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Black Women's Stories and the Criminal Law: Restating the Power of Narrative

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And I don't even know what the judge said, I couldn't even understand what he was saying. And the lawyer told me, he said "okay," he said "that's it, it's all over." I was right there and I don't even know . . . I didn't even know what he was talking about.¹

I am involved with this crime for being a Negro and having had a past record of forgery and I am still paying for my [p]ast [c]rime.²

INTRODUCTION

The above quotes are reactions from two African-American women who found themselves feeling, respectively, lost and unfairly stigmatized based on identity within American criminal courts. The first statement is attributed to Millie Simpson, a low-income research subject from a provocative and theory-generating study of legal consciousness.³

¹ Patricia Ewick & Susan S. Silbey, *Conformity, Contestation, and Resistance: An Account of Legal Consciousness*, 26 NEW ENG. L. REV. 731, 747 (1992) (quoting authors' research subject, pseudonym, Millie Simpson, about her experience in criminal court).

² Probation Officer's Report at 4, *People v. Spencer*, No. CR 12844 (Cal. Super. Ct. May 23, 1968). These are the words of my maternal grandmother, Leaila Spencer, describing her involvement in a robbery murder, for which her then boyfriend, Ernest Washington, was convicted. The facts of the underlying crimes are substantially described in Washington's appeal of his conviction. See *People v. Washington*, 71 Cal. 2d 1170, 1172-74 (1969). Of note, while records from Washington's and Spencer's cases routinely spell Spencer's first name as "Leiala," she, in her own hand, provides the spelling that is used throughout the Article: "Leaila" See *infra* notes 150-52 and accompanying text (discussing signed letter Spencer submitted to the presiding judge in her case, requesting change of counsel).

³ Broadly described, legal consciousness is "all the ideas about the nature, function and operation of law held by anyone in society at a given time." David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 592 (1984). The phrase has more narrowly come to describe the manner in which individuals use their understanding of legal norms to order their social worlds. See, e.g., David M. Engel, *Globalization and the Decline of Legal Consciousness: Torts, Ghosts, and Karma in Thailand*, 30 L. & SOC. INQUIRY 469, 471 & n.2 (2005) (discussing Ewick and Silbey's constitutive and reciprocal theory of consciousness, and explaining legal consciousness as "the practices and concepts invoked by ordinary people who have suffered injuries and who, in the course of their subsequent narrations, discuss questions of remedy, fate, causation, and justice"); Michael W. McCann & Tracey March, *Law and Everyday Forms of Resistance*, 15 STUD. L. POL. & SOC'Y 207, 211-12 (1996) (defining legal consciousness as description of "how citizens think about and negotiate legal norms; that is, how their experiences with, and practical knowledge of, legal norms and conventions shape social activity"). Millie Simpson's story is also recounted in a book, which theorizes the production of legality as a function of citizens alternately resisting, gaming, and acquiescing to law's power. See generally PATRICIA EWICK & SUSAN SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998) (discussing comprehensive explication and study of legal consciousness as reflected through behaviors and understandings of a group of New Jersey residents of varied racial and socioeconomic backgrounds). For a detailed overview of the development of legal consciousness theory and studies, see Mauricio Garcia Villegas,

While the goal of the study was to enhance the understanding of how everyday citizens participate in the construction of legality, the authors found that Millie Simpson's "race, class and gender, expressed in the specific elements of her biography, shaped her experience within the court . . ." ⁴ Millie Simpson's statement of frustration and bewilderment expresses the sense of foreignness many disenfranchised persons experience when confronted with the hyperformal and counter-normative environment of the criminal legal system. ⁵

My maternal grandmother, Leaila Spencer, uttered the second statement to explain why she had been indicted as a co-conspirator in a 1967 robbery-murder case. The comment reflects the separate, but related, concept that those who are "raced" ⁶ within criminal courts

Symbolic Power Without Symbolic Violence?, 55 FLA. L. REV. 157, 158-66 (2003). Villegas discusses the idea that legal consciousness is built upon European-influenced social conflict theory, but that empirical research in the area is grounded in American social theory, focusing on individual agency and autonomy. *Id.*

⁴ Ewick & Silbey, *supra* note 1, at 747.

⁵ For instance, most of us prefer to tell stories based on the totality of what we believe really happened. The legal system, however, uses filtering concepts such as the idea of "relevant evidence" to limit what facts a court considers. In their discussion of the requirement of legal "relevance" as a precursor to the admission of evidence at trial, two authors have captured the essence of my complaint:

The legal concept of relevance empowers a court to approve or disapprove certain narrative elements of a party's story . . . The truth value of a particular fact within the confines of legal discourse, therefore, is directly related to whether it explicates the substantive claim being adjudicated. The issue being litigated is the measure of truth.

Gerald Torres & Kathryn Milun, *Translating "Yonmondio" by Precedent and Evidence: The Mashpee Indian Case in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 177*, 184 (Kimberlé Crenshaw et al. eds., 1995).

⁶ The word is used as a verb because I agree with the claim that "[r]ace is the vehicle through which we can include or exclude; stratify or equalize; divide or combine. As I have said before, race is a verb. Historically, those with power have raced society to stratify people based on color, nationality, and ethnicity." John A. Powell, *A Minority-Majority Nation: Racing the Population in the Twenty-First Century*, 29 FORDHAM URB. L.J. 1395, 1415 (2002). Additionally, I concur with the following explanation of the interaction of race, racism, and the process of being "raced":

Race and racism should be viewed as overarching processes and structures that result in subordination of certain people based on their supposed membership in a "non-White" group. This approach emphasizes the effect on the persons who are "raced" — the persons who are the objects of racial thinking. It also acknowledges that law and policy can construct and communicate racial thinking even when they are not explicitly based on race.

Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 4 (2002).

understand that minority identity can be punitive within that environment. Additional comments contained in the papers from her case indicated that it was not solely her race, but also negative stereotypes premised upon her gender and class status that substantially defined her experience within the court.⁷

Both Millie Simpson's and my grandmother's cases, and those of far too many others, involve social and legal constructions of black women's identities that lead to their negative experiences in courts and their overrepresentation within prisons.⁸ This tendency to rely upon a legal subject's status rather than conduct, however, is rarely acknowledged by the legal actors who produce the formal doctrinal narratives of our legal interactions. At least a part of the future work of Critical Race Feminism ("CRF") should involve continuing to deconstruct the ways identity affects legal contest. Locating and giving voice to the counter-narratives of disenfranchised women,⁹ and advancing methods to challenge the systems of power that are partially responsible for instantiating and misrepresenting black female lives within the criminal law¹⁰ and society will remain critical to this undertaking.

This Article seeks to illustrate how narrative methodology, which has been central to Critical Race Theory ("CRT")¹¹ and CRF, remains

⁷ See *infra* Parts II.B, III.A.

⁸ See, e.g., CATHERINE FISHER COLLINS, *THE IMPRISONMENT OF AFRICAN AMERICAN WOMEN* (1997); CLARICE FEINMAN, *WOMEN IN THE CRIMINAL JUSTICE SYSTEM* 50 (1994); WILLA MAE HEMMONS, *BLACK WOMEN IN THE NEW WORLD ORDER: SOCIAL JUSTICE AND THE AFRICAN AMERICAN FEMALE* 223 (1996); Deborah Binkley-Jackson, Vivian L. Carter & Garry L. Rolison, *African American Women in Prison*, in *WOMEN PRISONERS: A FORGOTTEN POPULATION* 65 (Beverly R. Fletcher et al. eds, 1993).

⁹ Richard Delgado and Jean Stefancic describe counter-stories as those stories that oppose the destructive force of societal constructions by "[a]ttacking embedded preconceptions that marginalize others or conceal their humanity . . ." RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 42-43 (2001). The authors further suggest that critical writers make use of counter-stories "to challenge, displace, or mock . . . pernicious narratives and beliefs." *Id.*; see also Sumi Cho & Robert Westley, *Critical Race Coalitions: Key Movements that Performed the Theory*, 33 U.C. DAVIS L. REV. 1377, 1408 (2000) ("CRT participates in the production of knowledge through the creation of a counter-discourse.") (footnote omitted); George A. Martinez, *Examining the Limited Legal Imagination in the Traditional Legal Canon: Philosophical Considerations and the Use of Narrative in Law*, 30 RUTGERS L.J. 683, 684-90 (1999).

¹⁰ Carefully accounting for these experiences has certainly been the province of previous works by CRF scholars. See generally PAULA C. JOHNSON, *INNER LIVES: VOICES OF AFRICAN AMERICAN WOMEN IN PRISON* (2003) [hereinafter JOHNSON, *INNER LIVES*]; Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777 (2000); Paula C. Johnson, *Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER SOC. POL'Y & L. 1 (1995).

¹¹ According to one of its leading scholars, CRT is a movement rooted in "Critical Legal Studies . . . feminism, and Continental social and political philosophy," the goal of

essential to the project of charting the space between law as it is imagined and law as it is experienced. An analysis of the legal encounters of black women like Millie Simpson and my grandmother demonstrates how doctrinal narratives fail to acknowledge the way social constructions of minority identities shape the formal scripts of legal stories. Importantly, then, I seek to illuminate how formal legal narratives often fail to reflect the experiences of marginalized subjects within the criminal legal process.¹²

Like other works of CRT/CRF, this Article uses my grandmother's personal narrative to critique the companion doctrinal narrative of her legal experience.¹³ Her story reveals how institutional exercises of power

which is to expose the limits of formal legal equality in remedying entrenched racism within American society. RICHARD DELGADO, *Introduction to CRITICAL RACE THEORY: THE CUTTING EDGE*, at xiv-xv (Richard Delgado & Jean Stefancic eds., 1995); see also DELGADO & STEFANCIC, *supra* note 9, at 2 (describing CRT movement as "collection of activists and scholars interested in studying and transforming the relationship among race, racism and power").

¹² See DELGADO & STEFANCIC, *supra* note 9, at 39-42 (analyzing how storytelling opens a window to ignored and alternative lived realities of persons of color). It is not my claim that all black women experience the type of harmful identity constructions that will be discussed in this Article. Given the statistics that will be presented below, however, it should not be objectionable to aver that for some women of color, gender and race identity affect their experiences with the criminal justice system. See *infra* notes 53-60. My concern is to pursue my claims while limiting my reliance upon essentialism, a vantage point which Angela Harris describes as the belief in a "monolithic 'women's experience' that can be described independent of other facets of experience like race, class, and sexual orientation. . . ." Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990); see also ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN* 159 (1988); Sumi K. Cho, *Essential Politics*, 2 HARV. LATINO L. REV. 433, 433 n.1 (1997) (describing essentialism as view that all members of group share common essence); Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 356-61 (David Kairys ed., 3d ed. 1998) (discussing multidimensionality of black women's experiences and how courts have found it difficult to deal with claims existing at intersection of race and gender).

¹³ Using personal narratives to expose discrimination and illuminate how the law often fails to hear the voices of outsiders has been central to the project of CRT and CRF scholars. See DELGADO & STEFANCIC, *supra* note 9, at 38 (noting CRT scholars have used narrative to "investigat[e] the factual background and personalities, frequently ignored in the casebooks" and also to "study the way trial lawyers consciously or unconsciously construct narratives"); Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2378-81 (2003). For examples of the same, see generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992) (describing fictional stories designed to reveal law's dependence upon permanence of racism); ROBIN WEST, *NARRATIVE AUTHORITY AND LAW* 7 (1993) (commenting on role of storytelling to law, offering that "hearing and telling stories" and "the development of a capacity to empathize with the experience of others" are parts of potentially viable methodology to critique law); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (using personal stories to illuminate ways in which race affects legal and social standing); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1244 (1993); Jerome M. Culp,

substantially defined her relationship with the law and necessitated a series of responsive moves designed to resist, acquiesce to, or merely survive the contests.¹⁴ The significance of my grandmother's story, however, does not end with her. Thus, this Article attempts to assert the power of personal stories of subordinated individuals to reveal types of experiences, shared by other similarly situated individuals, which expose the stark reality of marginalization and debunk the promises of formal equality.¹⁵

In addition to demonstrating the continued relevance of analyzing how identity shapes one's experience within criminal courts, the two quotes that begin this Article embody an important second point. The stories of Millie Simpson and my grandmother alternatively represent examples from separate worlds of theoretical inquiry that rarely converge, but should. Millie Simpson was a subject in a sociological study of legal consciousness. This compelling area of sociolegal research uses empirical methods to chronicle, among other things, how the law

Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991); Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2278-91 (1992).

¹⁴ A portion of this Article uses my grandmother's story to demonstrate how courts can use unacknowledged understandings of identity to structure their doctrinal narratives. See *infra* Part III.A; cf. Dean Masaru Hashimoto, *The Legacy of Korematsu v. United States: A Dangerous Narrative Retold*, 4 UCLA ASIAN PAC. AM. L.J. 72, 97-113 (1996) (analyzing Supreme Court's failure to consider Mr. Korematsu's story, despite richness of personal facts in the record). This tool of using personal versions of stories to rearticulate and reinterpret doctrinal stories has also been wonderfully illustrated in the context of slave narratives. See PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997) (arguing that in important ways, neglected stories of enslaved families shaped and supported doctrinal stories of family rights jurisprudence); see also JON-CHRISTIAN SUGGS, *WHISPERED CONSOLATIONS: LAW AND NARRATIVE IN AFRICAN AMERICAN LIFE* (2000) (using analysis of literary texts to comment on relationship between African-American narrative and American Law). In a separate project, I use parts of my grandmother's story to challenge the doctrinal representations of her identity in the *Washington* case and to more generally explore how social position and cultural norms affect attitudes about law. Mario L. Barnes, *The Stories We Did Not Tell: Identity, Family Silence and the Legal Recreation of Inequality* (2004) (unpublished LL.M. thesis, University of Wisconsin) (on file with author).

¹⁵ See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324-25 (1987) (noting that victims of discrimination have unique perspective and voice — born of the "falsity of the liberal promise" — which legal scholars should include in methodological inquiries of law); Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2137 (1989) (discussing examples of "an analytic paradigm in which 'white = good and black = bad,'" and opining such a schematic "is powerfully hypostatized in our present laws and in Supreme Court holdings: this absurd type of twisted thinking, this racism-in-drag is propounded not just as a theory of 'equality' but as a standard of 'neutrality.'"); *supra* notes 12-13.

operates as an ordering structure in the everyday lives of individuals.¹⁶ Within this research, the “story” of the subject is the basic unit of critical inquiry, providing the raw data about attitudes and experiences that researchers use to catalogue how individuals understand, manipulate, and, at times, resist law’s power. While the sociolegal studies discussed may also comment on how identity can disadvantage subjects,¹⁷ these projects principally focus upon how study subjects, including persons marginalized by race, sex, and class, experience a dynamic, shifting, and mutually constitutive relationship with the law.¹⁸

Sociolegal studies employ a variety of qualitative and quantitative techniques for cataloging and exploring the law in everyday life, but the

¹⁶ See Ewick & Silbey, *supra* note 1. See generally KRISTEN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988) (describing legal consciousness of victims of workplace discrimination); DAVID M. ENGEL & FRANK W. MUNGER, *RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES* (2003); EWICK & SILBEY, *COMMON PLACE*, *supra* note 3; JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY* 146 (2001) (discussing legal attitudes of welfare poor); SALLY E. MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING CLASS AMERICANS* (1990); David M. Engel, *Law in the Domains of Everyday Life: The Construction of Community and Difference*, in *LAW AND IN EVERYDAY LIFE* 123-70 (Austin Sarat & Thomas R. Kearns eds., 1993) (addressing multidimensional nature of everyday life by describing how law operates within different domains or social spheres in which community norms govern behavior); David M. Engel & Frank W. Munger, *Rights, Remembrance, and the Reconciliation of Difference*, 30 *LAW & SOC’Y REV.* 7 (1996); Laura B. Nielsen, *Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens About Law and Street Harassment*, 34 *LAW & SOC’Y REV.* 1055 (2000); Austin Sarat, “. . . The Law Is All over”: *Power, Resistance, and the Legal Consciousness of the Welfare Poor*, 2 *YALE J.L. & HUMAN.* 343, 350-51 (1990); Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *BUFF. L. REV.* 1 (1990) (discussing revelatory snapshot of imposing and unwelcome influence law exerts in life of woman on welfare, even where purpose is laudatory).

¹⁷ See Ewick & Silbey, *supra* note 1, at 734-35 (“In particular, we are attempting to map the intersections of race and class with conceptions of law and legal institutions.”).

¹⁸ As Ewick and Silbey describe it, legal consciousness is “forged in and around situated events and interactions . . . [where] a person may express, through words or actions, a multifaceted and possibly contradictory consciousness.” EWICK & SILBEY, *supra* note 3, at 50. For example, they indicate that within her various legal interactions, Millie Simpson expressed all three forms of the consciousness they identified. *Id.*; see also Patricia Ewick & Susan Silbey, *Narrating Social Structure: Stories of Resistance to Legal Authority*, 108 *AM. J. SOC.* 1328, 1331 (2003) (describing power of stories of resistance as critical to understanding operation of social structures). Recent studies of legal consciousness, however, have attempted to more fully explore the impact of subject identity within their studies. See Nielsen, *supra* note 16, at 1087 (“[P]eople make connections from their past experiences . . . which arise in part from the social positions they occupy . . . and that these experiences shape their understanding of law.”); see also Kay Levine & Virginia Mellema, *Strategizing the Street: How Law Matters in the Lives of Women in the Street-Level Drug Economy*, 26 *L. & SOC. INQUIRY* 169, 178-79 (2001) (critiquing Ewick and Silbey’s articulation of legal consciousness by applying their model to studies of women in street-level drug economy).

use of first person narratives is often an integral part of these projects.¹⁹ The centrality of these narratives in sociolegal studies methodology provides CRT/CRF scholars with an opportunity to learn from the work of other disciplines and a potential basis to reply to critiques that have been skeptical of the ways outsider scholars use narrative.²⁰ I suggest that beyond exploring methodological synergies, CRT /CRF scholars should look more generally to interdisciplinary approaches and scholarship to support their methods and advance antisubordination theories.

On the one hand, focusing on how interdisciplinary research projects use qualitative methods may provide CRT/CRF scholars with more perspectives on how narrative may be used as a tool to generate theories that contextualize the relationship between the citizen, law, and society. Additionally, outside of our common employment of narrative, proponents of CRT/CRF might find that these disciplines and studies also produce other helpful strategies and theories for challenging the law's power to subordinate.

As a precursor to using the method for in this Article, Part I, presents a brief overview of the supportive and the critical critiques of the use of voice scholarship and narrative methodology in law. In Part II, I quantitatively foreground the continuing costs of minority identity within the American criminal legal system. Parts II.A. and II.B. present the stories of Millie Simpson and my grandmother as qualitative snapshots of two black women's experiences, respectively.²¹ In Part III, I use their personal stories to demonstrate the varying types of social

¹⁹ The variety of narratives and their myriad contexts proves this point. See, e.g., ENGEL & MUNGER, *supra* note 16 (discussing involvement in long-term project to explore how disabled construct their identities vis-à-vis law); Idit Kostiner, *Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change*, 37 LAW & SOC'Y REV. 323, 357 (2003) (interviewing social justice activists to analyze various ways they understand relationship of law to activism); Nielsen, *supra* note 16 (interviewing ordinary citizens on street about their understandings and beliefs regarding regulating street harassment); Sarat, *supra* note 16 (analyzing narratives of welfare poor, in and around welfare offices).

²⁰ For a recent example of such a critique, see DAN SUBOTNIK, TOXIC DIVERSITY: RACE, GENDER AND LAW TALK IN AMERICA 16-28 (2005) (challenging critiques and narratives of various race and gender scholars as "corrupt," one-sided, non-truth-seeking, premised upon minorities as perpetual victims, and at times, lacking empirical credibility); John O. McGinnis, *At Law School, Unstrict Scrutiny*, WSJ.COM OPINION J., July 30, 2005, <http://www.opinionjournal.com/forms/printThis.html?id=110007027> (reviewing Subotnik, and criticizing him for not entirely rejecting use of narrative in scholarly writing, as narratives are "difficult to verify, hard to place in context and generally impossible to evaluate."); see also *infra* notes 40-47 and accompanying text.

²¹ I later argue they have been devalued as persons and historically overrepresented as defendants. See *infra* Part III.

construction of black female identity taking place within the proceedings.²² With regard to Millie Simpson's narrative, I consider how hierarchies of dominance, essentialism, and the use of stereotype can converge to render black women invisible in some contexts.²³ Through my grandmother's story, I discuss how these same tactics can also produce hypervisibility — a vantage point which acknowledges the presence of the legal subject, but reduces her to the stereotypical representations of her identity.²⁴ Analysis of these constructions exposes the continuing significance of the operation of identity categories within criminal courts.

Finally, in Part IV, I return to the consideration of narrative as a methodological choice and suggest a specific convergence between sociolegal and critical race theories in addressing black women's status within the criminal legal system. CRT/CRF proponents use narrative to reflect more individualized, less essentialist understandings of social events. This approach shares common ground with sociolegal theory, where researchers use narrative to connect the particular to the general in a way that reveals the operation of power and subordination in social life.²⁵ Ultimately, I conclude by suggesting that an explicit recognition of

²² By social construction, I mean that categories such as race and gender are of little biological or physiological import, but instead, social relations dictate their power and meaning. See Robert Chang, *Critiquing "Race" and Its Uses: Critical Race Theory's Uncompleted Argument*, in CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY 87-91 (Francisco Valdes et al. eds., 2002) [hereinafter CROSSROADS]; D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 83 GEO. L.J. 437, 439-42 (1993) (arguing "race, for all its rhetorical power, is an incoherent fiction," which courts give meaning to for the purpose of constructing minorities as "other"); Ian Haney-López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27 (1994) (noting that within American society, race, a category of no biological consequence, permeates every facet of our lives and "is constructed along cultural, political and economic lines"). See generally Tanya K. Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER RACE & JUST. 183 (2001) (analyzing societal constructions of race and gender); Jennifer L. Nye, *The Gender Box*, 13 BERKELEY WOMEN'S L. J. 226 (1998) (discussing social construction of gender, sex, and sexual orientation).

²³ See *infra* Part III.B.

²⁴ See Theresa Raffaele Jefferson, *Toward a Black Lesbian Jurisprudence*, 18 B.C. THIRD WORLD L. J. 263 *passim* (1998). The hypervisibility attendant in my grandmother's case is discussed *infra* at Part III.A.

²⁵ See *infra* notes 172-74, 187-88 and accompanying text. See generally Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 LAW AND SOC'Y REV. 197, 216 (1995) (discussing *McCleskey v. Kemp*, 481 U.S. 279 (1987), and describing the U.S. Supreme Court's disparate intent standard as a requirement for a "narrative of particularity" — a narrative that reinscribes powerlessness by ignoring that an individual case may belong to a larger category of cases or may be connected to larger patterns of institutional behavior).

how stories are represented and utilized within both disciplines presents the best opportunity for fully exploring the conditions of black women and moving their stories more centrally into the public consciousness.

I. REVISITING THE POWER OF NARRATIVE

In this Article, I use personal stories as a method of challenging the harmful identity constructions contained within the formal legal narratives of two criminal cases. I also use these stories to reveal how the subjects experienced their legal contests.²⁶ Millie Simpson and my grandmother rejected the legal narratives of their cases as reflecting a singular, objective truth.²⁷ In each case, the social position of the speaker²⁸ or their membership in a historically disfavored social group

²⁶ For clarity, when I use the terms "story" and "narrative," I draw on definitions previously developed by others. See Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 *BUFF. L. REV.* 141, 147 (1997) (defining story as "an account of an event or set of events that unfolds over time and whose beginning, middle, and end are intended to resolve . . . the problem set in motion at the start" and narrative as a broader construct involving "recounting (production)" and "receiving (reception)" of stories); Binny Miller, *Telling Stories About Cases and Clients*, 14 *GEO. J. LEGAL ETHICS* 1, 1-2 (2000) (defining story as "the raw material of personal experience" and narrative, whether legal or personal, as merely larger construction amassed from stories).

²⁷ Securing outcomes premised on such a truth is foundational to our system of justice. See, e.g., Susan Haack, *Epistemology Legalized: Or, Truth, Justice and the American Way*, 49 *AM. J. JURIS.* 43, 43 (2004) ("[J]ustice requires not only just laws, and just administration of those laws, but also factual truth — objective factual truth; and . . . in consequence the very possibility of a just legal system requires that there be objective indications of truth"); cf. Baron & Epstein, *supra* note 26, at 173 (advancing perspective that legal arguments are constructed within context of many factors and while truth and objectivity are real, that "truth is always in some way filtered"); Paul Schiff Berman, *Telling a Less Suspicious Story: Notes Toward a Non-Skeptical Approach to Legal/Cultural Analysis*, 13 *YALE J.L. & HUMAN.* 95 (2001) (opining that, within reason, no narrative has stronger claim to truth than any other). Some think the personal story may, at times, be more truthful. See Kathryn Abrams, *Hearing the Call of Stories*, 79 *CAL. L. REV.* 971, 1001 (1991) (noting personal stories are better in that "they resonate with something I know about myself or those around me").

²⁸ See Nancy Cook, *Speaking In and About Stories*, 63 *U. CIN. L. REV.* 95, 99 (1994) (discussing that dominant discourse, after all, can itself be viewed as narrative, albeit narrative in which much of the "story" remains clouded and from which much is omitted) (footnote omitted); Kim L. Scheppele, *Foreword: Telling Stories*, 87 *MICH. L. REV.* 2073, 2079-80 (1989) (noting within legal discourse, insiders tell stories that are "officially approved," while outsiders' stories are only "officially distrusted"). For a description of the relationship between subordination and truth, see Robert L. Hayman, Jr., *Race and Reason: The Assault on Critical Race Theory and the Truth About Inequality*, 16 *NAT'L BLACK L.J.* 1, 24 (1998). He writes:

[T]ruth must be inclusive. It must embrace the lived experience of race. It must see, hear, and feel "race" in order to comprehend it; it must know the story of the past and reckon fully with the stories of the present if we are to realize the truth of a more equal future. Truth matters, and the truth of law is inequality.

mattered as much to the officially sanctioned story as did what actually transpired.²⁹ Moreover, this belief in the contingent nature of the precision of law stories is reflected in the work of a number of scholars³⁰ and has been of special concern to those working in the area of CRT.³¹ It is for these reasons, among others, that using narrative methodology has been a helpful tool for addressing the mostly unacknowledged harms of “objective” legal discourse and “neutral” representations of identity within criminal cases.³² As Angela Harris and Leslie Espinoza succinctly opined:

Critical theorists tell stories, both “real” and “fictional.” Arguably, the most significant impact of critical theory has been the reformation of legal analytical practices through the use of stories. Outsider tales provide an opportunity to breach the limits of language in describing oppression. They lead to the creation of new language. That which has not yet been named can be understood.³³

The production of narrative involves subjective perspectives that are tied to identity. This fact helps us to understand in a world of competing facts and inferences, whose story is more likely to become officially adopted.³⁴ In the introduction to the first edition of *Critical Race*

Id.

²⁹ See, e.g., Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1305 (1995) (discussing how distinct narratives of racial identity compete to be recognized in trials, where “neither reason nor truth confers the privilege of narrative dominance. Only power — circulating through the thickness of laws, institutional practices, and legal relations — bestows privilege”); Richard Delgado, *When a Story Is a Story Does a Voice Really Matter?*, 76 VA. L. REV. 95 (1990) (positing theory that marginalized groups tell stories that are not type usually heard by dominant society); Reginald L. Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 HOW. L.J. 1, 9 (1996) (“[l]aw’s meaning is a purposeful story, and its methodology is a narrative that silently underwrites already existing dominant norms and values”) (citation omitted).

³⁰ Abrams, *supra* note 27; Jane S. Baron, *The Many Promises of Storytelling*, 23 RUTGERS L.J. 79 *passim* (1991); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 *passim* (1994); Martinez, *supra* note 9, at 684-90; Scheppele, *supra* note 28.

³¹ See *supra* notes 112-13.

³² Paying attention to narrative production allows us to deconstruct doctrinal stories to “expose the narrative techniques used to construct seemingly unmediated objective accounts of an event.” Reginald Oh, *Re-Mapping Equal Protection Jurisprudence: A Legal Geography of Race and Affirmative Action*, 53 AM. U. L. REV. 1305, 1314 (2004). “One of the gifts that CRT has imparted to those who study its methodology is the importance of narrative to understanding the nature of contemporary racial injustice and subordination.” Sheila R. Foster, *Critical Race Lawyering*, 73 FORDHAM L. REV. 2027, 2037 (2005).

³³ Leslie Espinoza & Angela P. Harris, *Embracing the Tar-Baby — LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585, 1630 (1997); see also Margaret Montoya, *Celebrating Racialized Legal Narratives*, in CROSSROADS, *supra* note 22, at 243-46.

³⁴ As another professor has surmised, “the terms of narrative are prizes in a pitched

Feminism, Adrien Wing described critical scholars' turn toward the narrative method as follows: "CRT's critique of society thus often takes the form of storytelling and narrative analysis — to construct alternative social realities and protest against acquiescence to unfair arrangements designed to benefit others."³⁵ Part of the project of critical race and feminist legal theorists and other progressive scholars has been to expose legal scholarship and court-created doctrinal writings as a type of narrative or storytelling,³⁶ where one version of the facts is elevated as the "objective" truth.³⁷ In this view, "[t]he philosophical importance of the narrative movement is not to encourage the telling of clever literary stories and the critical parsing of them, but to emphasize how scholarly discourse and legal discourse are both socially constructed narratives that deny their rhetoricity with false claims to objectivity and necessity."³⁸ It is also squarely within the tradition of feminist and

conflict among groups attempting to describe their social reality, constitute their social identity, and vindicate their social existence." JODY ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COST OF BEING BLACK IN AMERICA* 81 (1997). This is not an opinion which only finds traction among those committed to CRT principles. Legal philosophers have also surmised that we filter evidence through our own life experiences to determine what type of factual claim it supports. See Haack, *supra* note 27, at 46 ("Similarly, how well a factual claim is warranted by evidence depends on how well it is supported by experiential evidence and background beliefs.").

³⁵ Introduction to *CRITICAL RACE FEMINISM* 3 (Adrien K. Wing ed., 1997).

³⁶ See, e.g., Robert L. Hayman, Jr. & Nancy Levit, *The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality*, 84 CAL. L. REV. 377, 421 (1996) (reviewing RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1995)) ("Judicial opinions are one form of storytelling in that they recount events, selectively offer facts in a narrative framework, and sometimes draw moral conclusions about the human actors in stories." (quoting David R. Papke, *Discharge and Denouement: Appreciating the Storytelling of Appellate Opinions*, 40 J. LEGAL EDUC. 145, 146-47 (1990))); Oh, *supra* note 32, at 1311 ("When courts construct legal doctrine and write judicial opinions, they do so by organizing and interpreting events according to a narrative in which the events and characters are interwoven with each other . . ."); see also Robert A. Ferguson, *Untold Stories in the Law*, in *LAW'S STORIES* 84-85 (Peter Brooks & Paul Gewirtz eds., 1996) (stating "trials always function through a framework of storytelling").

³⁷ One scholar offers that clashing ideologies cannot produce "the truth." Susan S. Silbey, *Ideology, Power, and Justice*, in *JUSTICE AND POWER IN SOCIOLEGAL STUDIES* 272, 292 (Bryant Garth & Austin Sarat eds., 1998) (finding that "law. . . masks the possibilities of alternative understandings and accounts of social relations"); see also Jane S. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 262-63 (1994); Baron & Epstein, *supra* note 26, at 169-70 (discussing "truth" being seen as "(just) a story"); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993) ("[M]ajoritarians tell stories too. But the ones they tell — about merit, causation, blame, responsibility, and racial justice — do not seem to them like stories at all, but the truth.").

³⁸ Frances J. Mootz, *Between Truth and Provocation: Reclaiming Reason in American Legal Scholarship*, 10 YALE J.L. & HUMAN. 605, 633 (1998) (footnote omitted); see also Berman, *supra* note 27, at 129 (noting "there is an infinite number of possible narratives for describing reality and that each narrative is inevitably a product of many cultural forces."); Foster,

critical legal scholars to use narrative to expose discrimination and illuminate how the law often fails to account for the voices of outsiders.³⁹

In response, however, to CRT and feminist legal scholars' attempts to use personal narratives as a method to destabilize hardened and assumed norms, a separate group of legal scholars has emerged to question both the CRT/CRF project and the choice of narrative as a valid methodology for challenging the law's presumed neutrality. Some scholars have questioned the operation of the method⁴⁰ and who can engage the discourse surrounding it.⁴¹ Others have queried standards

supra note 32, at 2037 (discussing narrative methodology as destabilizing influence upon power, one that is "not dependent upon limited legal and doctrinal frameworks, that displaces the dominant narratives of racism as discrete, isolated, and/or intentional incidents and outcomes"); Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 681 (1994) (noting we are taught to ignore personal identity in stories of lawyers and judges in favor of presumed true measures of academic and judicial excellence: "[o]bjectivity, neutrality, and acontextual comprehensiveness") (citation omitted).

³⁹ See Angela P. Harris, *The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 762 (1994) (indicating that one project of critical race scholars has been "the study of how racialized subjects can be subjected to, yet not represented in, the law. In coming to terms with the long exclusion of people of color from full legal 'belonging,' race-crits seek not just to expand the subject 'we the people,' but to turn a critical eye on the legal subject itself."); *supra* note 13.

⁴⁰ See e.g., John B. Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer to Do When His Two Favorite Theories Collide?*, 6 CLINICAL L. REV. 85, 91-95 (1999) (embracing, generally, narrative method to reveal biases that undermine claimed neutral and objective values in courts, but also claiming there is "darkside" of narrative — its requirement that the powerless tell belittling and demeaning stories about themselves, however untrue, in order to prevail within legal systems that only allow success when they present themselves as victims); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 259 (1992) (arguing, in part, that "narrative jurisprudence persuades through its 'literary-ness,' that is, through its style" and that "when stylistic missteps occur, narrative jurisprudence falls short of its promise") (footnotes omitted).

⁴¹ See Arthur O. Austin, *Deconstructing Voice*, 30 HOUS. L. REV. 1671, 1678-84 (1993) (arguing that critical scholars only falsely claim to be committed to deconstruction, since true allegiance to the practice would result in the silencing of "voice" scholarship); Jim Chen, *Unloving*, 80 IOWA L. REV. 145, 149 (1994) (challenging merits of race-conscious "voice" scholarship and claiming to stay out of the debate on narrative, even as he described the contest as between "the story-tellers and the serious scholars"); Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1749 (1989) (questioning whether there was unique "voice of color" among outsider scholars working in narrative method and whether they produced "racially distinctive brand of valuable scholarship"). But see Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467, 1469 (1995) (introducing eight critical responses to Chen's *Unloving*); Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864, 1870 (1990) (embracing minority perspectives in legal academia, and describing Kennedy as requiring "an empirically provable, neatly categorized definition of a minority perspective" which "invalidate[s] the experiential knowledge advanced in the narratives that minorities have developed to articulate the

for evaluating its effectiveness.⁴² The most virulent critics have rejected entirely the notion that doctrinal accounts of events are merely one, among many, representations of the events comprising cases. They believe, instead, that legal processes seek not to tell stories but to reveal the objective truth found in the facts of a set of circumstances.⁴³ Those embracing this perspective are therefore especially critical of the interjection of personal stories and autobiography into legal scholarship.⁴⁴ One scholar advancing this view has stated that “[n]arrative is essentially a vehicle for anecdotal evidence” in a realm where “anecdotes provide no mechanism for assessing truthfulness, typicality, or frequency.”⁴⁵ Using narrative methodology then, these

experience of our shared history and quest for solutions”); Alex M. Johnson, Jr., *Racial Critiques of Legal Academia: A Reply in Favor or Context*, 43 STAN. L. REV. 137, 139-40 (1990) (introducing argument that voice of color exists, although not as monolith, and challenging Kennedy's majoritarian merit-based evaluation of racial perspectives).

⁴² See, e.g., Abrams, *supra* note 27, at 1041-52; Baron, *supra* note 37, at 280-85; Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683 (1992); Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 953-61 (1992). The most well-known call for evaluative standards for narrative scholarship, however, did so in a manner that essentially attacked the use of the method by outsider scholars. Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 845-55 (1993) (finding that outsider claims to distinctive perspective were essentialist and that their uses of narrative violated conventional norms of legal scholarship, which were premised upon notions such as reason, analysis, typicality, and truthfulness). But see Nancy Levit, *Critical Race Theory: Race, Reason, Merit and Civility*, 87 GEO. L.J. 795, 808-15 (1998) (analyzing whether Farber, Sherry, and other “traditionalist” critics of narrative scholarship meet their own scholarly standards with regard to truth and reason); sources cited *infra* note 48 (other critiques of Farber and Sherry).

⁴³ See Abrams, *supra* note 27, at 978-79 (discussing critics who claim that story-as-law model is untrustworthy because stories are often neither normative nor typical; truth can only be generated through adversarial system); see also Matthew W. Finkin, *Reflections on Labor Law Scholarship and Its Discontents: The Reveries of Monsieur Verog*, 46 U. MIAMI L. REV. 1101, 1140 (1992) (suggesting that “legal concepts” are distinguishable from stories because legal concepts can separate meaningful from irrelevant); Douglas E. Litowitz, *Some Critical Thoughts of Critical Race Theory*, 72 NOTRE DAME L. REV. 503, 520-23 (1997).

⁴⁴ See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997) (claiming that legal academy is under attack from critical legal scholars who they describe as “radical multiculturalists” and accuse of abandoning necessary standards related to objective truth, rationality, and merit); Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647, 650-55 (1994) (reaffirming their commitment to merits of typicality, truth, and reason in legal scholarship, and substantially criticizing work of storytellers as political rather than scholarly and unsoundly essentialist and victim oriented); Richard A. Posner, *The Skin Trade*, THE NEW REPUBLIC, Oct. 13, 1997, at 40, 42 (claiming that rather than employing logical arguments or empirical data, “critical race theorists tell stories”).

⁴⁵ David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 IND. L.J. 797, 800-01 (1998)

critics argue, is dangerous because it “appeals to emotions and often makes no clear connections to legal arguments.”⁴⁶ Hence, this view treats the spoken and written experiences of legal storytellers as neither analytically sound nor trustworthy.⁴⁷

Other than to respond to what has appeared to be personal attacks in these critiques⁴⁸ and to suggest that by insisting on the “false” objective standard critics have missed the point,⁴⁹ CRT/CRF scholars appear to have given up on the idea of winning friends and influencing people with their choice of methods. However, recently we have seen some scholars seek to further the CRT/CRF mission by illuminating the ways that other disciplines fail to account for the persistence of

(footnotes omitted).

⁴⁶ Sylvia R. Lazos Vargas, *Critical Race Theory and Autobiography: Can a Popular “Hybrid” Genre Reach Across the Racial Divide?*, 18 LAW & INEQ. 419, 426 (2000) (citation omitted) (presenting, not endorsing, contention); see also Litowitz, *supra* note 43, at 522 (“Another danger of legal storytelling is that it plays upon emotion, instead of reason, and therefore it can convince people to adopt a position without giving them a doctrinal basis for it.”); Steven L. Winter, *The Cognitive Dimension of the Agony Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2228 (1989) (finding narrative methodology lacking because it “does not meet the threefold demands of generality, unreflexivity, and reliability that are necessary if a prevailing order is credibly to justify itself”).

⁴⁷ See Anne Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229, 1281-82 (1995) (offering that autobiography proposes experiential truth that is personal, falsifiable, and not capable of constructive engagement); see also RICHARD A. POSNER, *Nuance, Narrative, and Empathy in Critical Race Theory*, in OVERCOMING LAW 368-84 (1995) (critiquing Patricia Williams’s use of narrative, and finding the methodology “one-sided” and without “clarity”); Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737, 744 (1998) (stating that legal storytelling suffers from several flaws, including its atypical nature and reliance on emotion).

⁴⁸ See John O. Calmore, *Random Notes of an Integration Warrior — Part 2: A Critical Response to the Hegemonic “Truth” of Daniel Farber and Suzanna Sherry*, 83 MINN. L. REV. 1589, 1591-99 (1999); Jerome M. Culp, Jr., *Telling a Black Legal Story: Privilege, Authenticity, “Blunders,” and Transformation in Outsider Narratives*, 82 VA. L. REV. 69, 74-89 (1996) (responding to Anne Coughlin); Jerome M. Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637, 1640-59 (1999) (responding to Farber and Sherry); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 667-75 (1993); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803, 806-30 (1994); cf. Kathryn Abrams, *How to Have a Culture War*, 65 U. CHI. L. REV. 1091 (1998) (critiquing Farber and Sherry, and authored by non-CRT scholar); Edward L. Rubin, *Jews, Truth, and Critical Race Theory*, 93 NW. U. L. REV. 525 (1999) (same).

⁴⁹ Peter Margulies, *Inclusive and Exclusive Virtues: Approaches to Identity, Merit, and Responsibility in Recent Legal Thought*, 46 CATH. U. L. REV. 1109, 1111-15 (1997) (arguing that advocates are calling for openness to multicultural humanism, where critics of narrative are wed to virtues of civic republicanism). See generally Clark Freshman, *Were Patricia Williams and Ronald Dworkin Separated at Birth?*, 95 COLUM. L. REV. 1568 (1995) (accusing Posner, in his review of subject, of falling prey to very types of oppressive reasoning CRT seeks to combat).

discrimination.⁵⁰ Still, others have suggested examining previously overlooked (or even discounted) disciplines for methods to expand the tools available to critical legal scholars.⁵¹ In some ways, this Article marks a continuation of the classic use of narrative, using the stories of these two women to challenge the idea that systems of justice operate objectively and neutrally. My general contention, however, is that personal narratives reveal types of information and knowledge that are neither manifested in the doctrinal representations of their stories nor necessarily reflected in the statistics that present the quantitative picture of black women within the criminal justice system. If nothing else, both the statistics pertaining to the conviction and incarceration rates of African-American women discussed below and stories like those of Millie and my grandmother remind us that there is a real cost to being marked by difference within society. Telling our versions of our stories is merely a first step in revealing the reach of institutional power and the systemic nature of oppression.

Understanding, however, that a revisiting of, or recommitment to, narrative by CRT/CRF scholars also portends a return of the "radical multiculturalists" claim and critique, this Article serves necessarily as a recruiting call for cross-disciplinary methodological allies. As I discuss in detail in Part IV, in the largely ethnographic but empirical work being done by some law and society or sociolegal scholars, I see a potential

⁵⁰ See, e.g., Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727, 730-34 (2000) (claiming that racism, which economic theory suggests should naturally be eliminated from markets because it is inefficient, often persists, and proposing "lock-in model" of discrimination to explain markets remaining affected by behavior over long periods of time).

⁵¹ Clark Freshman has suggested, for instance, that law and economics methods complement CRT approaches to identifying discrimination across a number of subject areas. Clark Freshman, *Prevention Perspectives on "Different" Kinds of Discrimination: From Attacking Different "Isms" to Promoting Acceptance in Critical Race Theory, Law and Economics, and Empirical Research*, 55 STAN. L. REV. 2293, 2304-06 (2003) (making claim while simultaneously reviewing separate CRT and law and economics books on discrimination); see also ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS, at v-vii (Emma Coleman Jordan & Angela P. Harris eds., 2005) (looking at number of social problems through lens of "economic justice —" a method designed to bridge disciplines of critical legal scholarship and law and economics); Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1761-65 (2003) (exploring application of CRT and law and economics principles within context of employment discrimination). With regard to other disciplines, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1498-1528 (2005) (suggesting cognitive psychology studies and methods as a tool proving continued significance and unconscious nature of racism); Camille A. Nelson, *Breaking the Camel's Back: A Consideration of Mitigatory Criminal Defenses and Racism-Related Mental Illness*, 9 MICH. J. RACE & L. 77, 81 (2003) (asserting that use of racist words and symbols can operate as physiological and psychological violence).

partner for both the defense of narrative, in particular, and the meaningful articulation of the lived experiences of the marginalized, more generally. Using analyses of my grandmother's story and of Millie's story, I hope first, however, to demonstrate both the continued merits of the method and the compatibility of the partnership.

II. CRIMINAL LAW AND THE CONTINUING COST OF "UNFORGIVEABLE BLACKNESS (WOMANHOOD AND POVERTY?)"⁵²

Before undertaking the use of personal narratives to examine institutional constructions of black women's identities in criminal courts, it is critical to explain why there remains a need to pay special attention to this identity group. Historically, within American society, criminality has been associated with race.⁵³ Specifically, African-American men and women have experienced significant negative treatment within the criminal justice system⁵⁴ and have been portrayed as pathologically more criminal than others.⁵⁵ The unacknowledged and dangerous operation of

⁵² The great African-American public intellectual, W.E.B. DuBois, used the phrase "unforgivable blackness" in an editorial to describe why the boxer, Jack Johnson, was convicted of a crime based on his relationship with a white woman. See W.E.B. DuBois, *The Prize Fighter*, CRISIS MAG., Aug. 1914, at 181. It, however, is used here to support the general proposition that the fact of being a poor black woman within a criminal court may be tantamount to the "crime of identity." Devon W. Carbado, (*E*)*racing the Fourth Amendment*, 100 MICH. L. REV. 946, 962 (2002).

⁵³ See generally IAN HANEY-LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003) (examining legal history of Chicano movement in Los Angeles).

⁵⁴ See Sheila A. Bedi, *The Constructed Identities of Asian and African Americans: A Story of Two Races and the Criminal Justice System*, 19 HARV. BLACKLETTER L.J. 181, 184-85 (2003) (discussing disproportionate overrepresentation of African Americans as defendants within criminal legal system, on death row, and as victims of violent crime). See generally Jody Armour, *Res Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994); Jody Armour, *Stereotypes and Prejudice: Helping Legal Decision Makers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995); Regina Austin, *A "Nation of Thieves": Securing Black People's Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147; Michael K. Brown et al., *Been in the Pen So Long: Race, Crime and Justice, in WHITEWASHING RACE: THE MYTH OF A COLOR BLIND SOCIETY* 132-60 (2003); Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears — On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994); Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) (discussing impact of racism on jury verdicts); Sheri L. Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739 (1993).

⁵⁵ See JOHNSON, *INNER LIVES*, *supra* note 10, at 40-45 (discussing claim with regard to African-American women); Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verite and the Pedagogy of Vincent Chin*, 1 MICH. J. RACE & L. 347, 348 (1996) (citing link between race and criminality, and stating that "not only is race used to identify criminals, it is embedded in the very foundation of our criminal law"). Arguably, the comments of former Education Secretary and radio commentator, William Bennett, demonstrate a recent example of this conflation. In response to a caller's question about a

the conflation of race and criminality is detailed in the following passage:

In legal discourse, preconceptions and myths, for example about black criminality, shape mindset — the bundle of received wisdoms, stock stories and suppositions that allocate suspicion, place the burden of proof on one party or the other, and tell us in cases of divided evidence what probably happened. The cultural influences are probably at least as determinative of outcomes as formal laws.⁵⁶

This understanding of the cost of blackness is not only true within legal discourse but also of how identity works within criminal legal settings.⁵⁷ Certainly, race, although a social construction, has traditionally been a barrier to equal treatment for African Americans in the administration of justice.⁵⁸ While the causes are myriad and related to factors more far-

hypothesis linking decreases in crime to increases in the abortion rate, Bennett responded that "it's true that if you wanted to reduce crime, you could, if that were your sole purpose, you could abort every black baby in this country, and your crime rate would go down." Bennett: *Black Abortions Would Lower Crime*, ABC NEWS.COM, Sept. 30, 2005, <http://abcnews.go.com/US/wireStory?id=1173100>. Bennett went on to say that such a premise was "an impossible, ridiculous and morally reprehensible thing to do . . ." *Id.* The broader context of the comment involved Mr. Bennett's attempt to debunk theories relying upon extensive extrapolations, which had been advanced in a recent book. See Media Matters for America, *Bennett Defended Racial Comments with Falsehood*, <http://mediamatters.org/items/printable/200509300008> (last visited Jan. 9, 2006). The source material for this debate can be found at STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS* 137-44 (2005). Interestingly, one of the authors of the book claimed that race was "not an integral part of the story" of the link between abortion and crime rates. Media Matters for America, *supra*. By referring to race in a way that the authors had not, Bennett tapped into a stereotype, however unintentionally, that many people believe — that blacks are more prone to crime than are other races.

⁵⁶ DELGADO & STEFANCIC, *supra* note 9, at 42-43.

⁵⁷ The following passage is instructive:

Criminal trials provide a forum for identity construction and the sociolegal translation of violence. The trials shape identity and mold narrative. The mutability of identity and the plasticity of narrative coincide with several variables encompassing procedural and substantive laws, judges and juries, and defendants and victims. Although prone to alterations in cultural and social meaning, the variables establish a stable context for the construction of identity and the translation of narrative. That stability rests on stereotype.

Anthony V. Alfieri, *Gideon in White/Gideon in Black: Race and Identity in Lawyering*, 114 YALE L.J. 1459, 1479 (2005).

⁵⁸ See BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., BULLETIN: PRISONERS IN 2004, at 8 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf>. "At year end 2004, black inmates represented an estimated 41% of all inmates with at sentence of more than 1 year," and that "8.4% of black males between the ages of 25 to 29 were in prison December 31, 2004, compared to 2.5% of Hispanic males and about 1.2% of white males in the same age group." *Id.* For women, "[b]lack females (with an incarceration rate of 170 per 100,000) were more than twice as likely as Hispanic females (75 per 100,000) and 4 times as likely as

reaching than identity alone,⁵⁹ statistics demonstrate that black women are disproportionately overrepresented among the incarcerated within American prisons.⁶⁰

white females (42 per 100,000) to be in prison on December 31, 2004." *Id*; see, e.g., ANTHONY G. AMSTERDAM & JEROME BRUNER, *Race, the Court, and America's Dialectic from Plessy Through Brown to Pitts and Jenkins*, in *MINDING THE LAW* 247 (2000) (noting that construct of race serves hegemonic purpose of disempowering constructed "other" and empowering in-group); DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 140-88 (1990) (noting racial disparity in administration of death penalty); IAN HANEY-LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 111-16, 136-41 (1996); Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 *GEO. L. J.* 2227, 2231-36 (2001) (providing examples of racism in the criminal justice system); Christian Haliburton, *Neither Separate Nor Equal: How Race-Sensitive Enforcement of Criminal Laws Threatens to Undo Brown v. Board of Education*, 3 *SEATTLE J. FOR SOC. JUST.* 45, 50-53 (2004) (explaining how biased decision-making at each critical juncture in criminal legal system results in gross overrepresentation of Blacks on death row, particularly for those convicted of killing Whites); William T. Pizzi et al., *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 *MICH. J. RACE & L.* 327, 339-40, 348-52 (2005) (reporting results of study of Florida inmates that revealed that when one controlled for previous criminal record, race did not account for significant variance in sentence length between black and white offenders, but that study participants did manifest bias against Afro-centric features, which served as predictor for increased sentence length); see also Ruth E. Friedman, *Statistics and Death: The Conspicuous Role of Race Bias in the Administration of the Death Penalty*, 4 *AFR.-AM. L. & POL'Y REP.* 75, 75-81 (1999) (discussing racially significant consequences of supposedly race-neutral application of death penalty); Randall Robinson, *What America Owes to Blacks and What Blacks Owe to Each Other*, 6 *AFR.-AM. L. & POL'Y REP.* 1, 2 (2004) (citing statistics indicating blacks make up only 14% of nonviolent drug offenses, but 35% of arrests, 55% of convictions, and 75% of prison admissions for non violent drug offenses).

⁵⁹ For one explanation of why black women are overrepresented in the criminal justice system, see JOHNSON, *INNER LIVES*, *supra* note 10, at 46-47 (identifying "war on drugs" as playing role in overrepresentation of African-American women in prisons); Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 *J. CRIM. L. & CRIMINOLOGY* 827, 833-37 (2003) (noting that overrepresentation of African-American women in prison results largely from enforcement of drug laws, where African-American women experience some additional capture due to their relationships to male dealers). According to one study, part of the problem may relate to how the police target communities for enforcement based on race, notwithstanding the fact that more crime may be taking place in communities where persons of color do not constitute a significant portion of the population. See Florangela Davila, *Report Alleges Racial Disparities in Seattle Drug Arrests*, *SEATTLE TIMES*, Dec. 1, 2003, at B1; Katherine Beckett, *Race and Drug Law Enforcement in Seattle* (2004), <http://www.soc.washington.edu/users/kbeckett/Enforcement.pdf>. Outside of the context of the criminal legal system, black women are affected by a number of debilitating economic and social factors. See, e.g., Rebecca Giltner, Note, *Justifying the Disparate Impact Standard Under a Theory of Equal Citizenship*, 10 *MICH. J. RACE & L.* 427, 436, 439 n.56 (2005) (citing recent census data detailing that black women earn substantially less than similarly situated white women and men and that they are disproportionately affected by poverty).

⁶⁰ See statistics pertaining to black women's incarceration rates, *supra* note 58; JOHNSON, *INNER LIVES*, *supra* note 10, at 35-40 ("African American women currently comprise the majority of incarcerated women in the United States. Almost half — 48 percent — of female inmates across the nation are African American."); Coker, *supra* note

The stories of Millie Simpson and my grandmother are important because they present noteworthy examples of how the identities of at least some black women are negatively constructed within criminal courts.⁶¹ The two stories are also instructive because they present diverse frames of analysis. First, the crimes are vastly different, with one case involving only a claim of property damage, while the other alleges robbery and murder. Second, I have a personal attachment and insight into the case of my grandmother. In part, I use this familial and somewhat autobiographical narrative as other CRT scholars have: to implicate how outsiders often have a different relationship to the law and society than do those in the majority.⁶² No similar personal attachment exists to Millie Simpson's story. It is part of a data set within an empirical study, where the subject's identity traits⁶³ are accurately described but the actual identity is obscured. Finally, my grandmother's case took place in California in the late 1960s, while Millie Simpson's case was adjudicated in New Jersey in the early 1990s. This difference alone may explain why there were explicit references to identity categories in the former rather than the latter. Despite these differences in the severity

59, at 834 (citing growing number of women in prison and fact that African-American women were significantly more likely than Whites or Hispanics to enter prison); see also Kathleen Daly, *Criminal Law and Justice System Practices as Racist, White, and Racialized*, 51 WASH. & LEE L. REV. 431, 431-35 (1994); Jennifer Ward, *Snapshots: Holistic Images of Female Offenders in the Criminal Justice System*, 30 FORDHAM URB. L.J. 723, 736 (2003) ("African-American women make up a majority of those incarcerated in both state and federal prisons.") (footnotes omitted).

⁶¹ Black women's identities appear to not only affect their experiences with judges and attorneys within criminal courts, but juries also seem to improperly rely on societal constructions of black female identity. See 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, 1071.

⁶² See, e.g., WILLIAMS, *supra* note 13, at 17-19, 44-46 (discussing, respectively, her discovery of a contract for the sale of her great-great-grandmother and her story of being refused entry into New York city retail outlet); Culp, *supra* note 13 (using his autobiography to describe discomfort of simultaneously having had privileged education and professional position, while still being outsider by his race and class origins); Cheryl I. Harris, *Whiteness as Property*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 276-77 (Kimberlé Crenshaw et al. eds., 1995) (using story of her grandmother's passing as white to analyze property right that whiteness conveys).

⁶³ As I have previously indicated, identity categories have no real meaning outside of that attached to them as a function of social relations. *Supra* note 22. I use "identity traits" and similar phrases throughout this Article because they provide a predominate shorthand for describing the externally constructed categories. The categories, however, should always be understood to represent "ascribed otherness." See, e.g., Guyora Binder, *The Slavery of Emancipation*, 17 CARDOZO L. REV. 2063, 2101 (1996) (describing race as "hereditary status" where "[t]o occupy this status is to be the object of ascription of race as a characteristic").

of the crimes, time, location, and social climate, it is clear that both stories reflect an understanding that race, gender, and class, among other identity traits, may significantly affect the conduct and outcomes of criminal processes. While Millie Simpson's statement at the beginning of this Article evinces very little understanding of her criminal legal proceedings as a form of state-sanctioned subordination, for my grandmother, it is her predominant claim. In both cases, however, it is inescapable that the courts' constructions of their identities matter to the creation of the doctrinal narratives.

A. Millie Simpson's "Data"

As earlier indicated, a sociolegal study analyzing the legal experiences of everyday citizens contained the story of Millie Simpson.⁶⁴ The study described Simpson as an African-American woman, living in Newark, New Jersey, and working several part-time jobs, including one as a domestic for a family in suburban Short Hills, New Jersey.⁶⁵ A friend of Simpson's son took her car without permission and was involved in a hit and run accident.⁶⁶ Authorities charged Simpson with leaving the scene of the accident and failing to insure the vehicle.⁶⁷ Simpson reported to Patricia Ewick and Susan Silbey that on two separate occasions she was summoned and appeared in criminal proceedings. On the first occasion she attempted to tell the presiding judge about the unauthorized use of her car.⁶⁸ Based on her claim that she had not driven the car, the judge entered a not guilty plea on her behalf.⁶⁹ During her second appearance she did not repeat her story because she assumed the new judge was aware of the claim she made at her first appearance.⁷⁰ She claimed that this second judge pronounced her guilty without hearing any evidence and without her public defender present.⁷¹ The court sentenced Simpson

⁶⁴ For a complete presentation of the facts of Millie Simpson's case, see EWICK & SILBEY, *supra* note 3, at 3-14; Ewick & Silbey, *supra* note 1, at 732-34, 743-47.

⁶⁵ Ewick & Silbey, *supra* note 1, at 732, 735.

⁶⁶ *Id.* at 733.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 733, 743-44.

⁷⁰ *Id.* at 733, 744.

⁷¹ *Id.* at 733. Given that in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), the U.S. Supreme Court long ago recognized the "obvious truth" of the idea "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him," I initially found that Millie's account of the absentee lawyer greatly offended my sensibilities with regard to the requirements of due process. It appears, however, that securing adequate representation

to pay a \$300 fine and perform fifteen hours of community service, and suspended her driver's license for one year.⁷²

After hearing of her story, Simpson's employers hired an attorney who successfully lobbied the presiding judge and district attorney to reopen Simpson's case.⁷³ At the new hearing in front of the same judge who found Simpson guilty, her attorney told the story Simpson had told the court in her first appearance.⁷⁴ After hearing the attorney tell the story and without considering other evidence or hearing from witnesses, the judge found Simpson not guilty and dismissed the charges against her.⁷⁵ After this successful third appearance Simpson uttered the statement that begins this Article. Simpson's employer, however, had a different comment on Simpson's legal experiences: "[T]his was 'the typical story of American racism. To get justice, the poor black woman needs a rich white lady.'"⁷⁶

B. My Grandmother's "Story"

In 1968, a court convicted and sentenced my maternal grandmother's former boyfriend, Ernest Washington, to death for robbing and killing Benjamin Kay.⁷⁷ The case indicated that Kay was a local merchant who had extended credit to my grandmother and that she had been involved in the crime, which took place outside her home.⁷⁸ After discovering the *People v. Washington* appellate decision, I located the unpublished records for both Washington's and my grandmother's superior court criminal

for the poor in criminal matters has become increasingly problematic across the states. See Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1169-71 (2003) (discussing consequences to clients of public defender services being typically underfunded and undermanned); Laura Parker, *Eight Years in a Louisiana Jail, but He Never Went to Trial*, USA TODAY, Aug. 29, 2005, at 1A-2A (discussing American Bar Association report criticizing provision of criminal legal services to poor in 22 states, and providing stark examples — like attorney who met with his clients for only 11 minutes before trial — of quality of representation).

⁷² Ewick & Silbey, *supra* note 1, at 733-34.

⁷³ *Id.* at 734.

⁷⁴ *Id.* While Millie's attorney was well acquainted with, and had appeared previously before the presiding judge, he believes Millie's improved results would have been achieved as long as she was represented by any lawyer. *Id.* at n.7.

⁷⁵ *Id.* Millie was also repaid the fine she previously paid and had her license reinstated. *Id.*

⁷⁶ *Id.*

⁷⁷ See *People v. Washington*, 71 Cal. 2d 1170, 1172 (1969).

⁷⁸ *Id.* at 1172-73 (describing Kay as a local department store owner who extended credit to "welfare recipients and other people who had low incomes" and claiming Spencer assisted in planning of, and received money stolen during, crime).

proceedings.⁷⁹ The records from the cases clarified that the court indicted both my grandmother and another man, Mr. Davis, as co-conspirators in the robbery and murder several weeks after the arrest of Washington.⁸⁰ After originally pleading not guilty, she later had her case severed from Washington's and then pleaded guilty to the lesser-included offense of being an accessory after the fact.⁸¹ The record further indicated that the court sentenced my grandmother to prison "for the term provided by law."⁸²

During his case, Washington made several contradictory statements about who committed the crime,⁸³ including one where he identified my grandmother as the perpetrator.⁸⁴ During his trial, however, Washington denied any knowledge of the crime.⁸⁵ News reports also claim that during the trial he became agitated and violent.⁸⁶

For her part, my grandmother implicated only Washington in the crime.⁸⁷ She claimed, however, that she found out about his participation the day after the crime but initially said nothing "because of my record."⁸⁸ She further stated that Washington threatened that "if he rode,

⁷⁹ I discovered the *Washington* case in 1995 while conducting unrelated research on the death penalty. Prior to my discovery, I had never heard anyone in my family mention the case or my grandmother's alleged involvement in the crime. This circumstance is the subject of additional research into how legal narratives can shape identity within, and encourage silence in response to, the legal encounters of the subordinate. See Barnes, *supra* note 14, at 62-63.

⁸⁰ Indictment, *People v. Washington*, No. CR 12844 (Cal. Super. Ct. Dec. 14, 1967).

⁸¹ This plea pertained to the murder charge only. The robbery charge was dismissed as a part of her plea agreement. Record of Action at 1, *People v. Spencer*, No. CR 12844 (Cal. Super. Ct. May 1, 1968); Change of Plea at 1, *People v. Spencer*, No. CR 12844 (Cal. Super. Ct. May 1, 1968).

⁸² Judgment of Conviction to State Prison at 1, *People v. Spencer*, No. CR 12844 (Cal. Super. Ct. May 23, 1968).

⁸³ *Washington*, 71 Cal. 2d at 1174 (stating that Washington admitted "that he and Davis went behind Mrs. Spencer's [my grandmother's] house when Mr. Kay approached and stated that Davis hit him with a pipe, and that when Mr. Kay yelled, Davis hit him twice more").

⁸⁴ *See id.* ("In a later statement defendant revised his account of the crime and stated that Mrs. Spencer 'hit the old man; that she followed him out of the house and hit him with the pipe from the rear, from the back.'").

⁸⁵ He claimed that he was not involved in the crime and that he was in downtown San Diego, searching for his estranged wife when the crime was committed. *Id.* Additionally, he denied ever making most of the admissions attributed to him and testified "that other admissions that he made were false." *Id.*

⁸⁶ *Death Ordered in Slaying of Clothier Here*, SAN DIEGO UNION, Mar. 21, 1968, at B1 (reporting that during his trial Washington became agitated and heaved table at judge).

⁸⁷ With regard to the victim, she claimed that he was nice and helpful to her and "had done . . . nothing wrong with [her]." Probation Officer's Report, *supra* note 2, at 5.

⁸⁸ *Id.* at 4. Notably, this statement expresses an understanding that having prior

I would ride; that he would tell I helped.”⁸⁹ She denied she helped, but indicated he would implicate her nevertheless if she did not conceal his crime.⁹⁰ My grandmother also claimed she received no proceeds from the crime and offered her own explanation for the money in her possession after the murder. She claimed the money was from the welfare check Kay cashed before he was attacked, child support paid for her youngest child,⁹¹ and money Washington had given her.⁹²

In addition to the statement at the beginning of this Article, my grandmother expressed further surprise over the court's belief that she was a part of a murder plot: “I've never had a crime of violence — no robbery or stealing from nobody”⁹³ Finally, she indicated that she and my great-grandmother wanted to fight the charges, “but the attorneys and the Court wanted pleas . . . and she had gone along with it.”⁹⁴

Although my grandmother pleaded guilty and did not have a contested trial, outside of Washington's self-interested and contradictory statements, the prosecutor had very little evidence pointing to my grandmother's direct participation in the crime.⁹⁵ Davis, the alleged third co-conspirator, did not implicate her in any plan; the victim indicated, before he died, that two or three people *whom he did not know* had attacked him.⁹⁶

With circumstantial and conflicted evidence as a starting point, court documents reveal a state case principally built upon my grandmother's status as a black woman on welfare who had been previously convicted of nonviolent money crimes.⁹⁷ There are several examples in the official

convictions at all made her less believable to law enforcement. See *infra* notes 144-50 and accompanying text.

⁸⁹ Probation Officer's Report, *supra* note 2, at 3.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² She believed Washington acquired the money he gave her from the sale of her television and stereo and the sale of pills. *Id.* at 5.

⁹³ *Id.*

⁹⁴ *Id.* at 4.

⁹⁵ This description is not mere opinion. Prior to my grandmother's change of plea, her counsel had filed a motion to dismiss the indictment against her due to a lack of probable cause. See Memorandum of Points and Authorities at 1, *People v. Spencer*, No. CR 12844 (Cal. Super. Ct. Jan. 31, 1968).

⁹⁶ *People v. Washington*, 71 Cal. 2d 1170, 1176 (1969) (emphasis added). Kay, of course, was familiar with my grandmother, as she was one of his customers.

⁹⁷ The State filed a supplemental indictment that included records for a 20-year-old conviction for “Uttering a Fictitious Check,” four 16-year-old counts for forging money orders, and a 2-year-old count of obstruction of mail. Supplement to Indictment at 1-2, *People v. Washington & Spencer*, D.A. No. 51639, No. CR 12844 (Cal. Super. Ct. Jan. 12,

records of my grandmother's case of the use of these race-, gender-, and class-coded characterizations of her identity. Part III analyzes several of these examples and the dangers inherent in their use, along with an analysis of how Millie Simpson's identity facilitated the court's ability to substantially ignore her during her legal proceedings.

III. DOCTRINAL NARRATIVES AND IDENTITY CONSTRUCTION

Within their official narratives, courts employ biased social constructions of minority identities, which arise out of, and are sustained through, essentialism's power to erase the individual and stereotype's power to reconstitute identity.⁹⁸ They do so without ever acknowledging this practice or its tendency to undermine the goals of equal justice.⁹⁹ As such, the courts use stereotypes and the societal significance of race, class, gender, and other identity variables to perform a "legal construction" of identity.¹⁰⁰ Other scholars have indicated that this phenomenon may not be intentional,¹⁰¹ but nevertheless reflects courts relying on a "pre-understanding" of minority identity within their decisions.¹⁰² Alternatively, others have surmised that courts

1968); Federal Bureau of Investigation, Record of Leaila Spencer at 1-2, *People v. Washington & Spencer*, D.A. No. 51639, No. CR 12844 (Cal. Super. Ct. Jan. 8, 1968). With regard to the forgery charge, records indicate that my grandmother believed she had been convicted of a single charge, rather than four separate charges. Probation Officer's Report, *supra* note 2, at 5 (stating that Spencer claimed that it was explained to her that four money-order charges were "lumped together" as single offense). The confusion likely stemmed from the fact that she was only sentenced for the first of these offenses and received probation for the other three. See Judgment of Convictions at 3, *People v. Spencer*, No. CR 12844 (Cal. Super. Ct. May 23, 1968).

⁹⁸ Stated differently, rather than mechanically applying law to facts, "courts actually create narrative accounts of social reality and then make legal judgments and decisions based on their narrative accounts." Oh, *supra* note 32, at 1312.

⁹⁹ See Darren L. Hutchinson, *Factless Jurisprudence*, 34 COLUM. HUM. RTS. L. REV. 615-33 (2003) (claiming that courts engage in decontextualized analysis that treats pervasive race and gender discrimination as legitimate and neutral); Oh, *supra* note 32, at 1313 (discussing that courts use "invisible process" to produce "hegemonic visions of social reality").

¹⁰⁰ See HANEY-LÓPEZ, *supra* note 58, at 111-53.

¹⁰¹ *Id.* at 132-33 (contending that courts do not intentionally engage in discriminatory practices, but instead rely upon pervasive and debilitating understandings of race within their decisions).

¹⁰² See Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845, 1847 (1994) (defining pre-understanding as court's tendency to rely upon assumptions about categories of people, where certain traits correspond to certain categories); see also K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, in PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 62-65 (Robert Post ed., 2001) (noting dominant society ascribes traits and behaviors to certain groups and generally assumes all group members have assigned characteristics,

inadvertently distort identity in an effort to produce "universalized narratives."¹⁰³ In either case, the result is to reinforce, dominant assumptions about the subordinate in legal decisions.¹⁰⁴ Court opinions or doctrinal narratives describing legal encounters of the marginalized, then, have a potential to de-emphasize the individual story of the legal subject and to emphasize stock stories, which are partially built upon oppressive stereotypes. This operation of unconscious bias also reveals the importance of an individual's subjective experience to understanding legal relationships¹⁰⁵ — the disruption of unacknowledged distortions of identity appearing within and the companion doctrinal ("official") story.

A. *My Grandmother's Hypervisibility*

The criminal legal stories of Millie Simpson and my grandmother, Leila Spencer, illustrate women whose identities rendered them

then reckons those characteristics with false beliefs leading to societal discrimination against group members); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 707 (1995) (questioning ability of judges to be neutral when they are necessarily vulnerable to "an array of personal and cultural biases and influences"); Linda Hamilton Kreiger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1203 (1995) (noting that once persons use stereotypes to explain societal differences, they become engrained part of their cognitive processes); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 356-57 (1987) (noting that individuals acquire and use racial attitudes and stereotypes without knowing it).

¹⁰³ Professor Gilkerson describes universalized narratives as socially constructed meanings that, once implanted within legal discourse, "become normative (value-laden) interpretations of people and events that are difficult to dislodge, but easy to manipulate." Christopher Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 871 (1992); see also Peter Brooks, *Policing Stories, in LAW'S MADNESS* 39 (Austin Sarat et al. eds., 2003) ("Narratives do not simply recount happenings; they give them shape, give them a point, argue their import, proclaim their results The lack of awareness of how they are telling the story on the part of [j]udges . . . needs to be exposed for what it is: the telling of a stock story based on preconceptions.").

¹⁰⁴ See Ian F. Haney-López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1785-1825 (2000) (finding judges discriminate against minorities in court through usage of "script" and "path" racism, which he respectively defines as "undirected" and "directed" racial status-enforcement influenced in unrecognized manner by institutions); Sheri L. Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 *passim* (1988) (analyzing effects of unconscious racism in cases involving race and criminal procedure); see, e.g., Anthony Page, *Batson's Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 179-80 (2005) (discussing that unconscious discrimination related to use of stereotypes affects prosecutors choice of jurors).

¹⁰⁵ See, e.g., Gilkerson, *supra* note 103, at 866-67 (citing Gary Minda, *Phenomenology, Tina Turner and the Law*, 16 N.M. L. REV. 479 (1986)).

invisible¹⁰⁶ as well as hypervisible.¹⁰⁷ Court papers from my grandmother's case reflect that legal actors made repeated references to my grandmother's identity traits. These references minimized her individual identity, while she became hypervisible as a function of stereotypes associated with the race, class, and gender categories the court concentrated upon. The documents of the case suggest a particularized vision that legal authorities had of my grandmother. It was an image constructed by linking attitudes about the meaning of the identity categories she inhabited to some behaviors which had limited relevance to her case¹⁰⁸ and to others which were only helpful to diminishing her social status.¹⁰⁹ Although the law is allowed to craft a story about a defendant, it must do so with facts, not inferences related to identity and the presumed social capital it confers. In her case, at times, it appears as if the court created "facts" out of stereotypes related to the identity categories she inhabited. In place of my grandmother, a fully formed individual, the official documents from her case succeeded in substituting a depersonalized "other," one more likely to be convicted, despite the uneven quality of the state's evidence. Essentially, the court sought substantially to convict her based upon the universally understood, but limited, social status available to a black female welfare recipient in 1968.¹¹⁰

1. Identity Under Construction: The Acts of the Prosecutor

In his filings, the prosecutor took several actions that implicated my grandmother's race and class statuses as factors important to be considered within the case. First, although her charges involved robbery and murder, the prosecutor made repeated references in his filings to her

¹⁰⁶ See *infra* Part IV.A.2.

¹⁰⁷ As one author defines it, hypervisibility pertains to a court's tendency to erase individual identity but to rely upon stereotypical understandings of identity. Jefferson, *supra* note 24.

¹⁰⁸ See *infra* Part IV.A.1 (discussing welfare status and former nonviolent money crimes).

¹⁰⁹ See *infra* Part IV.A.2 (discussing care of her children, marital status, and her attitudes about Caucasians).

¹¹⁰ See DAVID COLE, NO EQUAL JUSTICE 41-47 (1999) (discussing import of racial stereotypes in criminal justice system's administration); see also Kimberlé Crenshaw, *Whose Story Is It Anyway?: Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, ENGENDERING POWER 402, 412 (Toni Morrison ed., 1992) ("Pervasive myths and stereotypes about black women not only shape the kinds of harassment that black women experience but also influence whether black women's stories are likely to be believed"); Daly, *supra* note 60, 438-41 (discussing law as sexist and racist, and finding that law has hard time believing voice of black women).

welfare status. This made some sense, as the primary circumstantial proof for my grandmother's involvement in the crime hinged on her status as a person of low income. Witnesses reported seeing her the day after the killing in possession of money greater than the amount of her welfare check.¹¹¹ In the absence of other direct evidence, this fact could be used as circumstantial evidence that my grandmother received funds stolen during the robbery. The prosecutor, however, issued two subpoenas for her welfare records and only the first limited its purpose to "clarifying subject matter" for the court.¹¹² In the second subpoena, he claimed that her "financial status" was also generally relevant,¹¹³ as if her welfare or poverty status alone provided meaningful information to the court. In essence, through the requests for the records, the prosecutor claimed that, in my grandmother's history of receiving assistance, the court might find some facts of consequence to her case. Despite the listed reasons for requesting the records, it may have been (and may remain) a standard practice to routinely query welfare records for aid recipients subject to criminal prosecution. Whatever the legitimate value of the practice, it is arguable that for some — those for whom receipt of welfare is understood within society to convey a negative message about one's identity or character — the practice is also status-reinforcing within a court where poverty and race are potentially conflated with culpability.¹¹⁴

In addition to the subpoenas, the prosecutor also supplemented my grandmother's indictment to include several past offenses.¹¹⁵ Each of the prior convictions was for nonviolent, money crimes.¹¹⁶ Additionally, four of the prior offenses, while charged separately, stemmed from a single incident, and five of the six offenses had been committed more than fifteen years previous. The crimes were largely irrelevant within the context of the *Washington* case or to attack my grandmother's

¹¹¹ See *People v. Washington*, 71 Cal. 2d 1170, 1173 (1969); Probation Officer's Report, *supra* note 2, at 3 (stating that witnesses testified that Spencer was seen near victim's store speaking with killer, her boyfriend, one day before crime and that she was seen speaking with Davis and Washington one day after crime).

¹¹² Declaration/Affidavit for Subpoena Duces Tecum at 1, *People v. Spencer*, No. CR 12844 (Cal. Super. Ct. Feb. 1, 1968).

¹¹³ Declaration/Affidavit for Subpoena Duces Tecum at 1, *People v. Spencer*, No. CR 12844 (Cal. Super. Ct. Apr. 23, 1968).

¹¹⁴ For further discussion of this point, see *infra* notes 119-21 and accompanying text. For the negative societal association that attaches to black women who receive welfare, see *infra* notes 135-37.

¹¹⁵ See Supplement to Indictment; *supra* note 97, at 1-2.

¹¹⁶ See *supra* note 97 and accompanying text.

character under the California evidence rules in 1968.¹¹⁷ In theory, the supplemental indictment was a sentencing tool.¹¹⁸ The offenses also, however, served the unacknowledged purpose of subtly reinforcing to the court a particular idea of the defendant's identity.¹¹⁹ According to one scholar, this is typical: "[I]dentity constructions are widespread and throughout law offices, jails and courtrooms. Social construction of this sort hinges on the multiple categories of client identity, including class, ethnicity, gender, and race."¹²⁰ Granted, a white defendant should have been subject to the same listing of prior offenses. Much like in the subpoena of the welfare records previously discussed,¹²¹ it is the impact of the practice, however, which is problematic across racial lines. Where an African-American woman is concerned, prosecutors then and now receive the benefit of the taint of criminality fostered by racial stereotypes.¹²²

I am not suggesting that a court would forego certain practices due to unacknowledged racial stereotypes. Current Supreme Court case law related to discrimination and intent make such a decision unlikely.¹²³ My

¹¹⁷ The California evidence rules did not allow the admission of evidence of prior misconduct to prove conduct in conformance on a specific occasion. See CAL. EVID. CODE § 1100 (West 1966). Looking at the crimes within the contemporary federal context, the crimes would also be of little import. Under the federal rules, character evidence is generally not admissible to prove actions in conformity with that character trait on a given occasion. FED. R. EVID. 404(a). Evidence of former crimes may be used, however, to prove "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." FED. R. EVID. 404(b). Also, if my grandmother had testified, the federal rules would have allowed previous felony convictions to be admitted as character evidence to attack her credibility, but only where such convictions were both more probative than prejudicial and occurred within 10 years of the pending matter. See FED. R. EVID. 609. Only the two-year-old obstruction charge could fit within the rule.

¹¹⁸ At the time, California amended pleadings because prior convictions were relevant to sentencing. See CAL. PENAL CODE § 969a (West 1966 & Supp. 1968). The rules on amended pleadings remain substantially the same today. See CAL. PENAL CODE §§ 969, 969a (Deering 2005).

¹¹⁹ This action placed the prior convictions on the same charging record as the matter at bar, so whenever the judge or jury would read the charges, they would be reminded of the previous convictions when deciding on a punishment.

¹²⁰ Alfieri, *supra* note 57, at 1475 (footnotes omitted).

¹²¹ See *supra* notes 112-14 and accompanying text.

¹²² This is the point my grandmother seems to be making in her claim that she was convicted based on identity. See *supra* note 2, at 3-4.

¹²³ See generally *McCleskey v. Kemp*, 481 U.S. 279 (1987) (discussing U.S. Supreme Court holding that empirical proof of discriminatory impact in administration of death penalty did not render practice unconstitutional without proof of discriminatory intent by state actors); *Washington v. Davis*, 426 U.S. 229 (1976) (discussing U.S. Supreme Court holding that facially neutral law may only be found unconstitutional when one proves discriminatory purpose on part of either persons who enacted or administer law). At least

comment serves the related function of illuminating how court practices that have a legitimate or neutral purpose may also trigger the effects of racial bias. Where such a bias disadvantages disfavored minority groups and confers additional benefits upon the state in criminal proceedings, the practices hold the power to significantly shape narrative production. For instance, in the case of my grandmother, a white person with similar prior offenses would need to construct a defense and personal narrative suggesting that they were both innocent of the pending charges and that their previous criminal convictions did not make guilt in the current matter any more likely. My grandmother, by contrast, faced constructing a defense and a narrative that advanced both of these premises, but additionally rebutted the implied and explicit references to her race, class, and gender as categories providing information relevant to a determination of her guilt. Her comment quoted at the beginning of this Article¹²⁴ is, at bottom, a statement about the difficulty inherent in the task of overcoming identity.

Although the court's sentencing documents list my grandmother's prior offenses, they further indicate my grandmother did not meet the penal code definition of a "habitual criminal."¹²⁵ The district attorney, however, still recommended that she serve the maximum sentence based, in part, on her "long repeated history of criminal behavior . . ."¹²⁶ Again, this is another instance where I contend that the strength of discriminatory identity construction prevails. As a matter of basic fairness, it would seem that the state should gain little traction in its recommendation on punishment from my grandmother's mostly very old money crimes convictions.¹²⁷ This, however, is only true for

one state court followed a standard that differs from the federal courts' intentional discrimination requirement. See *Minnesota v. Russell*, 477 N.W.2d 886 (1991) (striking down facially neutral state statute modeled after federal drug statute which differentially punished sellers of powder versus crack cocaine, even where there was no state discriminatory intent, because 96.8 % of those arrested for crack, the more harshly punished drug, in 1988 were black and 79.6 % of persons charged with possession of powder cocaine were white).

¹²⁴ See *supra* note 2 and accompanying text.

¹²⁵ Judgment of Convictions, *supra* note 97.

¹²⁶ Statement by District Attorney Under 1203.01 (Penal Code) at 1, *People v. Spencer*, No. CR 12844 (Cal. Super. Ct. May 24, 1968).

¹²⁷ See *supra* text accompanying notes 97, 116. I must concede, however, that based upon the Supreme Court's receptiveness to three strikes statutes — which permanently affix the significance of former crimes, then severely punish even nonviolent third offenses that straddle the line between the misdemeanor and felony designations — it is unlikely that such a notion could gain traction. See *Ewing v. California*, 538 U.S. 11 *passim* (2003) (upholding constitutionality of life sentence for offender whose third strike involved stealing three golf clubs, which is a "wobbler" offense that could have been charged as

defendants who are not stereotypically understood to be inherently more criminally inclined. Where your identity marks you as culturally prone to crime, evoking past nonviolent crimes is a tactic which serves the purpose of proving who you are, not what you've done. Based, then, on your extra- or hyper-criminality, you become marked as someone it makes sense to severely punish, notwithstanding the nature and age of the previous offenses.

2. Identity Under Construction: The Probation Officer's Report

The probation officer's report¹²⁸ overtly used my grandmother's diminished identity in a slightly different way — to infer my grandmother's motive for participating in the crime. The report points out that the day after the crime my grandmother had at least \$285.00 in cash and money orders.¹²⁹ This amount was greater than her public assistance provided. Using this information, the probation officer opined that greed must have been my grandmother's motive, "since defendant was on welfare and without funds."¹³⁰

Beyond just the facts pertinent to the crime, however, the report included comments about my grandmother loaded with questionable inferences. For instance, it references a conversation with her previous probation officer, who stated his opinion that "she dislike[d] Caucasians," without further proof or discussion.¹³¹ Her social worker stated that except when my grandmother was previously incarcerated, that she "ha[d] been on welfare most of the time since 1948."¹³² The report further provided questionable biographical information. For example, the report indicated my grandmother had been married three times and claimed that, "[t]he Defendant has her own morality with regard to men . . ."¹³³ Additionally, the report acknowledged her role as a mother, but with the following characterization: "Defendant has three children, but these have lived with her mother, and have been supported

misdemeanor but was not).

¹²⁸ The report, which was amassed from police reports, court documents, and interviews, includes a detailed accounting of the facts of the case. Probation Officer's Report, *supra* note 2. Prior to making his recommendation on sentencing, the presiding judge reviewed, considered, and then signed the report. *Id.*

¹²⁹ *Id.* at 3.

¹³⁰ *Id.* at 8.

¹³¹ *Id.* at 7.

¹³² *Id.*

¹³³ *Id.* at 6 (indicating that each of her previous husbands was deceased).

by welfare."¹³⁴ None of these statements was particularly legally relevant to the facts of the case. This information, however, assisted in the construction of a debilitated identity.

3. The Cost of Hypervisibility to the Legally Constructed Subject

Within her criminal case, my grandmother was first personally erased and then remade categorically hypervisible through negative stereotypes connected to the identity traits emphasized in the court's papers. For example, receiving welfare has been historically stigmatizing,¹³⁵ especially for African-American women.¹³⁶ The legal actors' repeated negative references to her welfare status in the court papers supported the unflattering notions that my grandmother was pathologically poor¹³⁷ and "too lazy to work."¹³⁸ Second, the probation officer's references to my grandmother's morality with regard to men and the care she took of her children placed her gender and race at issue. Being described as a woman who did not care for her children implicated her as both a putative bad mother and potentially a fraudulent recipient of government assistance.¹³⁹ Mention of her previous marriages and the

¹³⁴ *Id.* at 8. The report failed to mention that my grandmother lived in a house owned by my great-grandparents and located immediately behind their house. My grandmother's three daughters, until they reached the age of majority, split their time between the two houses.

¹³⁵ See, e.g., Randy Albelda, *Fallacies of Welfare-to-Work Policies*, 577 ANNALS 66, 74 (2001) (positing that for some researchers, welfare receipt "constitute[s] dysfunctional behavior" or "a pathology — one of the many 'bad' behaviors that helps reproduce poverty").

¹³⁶ See, e.g., Wahneema Lubiano, *Black Ladies, Welfare Queens and State Minstrels: Ideological War by Narrative Means*, in RACE-ING JUSTICE, EN-GENDERING POWER, *supra* note 110, at 330-40; see also Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS 309, 327 (1994) (finding that black welfare recipients have been politically represented as "pathologically independent with respect to men and pathologically dependent with respect to government").

¹³⁷ See Fraser & Gordon, *supra* note 136, at 327; Lucy A. Williams, *Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L. J. 719, 742-44 (1992) (discussing how welfare recipients have come to be viewed as depraved and amoral "undeserving poor" who are in need of behavior modification).

¹³⁸ One study has found this to be a typical belief about the work ethic of welfare recipients. ELAINE B. KAPLAN, NOT OUR KIND OF GIRL: UNRAVELING THE MYTHS OF BLACK TEENAGE MOTHERHOOD 133 (1997).

¹³⁹ Within welfare reform policy and doctrine, the identities created at the intersection of gender and race are of black women as "Welfare Queens," "inadequate mothers," and persons who "cheat the welfare system." Catherine R. Albiston & Laura B. Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 HOW. L.J. 473, 515-16 (1995); see also Lubiano, *supra* note 136; Dorothy Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1563-64 (1996) (noting welfare has become proxy for race and that "[w]hen Americans discuss welfare, many have in mind the

opinion that she had “her own morality” with regard to men tapped into stereotypical notions of black women as harlots or “oversexed.”¹⁴⁰ The idea is well-represented in the following passage:

Sexualized images of African Americans go all the way back to Europeans’ first engagement with Africans. Blacks have long been portrayed as more sexual, more earthy, more gratification-oriented. These sexualized images of race intersect with norms of women’s sexuality, norms that are used to distinguish good women from bad, the Madonna’s from the whores.¹⁴¹

Additionally, the probation report’s unsupported claim that my grandmother did not like Whites, again implicated her race and marked her as antisocial within the context of 1960s America and, perhaps, as more likely to have contributed to a crime which involved a white victim. Taken together, these examples show how a series of inferences related to negative connotations about class, race, and gender can cause formal, doctrinal narratives to erase personal identity and substitute an alternate construction of a legal subject.¹⁴²

The acts of the prosecutor coupled with the strategic insertion of these personal background facts into the court’s papers served multiple purposes. First, it is clear from family interviews that my grandmother saw these actions as designed to force her into a plea arrangement.¹⁴³ Coercion, which could not be supported by the underwhelming nature of the evidence, could be achieved through state legal actors reminding her that her race, gender, welfare status and prior record would harm her credibility.¹⁴⁴ Ironically, then, the state benefited from my

mythical black ‘welfare queen’ or profligate teenager who becomes pregnant at taxpayers expense to fatten her welfare check”) (footnote omitted).

¹⁴⁰ See Albiston & Nielsen, *supra* note 139, at 515-17 (describing “promiscuity myth” — a belief within society that poor women of color are sexually promiscuous and lascivious); Hernandez, *supra* note 22, at 209 (noting that prevailing societal stereotypes reflect women of color as “wanton,” which, in turn, causes them to be constructed as sexual objects); Darren L. Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 84 (1999) (discussing how historically, black women have been socially constructed as Jezebel’s — women governed by their sexual desires).

¹⁴¹ Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1271 (1991).

¹⁴² In her critique of legal consciousness research, Naomi Mezey has previously described this phenomenon in her comment that “the power and authority of the written text can erase and disfigure identity.” Naomi Mezey, *Out of the Ordinary: Law, Power, Culture, and the Commonplace*, 26 L. & SOC. INQUIRY 145, 159 (2001).

¹⁴³ See Barnes, *supra* note 14, at 53.

¹⁴⁴ This is an additional benefit of relying upon stereotypes and constructed identity —

grandmother acquiescing to the validity of the identity construction.¹⁴⁵ Additionally, the prior offenses acted as a signal to the fact-finder that guilt could be inferred from the constructed identity.¹⁴⁶ Instead of relying solely on the direct and circumstantial evidence of her guilt, the court could gauge culpability as a function of her welfare status and previous convictions. When this information was added to a record already containing unflattering race and gender characterizations, an image of her as a bad person emerged. Had her case gone to trial, this image would have significantly assisted prosecutors and limited her ability to project her claimed innocence.

The record shows that the effects of the identity construction were so strong that authorities saw even my grandmother's positive actions through a negative identity lens. For example, the court did not recognize either my grandmother's cooperation with the state in the *Washington* case or her attempts to act in her own defense as positive actions. The probation report indicated that long before my grandmother had reached any deal to lessen her charges, she assisted the police in capturing Washington.¹⁴⁷ Specifically, she allowed police to hide in her house while Washington visited and disclosed to her where he hid the murder weapon.¹⁴⁸ In describing her contribution to the case, a police officer admitted she had supplied "vital information" but then added that her actions were self-serving and said that she had only

that everyone understands the effect of the construction. Ian Haney-López discusses this pervasive adoption of prescribed social meaning as arising from courts using "common sense racism." See HANEY-LÓPEZ, *supra* note 53, at 110 (describing attitude as "the intuitive notion that certain objects and actions are simply what they are, widely known, widely recognized, not needing any explanation").

¹⁴⁵ Inasmuch as this element of the behavior reflects submission, it is an example of Antonio Gramsci's premise that hegemony requires the oppressed to acquiesce to dominance. Critical race scholars have previously made this point. See Kimberlé Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1350-57 (1988) (arguing that acceptance of this type of oppression seeps into legal consciousness of subordinated); Jones, *supra* note 22, at 443.

¹⁴⁶ Frank Rudy Cooper has noted a similar tendency in the policing of minorities and refers to it as reliance upon "cultural identity norms" — prevailing assumptions about the implications of particular identity statuses." Frank R. Cooper, *The "Seesaw Effect" from Racial Profiling to Depolicing: Toward Critical Cultural Theory*, in THE NEW CIVIL RIGHTS RESEARCH: A CONSTITUTIVE APPROACH (Laura Beth Nielsen et al. eds., forthcoming 2006); see also Frank Rudy Cooper, *Commentary: Understanding "Depolicing": Symbiosis Theory and Critical Cultural Theory*, 71 UMKC L. REV. 355, 356-57 (2003) (proposing use of "critical cultural theory methodology," which would require doctrinal analysis to consider how implicit assumptions about identity affect construction of discourse).

¹⁴⁷ See Probation Officer's Report, *supra* note 2, at 3-4.

¹⁴⁸ *Id.* at 4. The police arrested him and were able to retrieve the murder weapon.

cooperated with the police to "some extent."¹⁴⁹ This is distressing because it shows how even when the marginalized act "against" stereotypical understandings of identity, the behavior may not provide them with any advantage.

Another instance of the power of stereotype can be seen in my grandmother's attempt to act in her defense. While her case was pending, she wrote a letter to the judge to lobby for a new attorney, claiming that her original counsel was ill-equipped to try a serious criminal matter.¹⁵⁰ In the letter she stated, "[D]ue to the seriousness of my case, I definitely need a strictly criminal lawyer. There is a strong personality clash between myself and Mr. Gillis."¹⁵¹ She therefore requested the court to "please consider my request for a criminal lawyer and appoint someone who is capable of giving me the counsel that I am in such desperate need of."¹⁵² The next day the court granted the request, but her agency and intelligence reflected in the request seem to have hurt her rather than helped her.

My grandmother's probation report contains the first indirect but harmful reference to her intelligence. In that report, Washington's federal probation officer opined that his client was not "capable of planning the instant offense" — meaning he was not smart enough.¹⁵³ She, of course, by inference, was smart enough; this was an assertion the presiding judge later adopted. In his comment on her sentence, the presiding judge recommended she receive the maximum punishment with no parole. He claimed that "there was substantial evidence upon which this court was of the opinion that the Defendant Spencer not only was involved to a much greater extent than indicated by the (probation) report or her plea but that she actually engineered the assault."¹⁵⁴ Since neither my grandmother nor Davis, the other alleged co-conspirator, testified at any trial, it appears that the judge largely based his opinion on the papers of the prosecutor and probation officer. He may also have considered the testimony of Washington, who as mentioned above,

¹⁴⁹ *Id.* at 7. Only an African-American police officer, who knew my grandmother prior to the crime and who she spoke of fondly, was willing to comment without disparaging her, saying that "she was quite cooperative later in the investigation and helpful in the investigation of the case." *Id.*

¹⁵⁰ Letter to Judge Eli H. Levenson, *People v. Spencer*, No. CR 12844 (Cal. Super. Ct. Jan. 22, 1968).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See Probation Officer's Report, *supra* note 2, at 8.

¹⁵⁴ Statement by Trial Judge, *People v. Spencer*, No. CR 12844 (Cal. Super. Ct. May 23, 1968).

offered several contradictory stories about who planned and committed the crime.¹⁵⁵ The judge was so convinced by the image of my grandmother portrayed in the court's papers that he reiterated his opinion of her cunning in a letter opining that her parole should be denied.¹⁵⁶

The court's papers portrayed my grandmother as a parentally irresponsible black welfare recipient with too much money, a criminal record, suspect morality, dangerous intelligence, and shady associations and who lived at the scene of a murder. Using these facts as a backdrop and stressing selective voices, legal decision-makers constructed the doctrinal narrative of her case.¹⁵⁷ The constructions reduced my grandmother to only the stereotypes related to her status as a poor black woman with a criminal record. The constructions were so powerful that negative associations attached to even those behaviors that undermined the constructed identity. As the next section reveals, however, rendering black women hypervisible is not the only way in which formal narratives manipulate their identities within criminal proceedings.

B. Millie Simpson's Erasure and Opacity

Millie Simpson appeared in criminal courts on three occasions, but she was never completely heard until she had a private attorney present and speaking for her in the last proceeding. More importantly for the premise of this Article, it is not clear that she was ever truly seen — at least not as an individual. Quite clearly, Millie Simpson was physically present and viewable to the court. It is less clear, however, that she was ever considered to be a capable and autonomous human being with the power to express herself within the context of the courts' artificial

¹⁵⁵ See *supra* notes 79-81 and accompanying text.

¹⁵⁶ See Letter from Judge Eli H. Levenson to State of California Women's Board of Terms and Parole, *People v. Spencer*, No. CR 12844 (Cal. Super. Ct. Oct. 21, 1968). In the letter, which was written six months after Spencer's plea, the judge appears to have become even more committed to his belief in her criminality. He stated: "The evidence in this case *overwhelmingly* indicated that this defendant was the *mastermind* of a totally unnecessary and brutal killing for profit." *Id.* (emphasis added).

¹⁵⁷ As one scholar has noted, this construction necessarily reduces multiple stories into a singular narrative that "speaks univocally, and systematically excludes the voices and stories of those who ought to be included in the community of authoritative speech." Phillip N. Meyer, *Will You Please Be Quiet, Please?: Lawyers Listening to the Call of Stories*, 18 VT. L. REV. 567, 570 (1994); see also Michael Grossberg, *Telling Tale: How to Tell Law Stories*, 23 L. & SOC. INQUIRY 459, 463 (1998) (finding "description is always analysis," and calling for using "context" to mediate clashing ideas); Sherwin, *supra* note 38, at 717 (speaking of stories, author concludes that all cognition and perceptions are never without interpretive framework).

structures. She tried to explain to the judge in the first hearing that she had committed no crimes. Based on her belief in the continuity between hearings, she assumed the second judge would be aware of her not guilty plea. According to her, however, he adjudged her guilty without hearing from her at all. Not until her private attorney retold her story at her third proceeding, did the court deliver a result consistent with her story on innocence. Even then, Millie seemed to be absent from the transaction, having no knowledge that the proceeding had ended or that she had prevailed.¹⁵⁸ As the researchers indicated, Millie understood that white folks negotiated these incidents with greater ease, but this did not disturb her. It simply was the way of the world: “[F]or Millie, things simply happened within this terrain; they did not need to be explained.”¹⁵⁹

One can only conclude that outside of the first judge who heard just enough from her to enter a plea, Millie Simpson was a non-entity to the remainder of the state legal actors she encountered. While Ewick and Silbey locate instances of resistance in Millie’s story,¹⁶⁰ her courtroom experiences paint a picture of her mostly being “acted upon,” without her input or participation.¹⁶¹ These experiences represent a very specific danger — it is the problem of erasure.¹⁶² Despite her attempts to tell her individual story, Millie’s experience, story, and person were never recognized.¹⁶³ It may well be that Millie Simpson’s treatment in the course of her proceedings was based on the court reacting to stereotypes associated with the gender, race, and class categories she inhabited. In the alternative, it may be that she was overlooked or had her agency minimized because it was obvious to the court that she lacked the sophistication to meaningfully contribute to her own defense. Whichever was the case, Millie’s unique identity was erased. Rather than deciding what happened to Millie personally, the court was left

¹⁵⁸ See Ewick & Silbey, *supra* note 1.

¹⁵⁹ Ewick & Silbey, *supra* note 1, at 744. Perhaps in this instance Millie reveals an attitude similar to my grandmother’s feelings of powerlessness, albeit without the surprise that the justice system could work in this way.

¹⁶⁰ Describing as resistance, or “against the law consciousness,” Millie’s arranging to perform community service at a church where she already volunteered and keeping physical possession of her driver’s license, even though the court had revoked her driving privileges. Ewick & Silbey, *supra* note 1, at 745-46.

¹⁶¹ Within the study that recorded Millie Simpson’s story, the researchers described this category of legal understanding as “before the law” consciousness, where legality is envisioned as a separate and authoritative sphere. EWICK & SILBEY, *supra* note 3, at 47.

¹⁶² See *supra* notes 68-76, 159-61 and accompanying text.

¹⁶³ See Brooks, *supra* note 103, at 37-38 (suggesting that within court cases, multiple narratives of same event may have different meanings and legal consequences).

only with her disembodied identity categories.

Unlike in my grandmother's case, the court in Millie Simpson's case never explicitly described her as poor, a black, or as a woman. One could argue the failure to refer to identity categories signals that the traits were irrelevant to the court. The counterclaim, which appears more potent, given the unconscious operation of stereotypes, is that the court used the intersected identity in a manner that was merely unclear. In Millie's case and many others, courts have told us nothing of what has influenced them. The importance of identity to the proceeding is not rendered unimportant, just opaque.¹⁶⁴ We only know for sure that whatever understanding of identity the court used, it supported the erasure of Millie Simpson, individual, and she was only made fully visible and audible through her private counsel.

Millie's invisibility and my grandmother's hypervisibility should not be regarded as separate or independent phenomena. They should be understood as different techniques to accomplish the same goal — sublimation of the individual. With invisibility, a court's understanding of minority identity or its irrelevance to assisting in decision-making, effectively negates the individual's presence. Essentially, for the purpose of influencing the court's outcome, the defendant is simply rendered not there. With hypervisibility, a court uses identity constructions to erase then reconstitute the individual, but only as a caricature or exemplar of a debilitated identity. The individual, however, is no more present. While invisibility and hypervisibility have been presented as somewhat oppositional markings, they need not be understood as dichotomous processes. As others have suggested, it may be possible to have different aspects of one's identity simultaneously rendered invisible and hypervisible when it serves a court's purposes.¹⁶⁵

IV. STRATEGIC "INTEREST CONVERGENCE": SOCIOLEGAL THEORY AND CRITICAL RACE THEORY/FEMINISM — EMPLOYING SEPARATE BUT COMPATIBLE USES OF NARRATIVE METHOD TO FIGHT SUBORDINATION

As I indicated above, one point of contrasting Millie's story with that of my grandmother's has been to initiate a conversation about how critical scholars might benefit from looking to how sociolegal studies employ narrative methodology. Such an endeavor may assist critical

¹⁶⁴ In other words, one can claim that where a court completely fails to recognize the physical presence or narrative voice of an individual, then stereotypes associated with the identity categories that the person inhabits are all that remain.

¹⁶⁵ See Jefferson, *supra* note 24, at 281-87.

scholars in fully exposing the varied forms of identity distortion which take place within criminal courts and allow them to harvest greater purchase from their own uses of narrative methodology. This engagement makes sense because sociolegal theorists also understand and rely upon the power of narrative.¹⁶⁶ First, they understand the relevance of one's personal story to the creation of the formal narrative.¹⁶⁷ As Michael McCann and Tracey March have noted:

[M]ost [consciousness] studies rely heavily on ethnographic methods, individual narratives, and interview data gleaned from "up close" observations and interrogations of citizens as research subjects to capture the diversity of experiences with law. Some studies focus on the story of a single individual . . . while others focus on multiple similarly situated individuals.¹⁶⁸

Additionally, sociolegal theorists understand the power of the story to shape social reality.¹⁶⁹ Specifically, Ewick and Silbey have described stories in the following way:

The meaning of what seems like petty acts lies in their narratives. The process through which an event is made into a story is sociologically significant in and of itself. We argue that all stories are social events. In other words, stories are not just social reality; 'social reality' happens in stories.¹⁷⁰

These studies, however, additionally illuminate how the many different stories of a broad swath of people can reveal something systemic about citizens' structural relationships to law and the construction of legality.¹⁷¹

¹⁶⁶ See, e.g., Patricia Ewick & Susan Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 *LAW & SOC'Y REV.* 197 (1995); Benjamin Fleury-Steiner, *Narratives of the Death Sentence: Toward a Theory of Legal Narrativity*, 36 *LAW & SOC'Y REV.* 549, 559-64 (2002).

¹⁶⁷ See, e.g., Austin Sarat & Jonathon Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 *YALE J.L. & HUMAN.* 3, 25 (2001) ("[L]aw is always . . . irreversibly infected by the (often dated) cultural content of its own objects.").

¹⁶⁸ McCann & March, *supra* note 3, at 211.

¹⁶⁹ In the study that included Millie's story, Ewick and Silbey support this argument with their claims that "people report, account for, and relive their activities through narratives" and that personal stories "describe the world as it is lived and is understood by the storyteller." EWICK & SILBEY, *supra* note 3, at 29.

¹⁷⁰ Ewick & Silbey, *supra* note 18, at 1328, 1331 (citation omitted).

¹⁷¹ The following description captures the inescapable relationship of stories to the making of law:

The endless telling and retelling, casting and recasting of stories is essential to the conduct of the law. It is how law's actors comprehend whatever series of

Theories emerging from the studies suggest that individuals have complicated and shifting relationships to the law and power, where those inhabiting various identity categories sometimes submit to the will of the law, but at other times are capable of resisting the law.¹⁷² Sociologists and sociolegal scholars produce empirical studies that generally support what critical race and feminist legal theorists have been advancing all along — that minority stories about their legal experiences are different and that the difference has a typicality to it. For sociolegal theorists, the individual story alone is not the point, and they typically do not set out to prove a set of hypotheses related to personal stories. Their theories organically emerge from culling data from thick descriptions, which can take the form of a single episode, several cases, or many stories. To the extent, however, that their methods use an overlapping measurement device and that their results offer a different perspective upon the condition of the subordinated, their work is wonderfully instructive.¹⁷³

There is some danger in instructing CRT/CRF scholars to blindly rely upon sociolegal studies without further critical inquiry. First, as a general prescription, others have already surmised that, while interdisciplinary studies can be illuminating, we must be mindful that “[t]here are important differences in epistemology, methods, operating assumptions and overall goals” both among the social sciences and between the law and social sciences.¹⁷⁴ With regard to critical legal

events they make the subject of their legal actions. It is how they try to make their actions comprehensible again within some larger series of events they take to constitute the legal system and the culture that sustains it.

A. G. AMSTERDAM & JEROME BRUNER, *On Narrative*, in *MINDING THE LAW*, *supra* note 58, at 110 (footnote omitted); *see also* EWICK & SILBEY, *supra* note 3, at 243-44 (“[S]tories are socially organized phenomena whose production, meaning, and effects are not solely individual but collective. . . . [A] crucial part of the definition of the situation storytellers offer . . . is a particular construction of the moral universe and of legality.”).

¹⁷² EWICK & SILBEY, *supra* note 3.

¹⁷³ Such a strategic partnering is advisable given one scholar's claim that the sociolegal exploration of the connection between identity and consciousness has also historically been stressed in the work of feminist and critical race theorists. *See* Mezey, *supra* note 143, at 156-57. Moreover, critical legal scholars and sociolegal theorists are situated on common ground in that they both engage in analyzing the operation of institutional power and resistance, as the terms are conceptualized in landmark writings in sociology by Michel Foucault and Michel de Certeau. *See id.* at 145-48; *see also* MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* (Steven Randall trans., 1984); MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND WRITINGS 1972-77* (Colin Gordon ed., trans., 1980).

¹⁷⁴ Howard Erlanger et al., *Foreword: Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 336 (discussing “the process for formulating a new interdisciplinary paradigm for

studies, in particular, one scholar has pointed out that law and society scholars have, at times, failed to sufficiently attend to the issues of racial inequality and racial identity in their studies.¹⁷⁵ Additionally, an emerging study of law and society scholarship has averred that substantive works analyzing the operation of race within society rarely appear in law and society research or the *Law and Society Review*.¹⁷⁶

Finally, part of the CRT/CRF use of narrative has been intentionally personal or autobiographical and should remain so. To the extent that CRT/CRF scholars use narrative to demand a societal reckoning and reconciliation, we attempt to force persons and institutions that wield power to acknowledge the reality and essential truths of our lived experiences.¹⁷⁷ As accidental auto-ethnographers to a world made "double"¹⁷⁸ by our socially recognized and enforced identity categories,

the study of law"); see also Bruce A. Markell, *Bewitched by Language: Wittgenstein and the Practice of Law*, 32 PEPPERDINE L. REV. 801, 804 (2005) ("The problems inherent in importing the practices and mores of certain types of philosophical inquiry into law may stem from the different context in which philosophical theories are spawned and take root . . . the method employed by philosophers differs from that employed by either law or science. As a result, the transfer from one discipline to another of a theory, for example a theory of meaning, may be disastrous or it may be banal.").

¹⁷⁵ See Laura E. Gomez, *A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 453 (Austin Sarat et al. eds., 2004). But see Erlanger, *supra* note 174, at 339-41 (encouraging research of intersection of law and social sciences to operate, in part, from "bottom-up" and to include sensitivity "to the realities of power arrangements and hierarchies in studying law").

¹⁷⁶ Osagie K. Obosogie, *Race in Law & Society*, Paper Presented at the Annual Meeting of the Law and Society Association (June 5, 2005) (on file with author) (noting lack of race-focused articles in the *Law and Society Review* and describing studies with racial focus as exploring race in limited manner).

¹⁷⁷ A prevalent narrative within CRT/CRF involves stories where women professors and professors of color reveal the ways that our educational and economic privileges have not shielded us from instances of individual discrimination and societal subordination. See, e.g., WILLIAMS, *supra* note 13, at 44-46 (describing experience of being denied entry into clothing store); Culp, *supra* note 13, at 539-40 (describing how his students responded to his introducing his personal narrative of modest upbringing into his teaching); Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 5 MICH. J. RACE & L. 847 (2000) (describing experience related to discovering vulgar, racist, and sexist graffiti directed toward her at law school where she is on faculty). In a particularly moving example of this use of narrative, law professor Christine Zuni Cruz describes both the process and emotions her family encounters related to her son's arrest and conviction for driving under the influence. Christine Zuni Cruz, *Four Questions on Critical Race Praxis: Lessons from Two Lives in Indian Country*, 73 FORDHAM L. REV. 2133, 2136-37, 2157-58 (2005).

¹⁷⁸ Here, I mean to evoke the work of W.E.B. Dubois, who theorized that African Americans within American society experience a double consciousness — a "sense of always looking at oneself through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity." W.E.B. DUBOIS, THE SOULS OF BLACK

we attempt to articulate our lives from the perspective of participant-observers in a manner that often evades the very formalism that social science may require of such a method. There is no suggestion that sociolegal theorists must join us in this undertaking through the mode we employ. This particular manner for observing and then reproducing a narrative, however, does not prevent us from using the method in other ways. For instance, as long as we do so with an understanding of the import and the limits of the work, we can continue to use the studies of others, as I have tried to do here, to complement our work.¹⁷⁹ Where this proves too limiting for the ambition or nature of our projects, it also may be necessary for race and gender scholars to continue to undertake their own empirical studies¹⁸⁰ or to at least be steadfast in requiring law and society scholarship to account for our issues and identities.

Even though we must be vigilant in challenging studies and disciplines that improperly minimize issues of race in their inquiries, there is quite obviously a nice methodological "interest convergence" between CRT/CRF scholars and sociolegal theorists surrounding the use of narrative.¹⁸¹ This convergence may stem from CRT/CRF's initial rise from the scholarly traditions of critical legal studies and legal realism, which also figured prominently in the development of law and society

FOLK 48 (1969).

¹⁷⁹ For another example, see Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded as" Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. (forthcoming 2006) (using results of social science research studies as support for proposal to find that discrimination based upon using proxies for protected categories actionable under Title VII).

¹⁸⁰ See, e.g., Erlanger, *supra* note 174, at 350-56 (discussing unpublished empirical work of Professor David Wilkins on survival of minority lawyers at elite law firms); Tanya Kateri Hernández, *Sexual Harassment & Critical Race Feminism Empirical Research: The Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235 (2006) (mixing CRT/CRF perspectives with empirical research methods); Thomas Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557 (deftly using qualitative and quantitative data to track the unequal benefits accruing to white versus black landowners in adjacent segregated sections of rural North Carolina community); see also Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1 (1999).

¹⁸¹ This idea is borrowed from Derrick Bell's theory of interest-convergence which asserts that "[b]lack rights are recognized and protected when and only so long as policymakers perceive that such advances will further interests that are their primary concern." DERRICK A. BELL, JR., *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 49 (2004); see also Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). At least one scholar who has criticized narrative methodology has challenged Bell's theory as untrue, not helpful to reforming law, and an exercise in fatalism. Litowitz, *supra* note 43, at 525.

scholarship.¹⁸² Or, it just may be that the goals of our work and the use of our methods, across disciplines, do not typically offend each other.¹⁸³ Whether one uses the story as data in a sociological study of how ordinary citizens construct legality¹⁸⁴ or as tool to “expose how the forces of domination are experienced at the individual level,”¹⁸⁵ it is a prevailing methodological device of choice within each enterprise. Moreover, at present, there appears to be a common goal in the use of narrative — the production or generation of theory and knowledge. CRT/CRF methods in general, and narrative in particular, are not just deconstructive. The point of our stories is often not just to expose inequality where it was once unidentified but also to “provide new metaphors, nuances, linkages and inspiration, creating a narrative economy of shared vocabularies and common images.”¹⁸⁶ Further, where the individual story of disenfranchisement resonates with a critical mass of others, it develops the potential to become understood as a more generally relevant and applicable parable.¹⁸⁷ In our efforts then to both

¹⁸² See Arthur F. McEvoy, *A New Realism for Legal Studies*, 2005 WIS. L. REV. 433, 443-45; cf. Susan S. Silbey & Austin Sarat, *Critical Traditions in Law and Society Research*, 21 LAW & SOC'Y REV. 165, 168-73 (1987) (acknowledging legal realists as forbearers of law and society movement, but noting differences between law and society research and critical legal studies). For a discussion regarding CRT's emergence from Critical Legal Studies, see Kimberlé Crenshaw, *The First Decade: Critical Reflections, Or "A Foot in the Closing Door,"* 49 UCLA L. REV. 1343, 1354-64 (2002); Charles R. Lawrence, III, *Who Are We? And Why Are We Here? Doing Critical Race Theory in Hard Times, Foreword to CROSSROADS*, *supra* note 22, at 12-14.

¹⁸³ With the recent emphasis on analyzing the operation of the law in everyday life, researchers have sought to explore the reciprocal interactions between the law, environment, and culture. See McEvoy, *supra* note 182, at 434-36. While generally identifying this work as part and parcel of the New Legal Realism, it is also understood to build upon the multiple traditions of law and society and CLS scholarship. *Id.* at 440-41.

¹⁸⁴ See *supra* notes 3, 19, 162 & 172.

¹⁸⁵ Montoya, *supra* note 33, at 244.

¹⁸⁶ *Id.* at 243. Moreover, stories can reinforce our individual identities and sense of belonging to a larger group. See Harris, *supra* note 39, at 764 (“Storytelling serves to create and confirm identity, both individual and collective. . . . Storytelling in this sense is myth-making: the creation of a new collective subject with a history from which individuals can draw to shape their own identities.”).

¹⁸⁷ As the following passage illustrates, this understanding is also shared by some sociolegal theorists:

While many stories are themselves hegemonic, helping to sustain the legitimacy of the taken-for-granted world, resistant stories are a potent means through which individual lives and experiences are able to transcend the immediate and personal in such a way as to become socially meaningful and potentially transformative.

destabilize hierarchies of power and to find common ground across legal engagements, we generate separate but compatible theories to explain how we exist in the world.¹⁸⁸

In addition to our mutually beneficial use of narrative methodology, the substantive inquiries of sociolegal studies might also be helpful to the projects of CRT/CRF scholars. As one recent article committed to the notion of interdisciplinary work between law and the social sciences has espoused, we must not assume that work may be easily transferred across fields of inquiry.¹⁸⁹ Instead, we must strive to "translate" each other's work in a way that identifies both the benefits and limitations of interdisciplinary research.¹⁹⁰ For example, in another article, I explore how Ewick and Silbey's model of "before-," "against-," and "with the law" consciousness is evidenced within my grandmother's story and other family legal encounters.¹⁹¹ Their model was instructive because it helped to illuminate the ways in which my grandmother and other family members were not merely victims within their legal contests; like Ewick and Silbey's study subjects, they too exhibited shifting attitudes toward legal actors and found occasions to exert some control over their contests.¹⁹² While I found there were elements of our family legal stories

¹⁸⁸ Certainly CRT scholars have made myriad contributions to exploring perspectives born of racialization and theorizing the operation of oppression along multiple axes of identity. See, e.g., Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHIC. LEGAL F. 139, 140 (discussing "intersectionality theory," which states that multiple bases for subordination intersect in formulations of individual's identity and experiences). More recently, others have offered "post-intersectionality" theories to describe overlapping bases of subordination. See Darren L. Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 309 (2001) (discussing "multidimensionality theory," which finds inherent interrelatedness between forms of identity and oppression); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1280 (1997) (offering "cosynthesis theory," which posits that "multiple categories through which we understand ourselves are sometimes implicated in complex ways with the formation of categories through which others are constituted"); see also Harris, *supra* note 39, at 767-71 (discussing how race shapes subject perspective and how critical race scholars have theorized this perspective with theories related to intersectionality, W.E.B. Dubois' concept on multiple consciousness, and conceptualizing race as culture); Frank Valdes, *Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience — RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265, 1271 (1999) (describing LatCrit and other progressive scholars as having given voice to social justice claims of oppressed and "[brought] into existence the jurisprudential formations, communities and experiments that today constitute 'outsider jurisprudence' in the United States") (citation omitted).

¹⁸⁹ Erlanger, *supra* note 174, at 341.

¹⁹⁰ *Id.* at 341-42.

¹⁹¹ See Barnes, *supra* note 14, at 90-98.

¹⁹² *Id.* (examining different occasions where my grandmother attempted to resist, game,

that could not be explained by simply applying their model,¹⁹³ their work provided a framework for conceptualizing how my family processed the experience of subordination. Ewick and Silbey's work is foundational, but other sociolegal scholars have made recent contributions that are noteworthy and also hold important implications for CRT/CRF work. For instance, Laura Beth Nielson's work essentially asks whether we might not isolate legal attitudes based on race, gender, and other markers of social position.¹⁹⁴ Ben Fleury-Steiner's recent work in the area of death penalty jury narratives is wonderfully rich and insightful in its depiction of how society and the criminal justice system invest in racism.¹⁹⁵ Studies such as these are built upon narratives, but also have findings which can and should be a rich mining ground for CRT/CRF scholars looking for new ways to articulate how the world is very different for our constituencies.

CRT scholars need not limit the many ways in which we use our stories. Our long term projects, however, must include strategies to ensure that we are heard and, when appropriate, respond to those who challenge our methods. To this end, the sociolegal use of narrative helps the CRT/CRF cause in two important ways. First, the structure of the studies, by design, involve researchers who have no personal interests in the content of the data (stories).¹⁹⁶ Second, despite this more distant posture, the studies repeatedly find claims of disenfranchisement and subordination in data collected from persons of color.¹⁹⁷ The character and content of the studies rebut some of the claims of storytelling critics — that CRT scholars tell stories of subordination which are

or acquiesce during her legal encounter originating from *Washington* case). I also explore the applicability of the theories of Kirsten Bumiller and John Gilliom. See BUMILLER, *supra* note 16, at 82-88 (claiming that in response to discrimination, victims may employ "ethic of survival," behavior reflective of "private honor," to mitigate effects of subordination); GILLIOM, *supra* note 16, at 69 (discussing "ethic of care," which he states is moral and critical framework not based on rules or law, but instead rooted in daily experiences and lives of welfare poor).

¹⁹³ Barnes, *supra* note 14, at 98-108 (exploring family's tendency to respond with silence to its legal encounters in way that did not clearly fit into one of Ewick and Silbey's categories of legal consciousness).

¹⁹⁴ See Nielsen, *supra* note 16, at 1061, 1085-88.

¹⁹⁵ See Fleury-Steiner, *supra* note 166, at 11-28.

¹⁹⁶ This tends to refute the often stated claims that critical legal scholars, apparently unlike detached sociolegal theorists, use narrative in a manner that appeals to emotion. See *supra* notes 46-47.

¹⁹⁷ EWICK & SILBEY, *supra* note 3, at 234-41 (finding that persons socially marginalized by race, gender, and class were more typically associated with resistance consciousness and that problems of socially marginalized people typically failed to find expression in "dominant legal narratives"); Levine & Mellema, *supra* note 18; Nielsen, *supra* note 16.

untrustworthy, atypical, and too infrequent to constitute a viable methodology.¹⁹⁸ Beyond this benefit, recent sociolegal research has ventured into interesting and dynamic areas of inquiry,¹⁹⁹ reflecting how ostensibly neutral legal practices actually reproduce racial inequality in the law.²⁰⁰ Most importantly, as Ewick and Silbey suggested at the conclusion of their study, narratives linked across subjects present opportunities for political mobilization.²⁰¹ The sociolegal construction is at once responsive to criticisms of the use of narrative and still compatible with CRT's/CRF's potential use of the method to challenge subordination and accurately reflect the past and present conditions of the socially marginalized.

CONCLUSION

Millie Simpson and Leaila Spencer are unrelated black women who in many ways had unique experiences within the criminal legal system. The nature and seriousness of their alleged crimes were dissimilar. The time periods, locations, and outcomes of the cases were distinct. This Article has attempted to suggest, however, that despite the differences in the cases, that through the harmful constructions of black female identity their respective courts employed, they are connected — to each other and all black women who find themselves invisible and/or hypervisible within their proceedings.²⁰²

¹⁹⁸ See *supra* notes 45-47. Ewick and Silbey's research indirectly confronts the complaint about the alleged atypical character of personal narratives by suggesting, that in their operation, social structures "create a common opportunity to narrate and a common content to the narrative." EWICK & SILBEY, *supra* note 3, at 241.

¹⁹⁹ See GILLIOM, *supra* note 16, at 45-68 (class); Nielsen, *supra* note 16, at 1072-85 (race and gender).

²⁰⁰ See Fleury-Steiner, *supra* note 166 (providing examples of how ostensibly neutral death-qualified juries actually invest in racism, as their decision making is affected by beliefs about blacks as racially inferior and outsiders).

²⁰¹ EWICK & SILBEY, *supra* note 3, at 220 (noting that "sharing stories of resistance may be one means through which individual encounters with power become the basis for collective action"); see also Alfieri, *supra* note 57, at 1487 ("Equality-compelled resistance to racial hierarchy and racist ideology in civil and criminal justice systems informs cultural interpretation, social struggle and political protest."); Foster, *supra* note 32, at 2037-38 (asserting that narratives "can be very useful in building social movements, as well as raising the profile of, and educating policymakers and the public about, the nature of issues").

²⁰² Patricia Williams has written of this connectedness or shared status across individual experiences:

[D]espite all the progress and the multiplicity of purveyed images, each battle

Earlier in this Article, I suggested that paying attention to the stories of black women like Millie and Leaila represented a first step toward recognizing the unequal universe identity creates for some black women within the criminal law. The ultimate goal, however, remains liberation from, or at least disruption of, the processes which facilitate depreciation of the personal voice, story, and existence. Can stories really do all the work I envision for them? No, not if they are only thought of as the dubious domain of CRT/CRF scholars. In a discursive world where merely the act of identifying oneself as a critical legal scholar or a believer in narrative can engender skepticism toward one's projects and methods, we find ourselves in need of new strategies to increase the salience of our messages.

I wrote this piece to suggest that perhaps there are opportunities to gain leverage without sacrificing the authenticity of our voices or the multiple purposes of our methods.²⁰³ We should explore using the theories of other disciplines and scholars where methods and, perhaps, political agendas substantially converge. I believe in the goal of the sociolegal theorists who espouse political mobilization as an achievable result of connecting stories of the disempowered. As a precursor to such a laudable but lofty ambition, however, the stories of the disenfranchised have to gain a resonance with persons greater than the communities of people who already embrace them as true or typical. When we look to other disciplines, we present ourselves opportunities to challenge the merits of our own work and the theories of others. More importantly, however, we potentially broaden the appeal and audiences for our messages. In the realm of storytelling or narrative, the broadened appeal may translate as an opportunity to share experiences, parts of which may turn out to be more universal or typical than we currently understand them to be. We will likely not reach those hardened against what we believe to be the truth of these experiences, but we may reach portions of the unknowledgeable and the undecided. Greater acceptance by persons

seems not to have built on the last; rather our collective status as black women, like that of all who labor within stereotypes, remains at stake in every struggle. Each time one of us is on the line, so is the public image of the black woman. This makes for a precariousness, a fragility, a vulnerability, a political resonance to the erstwhile romantic fluffiness of Terry McMillan's "waiting to exhale."

Patricia Williams, *Anatomy of a Fairy Princess*, in *WHEN RACE BECOMES REAL* 173, 176 (Bernestine Singley ed., 2002).

²⁰³ By this I mean that in addition to whatever deconstructive or challenging purpose exists in the stories we tell, there is also often a personal validation or self-healing function that I do not wish to abandon.

inhabiting these groups is necessary if we hope to locate an audience open to social change.

For at least the near future, we who believe in the purpose and possibilities of CRT/CRF must remain committed to assessing the social reality of the marginalized and then providing the architecture to make real differences in the lives of those who are least able to do so for themselves. As a scholar who specifically uses CRT/CRF methods to analyze the contours of criminal law, my ultimate goal remains working toward a future where there are no more stories like those of Millie Simpson and my grandmother, and where black men and women are not so prevalent among those who populate criminal courtrooms and prisons. For that more hopeful future to arrive, the law must cease to be a tool for the harmful construction of minority identities, and courts must develop the capacity to effectively see and hear all participants within the criminal legal system. Until that day arrives, however, I will continue to look back to provide context and look ahead to create space for our versions of our law stories, understanding that "[m]ost importantly, the narrative potential of critical theory lies in its ability to free us to move backward and forward in time, to 're-story' the past and to 're-imagine' the future."²⁰⁴

²⁰⁴ Espinoza & Harris, *supra* note 33, at 1631.
