much lower standards of service).

45. See, e.g., Mary E. Pattillo, *Sweet Mothers and Gangbangers: Managing Crime in a Black Middle-Class Neighborhood*, 76 SOC. FORCES 747, 755 (1998) (citing the acceptance of interactions between drug dealers and law-abiding citizens in a Chicago neighborhood in order to preserve peace); see also Sudhir Alladi Venkatesh, *The Social Organization of Street Gang Activity in an Urban Ghetto*, 103 AM. J. SOC. 82 (1997) (examining gang-community relationships and how gangs complicate and contribute to the social fabric of poor neighborhoods).

2010]

GIMME SOME MORE

619

department's failure to enforce a court-mandated restraining order is not unconstitutional.⁴⁶

This underenforcement has severe consequences for women. First, socially stigmatized women become more vulnerable to various kinds of crimes (e.g., assault, rape, sexual violence, and robbery), as perpetrators believe that these cases will not be investigated thoroughly. Additionally, social scientists have commented on the decidedly masculine nature of poor and urban neighborhoods.⁴⁷ Similarly, underpolicing creates a more precarious situation for female residents by normalizing violence against women and weakening their expectations of state protection.⁴⁸ This *discretionary inaction* of underenforcement often leads to the underreporting of crime, makes people distrustful of police, and reifies the idea of minorities and poor people as uncooperative with police. This suspicion intensifies officers' "us" versus "them" mentality and alienates police and the public. The ethnographic work of the late Esther Madriz shows us how fear of crime uniquely impacts women of different ages and socioeconomic backgrounds, restricts their freedom (by determining when and where to travel, what route to take, how to dress, and how to act), and reinforces their subordination.⁴⁹ Underpolicing exacerbates the social control of women and makes their victimization less visible.

C. Arrests

As I suggested at LatCrit, the arrest stage is useful to consider because of its multi-faceted nature; it entails the decision to act or not to act (on behalf of female victims) and it is typically a suspect's first interaction with the state. This is particularly important considering the autonomy and low visibility of policing. In regards to (in)action, as noted earlier, crimes against women are often not taken seriously by law enforcement. This claim is buttressed by the empirical reality that police often view battered women of color as less deserving of legal protection and often offer a lower quality of response to their victimization.⁵⁰ This inaction is endured by

46. See 545 U.S. 748, 768 (2005) (determining that police inaction in failing to enforce a restraining order is not a violation of a citizen's due process rights).

47. See, e.g., ELIJAH ANDERSON, CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY 32 (1995); CAROL BROOKS GARDNER, PASSING BY: GENDER AND PUBLIC HARASSMENT 103 (1995); MILLER, *supra* note 12, at 154 (analyzing the code of the street in impoverished neighborhoods as accepting interpersonal violence, aggression, and harassment against women).

48. See Natapoff, *supra* note 42, at 1750 (explaining inner city perceptions of police as unprincipled, biased, and unreliable gangs).

49. See ESTHER MADRIZ, NOTHING BAD HAPPENS TO GOOD GIRLS: FEAR OF CRIME IN WOMEN'S LIVES 2 (1997) (arguing that the fear of crime contributes to the social control of women that undermines women's power, rights, and achievements).

50. See Amanda L. Robinson & Meghan S. Chandek, *Differential Police Response to Black Battered Women*, 12 WOMEN & CRIM. JUST. 29, 33 (2000) (indicating that law

620 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 18:3

women who need it the most—as women in disadvantaged neighborhoods are thirty-three percent more likely to experience intimate violence than those in affluent neighborhoods.⁵¹

For potential female offenders/suspects, the low visibility of policing also poses problems. Police misconduct that does not fall under the egregious category of rape often goes unacknowledged and misconduct ranging from obtrusive behavior (e.g., custodial strip searches and body cavity searches) to criminal behavior (e.g., sexual contact and harassment) is especially difficult to adjudicate under the discriminatory intent template and can be circumvented, respectively, by claims of evidence preservation or plain old denial.⁵² In fact, individual officers often have vague definitions of sexual misbehavior and police departments sometimes do not have formal policies regarding sexual misconduct.⁵³ This poses problems for poor, young women of color, who are particularly vulnerable to this misconduct and often have few avenues of redress or recourse.⁵⁴ In this *interstice of discretion* we see how seemingly gender-neutral practices and bureaucratic decision-making can intentionally and unintentionally produce gender inequality.

D. Charging

Gender is equally implicated in the charging process. Prosecutorial charging plays a significant role in how a case is adjudicated. Since one criminal act can typically be charged under a variety of statutes, the amount of charges filed and their extremity (e.g., misdemeanor or felony) are paramount. One explanation for the increase in female incarceration stems from the availability of conspiracy statutes to prosecutors. Originally

enforcement's views result from the belief that violence is a way of life for women of color).

51. See Michael L. Benson, et al., *Neighborhood Disadvantage, Individual Economic Distress and Violence Against Women in Intimate Relationships*, 19 QUANTITATIVE CRIMINOLOGY 207, 227 (2003) (acknowledging that according to the "Logistic Regression Model of Intimate Violence," women's rate of exposure to domestic violence in disadvantaged neighborhoods remains higher even after controlling for prior violence, economic distress, and male substance abuse).

52. See Peter B. Kraska & Victor E. Kappeler, *To Serve and Pursue: Exploring Police Sexual Violence Against Women*, 12 JUST. Q. 85, 94 (1995) (noting the possible institutional and cultural support for sexually obtrusive and criminal behavior by police).

53. See Timothy M. Maher, *Police Sexual Misconduct: Officers' Perceptions of Its Extent and Causality*, 28 CRIM. JUST. REV. 355, 356-57 (2003) (recognizing that not everyone shares the same idea of what is considered police sexual misconduct, based on the specific rules or lack thereof that each department establishes).

54. See MILLER, *supra* note 12, at 3 (arguing that violence against young women is especially acute in disadvantaged neighborhoods); Rod K. Brunson & Jody Miller, *Gender, Race, and Urban Policing: The Experience of African American Youths*, 20 GENDER & SOC'Y 531, 533 (2006).

2010]

GIMME SOME MORE

621

reserved for the mafia, these statutes made prosecution of coconspirators (from kingpins to foot soldiers) much easier, with the consequence of absorbing female partners of suspects into the system—some of whom were marginally involved in criminal activity *or* “trapped in abusive relationships in which their criminal activity occurred in the context of a relationship where they had little control.”⁵⁵

If we consider discretion in the context of bureaucratic inaction, we see how a significant number of sexual assault cases are foreclosed at the charging phase, as prosecutors have developed several techniques to discredit victim’s claims and circumvent prosecuting such cases. Some of these techniques include attempts to discover discrepancies and incongruence in the victim’s story; reliance on myopic classifications of rape-relevant behavior; attempts to unearth incriminating knowledge of the victim’s personal life, circumstances, and criminal connections; and presumptions of ulterior motives for reporting the assault.⁵⁶ Such prosecutorial misconduct is discreet and operates under the radar since prosecutors have been exempted from the typical regime of restraints, limitations, and reviews on administrative discretion that apply to other governmental actors—making them important players in the criminal justice system.⁵⁷

Considering the law’s differential posture on parenting, women are charged and sentenced more vigorously for child abandonment than men. Males can easily escape criminal responsibility, whereas females are often inscribed in a misguided socio-cultural logic that suggests that a woman’s status as child-bearer determines her social identity.⁵⁸ Just like the decision to arrest, the charging stage consists of the option to act or to not act, with

55. See ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS* 51 (2008) (explaining the case of Kemba Smith, a college student at Hampton University who entered into a romantic relationship with a local drug kingpin, and stating that despite being peripheral to her boyfriend’s drug trade, she was sentenced to twenty-four years in prison and held responsible for 255 kilograms of cocaine; she was eventually pardoned by President Clinton).

56. See Lisa Frohmann, *Discrediting Victims’ Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38 SOC. PROBS. 213, 217 (1991) (illustrating a scenario where a prosecutor discredits a victim’s account of a rape by comparing it to his typification of how the crime usually occurs).

57. See SIMON, *supra* note 16, at 39 (concluding that prosecutors’ exemption from discipline for misconduct has strengthened their unlimited discretion and power in the criminal justice system).

58. See Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 4 (1993) (explaining the socially enforced identity of motherhood and its relationship to patriarchy and racism); Matthew T. Zingraff & Randall J. Thomson, *Differential Sentencing of Women and Men in the U.S.A.*, 12 INT’L J. SOC. L. 401, 410 (observing that women have been stereotyped in our society as irrational, emotional, sneaky, dependent, submissive, and childlike and are thus punished for these characteristics in court).

622 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 18:3

either option entailing wider socio-legal significance. As penal bureaucrats, prosecutors' action or inaction are manifested as the state's policy toward different types of sexual violence as well as different women's contextual circumstances.

IV. CONCLUSION

I have attempted to offer some exploratory thoughts on how discretion in the criminal justice system reproduces gender inequality, and certainly every stone has not been unturned. My main intention is to provoke a more substantive discussion on discretionary power and discretion in the aggregate. Prescriptive policy suggestions are always difficult to make since rules and practices vary on local, state, and regional levels. I want to refrain from offering policy directives and offer a more modest proposal.

Although seemingly trite, a push for transparency that is anchored by intellectual insights and experiences of the formerly incarcerated and wrongfully convicted (and their families) would be powerful. There are interim approaches to tempering a race-, class-, and gender-biased criminal justice system: (1) increased transparency through surveillance of street-level bureaucrats as opposed to just the public;⁵⁹ (2) systematic documentation of traffic stops and prosecutorial charging; and (3) establishing independent review boards that have the power to randomly audit police departments and prosecutors' offices.⁶⁰ I offer this provisional element particularly because more scholarship is needed. In fact, the relationship between more research and transparency is symbiotic, as detailed scholarship would allow us to glean more insight into how discretion works in the criminal justice system.

I come back to the final point I suggested at LatCrit, and that is the idea that analyses on discretion must look at *institutional cleavages* and use *interdisciplinary* insight to offer policy and theoretical recommendations. As I suggested earlier, discretion occurs at various stages in the system and recognition of institutional cleavages is integral to understanding discretion cumulatively. Interdisciplinary research and scholarship are keys to these endeavors. Organizational sociology and qualitative research can reveal to us how street-level bureaucrats use their discretion and how their decision-making satisfies, challenges, or fails to meet organizational imperatives. Anthropological and ethnographic research could add to the rich literature

59. See CHRISTIAN PARENTI, *THE SOFT CAGE: SURVEILLANCE IN AMERICA FROM SLAVERY TO THE WAR ON TERROR* 174 (2003) (recognizing that electronic monitoring has enhanced the state's power and discretion over parolees, probationers, and the public).

60. See DAVIS, *supra* note 7, at 179-94 (suggesting prosecution review boards as one of the many prospects for reform).

2010]

GIMME SOME MORE

623

on policing and offer insight into the discreet nature of police culture.⁶¹

Quantitative researchers and stratification scholars could develop models to measure discretion and its impact on different social groups.⁶² Through survey research, experimental models, and interview data, social and legal psychologists could examine street-level bureaucrats' thoughts, feelings, and behaviors and how they influence discretion and the delivery of public services across various axes of difference. Psychologists could also investigate how unconscious bias manifests itself in discretion.⁶³ Legal scholars could engage in participant observation (which tends to be used more on the police side than on the juridical side) to capture the inner workings of the courtroom and could also analyze how court decisions, statutes, and policies on the national, state, and local levels influence bureaucratic decision-making. This model may also offer legal scholars an alternative approach to tackling the intent doctrine.

Understanding the ambiguities and silences of discretion and their relationship to race, class, and gender provide a productive way to think about the criminal justice system. This discretion is also present and noteworthy in other public service agencies such as schools, welfare offices, health agencies, and other industries where professional discernment is employed and determines the distribution of materials, life chances, and social outcomes. A focus on the interstices of discretion and disproportionate impact can yield insights that produce actionable items for prospective reformers, as opposed to focusing on only disparate impact, which produces insights, but is restrained by conservative American jurisprudence. Until the fundamental issues of discretion are addressed, we will continue to possess truncated and distorted versions of equality and

61. See, e.g., DAVID H. BAYLEY, *POLICE FOR THE FUTURE* 56 (1994); MICHAEL K. BROWN, *WORKING FOR THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM* 3 (1981); PETER MOSKOS, *COP IN THE HOOD: MY YEAR POLICING BALTIMORE'S EASTERN DISTRICT* 3 (2008) (analyzing the routine decision-making and discretion of police as they administer justice on the streets).

62. See WESTERN, *supra* note 17, at 65 (presenting a chart that examines judicial discretion in criminal sentencing). See generally Celesta A. Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 *LAW & SOC'Y REV.* 291 (1987) (describing the relationship between prosecutorial uncertainty in decision making and the decision to "go forward" with charges); Stephen Demuth & Darrell Steffensmeier, *The Impact of Gender and Race-Ethnicity in the Pretrial Release Process*, 51 *SOC. PROBS.* 22 (2004) (describing the effects of gender and race/ethnicity in pretrial release decisions).

63. See Ian F. Haney-Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 *YALE L.J.* 1717, 1823 (2000) (presenting a distinction between institutional and purposeful racism while commenting on American jurisprudence's poor template for understanding discrimination). See generally Gary Blasi, *Advocacy against the Stereotype: Lessons from Cognitive Social Psychology*, 49 *UCLA L. REV.* 1241 (presenting an overview of social science literature on stereotypes and prejudice and its implications for lawyers).

624 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 18:3
justice.