

THE CONSCIOUSNESS OF CRIME AND PUNISHMENT: REFLECTIONS ON IDENTITY POLITICS AND LAWMAKING IN THE WAR ON DRUGS

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It's turning into Drug War Summer. With the emergence of crack, the cheap and powerfully addictive form of cocaine, Americans are alarmed, even disgusted. And when the public is agitated, can politicians be far behind? Surely not . . . The key word is *verbal*, for so far, this is mostly a *war of words* (emphasis added).

New York Times Editorial, summer 1986

To these objections I reply that the subject of our study is the dupes and those who dupe them, the alienated, and that if there are White men who behave naturally when they meet Negroes, they certainly do not fall within the scope of our examination.

Frantz Fanon, 1965

INTRODUCTION

Politicians play a fundamental role in articulating America's consciousness of crime and punishment. As interpreters of both lay and professional attitudes and beliefs about criminality – as the makers of public policy – politicians are simultaneously the voices of the “people's” and the “official's” law.¹ Speaking

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in two often, contradictory, voices, the world of legislative debates is invariably a morass of images, technical language, and folk knowledge (Steiner, Bowers & Sarat, 1999, pp. 468–473). Crime and punishment in the political imagination is thus an outward, public expression (Garland, 1991, p. 192) at the same time that it may be couched in legalistic language. Yet, perhaps more importantly, as elected officials, politicians have a larger stake in a posture that appeals to public sentiment (Simon, 1997). As central figures in America's "law and order marketplace" (Steiner, Bowers & Sarat, 1999, p. 467) politicians have a vital interest in appearing "tough on crime" and thus appeasing their constituents.

The "official" world of legislative debates like the worlds of judicial retention elections (Olson & Batjer, 1999), small claims court disputants (Merry, 1990), and divorce lawyers (Sarat & Felstiner, 1986), is dependent on storytelling. Politicians tell stories to their colleagues when arguing for the passage of new crime control legislation and when campaigning for political office to show their constituents that they aren't "soft on crime." For example, while Democratic presidential candidate Michael Dukakis' furlough of Willie Horton, a Black man who went onto to rape a White woman after his release, may have been interpreted as a tale of alleged "criminal justice policy failure" (Steiner, Bowers & Sarat, 1999, p. 468), the story could also be interpreted as a broader attack on the failure of "permissive," "liberal" civil rights reforms.² "Dangerous Black men" on the loose in a "liberal" state may, indeed, be another interpretation of the Republicans' use of the Horton episode. As such, the conflating of racial spectacle³ with "liberal" criminal justice "failures" has been especially useful to politicians when arguing for and defending 'tough on crime' policies.

Political advocacy of this sort has been mobilized in the rhetorical battlefields of America's contemporary War on Drugs (Beckett, 1997). Such racially coded narratives calling for the one-hundred-to-one crack-powder cocaine federal sentencing disparity, for example, effectively came across as race-neutral (Dvorak, 2000). Indeed, such story telling, whether accompanied by images of racial and ethnic minorities, or reliant on coded language such as "urban, burned out buildings" or implicitly divisive allusions to "us versus them," resonate precisely because they are told to the public without explicit reference to race. Such "color blind" tales resonate with White, middle and upper class racial fears of crime (Skogan, 1981) because they appeal to politically correct views of race⁴ at the same time that they appease White punitiveness.

In the context of the War on Drugs, Richard Dvorak (2000) has recently observed that the crack cocaine debates were laden with what he has termed "color blind slurs." Accordingly, such slurs are "race-neutral entreaties to

Whites' stereotypes and racist prejudices" (p. 626). Drawing on the work of Edsall and Edsall (1991), Dvorak calls attention to how such slurs have effectively utilized racial coding to shift American criminal justice policy to the ideological Right. Moreover, throughout his article, Dvorak sees "de-coding" as an important legal methodology not only for future challenges to the "crack cocaine sentencing scheme, but also for scrutinizing other legislation where legislators may rely on racist code words to garner support for laws that disproportionately harm people of color" (Dvorak, 2000, p. 662).

Building on Dvorak's (2000) policy analysis of the War on Drugs, this essay seeks to articulate the "politics of law and order" (Scheingold, 1984; 1998) within a different conceptual framework. Critiquing political consciousness during America's contemporary drug war as part of a broader commitment to White privilege and innocence from criminality, I argue that the contemporary War on Drugs can justifiably be called a "war against the marginalized." Secondly, I argue that the identity politics of the War on Drugs constitutes a larger "White supremacy story." Finally, I offer reflections on drug war discourse and the ideological impediments to genuine civil rights reform in America.

LEGAL CONSCIOUSNESS, POLITICAL NARRATIVE, AND LAW MAKING

Politicians as Storytellers During the War on Drugs

Politicians, including those during the War on Drugs, told tales to their political allies and to their constituents in legislative debates. Throughout the late 1980s, an overwhelming majority of White Americans supported tougher penalties for illegal drug use, including the use of military force in marginalized,⁵ inner city communities (Glasser & Siegel, 1997, p. 232). Moreover, a majority of U.S. Senators, supported stiffer penalties for crack as compared to powder cocaine possession – a drug widely available and detectable by law enforcement assigned to open-air drug markets in impoverished inner city communities (Reinarman & Levine, 1997, pp. 36–38). In articulating such support, they told tales that carried the favor of their congressional allies and mobilized their middle and upper class, disproportionately White constituents. Indeed, crime as a potent political theme has a long history among Conservatives dating back to the Nixon campaign and presidency (Beckett, 1997; Beckett & Sasson, 1999; Sasson, 1996; Scheingold, 1984), and has more recently been adopted by Democrats such as Al Gore⁶ (Cockburn & St. Clair, 2000) and Bill Clinton (Hitchens, 2000). Democratic acquiescence, moreover, led to their

subsequent endorsement of the Conservative-led Violent Crime Control and Law Enforcement Act of 1994.⁷

Investigating legislative debates and subsequent law making during the War on Drugs provides an important opportunity to explore issues of legal consciousness (Merry, 1985). While elite ideologies are often contested by organized movements

(Olson & Batjer, 1999) in many cases such contestation is marginalized and/or silenced. Such has largely been the case in the contemporary politics of criminal justice. Although very recently there have been small, state-level breakthroughs by oppositional groups in the War on Drugs (Wallace, 2000), Conservative forces have largely prevailed in the criminal justice rhetorical and legislative wars of the 1980s and 1990s (Beckett, 1997; Beckett & Sasson, 1999; Sasson, 1996), typified best perhaps by the Willie Horton spectacle (Edsall & Edsall, 1991; Steiner, Bowers & Sarat, 1999).

How such a Conservative victory was achieved in the War on Drugs has as much or more to do with public consciousness of crime and punishment as it has to do with public consciousness of contemporary American socioeconomic arrangements. Indeed, Liberal politicians in the crack cocaine debates, themselves, told stories that linked the urban drug problem and the attendant “moral decay” in such cities to the middle class suburbs, within, what I call a “White supremacy story.”⁸ Such a “hegemonic tale” (Ewick & Silbey, 1995) was all-pervasive in the political narrating of the subsequent passage of the one-hundred-to-one crack-powder cocaine federal sentencing disparity, precisely because it is as “taken-for-granted as the natural received shape” (Comaroff & Comaroff, 1991, p. 23) of American society. Thus, however racist the dominant belief system is (e.g. Feagin, 2000), it is normalized in the disproportionately White, middle and upper class community (Dumm, 1998) and is reproduced as a pervasive form of unconscious discrimination (Lawrence, 1987) and White privilege (Lipsitz, 1998).

CRITICAL RACE THEORY AND CRIMINAL INJUSTICE

Victimizing the Victims

Focusing on White privilege has been particularly important for investigating the damaging effects of the criminal justice system on racially and ethnically aggrieved groups before and after the civil rights movements of the 1960s (Butler, 1997).⁹ Indeed, the limited effect of the civil rights movement on reforming the criminal justice system has been widely noted and has spawned a new and important theoretical dialogue and sociolegal critique (Bell, 1987;

Butler, 1997; Carbado, 1999; Crenshaw et al., 1996; Haney-Lopez, 1996; Lawrence, 1987; Matsuda, 1989; Morrison et al., 1997).¹⁰ While traditional liberalism has often viewed equal protection under law as sufficiently corrective (Pyle, 1999) – or in the case of many Conservatives “reverse discrimination” (e.g. D’Souza, 1995) – Critical Race Theory (CRT) calls attention to the inherent flaws in such reforms.

In a word, America’s equal protection project in the context of criminal justice sees racism’s trees but fails to see its forests. By focusing on individual acts of racial discrimination rather than the systemic effects on those discriminated against, such a project only preserves and reinforces or, at the very least, ignores such disparities. Such a narrow interpretation of racial discrimination in the criminal justice system remains relevant in the context of contemporary civil rights. Indeed, contemporary drug war jurisprudence (e.g. U.S. vs. Armstrong, 1996) continues to rely heavily on what Alan David Freedman (1978) calls a “perpetrator perspective” of racial discrimination:

The concept of ‘racial discrimination’ may be approached from the perspective of either its victim or perpetrator . . . From the victim’s perspective, racial discrimination describes those conditions of actual social existence as a member of a perpetual underclass . . . The perpetrator perspective sees racial discrimination not as conditions, but as actions, or a series of actions, inflicted on the victim by the perpetrator (Freedman, 1978, pp. 1051–1052).

Thus from the perpetrator perspective, “racism” is present only when an actor engages in an act of racial discrimination against another individual or group – there is no racism outside of the specifically, intentionally racist act. Such a model dominates the contemporary criminal justice system, and thus has had deleterious effects on communities of color during the War on Drugs (Cole, 1999; Mann & Zatz, 1998; Mauer, 1999; Tonry, 1997; Walker et al., 2000). As Jerome Miller (1996) observes, “from the first shot fired . . . African Americans were targeted, arrested, and imprisoned in wildly disproportionate numbers” (Miller, 1996, p. 80).

In addition to persistent institutional discrimination, another, perhaps more sinister, ideological function of the War on Drugs is revealed: such ideology invests in Whiteness (Steiner & Argothy, forthcoming).¹¹ In addition to the entertainment industry’s profiting from the very images the drug war constructs and reinforces (Rose, 1994) and the private prison industry’s investing and profiting from the growing captive populations it provides (Dyer, 1999), the War on Drugs invests in White, middle and upper class identity as law abiding and moral and African American and Latino/a American identity as immoral and lawless. One response to this claim may be that White arrests for illegal substance abuse have increased by 80% (Walker et al., 2000, p. 222 fn. 99). However, such arrests for African Americans have more than quadrupled under

present drug policy (Walker et al., 2000, p. 222 fn. 99). While White, middle and upper class Americans have been victimized by the drug war, such spectacles have been presented precisely as unjust “victimizations” (Norris et al., 1998).¹² The far more damaging effects of the drug war on racially and ethnically aggrieved communities, on the other hand, are rarely mentioned in the mainstream media and political discourse (Sloop, 1996) and are thus constructed as “typical” albeit “tragic” circumstances for such marginalized groups.

Consumption of illegal substances in middle and upper class, disproportionately White communities are no different than such consumption in communities of Color (National Institute of Health, 1995). However, centuries of racialized state policies that in nearly every socioeconomic respect “produced a circumstance and opportunity of positive gain for Whites” (Lipsitz, 1998; Oliver & Shapiro, 1995, p. 170), have left impoverished, open-air drug markets in marginalized communities fair game for the contemporary drug war’s targeted law enforcement and paramilitary tactics (Parenti, 2000, p. 112). Such policies have also largely shielded the White suburbs from such drug war enforcement (Stults, 2001).¹³ Conservative anti-government and law and order rhetoric has played a critical role not only in shaping so called “community” policing (Lyons, 1999) in this regard but has promoted political advocacy for such racially disparate policies. As George Lipsitz (1998) observes:

Police officers in large cities, pressured to show results in the drive against drugs, lack the resources to effectively enforce the law everywhere (in part because of social costs of deindustrialization and the tax limitation initiatives designed to shrink the size of government). These officers know that it is easier to make arrests and to secure convictions by confronting drug users in areas that have conspicuous street corner sales, that have more people out on the street with no place to go, and that have residents more likely to plead guilty and less likely to secure the services of attorneys who can get the charges against them dropped, reduced, or wiped off the books with subsequent successful counseling and rehabilitation. In addition, politicians supported by the public relations efforts of neoconservative foundations often portray themselves to suburban voters as opponents of the “dangerous classes” in the inner cities (Lipsitz, 1998, p. 12).

The Legal Construction of White Privilege

Whiteness is both a legal (Haney-Lopez, 1996) and a cultural (Frye-Jacobson, 1999; Lipsitz, 1998; Morrison, 1992; Roediger, 1994) construct. Regarding the former, courts in early American history imposed “genocide-at-law” on Native American peoples (Strickland, 1986), gave legitimacy to centuries of the atrocities of African American enslavement in the South (Crenshaw, 1988; Harris, 1993; Higginbotham, 1978) and subsequent Jim Crow laws (Woodward, 1999), gave legitimacy to the killing and subordination of Chicano/a Americans

(Mirandé, 1987; Sandrino-Glasser, 1998), and gave legitimacy to the internment of Japanese Americans in military prison camps (Alonso, 1998; Hongju Koh, 1994). Such acts of White imperialism under the cloak of legality served as the structural building blocks for the institutionalization of dominant interests in both the early American colonies and later in the U.S. Colonization itself is itself an inherently *legal* process in which the oppression of “outsiders” is viewed in terms of the accumulation of property. In this way, contemporary dominant-subordinate relations can be seen as a legal construction, what Neil Gotanda (1991) calls “historical race.”¹⁴ As Cheryl L. Harris (1993), writing about the legal construction of Whiteness and the African American experience throughout American history, observes:

The possessors of Whiteness were granted the legal right to exclude others from the privileges inhering in Whiteness; Whiteness became an exclusive club whose membership was closely and grudgingly guarded. The courts played an active role in enforcing this right to exclude – determining who was or was not White enough to enjoy those privileges accompanying Whiteness. In that sense, the courts protected Whiteness as they did any other form of property (Harris, 1993, p. 283).

Political advocacy played an important role as well. Robert L. Allen (1969), in his classic book *Black Awakening in Capitalist America*, eloquently describes America’s early race-law-politics relationship as effectively “an alliance between the occupying power and indigenous forces of conservatism and tradition” (Allen, 1969, p. 101). Furthermore, the ending of African American enslavement and subsequent Jim Crow laws, and the successful passage of Civil Rights reforms such as affirmative action represent profound shifts in American legal, social, and political hegemony. Nevertheless, institutionalized White privileges in virtually every aspect of American life including intergenerational transfers of wealth (Oliver & Shapiro, 1995), financial stability (Conley, 1999) employment (Wilson, 1997), environmental conditions and health care (Lipsitz, 1998, pp. 1–23), housing (Massey & Denton, 1994; Wilson, 1987) and treatment by the criminal justice system (Cole, 1999; Kennedy, 1998; Mann & Zatz, 1998; Maurer, 1999; Miller, 1996; Russell, 1999; Tonry, 1997; Walker et al., 2000) endure today.

THE CULTURE OF WHITE PRIVILEGE AND THE IDENTITY POLITICS OF BLAME AND DENIAL

Whiteness and Law and Order

The legal construction and hence institutionalization of White privilege is largely unquestioned by a majority of contemporary American Whites. Indeed, one

relevant characterization of contemporary Whiteness in the context of criminal injustice might be the *denial* of racial and ethnic inequality, and the *blaming* of marginalized African Americans and Latino/a Americans for their socially and economically subordinate status (Feagin, 2000, pp. 105–136). Despite centuries of racialized state policies (Oliver & Shapiro, 1995), Whites deny the existence of racial discrimination and racial inequality at the same time that they blame African Americans for it. Summarizing this empirical evidence, Joe R. Feagin (2000) observes:

Not surprisingly, national surveys indicate that today a majority of White Americans see equality of opportunity as the societal reality. They more or less agree with the elite view. Included in this perspective is the idea that discrimination is no longer widespread and black Americans who complain of it are paranoid or confused (Feagin, 2000, pp. 125-128).

If the majority of Whites deny and blame racial and ethnic minorities for their economically subordinate status, then it is not surprising that a majority of Whites attribute criminality disproportionately to African Americans (*Gallup Poll Monthly*, 1993, p. 37; see also Roberts & Stalans, 1996 for a review) and view Latino/a Americans as more prone to violence (Carnevale & Stone, 1995, p. 276).

While 76% of illicit drug users are White (Cole, 1999, p. 144), 95% of respondents in a recent survey “described a black person when asked how they envisioned a typical illegal drug user” (McCaffrey, 1998, p. 18). Studies also find Whites are more likely to see African Americans as “dangerous” (Bowers, Steiner & Sandys, 2000) and are less likely than African Americans to see the criminal justice system as racially discriminatory (Lock, 1999, p. 109). Since Whites invariably both deny the existence of racial inequality, and blame racial and ethnic minorities, then it is not surprising that such views are linked to White punitiveness. As Beckett observes, “[i]n sum, attitudes regarding crime and punishment are inextricably bound up with race and racial attitudes; opposition to racial and social reform is crucial in accounting for White support for law and order policies” (Beckett, 1997, p. 85).

In the context of drug wars past and present, law and order advocacy on the part of politicians invariably has been tied to the defense of White social and economic privilege (Steiner & Argothy, forthcoming). Such a “defense,” however, need not rely upon an overtly racist agenda, but rather, is accomplished nationally through various political and media propaganda campaigns. Throughout American history anti-drug crusades have targeted “sexually deranged” Chinese railroad workers under anti-opium laws, have targeted “cocaine crazed Negroes” under the Harrison Act of 1914, and have targeted African American and Latino/a American crack “demons,” “whores,” and

“pimps” during the contemporary War on Drugs (Dvorak, 2000; Reinerman & Levine, 1997).

The politics of law and order obviously has played an integral role in legitimizing such wildly punitive and racially selective legal regimes. Focusing on the contemporary drug war, Katherine Beckett (1997) systematically demonstrates how anti-drug political initiatives had less to do with the reported incidence of drug use or abuse, and far more to do with public concern about drugs (Chapter 2).¹⁵ Conservative political agendas, indeed, have benefited from White, often racist, views of African Americans and racial inequality generally (Feagin, 2000, p. 59) and racialized views of drug abusers in particular (McCaffrey, 1998, p. 18). Because Conservatism depends on the denial of racial inequality, depends on convenient scapegoats such as poor, disproportionately African American and Latino/a American communities, and depends on glaring public spectacles of immorality and deviance for its effectiveness as an ideological force in American politics (Beckett, 1997, pp. 28-44), the War on Drugs has been invaluable to prevailing Conservative hegemony¹⁶ and hence institutionalizing what Louie Albert Woolbright and David J. Hartmann (1987) call “the new segregation.” As Craig Reinerman and Harry G. Levine (1997) observe:

Crack was a godsend to the Right. They used it and the drug issue as an ideological fig leaf to place over the unsightly urban ills that had increased markedly under Reagan administration social and economic policies. “The drug problem” served conservative politicians as an all-purpose scapegoat. They could blame an array of problems on the deviant individuals and then expand the nets of social control to imprison those people for causing the problems (Reinerman & Levine, 1997, p. 38).

A WAR AGAINST THE MARGINALIZED

Economic Threats

In addition to galvanizing political partisanship, drug wars throughout history have had another important function in the name of White privilege. Like the lynching of “black brute rapists” in the South (Tolnay & Beck, 1995), targeting racial and ethnic minorities historically has been a means of controlling such groups perceived as economic threats (Reinerman & Levine, 1997, p. 5). Moreover, these drug wars have been less concerned with health issues and more with the subordination and control of such racially defined groups (Musto, 1973, p. 7). Economic inequality maintained through seek and destroy tactics that arrest, incarcerate, and disenfranchise racial and ethnically aggrieved groups, in a word, *insulates* a predominantly White labor market from minority competition (Duster, 1997, p. 278).

Racial and Ethnic Targeting

In contemporary America, while drug abuse is a problem that affects all Americans, irrespective of race or ethnicity (National Institutes of Health, 1995), treatment of the problem is invariably skewed (Steiner & Argothy, forthcoming). Middle and upper class White drug abuse is largely treated as a private, health problem, while poor, disproportionately African American and Latino/a American drug abuse is treated as a nationally fought, criminalized “war” against drugs (e.g. Towberman, 1994).¹⁷ White, middle class substance abusers are in fact often identified by political and media elites as “innocent” victims of an “urban” drug crisis that has “invaded” suburban America. Racial and ethnic minorities, on the other hand, are typically portrayed as “filthy,” “urban” ghetto or barrio dwellers resigned to a life of addiction.

NARRATING THE CRACK SENTENCING DEBATES*The Rhetoric of White Innocence in America’s “Crack Epidemic”*

Political storytelling is often laden with assertive rhetoric. Simple yet forceful and passionate oratory, however, is inadequate in the trenches of emotionally charged legislative debates. As F. G. Bailey (1983) in *The Tactical Uses of Passion* writes, “[a]ssertive rhetoric is a moral rhetoric. It is a rhetoric of belonging, of including in the congregation those who choose to believe and excluding the rest either by ignoring them, ridiculing them, or making them the objects of anger and contempt” (Bailey, 1983, p. 135). Thus, in the context of crime legislation debates, such an appeal to public morality must thus capitalize on popular consciousness of crime and punishment. In America’s contemporary culture of White privilege and its insidious identity politics of blame and denial, then, not surprisingly, such tales often invoke images and phrases that appeal to this dominant belief system. Indeed, in the political arena of crime and punishment, calling attention to symbols of disproportionate White privilege such as “suburban life,” and evoking phrases such as “our country” juxtaposed with vivid descriptions of “filthy, city streets” and “urban dwellers,” for example, constructs the “other” for the White majority at the same time that it inspires a perverse sense of group pride and identity. While it may have been impossible for politicians to deny the growing problem of illegal drug abuse amongst their predominantly White, middle class constituencies, nevertheless, they were able to articulate such a crisis precisely by rhetorically twisting White drug abuse into White victimization. Thus, politicians were able to speak to White, middle and upper class fears of spreading illicit drugs in

their suburban neighborhoods at the same time that they were able to reassure Whites of their law abiding identities. As the “voice of the people,” politicians like the public, defended White supremacy (i.e. Whites are innocent and law abiding) at the same time that they defended harsh penalties aimed at racially and ethnically aggrieved groups.

“THE DARK, STINKING ALLEYS OF URBAN AMERICA”

The Identity Politics of America’s “Crack Crisis”

Legislating the birth of the contemporary War on Drugs during the Reagan presidency, which according to Franklin Zimring and Gordon Hawkins (1992) represented the “most significant experiment in enlarging the federal lead in crime control in this century” (p. 158) was as much about the federal politics of law and order as it was about a polarizing, identity politics.¹⁸ Relying on “tried and true” stereotypes forged in centuries of White dominance (Morrison, 1997, pp. 10–11), predominantly White male Senators told tales of the immorality of “urban folks” generally and about so called African American and Latino/a threatening sexual deviance (Davis, 1978; Hoch, 1979, p. 49) in particular.⁹ Buttressing their stories with magazine articles depicting African Americans and Latino/a Americans as the “typical” crack user, depicting African American and Latino American men as “crack pimps,” and depicting the “growing problem” of “women selling their bodies for crack” (Dvorak, 2000, p. 660), Senators’ in the crack cocaine debates of 1986 set in motion an anti-drug war project at the same time that they continued and accelerated the cycle of America’s ongoing inequality project.

“Czar’ing” Crack

It is useful to begin the tale of anti-crack law making in America three years after the notorious congressional debates of 1986. Indeed, by this time former Reagan drug Czar William Bennett (1989) had released his infamous “National Drug Control Strategy.” As a largely pseudoscientific declaration of White innocence from the nation’s growing illicit drug problems, Bennett’s drug war manifesto is an important starting point because in it he states, in vivid language, that the American media machine’s runaway, racially and ethnically skewed portraits (Romer et al., 1998) of American drug abuse are indeed *accurate*. While Bennett, unlike his predecessors in the Senate three years earlier, refrains from more explicitly racist and chauvinistic story telling, he uses the now widely

accepted analog for 'Black or Brown street junkie' – *crack* (McCaffrey, 1998, p. 18) in sounding the trumpets of drug warfare:

What . . . accounts for the intensifying drug-related chaos that we see every day in our newspapers and on television? One word explains much of it. The word is crack . . . Crack is responsible for the fact that vast patches of the American landscape are rapidly deteriorating (Bennett, 1989, p. 3).

Despite the fact that 65% of all crack users are white (Cole, 1999, p. 142) Bennett's simultaneous denial (or ignorance) of America's long standing commitment to White supremacy (Lipsitz, 1998; Oliver & Shapiro, 1995) and his call to "those vast patches" (read White middle and upper class Americans) that are "now" being "poisoned" by crack, sets the stage for examining how Senators three years earlier told similar yet more explicitly racist and chauvinistic tales.

Political Narrative as Racial Ideology

The cumulative advantages afforded to Whites throughout American history have created what Hacker (1995), drawing on the 1968 Kerner Commission's phrase, calls "two nations." The formation of America's disproportionately White, middle and upper class and its poor, disproportionately African American underclass, has perhaps been most clearly articulated in Oliver and Shapiro's (1995) award winning study of 11,257 American households in *Black Wealth/White Wealth*. While White privilege can be seen in nearly every sector of American society (e.g. Hacker, 1995), perhaps the most concrete indicator of the socioeconomic construction of White privilege is measures of intergenerational transfers of wealth (Oliver & Shapiro, 1995, p. 170).

In addition to wealth privilege, White suburban estrangement from the African American ghetto and the typically non-English speaking Latino/a American barrio, leaves most with very limited images of racial and ethnic minorities. Drawing on media images that invariably rely on racially skewed images of criminality (Romer et al., 1998), most European Americans, come to view racially and ethnically aggrieved individuals as violent, dangerous, and drug crazed (Feagin, 2000, pp. 105–119). Many European Americans, moreover, come to discount their own equally damaging drug and crime problems (McCaffrey, 1998, p. 18), and, however falsely premised such identity construction is, see themselves as more law abiding in pervasively racial terms. Whiteness, in the context of crime and punishment, thus is largely constructed as law abiding and innocent while blackness and brownness is largely constructed as lawless and criminal (Steiner & Argothy, forthcoming).

The period leading up to the crack cocaine debates and subsequent passage of the so called “Drug Free-America Act” of 1986, which easily passed in the House of Representatives (392-16), can best be characterized as a political feeding frenzy on White, middle class fears. What made this prelude to Reagan’s national drug war particularly interesting was the complicity on the part of Democrats (Reinarman & Levine, 1997, p. 39). The runaway rhetoric of “soft on drugs” during the campaign of 1986, as it did eight years later with welfare and crime, evidently forced virtually complete liberal compliance on the issue. Such relatively uncontested anti-drug politics set the stage for legislative “debates” that even Conservative New York Times columnist William Safire described as anti-drug “hysteria” and “narcomania” (Reinarman & Levine, 1997, p. 39). Thus, political hegemony of law and order in the contemporary anti-drug crusade, as it has in other anti-drug crusades throughout American history, created another opportunity for politicians to reaffirm the nation’s commitment to and defense of White innocence and unearned privilege.

“VOICES” OF THE PEOPLE

The Majesty of the Senate

The White innocence tale politicians’ told in the crack cocaine debates of 1986 was hidden in the “structure of relations and institutions that made the story plausible” (Ewick & Silbey, 1995, p. 214). The majesty of the nation’s capital, the monolithic Senatorial chambers, and the “honor,” “dignity,” and centuries of American tradition that supposedly characterize public service often mask the possibility of unethical political behavior (Olson & Batjer, 1999, p. 139). Indeed, to make such a charge, in the context of law and order politics might more likely to be constructed as threatening the “rule of law” itself. Political debates, furthermore, often characterized by passionate, zealous advocacy guided by official rules of order, Senators’ dressed in formal attire, and the prevalence of the American flag and other patriotic symbols that adorn the Senate’s hallowed halls lends additional airs of legitimacy to such affairs.

In the context of anti-crime legislation, Senatorial committees, or in the case of the crack cocaine debates of 1986, in an open congressional debate on the Senate floor, focus on manufacturing legislation to be voted on by Congress. Legislative debates often draw on both the “people’s” and the “official’s” law – vis-à-vis various lay and professional witnesses. Moreover, similar to lawyers in a court of law, Senators, acting almost as legal advocates often both listen to and tell their own stories detailing their legislative positions. To be sure, giving and hearing of testimony in most instances is often more political ritual

than a judicial fact-finding. That is to say, partisan actors like those in many other organizational settings (Brunsson, 1985) and other legal contexts, such as jurors in death penalty cases (Bowers, Sandys & Steiner, 1998) often need little convincing in making a decision that is a foregone conclusion. Indeed, the crack cocaine debates of 1986, and the decision to offer legislation that made crack abuse penalties substantially harsher than powder cocaine penalties in many respects can be seen as a foregone conclusion that simply needed passionate storytelling to “massage,” or to “generate a feeling of being in control” (Brunsson, 1985, p. 118) of their colleagues’ and constituents’ political convictions and beliefs about punitive crack laws.

“Becoming a White Problem”

Such storytelling relied heavily on an implicit, taken for granted hegemonic¹⁹ of White innocence made salient by racial ideology of African American and Latino/a American criminality and sexual deviance on the one hand, and female sexual innocence and hence paternalism on the other. Like drug wars throughout American history, such tales evoked:

. . . [t]he same sentiment of the need to protect the White community from the dangers of African Americans and Latinos of the inner city . . . Members of Congress, in their comments and in the articles they praised and introduced into the Congressional Record, portrayed crack as an inner-city problem seeping into the suburbs and rural villages. Implicit in this argument is that crack, once only an African American and Latino problem, was suddenly becoming a White problem (Dvorak, 2000, p. 653).

Indeed, the theme of “becoming a White problem” in such story telling revealed the dualistic utility of race in socially constructing and hence *communicating* the need for stiffer crack laws. Consider, for example, the testimony of Senator Howell Heflin a Democrat from Alabama:

There is a violent war being fought in America. For many years this war was fought for us by special agents in dark, stinking alleys – through garbage-strewn streets, and in the burned out, abandoned buildings of our large metropolitan areas. But now, the battleground has moved into middle-class neighborhoods, into glass skyscrapers, and even into school playgrounds. This war was once fought only in urban America, but increasingly, there are daily skirmishes on country roads, on remote rural routes, and in the tree-lined streets of small towns and villages (Congressional Record, 1986).

Concealed in Heflin’s narrative are obvious “color-blind slurs,” or those, “references and quotations to prove that ‘color prejudice’ is indeed an imbecility and an iniquity that must be eliminated” (Fanon, 1967, p. 29) that Conservative social scientists’ such as Charles Murray (1993) falsely argue (For critiques of Murray’s research, see Fisher et al., 1996; Kincheloe, Steinberg & Gresson,

1997) are “founded on empirically accurate understandings about contemporary black behavior as compared to contemporary White behavior” (Murray, 1993, p. 9). But such a tale articulates a far more pervasive, institutionally racist message as well, one that reproduces an identity politics committed to investing in a culture of White blame and denial. If Whiteness stands for innocence and law abiding in the context of the drug problem, then it is not surprising that racial and ethnic minorities, who inhabit America’s “dark, stinking, garbage strewn alleys,” become the convenient scapegoats for White crack addiction at the same time that they become a diversion and/or rationale for the defense of White privilege. Indeed, an additional interpretation of Heflin’s narrative might read: *If “they” hook us on drugs, imagine what “they” would do to “us” if “they” lived on our “tree-lined streets?”* In this sense, such political storytelling can be seen not only as a dominant methodology for promoting ‘tougher’ anti-drug policies but also as a tacit defense of existing dominant-subordinate relations (i.e. social and economic inequality). Focusing on racial disparities in a criminal justice policy vacuum, thus both reinforces the “perpetrator perspective” of racial discrimination as a device for washing away the “sediment” of racial inequality – as the Supreme Court has done in both the *McCleskey* (1987) and *Armstrong* (1996) cases²⁰ – and, serves as fodder for Conservative, often genetically coded (Kitty & Segal, 1996) claims of a so-called “black and Hispanic crime problem.”²¹

*“Black” and “Brown” “Crack Devils” and the Sexual Conquest
of “White” Women*

The “voice of the people” in the crack cocaine debates of 1986, furthermore, simultaneously reinforced and reproduced gender identities vis-à-vis paternalism and racial supremacy through the use of witness testimony and media reports Senators’ submitted into the congressional record. Such stories, as detailed by Richard Dvorak (2000), built on Heflin’s narrative at the same that they expounded the “crack crisis”²² in even more graphically sexist and racist terms:

[T]he debate was permeated with the notion that women will sell their bodies for crack. One article introduced at the debate notes the particular susceptibility of the drug to turn women into prostitutes: “men have given up their paychecks, women have prostituted themselves.” Quoting police officers, the article warns that “dealers have told them that women freely will trade intercourse or oral sex for a single rock.” This notion was confirmed during the “Crack” Hearing in the Senate, when a drug dealer named Michael Taylor testified: [A] prostitute might work the streets all night, returning to the crack house each time she put together a purse of \$200 or \$300. Some crack houses specialize in women customers only, allowing no men inside and catering primarily to prostitutes. Men run such crack houses. Taylor also said the crack houses were a sort of singles scene for crack addicts.

“Cocaine smokers may see friends in crack houses, men may make dates with women,” he testified (Dvorak, 2000, p. 661).

One preliminary observation regarding the crafting of federal drug legislation in the above account is the use of “folk knowledge” (Steiner, Bowers & Sarat, 1999, pp. 462–463). As a White innocence tale, such testimony can be interpreted as providing further rhetorical currency to Senators during the crack cocaine debates of 1986. By relying on such typifications of female exploitation by racial and ethnic male minorities in the perpetuation of the crack problem, White male senators – vis-à-vis such articles – tell a tale that reveals the implicit way masculinity invests in Whiteness. Like past racist myths such as the “black brute rapist,” “black and Hispanic” masculinity here is constructed as the virtual equivalent to a sexually deviant and predatory “devil” (Davis, 1978; Hoch, 1979), “a lascivious black male with cloven hoofs, a tail, and a huge penis capable of super-masculine exertion – an archetypal leering “black beast from below” (Hoch, 1979, p. 44). Moreover, Senators pervasively articulated White male dominance as essential for the benevolent “protection” of women, or, perhaps, more implicitly, because they are the “property” of White men (Messerschmidt, 1993, p. 83).

Such reproduction of gender during the crack cocaine debates was clearly situational and not based on a “timeless, universal tautology that always works to reduce all gender relations to an identity of male dominance” (Brown, 1988, p. 410). However, Senators’ use of paternalism as seen in varying degrees throughout American history (Connell, 1987), is nearly analogous to paternalism in other contexts such as traditional father-daughter relationships (Jackman, 1996, p. 11) and explicit in the early common law construction of marriage (Pateman, 1980, p. 12). In summary, by playing on existing inequities in the social construction of race, gender, and class,²³ such political narrative elucidates the War on Drugs as a powerful site for reinforcing America’s “inequality marketplace” and hence the reproduction of White male supremacy in contemporary American society.

“INTERLOCKING SYSTEMS OF OPPRESSION” AND THE CONSCIOUSNESS OF CRIME AND PUNISHMENT

In the arena of federal law making, as in much of contemporary American society, Whiteness pervades. As a dominant belief system that supports, or, acquiesces to, institutionalized privileges for middle and upper class, disproportionately European American males and hence the subordination and marginalization of women, the poor, and communities of color, in particular, White privilege in contemporary federal law making voices the “legacy of overt

racism, of *de facto* practices that often get codified by *de jure* mechanisms” (Georges-Abeyie, 1990, p. 28). Narrating the crack cocaine debates and subsequent passage of the 100-1 federal crack-powder cocaine sentencing disparity, politicians’ relied on race, class, and gender ideology as, what Coramae Richey Mann and Marjorie S. Zatz (1998) call, “interlocking systems of oppressions” (p. 6). Such systems of oppression are given voice in the narrating and hence the making of law in the War on Drugs.

Drawing on the past and present, Senators in the federal crack cocaine debates of 1986, in effect, *temporally blurred*²⁴ the contemporary tale (or lack thereof) of civil rights in America, by evoking an “old” White supremacy tale and making it appear “new.” Such blurring of racist stories vividly displays the resilience of Whiteness as political narrative in America’s contemporary inequality, and, hence, law and order marketplaces. Moreover, and perhaps more critically, the pervasiveness of White privileges in contemporary American society and politics reveals the tremendous challenges and perhaps insurmountable obstacles for genuine legal reform under current U.S. laws (e.g. Steiner & Argothy, forthcoming). “Enforcing” civil rights laws in the way of the current Supreme Court, indeed, results in the racist defense of the “perpetrator perspective,” in the continued blaming and denying of pervasive and persistent racial and social inequality by both the public and politicians, and in the perpetuation of federal policy making, including anti-drug laws that invest in Whiteness, and, hence, the further subordination and marginalization of racially and ethnically aggrieved groups.

DISCUSSION

This essay has investigated politico-legal consciousness in the crack cocaine debates of 1986. More specifically, it has incorporated the insights of two complimentary theoretical perspectives in order to understand the origins, defense, and, indeed, continued use, of such wildly punitive policies as the 100-1 crack-powder cocaine federal sentencing disparity in America’s contemporary War on Drugs. Investigating the War on Drugs reveals how criminal justice policies of the present are filtered through the lens of prevailing and pervasive contemporary inequalities. Indeed, law-making is a highly contingent and dynamic process (Chambliss & Seidman, 1982, pp. 139–165) that can evoke divisive and often racist and chauvinistic stories of the past that lead to the revising of contemporary moralities and thus the implementation of racially and ethnically targeted anti-drug policies. Conservative law and order hegemony before,²⁵ during, and after the passage of the crack cocaine sentencing laws of 1986, elucidates the limits of largely under enforced civil rights laws in

overcoming the deep structural inequities that are products of centuries of dominant-subordinate relations and spill over into the legal process, including federal law making.

Such a spill over effect is not “public opinion” in the abstract, but public opinion in the sense of exerted social force” (Friedman 1997, p. 99). The social force of dominant folk knowledge, indeed, evoked by political elites in justifying the new crack sentencing laws persuasively demonstrates how America’s White innocence tale serves as a pervasive “mechanism of social control” and as a way to “colonize consciousness” (Ewick & Silbey, 1995, pp. 213–214). Yet public consciousness of the War on Drugs has recently shifted at the state level with the passage of California citizen’s initiative, Proposition 36. However, such “folk legislation” excludes “drug pushers” (read poor, disproportionately African American and Latino/a American urban, open-air market sellers) (Wallace, 2000, p. A17). While Proposition 36 may have a dramatic effect on lowering California’s prison population and might, in former drug Czar Barry McCaffrey’s (2000) words “engage in a more coherent, rational way the chronically addicted as we encounter them in our communities” (Wren, 2000, p. A8) such legislation, through pervasive racially and ethnically coded exceptions, perpetuates, however unintended, America’s culture of White privilege and hence an identity politics of blame and denial. Indeed, it is this embedded world of America’s racial and gendered power structure that so insidiously prevents any truly meaningful civil rights reform today. As Martha Minnow (1987), writing about how power differentials engender covert and systemic inequities in Supreme Court decisions, observes, “[p]ower . . . is exercised not simply in individually chosen acts, nor even in winning particular contests for political control or public attention. Power is at its peak when it is least visible, when it shapes preferences, arranges agendas, and excludes serious challenges from discussion or even imagination” (Minnow, 1987, p. 68).

NOTES

1. While I separate the “people’s” from the “official’s” law to emphasize the role of the political, I want to make clear that it in no way implies a belief that there is a clear separation between the two. Perhaps the clearest case is when jurors are enlisted from the everyday world into the official world of state law (For an analysis of the blurring of “folk” and “official” law in death penalty cases, see Steiner, Bowers & Sarat, 1999). Generally, I want to stress a broader, more global view of the role law plays in society. As David M. Trubek (1984) observed, “[l]aw, like other aspects of belief systems, helps to define the role of an individual in society and the relations with others that make sense. At the same time that law is a system of belief, it is also a basis of organization, a part of the structure of which action is embedded (Trubek, 1984, p. 604).

2. Writing about the Conservative counter attack against civil rights laws and the subsequent growth of White racism in the 1980s, Joe R. Feagin and Hernán Vera (1995) observe:

[T]he civil rights revolution came to a standstill in the 1980s, and many African Americans now believe that the country and its government are moving backward in the quest for racial justice. Presidential use of the “bully pulpit” for conservative political agendas during the Reagan and Bush years of the 1980s and early 1990s was particularly devastating to racial relations. Federal civil rights enforcement programs were weakened significantly in this period. The political denial of White racism made its way into intellectual circles and the mass media, where the concept of the “declining significance of race” became fashionable (Feagin & Vera, 1995, p. 3)

3. Writing about the O. J. Simpson case, Toni Morrison (1997) eloquently captures just how powerfully representative and far reaching such racialized spectacles of criminality can be:

He has become the whole race needing correction, incarceration, censoring, silencing; the race that needs its civil rights disassembled; the race that is sign and symbol of domestic violence; the race that has made trial by jury a luxury rather than a right and placed affirmative action legislation in even greater jeopardy. This is the consequence of official stories: to impose the will of a dominant culture. It is Birth of a Nation writ large – menacingly and pointedly for the ‘hood (Morrison, 1997, p. XXVIII).

4. Such “politically correct” racism in the broadest sense involves White denial of racism as a “lived experience” (Feagin, 2000, p. 28–29). As a respondent’s in Feagin and Vera’s (1995) study account demonstrates:

It’s everybody else’s fault but black America. We are born in this world in times that are tough. But times have changed; there’s equality. We’re actually past equality. We’re actually into favoritism based on sex and race, and it’s not easy to understand their anger (Feagin & Vera, 1995, p. 156).

5. My use of the term “marginalized” throughout this essay draws on Coramae Richey Mann and Marjorie S. Zatz’s (1998) definition: “Among other social categories, the marginalized may be old people, young African Americans and Latinos/as who are unable to secure jobs, single mothers, the physically disabled, or American Indians living on reservations” (p. 7).

6. Perhaps ironically, Al Gore was the first to introduce the nation to Willie Horton vis-à-vis a Democratic primary debate against then opponent Michael Dukakis (Cockburn & St. Clair, 2000, p. 15).

7. The most vivid sign of Clinton’s attendant shift to the right on crime came when he as Democratic candidate/Governor returned to Arkansas to preside over the execution of Ricky Ray Rector. Rector, a retarded man was described by Wendy Kaminer as a “brain-damaged lunatic, shuffling to his death, [looked] forward to eating his desert when his execution was over” (Kaminer, 1995, p. 175).

8. Throughout this essay my use of the phrase “White supremacy” refers to the system of social and economic privileges European Americans – those who are “White” (Frye Jacobson 1999) – are privy to at the expense of other racial and ethnic American groups. As George Lipsitz (1998) eloquently observes:

The problem with White people is not our Whiteness, but our possessive investment in it. Created by politics, culture, and consciousness, our possessive investment in Whiteness can be altered by those same processes, but only if we face the hard facts openly and honestly and admit that Whiteness is a matter of interests as well as attitudes, that it has more to do with property than with pigment. Not all believers in White supremacy are White. All Whites do not have to be White supremacists. But the possessive investment in Whiteness is a matter of behavior as well as a belief (Lipsitz, 1998, p. 233).

9. Advocating for the expansion of affirmative action into the criminal law, Paul Butler (1997) writes:

Affirmative action acknowledges that this grotesque history is responsible for the environment of African Americans, and for their substandard performance under almost every “objective” measure of achievement. When we understand that the explanation for the disproportionate frequency of black crime is environmental, we discern the connection between past discrimination and black criminality. Black criminality – like low standardized test scores, poor grades, depressed wages, and poorly capitalized businesses – is another symptom of the disease of White supremacy. It is a disease that no reasonable person would choose, if she had a choice (Butler, 1997, p. 862).

10. As Derrick Bell (1993), writing about civil rights law in the 1990s, cogently summarizes: “(1) Because most policies challenged by blacks as discriminatory make no mention of race, blacks can no longer evoke the strict-scrutiny shield in absence of proof of intentional discrimination – at which point, strict scrutiny is hardly needed. (2) Whites challenging racial remedies that usually contain racial classifications are now deemed entitled to strict scrutiny without any distinction between policies of invidious intent and those with remedial purposes. Thus, for equal protection purposes, Whites have become the protected ‘discrete and insular minority.’ ”

11. Throughout this essay, I draw on Lipsitz’s (1998) conception of Whiteness as a system of unearned privilege that such drug war policies targeting racially and ethnically aggrieved groups “invest” in. As George Lipsitz (1998) states:

I argue that White Americans are encouraged to invest in Whiteness, to remain true to an identity that provides them with resources, power, and opportunity. This Whiteness is, of course, a delusion, a scientific and cultural fiction that like all racial identities has no valid formation in biology or anthropology. Whiteness is, however, a social fact, an identity created and continued with all-too-real consequences for the distribution of wealth, prestige, and opportunity (Lipsitz, 1998, p. vii).

12. In addition to the recent coverage of actor Robert Downey Jr.’s “victim of addiction” coverage in the popular media, Norris et al.’s (1998) “Shattered Lives,” a pamphlet that details the personal narratives of individual’s incarcerated under the War on Drugs as part of a larger “Human Rights and the Drug War Exhibit Project,” is interesting in its lack of stories on individuals from racially and ethnically aggrieved communities. Nearly all of the stories involve middle class, predominantly White individuals and their families. While I am in no way arguing against the use of such materials in detailing the growing injustices of the War on Drugs, I do, however, feel it is important to point out how the issue of drug war injustice has been racially constructed – a story that conspicuously omits the War on Drugs most victimized populations.

13. Brian J. Stults's (2001) research on racial disparities in drugs arrests systematically demonstrates that African Americans are disproportionately targeted for drug related-crimes, net of actual levels of drug activity.

14. Such a concept is particularly useful in viewing the historicity of racial and ethnic identities in the contemporary drug war context. Neil Gotanda (1991) defines "historical-race" as "socially constructed formal categories predicated on race subordination that included presumed substantive characteristics relating to 'ability, disadvantage, or moral culpability' (Gotanda, 1991, p. 35).

15. Using OLS regression analysis to analyze such relationships over a seven-year period, Beckett found, "from 1985 to 1992, political initiative on the drug issue – but not the reported incidence of drug use or abuse – was strongly associated with subsequent public concern about drugs" (Beckett, 1997, pp. 42–43).

16. Throughout this paper, my use of the term hegemony draws on Antonio Gramsci to "refer to ascendancy – obtained primarily by manufactured consent rather than by force – of one class over other classes" (Messerschmidt, 1993, p. 81). James W. Messerschmidt's (1993) summarization of Gramsci's use of the term is quite well stated:

Ideological hegemony, as the dominant conception of reality, is manifest throughout social institutions, and, therefore, comprises "the spontaneous consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group" (Gramsci, 1978, p. 12). According to Gramsci, hegemony is achieved fundamentally through consent, yet force may at times be necessary for "those groups who do not 'consent' either actively or passively" (Messerschmidt, 1993, p. 82).

17. For example, Donna B. Towberman's study of 188 delinquents in seven youth facilities finds that Blacks are *significantly less likely* to access psychiatric and drug treatment facilities, community treatment referrals, and to be placed in foster homes. On the other hand, Whites were found to be *over-represented* in psychiatric or drug treatment facilities.

18. For a provocative discussion of the polarizing effects of identity politics see Crenshaw, 1991.

19. By "hegemonic" narrative I adopt sociologists Patricia Ewick's and Susan Silbey's (1995) use of the term for my purposes in the context of the sociopolitical construction of race:

[T]he concept of hegemony is defined in terms of its relationship to the taken-for-granted everyday world (which is of course, historically contingent). We identify the hegemonic as "the order of signs, practices, relations and distinctions, images and epistemologies – drawn from a historically situated cultural field – that come to be taken-for-granted as the natural and received shape of the world and everything that inhabits it (Ewick & Silbey, 1995, p. 212 fn. 10).

20. In both *McCleskey* (1987) and *Armstrong* (1996), the Supreme Court accepted the defendant's showing of discriminatory impact in the administration of the death penalty and federal crack sentencing respectively. However, in both of these cases, the Court denied to set aside either defendant's sentence because they failed to demonstrate "discriminatory intent" on the part of the decision-maker (i.e. the jury that sentenced McCleskey and the prosecutor that charged Armstrong). In *Armstrong*, more specifically, defendants charged with the sale of crack alleged that they had been targeted and

thus delivered to federal court based upon their race, and moved to dismiss on the basis of selective prosecution. In support of their claim, the defendants submitted an affidavit stating that every crack case closed by the Federal Public Defender's Office for the Central District of California involved a black defendant. While the district court granted the discovery motion and ordered the government to disclose information concerning the race of defendants charged with cocaine offenses during the previous periods, the district court also demanded disclosure of the charging criteria for such prosecutions. The prosecution failed to comply with the order and the court dismissed the indictments.

In overturning the district court, the United States Supreme Court in *Armstrong* held that defendant had to present "clear evidence" that the prosecutor's decision to prosecute "had both a discriminatory effect and that it was motivated by a discriminatory purpose" (McCleskey, 1987, p. 289). Identical to the standard set in *McCleskey*, such a ruling created a virtually "immoveable object" for defendants in such cases to surpass. As Andrew Sacher (1997) observes:

Under the standard set forth in *Armstrong*, it is unlikely that a defendant will ever demonstrate to the Court's satisfaction that race was a basis for prosecution. Defendants alleging selective prosecution understandably rely on discovery to obtain the crucial evidence needed to substantiate their claims. The Ninth Circuit's standard of "colorable basis" seemingly established a sufficient threshold to preclude frivolous claims and to recognize meritorious ones (Sacher, 1997, p. 1158).

21. Such coding, indeed, is so pervasive that not only have liberal politicians acquiesced to a so called "perpetrator perspective" of racial discrimination but so called "liberal" academics have as well. For example, Kennedy, Meares and Kahan (for a critique see Steiner & Argothy, forthcoming), Walker et al. (2000), and Cole (1999), in recent writings on race, class, and criminal justice all succumb, in varying degrees, to the Conservative propagated myth of "black criminality" in their implicit allegiance to "the rule of law." While Walker et al. (2000, pp. 24–55) and Cole (1999, p. 145–146) at least make explicit reference to crime data and research that debunks the myth of race as predictive of criminality and illegal substance abuse, both avoid the explicit realities of how the criminal justice system *itself* serves as a "technology of the color line" (Steiner & Argothy forthcoming). Walker et al. (2000) more specifically, make reference to "crime seriousness" in reviewing analyses of racial disproportionately in sentencing outcomes as way to appear "even-handed" in their analysis (p. 202–205) but fail to tackle the more insidious issue of how "seriousness" itself is racially constructed (i.e. how the crack-powder cocaine federal sentencing disparity was rationalized). Likewise, Cole (1999) reverts to a shaky "legal legitimacy" rational for the prevalence of black criminality (p. 171–178). Such a hypothesis has the dual effect of calling attention to criminality in false racial terms, and secondly evades the opportunity to present a more constructive dialogue on why African Americans mistrust the criminal justice system as well as other institutions that invest in Whiteness in the first place (i.e. institutions committed to White advantage at the cost of black disadvantage).

22. Crack, in the place of more worthy epidemics, was, as Reinerman and Levine (1997) point out, constructed into an epidemic by the media:

The empirical evidence on crack use suggests that politicians and journalists have routinely used the words "epidemic" and "plague" imprecisely and rhetorically as words of warning, alarm, and danger. Therefore on the basis of press reports, it is difficult to determine

if there was any legitimacy at all in the description of crack use as an epidemic or plague . . . Among the urban poor, however, especially African American and Latino youth, heavy crack use has been more common . . . However, many more people use alcohol and tobacco heavily than use cocaine in any form. Therefore, “epidemic” would be more appropriate to describe tobacco and alcohol use (Reinarman & Levine, 1997, p. 35).

23. Such raced, gendered, and classed constructions are highly contingent on historical circumstances and social contexts, as Messerschmidt (1993) observes regarding race: “[T]he meaning of race is always undergoing change. After about 1680, the racial category ‘black’ emerged, and for the first time, colonial Europeans began to identify themselves as ‘White’ (Messerschmidt, 1993, p. 191 fn. 2) And regarding the contingency of gender construction: “Some men may actually reject the ideals of hegemonic masculinity yet because the resources are not available to support that rejection, they engage in a pragmatic use of the resources accessible and reproduction of hegemonic masculinity is the result” (Messerschmidt, 1993, p. 191 fn. 5).

24. Indeed, these tails were episodic in nature, stories that were “stitched together by theme rather than by time” (Kohler Riessman, 1993, p. 17).

25. “Like conservatives before them, the Reagan and Bush administrations went to great lengths to reject the notion that street crime and other social problems have socioeconomic causes” (Beckett, 1997, p. 48).

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