This essay considers the empirical evidence showing that women receive more lenient treatment from the American criminal justice system than men. It recognizes that this may be attributed to stereotypes about women as the weaker sex or to gender bias from prosecutors and judges, but ultimately rejects both scenarios. The essay argues that disparities in the way women are prosecuted and sentenced are more likely linked to legitimate differences in women's culpability compared to their male counterparts and that this mirrors current societal influences, including unequal opportunities for women in training, employment, pay, and similar factors.

By Melanie D. Wilson

Sentencing Inequality Versus Sentencing Injustice

Women lag behind men in pay for equal work and in positions of prestigious employment, such as chief executive officers at Fortune 500 companies and presidents of colleges and universities.[1] Women also suffer conscious and subconscious negative bias from both men and women in positions to evaluate an applicant's capabilities and potential, making it less likely that an employer or mentor will choose a woman instead of a man.[2] In contrast to these and many other contexts, our federal criminal justice system regularly favors women over men. Empirical studies show that this lenient treatment begins with prosecutors and law enforcement officers, who tend to forego charges against women; continues with magistrate judges, who often release female defendants on bail or on their own recognizance pretrial; and culminates with lesser sentences after women are found guilty.[3] Post-conviction leniency includes fewer death sentences, no incarceration when that option is available, substantially more downward departures from the otherwise applicable sentencing guidelines, and few upward departures.[4] A smaller number of studies reveal that women, nevertheless, receive harsher sentences when they engage in particularly "unladylike" crimes.[5]

The reasons for this generally favorable treatment are open to debate. The relevant literature offers at least three notable theories to explain such disparities: (1) the paternalism/chivalry theory; (2) a social control theory; and (3) a multifactor explanation linked to gender.[6] The paternalism theory generally asserts that judges respond sympathetically to women to protect them from harsh outcomes that they are not designed to weather, such as extensive periods in prison. The social control theory rests on women's strong ties to family and other social support groups, which provides structure for behavior and, the argument goes, reduces the need to constrain women with incarceration. The multifactor theme (as the name implies) takes a bit from the paternalism theory and adds factors, such as child care responsibilities, that make it more costly for the government and society to incarcerate women for extended periods. Whatever the cause or causes of gender inequality in our criminal justice system, the differences in treatment deserve additional discussion and continuous and careful monitoring by all of the system's participants. Gender-neutral criteria may legitimately justify treating men and women differently. Or, the difference in treatment may rest on baseless stereotypes or with prosecutors' and judges' personal bias about women.

If there are no legitimate, nongendered reasons to treat women more leniently, then in the aggregate, the lenient treatment harms women because it perpetuates stereotypes about them as the "weaker sex" and as less capable and qualified both to mastermind complex, albeit criminal, organizations and to stand up to the rigors of life in prison. These are the same types of explanations that decision-makers might offer for choosing men instead of women for high-paying, leadership positions that require mental and emotional strength. On the other hand, as I contend here, the disparities in the way women are prosecuted and sentenced may accurately reflect legitimate differences in women's culpability compared to their male counterparts. These disparities may simply mirror current societal influences, such as unequal opportunities in education, training, employment, pay, and other material resources that impact women's roles and status when committing crimes, just as these factors influence women and their standing in society more broadly.

In this essay, I rely on my personal experience and training, particularly my time as a federal prosecutor, to stimulate thought and discussion about the reasons behind the empirical data and the corresponding gender disparities, especially in sentencing. I offer an explanation pointing to bias and socialization outside the criminal justice system, rather than within the system itself. In other words, while I urge law enforcement officers, prosecutors, probation officers, and judges to remain vigilant against treating similarly situated persons differently, whatever their unique characteristics, I remind the same actors that justice rests on the individual circumstances of the criminal and the crime. As long as society continues to perpetuate gender bias, female criminals will continue to act differently than male criminals. As a result, those legitimate differences in culpability, criminal history, and responsibility will persist in legitimizing federal sentences for women involving shorter prison time, more downward departures from the sentencing guidelines, fewer upward departures and variances, and larger sentencing breaks for acceptance of responsibility and cooperation with authorities in the prosecution of other crimes.[7]

Relying on actual cases as examples, I argue that the best measure of sentencing injustice, as opposed to sentencing inequity,[8] between men and women requires a comparison of the sentences assigned in multidefendant cases, rather than an analysis of district-wide or nation-wide statistics. The difference in the way the justice system treats men and women, I contend, may legitimately be linked to nongendered considerations and a proper application of the Bail Reform Act, the federal statute governing sentencing, and the federal sentencing guidelines,[9] rather than invidious discrimination or irrelevant factors, such as sympathy. For instance, the federal sentencing guidelines call for a longer sentence for defendants who act as organizers or leaders of criminal activity, for those who manage or supervise other criminals, and for defendants who obstruct justice during the course of the investigation.[10] In contrast, the guidelines direct judges to shorten a defendant's sentence, if he or she acts as a "minimal" or "minor" participant in the crime. Further, the guidelines grant judges significant leeway to sentence even below an otherwise statutorily mandated minimum sentence, if a defendant has little criminal history; if a defendant did not use violence or threats of violence or possess a dangerous weapon; the offense did not result in serious bodily injury; a defendant is not an organizer, leader, manager, or supervisor of an offense; and a defendant provides truthful information about her criminal conduct.[11]

Additionally, when a defendant commits a crime under duress or coercion, not amounting to a complete defense, or to avoid a perceived greater harm, or if the defendant's criminal conduct constitutes aberrant behavior, the guidelines permit a judge to decrease the otherwise applicable sentence below the usual range.[12] Indeed, the sentencing statute on which the guidelines rest requires judges to consider all of the circumstances of the offender and offense in tailoring the sentence to the individual offender.[13] This opportunity for judges to exercise discretion by considering the totality of the circumstances may lead to gender-biased decisions, but such discretion also allows space for individual and appropriate assessments of the accused based on legitimate criteria such as dangerousness, acceptance of responsibility, assistance to the government, role in the crime, and susceptibility to rehabilitation and reform.

In my experience, the criminal conduct of female defendants fits within the mitigating sentencing categories more often than that of male defendants. When, however, women defendants exhibit "unladylike," aggravating characteristics, such as a penchant for violence, a record of organizing other criminals, a willingness to obstruct the investigation, or similar traits, prosecutors and judges count those circumstances against them, as they do with all defendants. Those factors properly result in harsher charges, stricter bail decisions, and longer sentences, including incarceration, just as they do for male defendants.

I find it reasonable to believe that societal differences in the treatment of women (often referred to as socialization) account for women's (generally) lower propensity to commit crimes and that these same differences, rather than system bias, explain why when women break the law, they often engage in less culpable activities with fewer aggravating circumstances than their male counterparts. For instance, women rarely serve as organizers or supervisors of criminal activity. They also tend to fall victim to pressure from other criminal actors, often husbands or lovers. Because many women, who find themselves defendants in the federal criminal justice system, exhibit these mitigating characteristics, prosecutors and judges naturally and, in my analysis, appropriately treat these women more favorably than they treat men who commit the same crime but demonstrate more culpability and more dangerousness and are less amenable to rehabilitation.

Below I use two examples from cases I helped to prosecute and a third from the district in which I teach law to show how the disparately lenient treatment of women in the criminal justice system may very well be the mirror image of the disparate treatment of women in education, the workforce, the boardroom, pay, and other realms.[14]

Case No. 1

In this example, there are two defendants—one female (W) and one male (M). Each was a high-level employee at a historically black college. The indictment charged the defendants jointly with unlawfully obtaining millions of dollars in federal student loans for students who did not attend the college or who attended but quit and, therefore, did not maintain enrollment at the time the loans were processed. The indictment similarly charged that the defendants

obtained other monies legally but kept and used them unlawfully.

At the time of indictment, W was 70 years old and the president of the college. She had no criminal history. She was physically frail, partially because she had suffered a series of mini strokes. The indictment alleged that W pressured the director of financial aid (M) to obtain loan money for students who were ineligible. W agreed that she wanted the director to be aggressive in seeking federal loans lawfully but contended that she had no knowledge of his obtaining loan money for which the college was ineligible. W used some of the money for personal and professional advancement. More specifically, some was used to benefit the college and some to benefit the president personally. All of the loans were prohibited by the terms of the financial aid regulations. W pled guilty to 1 of the 28 counts in the indictment.

M was 64 years old and the director of financial aid for the college. M reported directly to W. M had no criminal history. The indictment alleged that M actively and personally applied for loans for which the college was ineligible. Some of the loans he sought were for students who did not exist; others were for students who stopped attending the college. M also supervised others who applied for similar loans. M contended that any financial aid wrongfully obtained by the college was the result of poor record keeping, not knowing misconduct. When M was first arrested on the 28-count indictment, he tried to leave the country for India. The government contended that M was attempting to flee adjudication of the merits of his guilt. Shortly after that, M agreed to cooperate with the government and provide information to help prosecute W, including testifying against her, if necessary. Eventually, M pled guilty to one count in the indictment.

Sentences Imposed in Case No. 1

The judge sentenced W to 12 months of home confinement, 5 years probation, and to pay restitution.

The judge sentenced M to 18 months of home confinement, 5 years probation, and to pay restitution.

While the judge sentenced the defendants similarly, the female defendant received a slightly shorter sentence, even though she held a position within the college of more prestige and greater overall responsibility. One could certainly argue that this case supports one of the theories above—that judges treat women with undue sympathy. I take a different view. While both sentences were arguably overly generous, given the extent of the fraud and the significant breach of public trust, the disparity between defendants is rational and supported by legitimate sentencing concerns. While M's willingness to cooperate with the government weighs in favor of a lighter sentence for him than W, almost every other factor in the case suggests that M was more culpable and deserved a harsher sentence. He, not W, personally and actively filed the paperwork to obtain the fraudulent loans. He also directed (or, in the words of the guidelines, organized or managed) others (his immediate subordinates) to obtain money for students he knew were ineligible. And, when indicted and arrested, M did not take responsibility for his involvement in the crime but, instead, tried to escape prosecution by fleeing the United States.

The proof against W was weaker (more circumstantial) than the proof against M because M was directly responsible for financial aid and personally completed at least some of the paperwork. Witnesses could also confirm that M directed them to file paperwork seeking loans for which the school was not eligible. W had a plausible (but unlikely) defense that she was unaware of M's criminal behavior. Other than M's testimony that he discussed the fraudulent loans with W, there was no direct proof that W knew M was applying for loans for nonstudents. W was also older than M and physically frail, suggesting that even a short prison sentence might equate to a death sentence. W never attempted to avoid prosecution by absconding. She initially entered a plea of not guilty but made no other attempts to deny responsibility. During the plea colloquy, she admitted her involvement.

If there are no legitimate, nongendered reasons to treat women more leniently, then in the aggregate, the lenient treatment harms women because it perpetuates stereotypes about them as the "weaker sex" and as less capable and qualified both to mastermind complex, albeit criminal, organizations and to stand up to the rigors of life in prison. These are the same types of explanations that decision makers might offer for choosing men instead of women for high-paying, leadership positions that require mental and emotional strength.

Case No. 2

In this second example, a husband and wife conspired to commit, and actually committed, a bank robbery. The couple was strapped for money. Husband worked as a mechanic and performed other low-paying jobs. Wife stayed home with the couple's infant child. The couple shared one car, which husband drove to work. Wife did not have friends or family in the area and was completely dependent on husband for financial support.

Husband acquired a handgun several months before the robbery and purchased a Halloween costume a few days before. The costume came complete with mask and cloak. Husband told his wife that he wanted to rob a bank and that she needed to act as a lookout and would be responsible for disposing of his costume and hiding the money after the robbery. Wife was reluctant, but acquiesced. Wife also knew that husband owned a gun, but she contended that he agreed not to take the gun into the bank. Husband rented a car as a getaway vehicle.

During the robbery, husband wore the Halloween costume and brandished the pistol he owned. When husband obtained cash from a bank teller at gunpoint, he ran from the bank, drove a couple of blocks to a designated meeting point, and handed wife a bundle of clothes to dispose of and the money to hide. Wife drove home and immediately began to burn the bundle of clothes in the couple's barbeque grill. Unbeknownst to wife, husband had placed the loaded pistol in a pocket of the costume. When the gun heated up, live rounds exploded, and the neighbors called the police. Upon initial questioning by police, wife confessed to the crime, detailed their respective roles and actions, and cooperated with the government against her husband.

After police found the burned evidence in the barbeque, they

arrested husband, who denied any involvement in the crime and refused to make a statement. Only after husband pursued motions to suppress evidence found burned in the barbeque and completed discovery, and after the government prepared for trial, did husband plead guilty. Wife testified against husband at his sentencing hearing.

Husband had no criminal history. Wife had previously been convicted of a misdemeanor.

Sentences Imposed in Case No. 2

Husband was sentenced to 60 months in prison and ordered to pay restitution.

Wife was sentenced to 18 months in prison and ordered to pay restitution.

As with Case No. 1, I can offer a rational argument that the sentencing judge's subconscious bias influenced the respective sentences in ways that unfairly benefitted the female defendant (wife) and unduly punished the male (husband). After all, wife had a criminal history when husband had none, and both husband and wife expressly agreed to rob a bank.

But the stronger argument, I believe, is that wife deserved a shorter sentence. Wife denied knowing that her husband intended to use a gun to commit the robbery, and her ignorance was buttressed by the fact that she tried to dispose of the evidence without checking for a gun. That mistake led to the couple's capture. When caught, wife immediately "came clean" about her role in the crime and reluctantly agreed to implicate her husband. She later testified against him when he would not admit his complete involvement. Likewise, all evidence suggested that it was his idea to rob the bank and that she was opposed to the idea but that she succumbed to his pressure because she was completely dependent on him for resources, including resources for their child. If wife had, instead, chosen to leave her husband, with no family or friends to rely on for help, and no car for transportation, wife would have been relegated to leave her home on foot, in a taxi, or on a bus, with her infant child in tow. She would also experience significant difficulty in finding even short-term housing.

Case No. 3

In this third example, I played no personal role. Seven defendants were involved—two female and five male. All were employees of a Division I Athletic Department. Each played a part in skimming more than $1million in basketball and football tickets to sell for personal gain. The indictment charged conspiracy to commit wire fraud.

Defendant 1 was a 54-year-old male (M1) associate athletic director, whom the university paid to oversee fundraising. M1 personally profited about $300,000 from the ticket scandal. He had no prior criminal history, paid back $64,000 before sentencing, and during the sentencing hearing expressed remorse for his involvement.

Defendant 2 was a 44-year-old female associate athletic director (W1), who oversaw the ticket office. She resigned her position before charges were brought. It was unclear how much she personally profited from the conspiracy because she divided her profits with other defendants. She had no criminal history, agreed to cooperate against other defendants, and pled guilty, yet made no statement at her sentencing hearing.

Defendant 3 was the 46-year-old husband of W1 (M2). He consulted with the athletic department on an as-needed basis. His crime was taking tickets funneled to him from W1, his wife, to sell for personal profit. M2 had no criminal history.

Defendant 4 was 42 years old (M3). He served as an assistant athletic director. He sold $975,000 worth of tickets for personal gain. He had no criminal history and agreed to cooperate with the government in the investigation.

Defendant 5 was the most junior of the defendants (W2). She worked as a systems analyst. She was only 28 years old with no criminal history. She became involved in the ticket scandal when her boss (M3) gave her cash from his own wrongful ticket sales. W2 pled guilty early in the prosecution and expressed remorse during her sentencing hearing.

Defendants 6 and 7 are both male (M6 and M7). They were the least involved in the criminal conduct and pled guilty early in the investigation to concealing the felonies of the other defendants.

Sentences Imposed in Case No. 3

M1 and W1 were each sentenced to 57 months in prison. M1 was ordered to pay $1.19 million in restitution and $85,000 in unpaid taxes. W1 was ordered to pay $2.56 million in restitution and unpaid taxes.

M2 and M3 were both sentenced to 46 months in prison and a share of restitution.

The judge sentenced W2 to 37 months incarceration, $1.3 million in restitution, and $80,000 in unpaid taxes.

M4 and M5 received a sentence of probation only.

The district court judge sentenced M1 and W1 comparably, probably because their status in the fraud scheme was similar. Both held positions at the university requiring trust and significant professional responsibility. Both breached their duties to their employer and the citizens of the state. The only notable differences between these two defendants (other than their sex) appear to be the amount of money they misappropriated, which could be (and was) reflected in their restitution obligations, and the fact that W1 involved her husband (M3). M1's early repayment of part restitution might also be considered an attempt at exceptional efforts of acceptance of responsibility, although courts do not typically count such efforts.[15]

From my perspective, it seems that the sentencing judge attempted to treat similar defendants within the scheme similarly and to carve out sentencing bands. The two defendants (one male; one female) with the most culpability received the longest prison sentences. The two defendants with the least culpability (both male) received no prison time. The defendants in the middle ranges (two male and one female) received sentences between the extremes. Only W2 was sentenced differently than any other defendant. Her sentence was arguably appropriately lighter than Defendants 1 through 4 because although she violated the law, she had not been hired into a position of significant public trust, like W1 and M1. Also, her boss, the more culpable M3, lured W2 into the criminal activity. Likewise, W2 was properly sentenced more harshly than M4 and M5, who pled guilty to a lesser crime and who accepted responsibility for their involvement by pleading guilty early in the investigation and by cooperating with law enforcement in the prosecution of defendants 1 through 5.

The only difference in sentencing among the seven defendants that might raise a valid question regarding sex bias is the lenient treatment of M2 versus W2. Like W2, who held a low-level position within the university and who became involved with encouragement from her boss, M2 was a mere consultant and became involved with the scheme only after his wife funneled tickets to him.

Inequality Versus Injustice

Women have always received more favorable treatment than men from the American criminal justice system. The leniency women experience may be a result of invidious discrimination and outdated stereotypes. But my personal experience and training suggest that the explanation is more complex and due, at least in part, to the continuing differences in the socialization of women. As one of the other articles in this issue shows, even at one of the finest law schools in the country, women continue to assert themselves less than men. They speak up less often in class and take less aggressive approaches in seeking mentorship during law school and in pursuing top-level employment positions after.[16] Even at the Ivy League level, women are conditioned to behave more passively than men.

When women behave in less assertive ways in criminal organizations, the justice system appropriately labels them less culpable. Of the cases I prosecuted, not one involved a woman kingpin of the criminal enterprise. The closest I came to a female kingpin was the 70-year-old college president referenced in Case No. 1 above. In fact, in my own experience, I do not recall anyone else in the U.S. Attorney's Office talking about a case they were handling in which a woman was **the** key criminal. Rather, federal cases with women defendants were (and are) relatively rare. And in those involving female defendants, I confronted case after case in which a girlfriend, wife, sister, or daughter supported her boyfriend, husband, brother, or father in a criminal undertaking, playing a subordinate role. Not uncommonly, the male mastermind exerted overt pressure on the female to participate. Other times, the women seemed to acquiesce more readily. In every case, an intellectually honest application of the federal sentencing guidelines demanded that the women receive a more lenient sentence.

I find the gender disparities in the criminal justice system unsurprising given that few educated and accomplished women become CEOs, CFOs, college presidents, law school deans, and other prominent leaders. Why should we expect more success from women criminals? ⊙

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Endnotes

[1]*See*, *e.g.*, Laura Bassett, *Obama to Sign Executive Orders on Equal Pay*, The Huffington Post (Apr. 6, 2014), available at www.huffingtonpost.com2014/04/06/obama-equal-pay_n_5100361.html (reporting that President Barack Obama intends to sign two executive orders addressing equal pay and noting that women continue to earn "77 cents for every dollar men make"); Alanna Vagianos, *There Are Still Few Women at the Top of Fortune 500 Companies, Says Report*, The Huffington Post (Dec. 11, 2013), available at www.huffingtonpost.com/2013/12/11/women-in-leadership-roles_n_4418725.html (stating there is "little to no increase of female CEOs, CFOs, and board members over the past three years." For example, "Just 16.9 percent of corporate board seats were held by women in 2013, the eighth consecutive year with little to no progress in narrowing the gender gap"; in 2013, just 8.1 percent of Fortune 500's top earners were women; and "only 4.2 percent of Fortune 500 companies employ female CEOs); Jack Stripling, *Survey Finds a Drop in Minority Presidents Leading Colleges*, The Chronicle of Higher Education (Mar. 12, 2012), available at chronicle.com/article/Who-Are-College-Presidents-/131138/ (finding that in 2011, 26.4 percent of university presidents were women); *see also* Laura M. Padilla, *A Gendered Update on Women Law Deans: Who, Where, Why, and Why Not*, 15 Am. U.J Gender Soc. Pol'y & L., 443, 461 (2007) (indicating that 18.7 percent of law school deans were women as of the 2005–2006 academic year).

[2]*See* generally Corinne A. Moss-Racusin, *et. al*, *Science Faculty's Subtle Gender Biases Favor Male Students*, 109 Proc. of the Nat'l Acad. of Sci. of the U.S. of Am., 16474, 16477 (2012), available at www.pnas.org/content/109/41/16474.full.pdf+html (reporting study in which researchers randomly assigned a male or female name to materials of student applicants for a laboratory manager position, and despite identical qualifications, females were less likely to be hired but more likely to be offered a lower salary when selected).

[3]Stephanie Bontsager, Kelle Barrick, and Elizabeth Stupi, *Gender and Sentencing: A Meta-Analysis of Contemporary Research*, 16 J. Gender Race & Justice 349, 350 (2013) (noting that since 1985, the gender gap in sentencing has been narrowing and that "women have been entering prison at twice the rate of males"); Sonja B. Starr, *Estimating Gender Disparities in Federal Criminal Cases*, Mich. U. L. & Econ. Research Paper 4 (Aug. 2012) (noting that male arrestees face a "modestly but significantly higher probability of a charge before a district judge" than females); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & Econ. 285 (2001) (finding significant disparities in sentencing of men and women defendants).

[4]*See id.*

[5]*See* Andrea Shapiro, *Unequal Before the Law: Men, Women and the Death Penalty*, 8 Am. U.J. Gender Soc. Pol'y & Law 427, 459 (2000).

[6]*See*, *e.g.*, Ann Martin Stacey and Cassia Spohn, *Gender and the Social Costs of Sentencing: An Analysis of Sentences Imposed on Male and Female Offenders in Three U.S. District Courts*, 11 Berkeley J. Crim. L. 43, 49-51 (2006) (providing a basic overview of these theories).

[7]In her empirical study, Sonja Starr recognizes that "unobserved differences" in the crimes women commit and those men commit may account for differences in treatment. Starr, *supra* note 3, at 12. For instance, she notes that more women receive the benefit at sentencing of the "'safety valve' loophole" available to offenders who face mandatory minimums for drug crimes. *Id.* at 13. She also acknowledges that women "might [rightly] be viewed as minor players." *Id.*

[8]I view sentencing injustice as disparate treatment based on illegitimate grounds, while sentencing inequality may be legitimate and reasonable discrimination between two people because of their materially different and relevant circumstances.

[9]The Bail Reform Act of 1984, *see* 18 U.S.C. § 3142, *et seq.*, provides statutory guidance to magistrate judges who must decide whether to detain or release the accused pending trial. The sentencing statute provides similar guidance for federal judges who must sentence convicted defendants. *See* 18 U.S.C. § 3553, *et seq.* Finally, federal sentencing guidelines, *see infra* notes 10-12, are advisory guidelines designed to assist federal judges in meting out similar punishments for similarly situated defendants based on their like criminal histories and the similarities of their criminal conduct.

[10]U.S. Sentencing Guidelines Manual § 3B1.1, § 3C1.1 (2013).

[11]U.S. Sentencing Guidelines Manual § 3B1.2, § 5C1.2 (2013). In her study of gender disparities in federal criminal cases, Sonja Starr notes that fact-finding for sentencing and guidelines departures "are both stages in which men's and women's outcomes appear to diverge substantially." Starr, *supra* note 3, at 11. In my view, Starr's findings are consistent with my contention that such significant disparities can be explained by meaningful differences in women and men's criminal conduct (in most cases) that warrants disparate sentencing. Starr seems to disagree. *See id.* at 12 ("there are good reasons to doubt that [nuance differences in underlying criminal conduct] explain much of the observed disparity.").

[12]U.S. Sentencing Guidelines Manual § 5K2.12, § 5K2.11, § 5K2.20 (2013).

[13]*See* 18 U.S.C. § 3553(a) (directing that the court "shall impose a sentence sufficient, but not greater than necessary" to "reflect the seriousness of the offense … afford adequate deterrence to criminal conduct … to protect the public from further crimes of the defendant," and to effectuate rehabilitation).

[14]I have avoided using the names of the defendants to allow readers to focus on the gender disparity issues.

[15]*See* United States v. Kuhlman, 711 F.3d 1321 (11th Cir. 2013) (reversing the district court's decision to take into account the defendant's "full restitution payment" in deciding what sentence to impose).

[16]*See* Ruth Anne French-Hodson, *The Continuing Gender Gap in Legal Education*, The Federal Lawyer, July 2014, at 80.

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not just academia. For a comprehensive review of the social science literature on implicit racial bias, *see* Cheryl Staats, *State of the Science: Implicit Bias Review 2013*, available at www.kirwaninstitute.osu.edu/reports/2013/03_2013_SOTS-Implicit_Bias.pdf (last accessed April 18, 2014).

[13]Serena Easton, *On Being Special*, in Presumed Incompetent, *supra* note 2, at 153.

[14]Linda Trinh Võ, *Navigating the Academic Terrain: The Racial and Gender Politics of Elusive Belonging*, in PRESUMED INCOMPETENT, *supra* note 2, at 107-108.

[15]*See* Francisca de la Riva-Holly, *Igualadas*, in Presumed Incompetent, *supra* note 2, at 292-294 (discussing tenure denial and negative performance reviews based on lack of "collegiality").

[16]Yolanda Flores Niemann, *The Making of a Token: A Case Study of Stereotype Threat, Stigma, Racism and Tokenism in Academe*, in Presumed Incompetent, *supra* note 2, at 344.

[17]*See* Jessica Lavariega Monforti, *La Lucha: Latinas Surviving Political Science*, in Presumed Incompetent, *supra* note 2 , at 401-402

[18]Adrien Katherine Wing, *Lessons from a Portrait: Keep Calm and Carry On*, in Presumed Incompetent, *supra* note 2 , at 366.

[19]Margalynne J. Armstrong and Stephanie M. Wildman, *Working Across Racial Lines in a Not-So-Post-Racial World*, in Presumed Incompetent, *supra* note 2, at 225-226.

[20]*See generally* Yin Paradies, *A Systemic Review of Empirical Research on Self-Reported Racism and Health*, 35(4) Int'l J. Epidemiolog. 888 (2006) (reviewing 138 empirical quantitative studies on the relationship between self-reported racism and physical and mental health).

[21]*See generally* Flores Niemann, *supra* note 16.

[22]Sylvia R. Lazos, *Are Student Teaching Evaluations Holding Back Women and Minorities?* in Presumed Incompetent, *supra* note 2, at 165.

[23]*See* id. at 166, 182.

[24]de la Riva-Holly, *supra* note 15, at 290, 292.

[25]Constance G. Anthony, *The Port Hueneme of My Mind: The Geography of Working-Class Consciousness in One Academic Career*, in Presumed Incompetent, *supra* note 2, at 310.

[26]*See* Angela P. Harris and Carmen G. González, *Introduction*, in Presumed Incompetent, *supra* note 2, at 5-6; *see generally*, Benjamin Ginsberg, The Fall Of The Faculty; The Rise Of The All-Administrative University And Why It Matters (2011); John W. Curtis and Saranna Thornton, *Losing Focus: The Annual Report on the Economic Status of the Profession 2013-14*. Academe (March–April 2014) (discussing the stagnation of faculty salaries and the growing "administrative bloat" in U.S. colleges and universities).

[27]Delia D. Douglas, *Black/Out: The White Face of Multiculturalism and the Violence of the Canadian Academic Imperial Project*, in Presumed Incompetent, *supra* note 2, at 59.

[28]John F. Dovidio, *Introduction*, Part II, in Presumed Incompetent, *supra* note 2, at 114.

[29]*See* Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 Iowa L. Rev, 1549, 1572-1577 (2011).

[30]*See* AALS, *The Promotion, Retention, and Tenuring of Law School Faculty: Comparing Faculty Hired in 1990 and 1991 to Faculty Hired in 1996 and 1997* (Dec. 14, 2004), available at www.aals.org/documents/2005recruitmentreport.pdf (last accessed April 29, 2014). For the 2009 statistical report, see *supra* note 4.

[31]*See The Racial Gap*, *supra* note 5 (analyzing the AALS longitudinal study).

[32]John W. Curtis and Saranna Thornton, *Here's the News: Annual Report on the Economic Status of the Profession 2012-2013* at 7, Academe (March–April 2013) According to the American Association of University Professors (AAUP), graduate student employees, contract faculty, and adjuncts comprised more than 76 percent of university instructional staff in 2011. Between 1975 and 2011, nontenure-track positions increased at a rate of 300 percent as compared to 26 percent for tenure-track positions. *See* id. at 7–8.