

# DOMESTIC VIOLENCE IN BLACK AND WHITE: RACIALIZED GENDER STEREOTYPES IN GENDER VIOLENCE

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## I. INTRODUCTION

The media attention given to the criminal<sup>1</sup> and civil<sup>2</sup> trials of Orenthal James Simpson has focused the attention of mainstream society on the issues surrounding domestic violence.<sup>3</sup> Unfortunately, instead of

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<sup>1</sup> People v. Simpson, No. BA097211, 1995 WL 704381 (Cal. Super. Ct. Oct. 3, 1995) (lasting fifteen months between June 1994 and October 1995).

<sup>2</sup> Rufo v. Simpson, No. SC03197; Goldman v. Simpson, No. SC036340; Brown v. Simpson, No. SC03687; 1997 WL 114574 (Cal. Super. Ct. Mar. 10, 1997).

<sup>3</sup> While this “attention” has created greater awareness of the issues and prompted more women to get help, the acquittal of O.J. in the criminal trial, and its portrayal by the media, unfortunately has been disheartening to victims of abuse and empowering to abusers. For example, many batterers now boast that they can get away with abusive behavior because “O.J.

prompting greater awareness of the magnitude of the issues,<sup>4</sup> the media and the actors in the legal proceedings manipulated stereotypes and obscured the issues of domestic violence.

Through the lens of the media focus on the O.J. trials, the issue of domestic violence has implicitly become “black and white.” Literally, beliefs about justice in these cases were portrayed by media polls as divided by race. For example, a Los Angeles Times poll conducted near the end of the civil trial indicated that “71% of whites said they thought Simpson committed the murders, while 70% of blacks said they thought he was innocent.”<sup>5</sup> There were no polls broken down by gender. In fact, we don’t know if the polls that were done by race included proportional numbers of men and women of either race. Would it have been more or less significant if men and women (regardless of race) held the same views about the issues of domestic

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got away with it;” and “to O.J.” has become a verb used to threaten women. *See, e.g.*, Mark Puls, Simpson Case a Blessing and Curse, Abused Women Say, Detroit News, Oct. 24, 1995, at A4; Wade v. State, 951 S.W.2d 886 (1997) (while holding a knife to her throat, defendant asked his victim if “she wanted to end up like Nicole Simpson”); Peterson v. State, 930 P.2d 414 (1996) (while stalking his victim, defendant said he was going to kill her and she was going to be the next Nicole Simpson); Miller v. State, 477 S.E.2d 430 (1996) (when defendant saw his former girlfriend dancing with another man, he told her she was going to be another Nicole Simpson to his O.J.).

<sup>4</sup> Media attention is generally only given to those rare cases when women use violence, despite the fact that somewhere between one-third to half of all female murder victims are killed by a male intimate. *See* Nancy S. Ehrenreich, O.J. Simpson & the Myth of Gender/Race Conflict, 67 U. Colo. L. Rev. 931 (1996) (noting the unfortunate fact that it takes a high-profile case to give domestic violence issues any attention despite its prevalence in society); Ronet Bachman, Ph.D. and Linda E. Saltzman, Ph.D., U.S. Dep’t of Justice, Violence Against Women: Estimates From the Redesigned Survey, 1 (1995) [hereinafter Violence Against Women III] (noting that estimates are conservative since “[m]any factors inhibit women from reporting these victimization both to police and to interviewers, including the private nature of the event, the perceived stigma associated with one’s victimization, and the belief that no purpose will be served in reporting it.”); Ronet Bachman, Ph.D., U.S. Dep’t of Justice, Violence Against Women: A National Crime Victimization Survey Report 1 (1994) [hereinafter Violence Against Women I]. “The public education on domestic violence that we need as a society can’t happen in the ‘quick fix’ of a trial,”[ but needs to be discussed through broader educational vehicles and in the wide variety of social fora that affect our daily lives and the daily lives of victims of abuse.] Elizabeth M. Schneider, What Happened to Public Education About Domestic Violence? in *Postmortem: The O.J. Simpson Case* 82 (Jeffrey Abramson ed., 1996).

<sup>5</sup> Abigail Goldman and Mary Curtius, Simpson Civil Case: For Many It’s as Simple as Black and White Reaction, L.A. Times, Feb. 5, 1997, at A14.

violence?<sup>6</sup> There were also no polls broken down by income or social status. Would it have mattered if people's belief in Simpson's innocence or guilt correlated to their relative income? Most significantly, these polls did not reveal the basis for the responses of the pollees. Do we know if their perceptions of justice were based on race, or on gender, or on class, or on the available evidence, or on all of the above?

The criminal trial was portrayed as a defeat for battered women and simultaneously as a victory for the African American community and the civil trial as a vindication of the rights of battered women and retributive of mainstream (read white) justice.<sup>7</sup> Implicit in this characterization is the understanding that the battered women imagined were white.<sup>8</sup> This conceptualization existed, most obviously, because Nicole Brown Simpson was white and the defendant was black. Notwithstanding the obvious, the "racial divide" reflected a misuse of the disbelieving opinions of black women, particularly those on the jury of the criminal trial,<sup>9</sup> to indicate that the issues of the trial had import only as determined by race. Also important in the representations of domestic violence was that it was only a "woman's issue." Thus, with the foregoing characterizations, the battle-lines concerning

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<sup>6</sup> See Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy 104 (1994).

<sup>7</sup> At the end of the criminal trial, "[s]everal white males said they were angry that a domestic abuser like Simpson could walk. But it seemed rather disingenuous for them to now rush to make an African-American a poster child for spousal abuse when the issue has been epidemic among all men." Derrick Z. Jackson, Take a Deep Breath, Everyone: We All Lost, Boston Globe, Oct. 6, 1995, at 19.

<sup>8</sup> Not so obvious is the ways in which stereotype characterizes a true "victim" as being a white woman. See *infra* text accompanying notes 80-94.

<sup>9</sup> For example, the statements of Brenda Moran, an African American woman who served on the O.J. criminal jury, were often cited concerning domestic violence in the trial: "Domestic abuse—to me that was a waste of time. This was a murder trial, not domestic abuse. If you want to get tried for domestic abuse, go in another courtroom and get tried for that." See, e.g., CNN & Company, transcript #750 (Cable News Network, Inc. broadcast, Jan. 15, 1996). The intention of the media in using this statement was quite clearly to show that black women were unsympathetic to the issues of domestic violence. Nonetheless there were other plausible interpretations of Ms. Moran's statements. For example, given the entire context of the prosecutions case, she could just have easily been suggesting that, even though the prosecution was able to prove that O.J. did abuse Nicole, emphasis on motive was a waste of time without better proof of opportunity, intent, and ability.

domestic abuse were not drawn in terms of gender,<sup>10</sup> but primarily in terms of race.<sup>11</sup>

In purposefully using the voice of an individual black woman, the popular national media was seeking the “monolithic voice of the black community”<sup>12</sup> to include in their stream of sound bites through which they

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<sup>10</sup> Given the fact that domestic violence is disproportionately perpetrated by men against women (see *Violence Against Women II*, *supra* note 4, at 4 (based on the Uniform Crime Reports, in 1992 approximately 28% of female victims of homicide were killed by their husband, ex-husband, or boyfriend; approximately 3% of male victims were killed by their wife, ex-wife, or girlfriend); *Violence Against Women I*, *supra* note 4, at 6 (noting that approximately 33% of violence against women is by an intimate, whereas only 5% of violence against men is by an intimate)), it would be logical to think the “battle-lines” would be drawn in terms of gender. However, I am not suggesting that this is the appropriate way to address the issue of domestic violence. Aside from the fact that domestic violence is also perpetrated by men against men, women against women, women against men, adults against children, and adults against the elderly, domestic violence and its inherent relational power imbalance are issues that we all must address to eradicate them from society.

<sup>11</sup> One columnist said of the reactions to O.J.’s acquittal and its aftermath, “And nowhere was that divide more stark than it was between black women and white women.” Isabel Wilkerson, *Whose Side to Take: Women, Outrage And the Verdict on O.J. Simpson*, N.Y. Times, Oct. 8, 1995, sec. 4, 1. On the jury for the criminal trial, there were eight African Americans; there were also eight women. Another journalist pointed out that “much has been made of the pigmentation of the O.J. jury but relatively little of its gender.” Les Payne, *O.J.’s Subplot: Gender and Race*, Newsday, Feb. 5, 1995, at A36. In addition, even though there was some discussion of the defendant’s ability to “buy his freedom” (especially through reference to the money spent on the “dream team”), relatively little was made of class distinctions. As bell hooks points out, “[t]his tragedy would not have happened if male violence against women was not so acceptable in our culture... we know that whenever sexuality is involved and gender in our culture, people often prefer to talk about race. Race is easier for people to—it’s easier to racialize something because if we make it a case of gender, we have to see a man like O.J. Simpson as very empowered by class and by patriarchy.” *Interview: bell hooks*, Charlie Rose (WNET Educational Broadcasting Company broadcast, Oct. 24, 1995).

<sup>12</sup> “All too often in our society, it is assumed that one can know all there is to know about black people by merely hearing the life story and opinions of one black person.” bell hooks, *Ain’t I A Woman: Black Women and Feminism* 11 (1981). This is faulty, not only for the assumption that one opinion can represent those of others, but also because it forces the dissection of the attributes and experiences of the individual. Kimberlé Crenshaw points out that “[f]eminist efforts to politicize experiences of women and antiracist efforts to politicize experiences of people of color have frequently proceeded as though the issues and experiences they each detail occur on mutually exclusive terrains.” *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1242 (1991); *see also*, Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581, 588 (1990); Regina Austin, *“The Black Community,” Its Lawbreakers and Politics of Identification*, 65 S. Cal. L. Rev. 1769 (1992).

serve us all cafeteria style.<sup>13</sup> This (mis)use of the “representative one voice” is intellectually dishonest and socially deceptive in much the same way, but on a grander scale, as the use of the reprise, “I have (a) black friend(s),” as proof of the good, non-racist intentions of the speaker. The media’s use of the “monolithic voice” is the means by which issues of gender violence become issues of racial politics.

This politicization of the issues occurred in the commentary concerning the O.J. trials and works to obscure the complexity of the situation. The simplistic and politicized media attention<sup>14</sup> has given this new found attention to domestic violence the face of a white woman and the disbeliever the face of a black woman.<sup>15</sup> This conceptualization was further reinforced by

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<sup>13</sup> An example of this is in the ironic statements of Katie Couric: “...So you can’t say that—that African-Americans think monolithically. However, how do you think black America would accept a ruling that O.J. Simpson is, in fact, liable, if that is to come to pass?” Interview: Earl Ofari Hutchinson on the Role of Race in the Simpson Civil Case, Today (NBC television broadcast, Feb. 3, 1997).

<sup>14</sup> “... in televised images after the acquittal, black women smiling to the heavens, thanking Jesus, and white women, sobbing, unable to speak.” Wilkerson, *supra* note 11. What televised reports and other media accounts did *not* emphasize was that there are black women convinced that Mr. Simpson was guilty, and there are white women who say Mark Fuhrman planted the bloody glove.

<sup>15</sup> The popular media is not alone in characterizing domestic abuse as only of concern to white women.

The literature on battered women tends to overlook the experiences of non-majority women. The battered-wife literature typically addresses the issues of ethnicity and abuse in one of three ways: (1) by failing to mention the race of the women studied; (2) by acknowledging that only majority women are included; or (3) by including some women of other non-majority groups but not in proportion comparable to their number in the national population.

Robert L. Hampton, Richard J. Gelles and John Harrop, Is Violence in Black Families Increasing?: A Comparison of 1975 and 1985 National Survey Rates, in Black Family Violence: Current Research and Theory 5 (Robert L. Hampton ed., 1991).

Contrary to these characterizations, recent studies have shown that those most likely to fall victim to street crime are also most likely to be subject to domestic abuse. See Southern California Injury Prevention Research Center, Americans Who Are Black, Under 30, Lower Income, Less Educated or Urban Dwelling More Likely to Report Domestic Violence, (Jan. 26, 1996), <<http://www.ph.ucla.edu:80/sph/pr/wr039.html>>. As a class, women of color who are of lower economic status, are the victims of a higher percentage of street crimes. See Violence Against Women II, *supra* note 4, at 4-5; Violence Against Women I, *supra* note 4, at 1; see also, Jeane Ann Grisso, M.D., M.Sc. *et al.*, Injuries Among Inner-City Minority Women: A

the composition of the civil trial jury which was predominantly white and predominantly female (though not predominantly both white and female).<sup>16</sup> The stereotypic dichotomies<sup>17</sup> were thus complete: black jury—not guilty; white jury—guilty (that is, liable).

The purpose of this article is to explore the ways in which the conceptual violence of stereotype<sup>18</sup> reinforces, perpetuates, and contributes to literal gender violence, domestic abuse, and racial tensions and how these conceptualizations can be understood through feminist dialectics.<sup>19</sup> Feminists

Population-Based Longitudinal Study, 86 *Amer. J. of Pub. Health* 67 (1996) (pointing out that homicide rates are nearly four times higher for African American women than among white women). By extension, these women are also the victims of a higher percentage of domestic crime. Domestic violence affects every race, age, and socio-economic class, but it would seem prudent to at least include to a greater extent in our literature, discussions, and efforts to eradicate domestic abuse, those who are most affected.

<sup>16</sup> The Simpson civil jury consisted of five white women, three white men, one Latina, one black woman, one black man, and one man of Asian and black descent. See Harriet Chiang, Whites Dominate Jury for Simpson Civil Trial, *San Francisco Chronicle*, Oct. 18, 1996, at A1.

<sup>17</sup> See *infra* Part II.

<sup>18</sup> Stereotypes are commonly held, well-learned, and established associations among groups and traits that comprise a standardized conception or image invested with special social meaning. See David L. Hamilton, Steven Stroessner, and Denise M. Driscoll, Social Cognition and the Study of Stereotyping in Social Cognition: Impact on Social Psychology 291, 309 (Patricia G. Devine, *et al.* eds., 1994) (“A stereotype consists of the beliefs that are associated with a particular social group”); Wolfgang Stroebe and Chester A. Insko, Stereotype, Prejudice, and Discrimination: Changing Conceptions in Theory and Research, in Stereotyping and Prejudice: Changing Conceptions 3, 5 (Daniel Bar-Tal, *et al.* eds., 1989) (defining stereotypes as “a set of beliefs about the personal attributes of a group of people”). For a discussion of the psychological and cognitive manifestations and affects of stereotypes in judicial proceedings see Jody Armour, Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit, 83 *Cal. L. Rev.* 733, 739-759 (1995).

Stereotype has both social-structural manifestations and psychological bases. See David L. Hamilton, *et al.*, *supra*; Miles Hewstone, Changing Stereotypes with Disconfirming Information in Stereotyping and Prejudice: Changing Conceptions 207 (Daniel Bar-Tal, *et al.* 1989). My focus is primarily on the social-structural effects of stereotype and the ways those effects condition both actual and perceived justice. Necessarily, the psychological associations that we have tailor the existence of these stereotypes in society. Thus, I also discuss the cognitive psychological approaches and explanations for stereotype in understanding how they are perpetuated and how they might be combated. See *infra*, Part II.

<sup>19</sup> These analyses rely on a large body of literature exploring patterns of domination, exclusion, and difference. Whereas I do not devote space in this article to defending the theoretical approaches upon which I rely, which is a worthwhile task, I nonetheless acknowledge a range of criticisms of my basic presumptions. See, *e.g.*, Daniel Farber and

have shown that the normative assumptions underlying the foundations of the law are primarily “male.”<sup>20</sup> Unfortunately, the resulting theories and efforts to replace those norms often relied on the “essential” woman<sup>21</sup> as the counter norm to be included in legal foundations, replicating the “normative” approach. The “normative” approach and the “essentialist” approach share a reliance upon forms of stereotype to deflect the characteristics not implicitly included in the relevant standard.<sup>22</sup> Stereotype is an explicit means of illustrating “difference.” Stereotypes may seem less nuanced or sophisticated than that to which the standardized approaches refer, but nonetheless are necessary for their existence.<sup>23</sup>

The issue of domestic violence discussed has been framed by feminist discourse in three ways that parallel the relevant framework for the discussion of stereotype. First, feminists have demonstrated the fallacy of the conceptual

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Suzanna Sherry, The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth, 46 Stan. L. Rev. 647 (1994); Randall L. Kennedy, Racial Critiques of Legal Academia, 102 Harv. L. Rev. 1745 (1989); Richard A. Posner, The Decline of Law as an Autonomous Discipline: 1962-1987, 100 Harv. L. Rev. 761 (1987).

<sup>20</sup> See, e.g., Catharine MacKinnon, Feminism Unmodified: Discourses on Life and Law (1987); Robin West, The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, 3 Wis. Women's L.J. (1987); Clare Dalton, Where We Stand: Observations on the Situation of Feminist Legal Thought, 3 Berkeley Women's L.J. 1 (1987); Frances E. Olsen, The Family and the Market: A Case Study of Ideology and Legal Reform, 96 Harv. L.Rev. 1497 (1983).

<sup>21</sup> See, e.g., Dorothy E. Roberts, Racism and Patriarchy in the Meaning of Motherhood, 1 J. Gender & Law 1 (1993); Regina Austin, Black Women, Sisterhood, and the Difference/Deviance Divide, 26 New Eng. L. Rev. 877 (1992); Mari J. Matsuda, Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition, 43 Stan. L.Rev. 1183 (1991); Paulette M. Caldwell, A Hair Piece: Perspectives on the Intersection of Race and Gender, 1991 Duke L.J. 365; Harris, *supra* note 12; Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U.Chi.L.F. 139; Marlee Kline, Race, Racism, and Feminist Legal Theory, 12 Harv. Women's L.J. 115 (1989); Diana Fuss, Essentially Speaking: Feminism, Nature & Difference (1989); Martha Minow, Feminist Reasoning: Getting It and Losing It, 38 J.Legal Ed. 47 (1988); Elizabeth Spelman, Inessential Woman: Problems of Exclusion In Feminist Thought (1988).

<sup>22</sup> I sometimes refer to the “normative” and “essentialist” approaches collectively as “standardized” approaches.

<sup>23</sup> See Stroeb and Insko, *supra* note 18, at 5 (“Stereotypes help to preserve or create positively valued differentiations of a group from other social groups and contribute, therefore, to the creation and maintenance of group ideologies explaining or justifying a variety of social actions against the outgroup.”).

split of public and private, relegating family and the “woman’s sphere” to the private, and policy and justice to the public.<sup>24</sup> Domestic abuse has traditionally been consigned to the private realm, accounting for why these issues have been so difficult to address through the public justice system.<sup>25</sup> This dichotomy is itself a means of perpetuating violence. In a similar fashion, stereotypes are also formulated in dichotomous, oppositional structures.<sup>26</sup> Thus, the conceptual framework of stereotype also conditions the acceptance of violence.

Second, feminists aim to eradicate violence against women.<sup>27</sup> This second point is related to the first, since one means of accomplishing the second is to demonstrate how the “private” realm is interconnected to and

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<sup>24</sup> See Elizabeth Schneider, The Violence of Privacy, 23 Conn. L. Rev. 973 (1991); Olsen, *supra* note 20 (discussing how the conceptual and ideological division between the family and the market implicitly affect the role division and conceptualization of male and female).

<sup>25</sup> As Martha Minow points out,

The violence encountered by people within their families has roots and consequences not confined to those families.... Society is organized to permit violence in the home; it is organized through images in mass media and through broadly based social attitudes that condone violence.... Society permits such violence to go unchallenged through the isolation of families and the failures of police to respond. Public, rather than private, patterns of conduct and morals are implicated....

Martha Minow, Words and the Door to the Land of Change: Law, Language, and Family Violence, 43 Vand. L.Rev. 1665, 1671(1990).

<sup>26</sup> See David Hamilton and Steven Sherman, Illusory Correlations: Implications for Stereotype Theory and Research, in Stereotyping and Prejudice: Changing Conceptions 59 (Daniel Bar-Tal, *et al.* eds., 1989) (describing how a “cognitive bias, called an illusory correlation, refers to an erroneous judgment of the relationship between two variables).

<sup>27</sup> See, *e.g.*, Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117, 2135 (1996); Barbara Hart, Battered Women and the Criminal Justice System, 36 American Behavioral Scientist 624, 626 (May 1993); Crenshaw, *supra* note 12; Martha Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich L.Rev. 1 (1991); Schneider, *supra* note 24; Minow, *supra* note 25; Christine A. Littleton, Women’s Experience and the Problem of Transition: Perspectives on Male Battering of Women, 1989 U. Chi. Legal F. 23; Susan Estrich, Real Rape (1987); MacKinnon, *supra* note 20; Beth Richie, Battered Black Women: A Challenge For the Black Community, Black Scholar, Mar./Apr. 1985, at 41; Jennifer Wriggins, Rape, Racism, and the Law, 6 Harv. Women’s L.J. 103 (1983); Susan Schecter, Women and Male Violence: The Visions and Struggles of the Battered Women’s Movement (1982); Susan Brownmiller, Against Our Will (1975).



dependent upon the “public.”<sup>28</sup> This may be done by showing how the costs of “private” violence are imposed upon individuals within society and on society as a whole, and, simultaneously, how public conceptualizations and responses to “private” violence condition the measure and extent of that violence. This may also be done by illustrating the shortcomings of reductionist, dichotomous, oppositional thinking. Understanding conceptual violence, and the ways in which stereotype perpetuates that violence, is an integral part of this endeavor.

Third, feminists strive to use context to evaluate justice, rather than merely to provide more abstraction and theory.<sup>29</sup> Examining the reality of women’s experiences has been the means by which feminists have tried to alter the abstraction upon which the law is based. Abstraction is also the means by which individuals formulate stereotype.<sup>30</sup> One means of disestablishing stereotype is also by providing context and disconfirming information.<sup>31</sup>

Part II explores the nature and formation of stereotype and how social power drives the formation and perpetuation of stereotype. Society uses stereotype as a tool for controlling the relative status of groups, such as African Americans and women, and of individuals, such as victims of domestic abuse. Stereotypes of race and/or gender depend upon and reinforce

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<sup>28</sup>See, e.g., Schecter, *supra* note 27; Olsen, *supra* note 20.

<sup>29</sup> See, e.g., Carrie Menkel-Meadow, Portia in a Different Voice: Speculations on a Woman’s Lawyering Process, 1 Berkeley Women’s L.J. 39, 48 (1985) (remarking that “[men] focus on universal abstract principles like justice, equality and fairness so that their world is safe, predictable and constant. Women solve problems by seeking to understand the context and relationships involved and understand that universal rules may be impossible.”); Mari J. Matsuda, Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls’ Theory of Justice, 16 N. Mex. L. Rev. 613, 619 (1986) (“The refusal to acknowledge context—to acknowledge the actual lives of human beings affected by a particular abstract principle—has meant time and again that women’s well-grounded, experiential knowledge is subordinated to someone else’s false abstract presumptions.”); Robin West, Jurisprudence and Gender, 55 U. Chi. L.Rev. 1, 58 (1988) (“By the claim that modern jurisprudence is ‘masculine,’ I mean... that the values, the dangers ... that characterize women’s lives are not reflected at any level whatsoever.... The values that flow from women’s material potential for physical connection are not recognized.”).

<sup>30</sup> See Hamilton, *et al.*, *supra* note 18, at 295.

<sup>31</sup> Providing information that is counter-stereotypic enables people to change their views and images of members of out-groups. See Hewstone, *supra* note 18; Walter G. Stephan, A Cognitive Approach to Stereotyping in Stereotyping and Prejudice: Changing Conceptions (Daniel Bar-Tal, *et al.* eds., 1989).

each other, and serve as justifications for the perpetuation of violence. In addition, sex and sexuality are integral to the power dynamic enabling the formation of these stereotypes. Finally, the stereotypes associated with domestic violence and victimhood, also dependent upon race and gender stereotypes, condition the environment, both within the home and in society, for the acceptance of physical violence. This section concludes with an analysis of how stereotypes affect mainstream perceptions of jury verdicts and justice.

In Part III, I discuss the dynamic of social power and how the position of power in social relationships explains the operation of stereotypes. This section explores the relationship between normative understandings, essentialist approaches, and stereotypes. It examines how portrayals of the interests of different social groups, and different aspects of individual identity, serve to maintain social hierarchy. I explore the portrayal and perception of “victim” as a primary tool in this dynamic.

Part IV is an example of dismantling stereotypes through context so that *real* differences are understood and justice achieved. Providing context and actually hearing perspectives outside your own, are key to challenging the ready acceptance of stereotypes. In this section, I explore the possible contexts from which black women may have reacted to issues of domestic violence as presented in the O.J. trials. True understandings of other’s perspectives may well lead to a change in our normative applications. Finally, this section explores possibilities for changing norms to avoid stereotypes. This exploration includes an examination of existing legal procedural norms, including rules of ethics, rules of evidence, and jury instructions, to mitigate and eventually eliminate the prejudice of stereotypes within the judicial process.

## II. STEREOTYPES—POWER, SEX, GENDER, RACE

### A. The Formation of Stereotypes

Violence has continuously been justified and perpetuated by the use of stereotypes. Specifically, domestic violence is infused with the stereotypes associated with race, gender and victimization. Racial stereotypes (often

gender dependent) and gender stereotypes (usually race dependent)<sup>32</sup> are used to qualify the meaning of the stereotypes associated with victimization.

Stereotypes serve as a proxy for the character of the person and for the truth of a situation. With the use of a stereotype, we don't have to use the effort to *really* know about a person or *really* understand her situation or the ways in which that situation and the world affects her life. Stereotypes maintain the *status quo* by preventing those who subscribe to those views from adequately dealing with the situation, keeping the objects of the stereotypes bound in their prescribed roles, and perpetuating misconceptions.<sup>33</sup> Because of the impersonal and general nature, stereotypes devalue their objects,

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<sup>32</sup> Stereotypes, born out of racist and sexist ideology, reinforce the oppressive nature of each other. See Roberts, *supra* note 21, at 3 (1993) (“[Racism and patriarchy] are two interrelated, mutually supporting systems of domination and their relationship is essential to understanding the subordination of all women.”); Audre Lorde, Sexism: An American Disease in Blackface, in Sister Outsider (1984) (“The results of woman-hating in the Black community are tragedies which diminish all Black people. These acts must be seen in the context of a systematic devaluation of Black women within this society.”).

I describe racial stereotypes as being *often* gender dependent because there are many that are gender neutral. Since stereotypes for African Americans, in particular, were created as a means of dehumanization, gendered androgyny served the function of dehumanization through gender-neutral references similar to those used for chattel. See Patricia Hill Collins, Learning From the Outsider Within: The Sociological Significance of Black Feminist Thought, 33 Social Problems S14, S17 (December 1986).

I describe gender stereotypes as *usually* race dependent because the stereotypic definitions of femininity and true womanhood were created for white women, explicitly contrasted to the stereotypic definitions of black women. See *infra* text accompanying notes 68-94. Nonetheless, despite the stark contrasts in the stereotypes, all women are subject to the confines of the patriarchal order. To that extent, there are some unifying stereotypes for women *vis a vis* men within a specific context.

<sup>33</sup> Lenore E. Walker, The Battered Woman 14 (1979) (discussing affects of prejudicial attitudes as described by psychologist William Ryan regarding the cultural deprivation associated with race and poverty in Blaming the Victim (1976)).

compounding the violence by re-victimizing the victim.<sup>34</sup> Thus, the mere existence of stereotypes is itself a form of violence.<sup>35</sup>

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<sup>34</sup> “It is often said that rape victims are raped twice—once by the rapist and once by the legal system. If that is so, then battered women are battered three times—once by the batterer, a second time by society and finally by the legal system. Traditional society blames the victim of battering for ‘deserving’ the punishment.” Littleton, *supra* note 27, at 28-29.

This discussion is premised on the understanding that all violence against women is of the same nature, manifesting in different degrees and kind. See *infra* text accompanying notes 61-63. This being the case, literature concerning all kinds of violence against women, especially rape, is used as support within this article.

Rape is a helpful paradigm because it captures the ways that many women respond to sexual abuse and the way that law shapes the treatment of the few courageous women who do come forward. In sexual harassment as well as in rape, it is the woman rather than the accuser who is on trial. The inquiry is animated by myths about women, about assumptions regarding our veracity, about our integrity, and even about our grasp upon reality. Rape law traditionally, and sexual harassment currently, focuses on women’s conduct, and character of the perpetrator.

Kimberlé Crenshaw, Race Gender and Sexual Harassment, 65 S.Cal.L.Rev. 1467, 1469 (1992). This analysis may also be extended to domestic violence.

In a similar way, violence of all kinds is unified in its root essence of power and control.

... I believe that violence is inextricably linked to all acts of violence in this society that occur between the powerful and the powerless, the dominant and the dominated. While male supremacy encourages the use of abusive force to maintain male domination of women, it is the Western philosophical notion of hierarchical rule and coercive authority that is the root cause of violence against women, of adult violence against children, of all violence between those who dominate and those who are dominated. It is this belief system that is the foundation on which sexist ideology and other ideologies of group oppression are based; they can be eliminated only when this foundation is eliminated.

bell hooks, Feminist Theory: From Margin to Center 118 (1984).

<sup>35</sup> In discussing how legal interpretive acts signal and occasion the imposition of violence upon others, Robert Cover suggests a distinction between the violence imposed by the legal system and the figurative violence inflicted by poets, critics, or artists in their work. Robert M. Cover, Violence and The Word, 95 Yale L. J. 1601 1609 (1986). In the first instance, I am suggesting a form of figurative violence. Nevertheless, the figurative violence I am suggesting is more closely analogous to that of legal interpretation suggested by Cover. Whereas Cover is discussing the facilitation of violence through formalized institutional roles, I am discussing the facilitation of violence through informal, yet socially accepted, norms that “*condition effective domination*,” *Id.* at 1616 (emphasis in original), and are supported by the operation of these formal institutions. See Minow, *supra* note 25, at 1671. The analogy is

Stereotypes may include attitudes that are both positive and negative associations with an out-group.<sup>36</sup> However, I have limited my discussion to stereotypes without directly considering the operation of prejudice. There is a close relationship between stereotype and prejudice in psychology literature and analyses, but they are generally treated separately.<sup>37</sup> Prejudice generally includes only the negative attitudes toward an out-group.<sup>38</sup>

Indeed, stereotypes may also serve a useful function to the extent that they facilitate processing of large volumes of information<sup>39</sup> in rational ways. For example, it is useful and rational to make an initial assumption that children are less capable of taking care of themselves than adults, even though some children are perfectly capable of taking care of themselves and some adults are not.

Nonetheless, even though stereotypes may include positive associations, I discuss it only in negative terms for two reasons. First, what is considered a positive association is socially constructed and dependent upon the perspective of the observer. Second, and more importantly, stereotypes serve as a representation of a group of individuals that may not be true for a particular person, forcing her into a particular role and position, either ideologically or in reality. I view these constrictors as negative.

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complete with the realization that there is a real connection between the literal and figurative nature of violence. See Robert Wieberg, Private Violence as Moral Action: The Law as Inspiration and Example in Law's Violence (Austin Sarat and Thomas R. Kearns, eds., 1992) (arguing that the force of law operates as an inspiration for imitation outside the boundaries of the law). Finally, the violence of legal interpretation is implicated just as strongly when there is a lack of interpretive act, permissively maintaining the existence of societal violence.

<sup>36</sup> Stroeb and Insko, *supra* note 18, at 4-8; Shalom H. Schwartz and Naomi Struch, Values, Stereotypes, and Intergroup Antagonism in Stereotyping and Prejudice: Changing Conception 151 (Daniel Bar-Tal, *et al.* eds., 1989).

<sup>37</sup> See generally, Stroeb and Insko, *supra* note 18.

<sup>38</sup> *Id.* at 8-10.

<sup>39</sup> See Hamilton, *et al.*, *supra* note 18, at 311; Yaacov Trope, Stereotype Dispositional Judgment in Stereotyping and Prejudice: Changing Conceptions 133 (Daniel Bar-Tal, *et al.* eds., 1989) ("From a cognitive perspective, stereotypes are inevitable consequences of the limitations of human information processing capabilities and the complexity of social reality"); see generally, Susan T. Fiske and Steven L. Newberg, Category-Based and Individuating Processes as a Function of Information and Motivation: Evidence From Our Laboratory in Stereotyping and Prejudice: Changing Conceptions (Daniel Bar-Tal, *et al.* eds., 1989).

Stereotype formation is based both in social-structural and individual psychological processes.<sup>40</sup> These two bases are intimately related in the perpetuation of stereotypes. In our cognitive processes, we categorize for simplicity and organization. Stereotypes are just cognitive associations of traits within particular social groups. Subsuming an entirety into a singularity<sup>41</sup> is the essence of stereotype,<sup>42</sup> providing the easy way out of assessing real difference and providing perspectives outside of one's own perceptions. Because a stereotype is often intended to describe the antithesis of the formulator of the stereotype, as much as to represent the social traits of others,<sup>43</sup> these associations tend to be formed in oppositional structures.<sup>44</sup> "[N]egative attributes of the self or of one's in-group come to be perceived as characteristics of members of some out group."<sup>45</sup> Since cognitively, categorization is inevitable,<sup>46</sup> we can postulate that a stereotype roughly correlates to one side of a pair in what is regarded as conceptual opposites in

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<sup>40</sup> See Hamilton, *et al.*, *supra* note 18; Hewstone, *supra* note 18.

<sup>41</sup> See *supra* note 12 and accompanying text.

<sup>42</sup> See Hamilton, *et al.*, *supra* note 18, at 295 ("Stereotypes undermine the perception of within-group variability.").

<sup>43</sup> See Stroebe and Insko, *supra* note 18, at 5.

<sup>44</sup> See Hamilton and Sherman, *supra* note 26, at 59 (describing how a "cognitive bias, called an illusory correlation, refers to an erroneous judgment of the relationship between two variables.").

<sup>45</sup> Hamilton, *et al.*, *supra* note 18, at 293 (explaining that from a psychodynamic perspective, stereotypes serve the motivational needs of the perceiver, through the use of defense mechanisms, such as projection and displacement).

<sup>46</sup> *Id.*, at 311 ("The cognitive approach to stereotyping has emphasized the role of categorization in stereotyping.... categorization is both ubiquitous and highly functional; without it, we would have difficulty functioning in a world that inundates us with countless pieces of information."). See generally, Ludwig Wittgenstein, On Certainty (G. Anscombe and G. Von Wright eds., 1974); George Lakoff, Women, Fire, and Dangerous Things (1987).

classic dichotomous thinking:<sup>47</sup> bad/good; black/white; lies/truth; whore/virgin;<sup>48</sup> castrator/victim; dominance/subordination,<sup>49</sup> to name a few.<sup>50</sup>

Social power, its acquisition and maintenance, is the driving force behind the formulation of stereotypes.<sup>51</sup> Control over the definition of acceptable sexuality is one of the principal means of establishing power.<sup>52</sup> In

<sup>47</sup> Since stereotypes are viewed as cognitive structures, we can assume that they influence information processing in the same general ways that other general knowledge does. See Yoram Bar-Tal, Can Leaders Change Followers Stereotypes? in Stereotyping and Prejudice: Changing Conceptions 225 (Daniel Bar-Tal, *et al.* eds.). Thus, it is consistent to view the formation of stereotype as a part of the development in Western thought and philosophy. As Frances Olsen explains, “[s]ince the rise of classical liberal thought, and perhaps since the time of Plato, most of us have structured our thinking around a complex series of dualisms, or opposing pairs: rational/irrational; active/passive; thought/feeling; reason/emotion; culture/nature; power/sensitivity; objective/subjective; abstract/contextualized; principled/personalized. These dualistic pairs divide things into contrasting spheres or polar opposites,” Frances Olsen, Feminism and Critical Legal Theory: An American Perspective, 18 *Int’l J. Sociology L.* 199 (1990); see also, Olsen, *supra* note 20, at 1575-76 (1983).

<sup>48</sup> See Estrich, *supra* note 27, at 27-41 (1987); Elizabeth M. Iglesias, Rape, Race, and Representation: The Power of Discourse, Discourse of Power, and the Reconstruction of Heterosexuality, 49 *Vand. L. Rev.* 869, 929-945 (1996).

<sup>49</sup> See Catharine A. MacKinnon, Toward a Feminist Theory of the State 137 (1989).

<sup>50</sup> In this discussion, I specifically explore the dichotomies of black and white and male and female and some of the ways in which stereotype operates concerning them. As with any dichotomy, the two extremes seldom encompass the “shades of gray.” Internal to each dichotomy are a range of possibilities. Certainly there are many people who are both black and white and encompassing the degrees of the spectrum. Male and female are also not the only possibilities as many individuals may identify with their apparent gendered opposite, identify with both, neither, and the range of possibilities in between. And of course, each of us as individuals encompass both “feminine” and “masculine” qualities.

Despite the relegation of this point to a footnote, I do not wish to marginalize the effects of stereotypes not discussed here. Although there are similarities in the use of stereotype to maintain or assert social power, stereotype affects different races, ethnicities, religious affiliations, sexual identity, and class strata or disability in different ways.

<sup>51</sup> This “driving force” may be blatant and calculated or deliberately subconscious with the desire to maintain the status quo. See Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 *Stan. L. Rev.* 317, 326, 328-344 (1987) (describing how unconscious motivations are dependent upon an “ideology [as] a defense mechanism against the anxiety felt by those who hold power through means and with motives that they cannot comfortably acknowledge.”).

<sup>52</sup> Implicitly sexuality, and concomitantly beauty standards, have always been key to defining the stereotypes associated with both race and gender. “Race, gender and sexuality converge on [the] issue of evaluating beauty. Judging white women by their physical appearance and attractiveness to men objectifies them. But their white skin and straight hair

the case of race, gender, and domestic violence, stereotype has served as a fundamental tool in effectuating this end.<sup>53</sup>

The structure and formation of stereotypes is of the same character as “normative” approaches and “essentialist” approaches, in that all three are intended to reflect a standardized embodiment of reality. The normative approach presumes a neutral and objective position. Normative ideals tend to be based on unstated male standpoints and frames of reference, effectively belying notions of neutrality and objectivity.<sup>54</sup> Notions of a universal perspective undermine the soundness of the normative approach. Rather than merely presuming the neutral, objective, universal perspective, the normative approach also rejects anything outside that “norm,” emphasizing it as deviant through exaggeration and stereotype. Some feminist writers, in their efforts to challenge “male norms,” have asserted the “woman’s point of view.” In doing so they have only accounted for the “essential” woman’s standpoint, universalizing perspective in much the same way as the normative approach.<sup>55</sup> Any approach that defines “self” from only one perspective, consequently excludes the perspectives of “others.”<sup>56</sup>

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privilege them in a system in which part of the basic definition of whiteness is its superiority to blackness.” Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment 79-80 (1990). *See also*, Harris, *supra* note 12, at 596-98.

<sup>53</sup> Stereotype serves to denigrate and dehumanize its object and is ultimately used as a mode of control. *See* Collins, *supra* note 32, at S17. One of the functions of stereotype in intergroup relations is “delegitimization,” which may operate to deny a categorized group’s humanity. *See* Daniel Bar-Tal, Delegitimization: The Extreme Code of Stereotyping and Prejudice in Stereotyping and Prejudice: Changing Conceptions 169, 171 (Daniel Bar-Tal *et al.* eds., 1989).

<sup>54</sup> Martha Minow discusses how feminists have shown that the presumptions of neutrality within the law are in fact based on a male norm, and treat the male perspective as natural and necessary. Minow, *supra* note 21, at 48.

<sup>55</sup> Minow chastises feminists for replicating the faults of the approach they criticize: making normative assumptions about the “woman’s” perspective, marginalizing “others.” *Id.* Understanding that it can function both as a means of legitimation and a means of resistance, essentialism, unlike the normative, operates to point out its own difference from the norm (in the resistance function) and to exclude the differences of others (in its legitimation function). *See generally* Fuss, *supra* note 21.

<sup>56</sup> *See* Minow, The Supreme Court 1986 Term Foreword: Justice Engendered, 101 Harv. L.Rev. 10, 14 (1987) (“Regardless of which perspective ultimately seems persuasive, the possibility of multiple viewpoints challenges the assumption of objectivity and shows how claims to knowledge bear the imprint of those making the claims.”). In effect, the standardized approaches are stereotypes of “self.”



Stereotypes, on an individual or collective basis, are a means of defining “self” by deflecting certain characteristics onto “others.”<sup>57</sup> Thus, both normative and essentialist approaches are dependent upon the existence of stereotypes to confirm their entitlement to the normative position. Thus, when I describe the operation of stereotypes, I necessarily discuss a component of normative or essentialist approaches. Stereotypes of black women bring to the fore the connection between these two approaches. Angela Harris demonstrates how, whereas in a contemporary male supremacist system, black women are something less than women, in a peculiar symmetry, essentialist dominance feminism recasts black women as something more than women.<sup>58</sup> In this manner, feminism, like the normative approach, has served to reinforce certain stereotypes by not being inclusive.

Frances Olsen’s work, focusing primarily on the conceptual ways in which the law operates to subordinate women, has demonstrated that inherent in dichotomous, oppositional structures are power hierarchies where one part of the pair is considered superior. She describes these dualisms as “sexualized” in how they constitute hierarchy, with each of the two halves as either “masculine” or “feminine.”<sup>59</sup> This hierarchization corresponds to the conceptual approach to stereotype whereby the perception of out-groups is less favorable, making one’s in-group “better” than other groups.<sup>60</sup> This understanding is important as the conceptual, including the ideology of stereotypes, informs and determines social reality and the operation of the current legal regime.

Catharine MacKinnon’s work, which has been a focal point of feminist discourse, has made it a given that the ideological boundaries to sexuality are fundamental to gender, that gender is fundamental to those

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<sup>57</sup> See *supra* text accompanying note 40.

<sup>58</sup> Harris, *supra* note 12, at 596.

<sup>59</sup> Olsen, *supra* note 47. To the extent that this is intended to describe the power structure inherently conferred by dualisms, this is accurately applied to the dualisms of the stereotypes discussed here. See also Collins, *supra* note 32, at S20 (“[d]ichotomous oppositional differences invariably imply relationships of superiority and inferiority, hierarchical relationships that mesh with political economies of domination and subordination”); Stephan, *supra* note 31, at 40-41; Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1370-74 (1988) (describing the oppositional dualities of black and white images in a white hegemonic system); Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976) (using oppositional dualities to explain opposing tendencies in the law).

<sup>60</sup> Hamilton *et al.*, *supra* note 18, at 293.

boundaries,<sup>61</sup> and that our culture eroticizes dominance.<sup>62</sup> Her work has demonstrated that male dominance and assertions of power over women and their sexuality is the unifying and precipitating factor of violence against women. This includes rape, pornography, sexual harassment, and battery.<sup>63</sup> Specifically, domestic battery is a means for the batterer to get what he wants; a means to control the behavior of his victim so that she conforms to his expectations and societal expectations of the “true woman.”

Not often discussed are the ways in which race is part of our sexual culture and integral to that culture of dominance. Racial stereotypes are infused with sexual meaning. As Cornell West describes these stereotypes,

...the dominant myths draw black women and men either as threatening creatures who have the potential for sexual power over whites, or as harmless, desexed underlings of a white culture. There is Jezebel (the seductive temptress), Sapphire (the evil, manipulative bitch), or Aunt Jemima (the sexless, long-suffering nurturer). There is Bigger Thomas (the mad and mean predatory craver of white women), Jack Johnson (the super performer—be it in athletics, entertainment, or sex—who excels others naturally and prefers women of a lighter hue), of Uncle Tom (the spineless, sexless—or is it impotent?—side-kick of whites).<sup>64</sup>

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<sup>61</sup> MacKinnon, *supra* note 49, at 126-154.

<sup>62</sup> *Id.*

<sup>63</sup> “Male dominance is sexual. Meaning: men in particular, if not men alone, sexualize hierarchy; gender is one. As much a sexual theory of gender as a gendered theory of sex, this is the theory of sexuality that has grown out of conscious raising. Recent feminist work, both interpretive and empirical, on rape, battery, sexual harassment, sexual abuse of children, prostitution and pornography, support it.” *Id.* at 127 (citations omitted). *See also*, MacKinnon, *supra* note 20, at 85; Diana Scully, Understanding Sexual Violence 166-169 (1994) (noting that sexual violence and all its manifestations are the inevitable consequence of patriarchal social structure).

<sup>64</sup> Cornell West, *Race Matters* 119-20 (1993); *see also*, Nell Irvin Painter, Hill, Thomas, and the Use of Racial Stereotype, in *Race-ing Justice, En-gendering Power* 200 (Toni Morrison ed. 1992); *see also* Amii Barnard, The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women’s Fight Against Race and Gender Ideology, 1892-1920, 3 *UCLA Women’s L.J.* 1, 9-13 (1993) (discussing the myth of the black rapist and the myth of the promiscuous black woman); Adele Alexander, “She’s No Lady, She’s A Nigger”: Abuses, Stereotypes, and Realities from the Middle Passage to Capitol (and Anita) Hill, in *Race, Gender, and Power in America* 5 (Anita Faye Hill and Emma Coleman Jordan eds., 1995).

The stereotypes of gender and race are unified around the common axis of sexuality. The themes of race, gender, and control of sexuality also interact in ways that have determined the development of the recognition of domestic violence.<sup>65</sup> The unified means of control, defining the appropriate manifestations of sexuality, culminate in an ideology of control, which I call "lynch mob ideology."<sup>66</sup> This terminology is particularly appropriate as I explore the existence of stereotype within the contours of American culture<sup>67</sup> and history.

## B. Stereotypes Formed

The violence of lynch mob ideology has been the precipitating factor in the formation of racialized gender stereotypes<sup>68</sup> and has been both a literal and conceptual means of controlling both women and African Americans. I state its structure in this way, precisely because it demonstrates further the literal and conceptual control of black women, who, by the choice of the text,

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<sup>65</sup> Reva Siegel points out that one of the first cases repudiating the right of chastisement was Fulgham v. State 46 Ala. 143 (1887), where an emancipated slave was indicted for assault and battery for striking his wife, also emancipated, with a board to the back of the head. In discussing the implications of this case, Siegel asks the very insightful question, "Was it to ensure that the woman was not treated like a 'slave,' or to prevent her recently emancipated husband from asserting the 'privileges' of a master?" Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117, 2135 (1996). She also points out that as legal penalties for wife beating emerged, it was poor, immigrant, and African-American men who were most prosecuted, despite the prevalence of domestic violence in all social classes and ethnicities. *Id.* at 2138-2140.

<sup>66</sup> I explore history only to the extent it explains the development of the currently prevailing stereotypes. Once formed, stereotypes have a life of their own, persisting long after the original time and intention of their formation. See Stroeb and Insko, *supra* note 18, at 16.

<sup>67</sup> Stereotypes and the general manner in which they function to delegitimize are culturally bound. See D. Bar-Tal, *supra* note 53.

<sup>68</sup> In theory, you might question whether sexism would exist without racism, or whether racism would exist without sexism. This is an empty inquiry without real historical context. All modern societies exhibit forms of racism and patriarchy, albeit manifesting and interacting in ways different from those in American society.

All forms of oppression are unified in the quest for social power and control. In this sense, both racism and sexism, both independently and in chorus, were born of the same genitor. Classism and social stratification must also be viewed from this understanding. Though the stereotypes associated with race, gender, and victimhood are the focus of this discussion, classism should also be considered as it influences the formation and interaction of these stereotypes.

are simultaneously included in both categories yet disappear from explicit consideration.<sup>69</sup> In addition, this construction demonstrates the omnipresence of patriarchy and white supremacy, in that white men are explicitly excluded from both categories and comprise the unstated norm from which the original statement is meant to deviate.<sup>70</sup>

Most literally, lynch mob ideology has been a means of controlling the power of black men and their sexual access to women, both black and white; access to white women denied completely<sup>71</sup> and access to black women only as permitted by white men.<sup>72</sup> While white men enjoyed sexual access to both white and black women, “consensual sexual intercourse between a white woman and a Black man was the ultimate symbol of Black and white equality and a direct threat to the racial hierarchy of the post-war South.”<sup>73</sup> Lynchings were justified by the pervasive stereotype that “Black male sexuality [was] wanton and bestial, and that Black men [were] wild, criminal rapists of white

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<sup>69</sup> See generally, Crenshaw, *supra* note 34; see also, hooks, *supra* note 12; see generally, All the Women are White, All the Blacks are Men, But Some of Us Are Brave (Gloria T. Hull, *et al.* eds., 1982) (specifically compiled to academically address the experiences of black women).

<sup>70</sup> In fact, I do not discuss the stereotypes associated with white men as these stereotypes are most commonly understood as normative expectations. See Minow, *supra* note 21, at 47 (discussing how the male norm has been treated as neutral and as the universal perspective).

<sup>71</sup> Rape of a white woman was the most common justification for the lynching of black men. See Ida B. Wells, Southern Horrors: Lynch Law in All Its Phases (1892), *reprinted in On Lynchings* (1969) [hereinafter Wells, Southern Horrors]. Even though such a rape seldom actually occurred, “[b]y incorporating common racial and gender stereotypes, this justification successfully masked the true identity of lynching as an instrument of Black subjugation wielded by whites.” Barnard, *supra* note 64 at 2; see also, Ida B. Wells, A Red Record 58-70 (1894), *reprinted in On Lynchings* (1969) [hereinafter Wells, A Red Record]; Brownmiller, *supra* note 27, at 210-255; Wriggins, *supra* note 27.

<sup>72</sup> This conceptualization of women as property, subject to access and control by men, is the unifier of women within feminist theory that most transcends difference. Nonetheless, this conceptualization also manifests to different degrees when considering race and class.

<sup>73</sup> Barnard, *supra* note 64 at 11; see also, Brownmiller, *supra* note 27, at 220.

women.”<sup>74</sup> Now, even though literal lynchings are no longer a common occurrence,<sup>75</sup> this ideology and conceptualization continues.<sup>76</sup>

Since it is also a means of controlling the actions and behavior of white women,<sup>77</sup> the effectiveness of lynch mob ideology is dependent on the perpetuation of dual stereotypes of them. White women have historically been characterized as “feminine, *i.e.* ‘small,’ ‘delicate,’ ‘soft,’ and ‘light.’ She may also be ‘dull, peaceful, relaxed, cold, rounded, passive and slow.’ She is also portrayed as the ideal housewife, and the symbol of love and motherhood.”<sup>78</sup> This is the ideal woman and the stereotypic “good girl.” If a woman does not meet these expectations then she is not a “true woman,” and thus a “bad girl.” The “good girl” deserves protection, especially from the stereotypic black man. Any woman who deviates from the “good girl” image is thus a “bad girl” and not deserving of protection. This dichotomy is itself a form of

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<sup>74</sup> Wriggins, *supra* note 27, at 108. The dehumanizing effect of stereotype involves categorizing a group as subhuman or as superhuman beasts such as demons, monsters, and satans. See D. Bar-Tal, *supra* note 53, at 172.

<sup>75</sup> Lynchings may no longer be common, but racial animus still motivates race-based hate-crimes. See *e.g.*, Mike Allen, Human Tragedy or Inhuman Cruelty?//Virginia Town Struggles With Possibility of Racism in Alleged Killing of Black Man, Washington Post, Aug. 3, 1997, at B01 (where two white men were charged with the murder of a black Marine veteran by dousing him with gasoline, burning him alive, then beheading him with an axe).

<sup>76</sup> In a recent case, “A Michigan probate judge, discussing the Michigan law under which minors seeking abortions may request a waiver of the parental consent requirement, stated that he was reluctant to grant waivers, but might do so ‘in some cases such as incest or when a white girl is raped by a black man.’” Sheri Lynn Johnson, Racial Imagery in Criminal Cases, 67 Tul. L. Rev. 1739, 1749, n. 29 (1993) (citing, Judge Cites Interracial Rape in Abortion Debate, UPI, Apr. 26, 1991 available in LEXIS, Nexis Library, UPI File).

This imagery has contributed to the stereotypic conceptualization of the believability of male violence against women. In discussing her own rape, Susan Estrich points out that hers was a “real rape” because she was a “nice (white) girl” whose rapist was a strange black man. Estrich *supra* note 27, at 1-7 (“The history of rape in the United States is clearly a history of both racism and sexism. It is impossible to write about rape without addressing racism...”).

Another indication that racist concepts and stereotypes are internalized is a recent Gallup poll indicating that 61% of whites approve of black-white marriages. Most reporting on this poll characterized it as positive since the percentage was up from 45% in 1994 and a bare 4% in 1958. See, *e.g.*, Haya El Nasser, Poll: Whites Increasingly Accept Blacks, USA Today, Jun. 11, 1997, at 1A. Where the increase in ratings is positive, I wonder if some pollees included in that 61% are just saying what they think they should, and wonder even more about the remaining 39%. After all, this is not just an inadvertent racist comment.

<sup>77</sup> Brownmiller, *supra* note 27, at 220.

<sup>78</sup> Mae C. King, The Politics of Sexual Stereotypes, 4 Black Scholar 12, 15 (Mar.-Apr. 1973) (citations omitted).

violence. The forced comportment with the “good girl” stereotype is a limitation of women’s free existence.<sup>79</sup>

Logically, intertwined with the “good girl” stereotype is the perception of victimhood.<sup>80</sup> As Susan Brownmiller points out, “[t]he psychic burden under which women function is weighted by a deep belief, borne out by ample evidence, that our attractiveness to men, our sexual desirability, is in direct proportion to our ability to play the victim.” Only “good girls,” expected to be both chaste and truthful, can be victims. In the world of stereotype, only chaste women are truthful. Thus, for a white woman, her veracity is directly tied to the realization of her sexuality, in a way that it is not for men.<sup>81</sup> In accordance with lynch mob ideology, truth is a double edged sword for white women. If they didn’t lie about being raped by a black man, they were labeled whores and liars; if they cried rape and played their role in the system of domination over black men, they were in fact liars.<sup>82</sup> White

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<sup>79</sup> See Olsen *supra* note 47, at 200 (“[Men] have also placed [white] women on a pedestal and treasured them in a fantasy world....simultaneously exalt[ing] and degrad[ing] women...”).

<sup>80</sup> See Brownmiller, *supra* note 27, at 333. When Susan Estrich tells her story of rape, she remarks that, “[w]hen I tell my story, no one doubts my status as victim.” She makes this observation from a context of a white woman being raped by a black man. She also remarks that, “[h]is being black...probably makes my account more believable to some people ....” Estrich, *supra* note 27, at 3.

<sup>81</sup> See Wriggins, *supra* note 27, at 126 (“...chastity was thought to bear on the woman’s general character, and, hence, on her credibility. A woman’s propensity for falsehood was assumed to increase proportionately to her sexual experience.”).

<sup>82</sup> See Wells, A Red Record, *supra* note 71, at 60; Brownmiller, *supra* note 27, at 234 (discussing the infamous “wolf whistle” murder of Emmett Till, a fourteen year old boy who was beaten, shot in the head, had a weight tied around his head, and was dumped into the Talahatchie River for whistling at a white woman). For a full historical account of the death of Emmett Till, see Stephen J. Whitfield, A Death in the Delta: The Story of Emmett Till (1988). Another infamous mark in our history is the convictions of nine black youngsters, aged thirteen to twenty for raping two white women, based almost exclusively on the women’s allegation. See Dan T. Carter, Scottsboro: A Tragedy of the American South (1979).

Susan Brownmiller notes that the persecution of black men does not relieve them from their support of a patriarchal order or the objectification of women. See Brownmiller, *supra* note 27, at 247. She also notes the irony of the standard defense strategy of campaigns to save the lives of black men convicted of raping white women, which was to impugn the reputation of the alleged victim “by smearing her as mentally unbalanced, or as sexually frustrated, or as an oversexed, promiscuous whore.” *Id.* at 238. On the other side of the coin, Angela Harris notes that the oppressive nature of patriarchy does not relieve white women of the responsibility of their complicity in a social structure that perpetuates a system of oppression of people of color. See Harris, *supra* note 12, at 60; see also, Wells, A Red Record, *supra* note 71, at 80-90

women who chose to have sex with black men,<sup>83</sup> or any sexual relations outside the bonds of marriage, were in danger of being labeled prostitutes and liars and of being socially outcast. Thus, white women, whether “good girls” or “bad girls” are stereotypically considered less credible than white men.

Lynch mob ideology is also dependent on the concept of permissible sexual access of white men to black women.<sup>84</sup> To meet this end, the stereotype of black women was that they were immoral and less deserving of protection from violence or sexual exploitation.<sup>85</sup> The stereotyping of black women supported the image of the “masculinized sub-human creatures” that could not be true women.<sup>86</sup> Black women have historically been characterized as:

tough, hard-working domestics who assume the role of matriarch in the home but somehow always manage to know their place and remain appropriately submissive in the white world.... As the “matriarch,” she is dominant in the black family and psychologically castrates the black man.... She is characterized as a depreciated sex object; sexually objectified, yet denied the

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(discussing the disassociation of the Woman’s Christian Temperance Union with the anti-lynching campaign because of accusations implicating white women).

<sup>83</sup> Ida B. Wells noted that “there [were] white women in the South who love the Afro-American’s company even as there are white men notorious for their preference for Afro-American women.” Wells, Southern Horrors, *supra* note 71, at 11. Nonetheless, such liaisons have continued to be frowned upon within society, conditioning the acceptance of the relevant stereotypes. Only thirty years ago was the legality of miscegenation laws denounced by our Supreme Court. See Loving v. Virginia, 388 U.S. 1, 12 (1967); see also, *supra* note 76.

<sup>84</sup> See Wiggins, *supra* note 27, at 120-21 (“These attitudes reflect a set of myths about Black women’s supposed promiscuity which were used to excuse white men’s sexual abuse of Black women.”).

<sup>85</sup> Uncatalogued rapings of black women, in slavery and then in their employers kitchen, did not precipitate lynchings. See Wiggins, *supra* note 27, at 117-23; hooks, *supra* note 34, at 1-4; Wells, Southern Horrors, *supra* note 71, at 11-12. In fact, there are recorded instances of black women being lynched. See Kendall Thomas, Strange Fruit in Race-ing Justice, Engendering Power 370 (Toni Morison, ed., 1992) (“In addition to suffering the rape and other forms of sexual terror, a number of black females lost their lives at the hands of lynch parties.”); Wells, Southern Horrors, *supra* note 71, at 13-4, 24.

<sup>86</sup> bell hooks, *supra* note 12, at 71.

political power and equality derived from the partnership of marriage (with white men).<sup>87</sup>

Stereotypes of black women were the key to controlling all women, black or white. The ultimate symbol of equality between the sexes is the ability to do the same work.<sup>88</sup> Enslaved black women performed the same tasks as their male counterparts while still fulfilling traditional female roles. Therefore, necessarily, the stereotypes for black women were opposite those for white women, and directly correlated with the “bad girl” stereotype. “According to governing stereotypes, chastity could not be possessed by Black women,”<sup>89</sup> which, of course, meant they could not be truthful. The inability to be perceived as chaste, the absence of the appearance of truthfulness, and the attribute of strength, characteristic of the stereotype for black women and contrary to the stereotype of frailty for white women, are also directly opposed to the stereotypes for victimhood. Thus, the prevailing stereotypes of black women do not allow them to fit within the stereotype of the “good girl” or

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<sup>87</sup> King, *supra* note 78, at 16-17. See also, Alexander, *supra* note 64, at 18 (discussing “the familiar stereotypes of America’s black women, be they Mammy or Prissy, Jezebel, Topsy, or Eliza, Sapphire, ‘red-hot mama,’ ‘tragic mulatto,’ ‘welfare queen,’ ‘superwoman,’ or ‘emasculating matriarch’”).

Contemporary illustrations of these stereotypes are ever present. For example, a recent New York Times Magazine cover, depicting the story, It Takes a Village to Reform Welfare, shows the welfare recipient as a dark-skinned black woman with her three children (the caption for her reads: “The Welfare Recipient (with Children): Has a job but can she keep it?”); the employment counselor as a light-skinned black woman; and the reformers and architects of change in the welfare system as three white men in suits and ties. The New York Times Magazine, Aug. 24, 1997. Not only does this indicate the continued existence of the “welfare queen” stereotype, but also points out that the most accepted stereotype associated with poverty is blackness. Since the majority of people who are in poverty are white, this is a stereotype. See Martina Shea, U.S. Dep’t of Commerce, Bureau of the Census, Dynamics of Economic Well-Being: Poverty 1990 to 1992, at 6 [hereinafter Dynamics of Poverty].

<sup>88</sup> During the nascent stages of the feminist movement, having the *opportunity to work* was the essence of equality for women; it then evolved into the recognition of women’s ability to do the same work as men. The modern struggle of feminist activists is for *equal compensation* for the same work, both financially and in status recognition. Fundamentally, these foci has not considered the social position of black women or poor women who have always worked and have always been expected to do so. See hooks, *supra* note 34, at 1-4 (discussing Betty Friedan, The Feminine Mystique (1963)).

<sup>89</sup> See Wriggins, *supra* note 27, at 126.



“victim,” making interactions with the justice system that much more complicated.<sup>90</sup>

In addition, the popular conceptualization of the “black male offender/white female victim,”<sup>91</sup> not only creates a collective belief that black men are responsible for all of the violence in society, but also minimizes and denies the seriousness of violence against women that does not fit within this paradigm.<sup>92</sup> Because the ability of women to obtain justice is so dependent upon their ability to be perceived as a “victim” by meeting the stereotypic expectations, both in character and situation, gender stereotypes serve as a powerful means of social control.<sup>93</sup>

Within the framework of “lynch-mob” ideology, stereotype serves to scapegoat some (black men); re-victimize others (white women); formulate the disappearance of many (black women); and relieve most everyone else (white

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<sup>90</sup> See Note, Clemency For Clemency For Killers? Pardoning Battered Women Who Strikes Back, 29 Loy. L.A. L. Rev. 297, 319-20 (1995) (discussing how black battered women have difficulty meeting “good battered woman” stereotypes and are less likely to benefit from testimony on the battered woman syndrome). Especially in considering the battered women’s syndrome, its initial rejection by the courts was criticized by feminists for adhering strictly to a male norm in establishing self defense. See Elizabeth M. Schneider, Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering, 9 Women’s Rts L. Rep. 195 (1986). There is still much persuasion necessary to convince a jury to disregard the male norm. Considering this in conjunction with the conceptualization of the “victim” as being a white woman, who is a “good girl,” stereotype continues to be an impediment to justice.

<sup>91</sup> See Wriggins, *supra* note 27, at 120. *But see*, Catharine Clinton, “With a Whip in His Hand”: Rape, Memory, and African American Women, in History and Memory in African-American Culture 205 (Genevieve Fabre and Robert O’Meally eds., 1994) (“Despite the incontrovertible evidence that only a small fraction of rapes are interracial, race continues to inflame the issue and to obscure the fact that African American Women are represented in rape statistics in dangerously disproportionate numbers. *In America today, a black woman is six times more likely to be raped than a white woman.*”) (emphasis in original).

<sup>92</sup> See Wriggins, *supra* note 27, at 125. Obtaining victim status is often dependent on an individual’s ability to fit within a particular identity, which is often treated as if it were reducible to a single trait. See Minow, Surviving Victim Talk, 40 U.C.L.A. L. Rev. 1411, 1432; *cf. supra* note 27.

<sup>93</sup> In much the same way, an innocent black man’s ability to obtain justice is dependent upon his ability to avoid the perception of perpetrator. This is ironic since black males are most likely to be victims in society. See Michael R. Rand and Kevin Strom, U.S. Dep’t of Justice, Violence-Related Injuries Treated in Hospital Emergency Departments 3 (1997) [hereinafter Emergency Departments] (“The National Crime Victimization Survey (NCVS) has consistently found that blacks, males, and persons age 15-24 are the most vulnerable to become violent crime victims.”).

men) from responsibility. Thus, stereotype, by its mere existence and operation is a conceptual means of violence that has served as a justifying force in the perpetuation of literal violence.<sup>94</sup>

### C. Domestic Violence—a Point of Culmination

Domestic violence has traditionally been relegated to the conceptual realm of the private sphere, as opposed to the public market.<sup>95</sup> Even though the notion that domestic violence is a private matter has slowly been changing over time,<sup>96</sup> domestic violence is still a subject that we, as a society, prefer to leave in private.<sup>97</sup> This preference allows us to be detached from “someone else’s problem” and avoid responsibility. Because we prefer to conceptualize domestic violence as a private matter, the use of stereotype makes it easier for us to further remove ourselves from the issues.

Violence, beyond the conceptual realm of stereotype, is a literal means of control. Stereotype serves as the justification which allows us to put things into their place within our normative expectations when the presumptively deviant behavior of violence occurs.<sup>98</sup> On scale, domestic abuse is the literal means of control within the family.<sup>99</sup> Stereotype adds an additional tool for control, both within family relations and in societal perceptions that influence a woman’s ability to get help and succeed in the justice system.

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<sup>94</sup> See *supra*, note 35.

<sup>95</sup> See Schneider, *supra* note 24; Olsen, *supra* note 20; Evan Stark, *et al.*, Medicine and Patriarchal Violence: The Social Construction of A ‘Private’ Event, 9 Int’l J. Health Services 461 (1979).

<sup>96</sup> See generally, Schneider, *supra* note 24. In addition, a strong indication that we are moving toward conceptualizing violence against women as public acts is the enactment of the Violence Against Women Act of 1994, 42 U.S.C. § 13981.

<sup>97</sup> See Stark, *et al.*, *supra* note 95.

<sup>98</sup> Even though we generally do not include violence within our normative expectations, this is closer to a collective wish than a normative reality. Violence has always been an integral part of society, in its existence, its establishment of organized order, and its maintenance of that order. See generally, Cover, *supra* note 35; Law’s Violence (Austin Sarat and Thomas R. Kearns eds., 1992).

<sup>99</sup> See Susan Schecter, Women and Male Violence: The Visions and Struggles of the Battered Women’s Movement 219-224 (1982).

Whether or not someone subject to domestic abuse is considered a “victim,” is intimately connected to the “good girl/bad girl” stereotypes. The stereotype of victimhood, implicitly infused with racialized gender stereotypes, is central to the stereotypes of domestic abuse. Because sexuality is implicit in the backdrop of relationships and families, it is the unifying factor bringing domestic violence within the ambit of this overall framework of violence. In other words, the race and gender infused stereotypic position of a victim, constrains her relative social reality in ways that inflict conceptual violence through the stereotype itself and condition the acceptance and perpetuation of literal violence within her home and in society.

The stereotypes associated with domestic violence include that the victim precipitates her own assault, that she is masochistic and either “likes” or “deserves” to be beaten, that she is “crazy,” that even if she leaves one abusive relationship, she will just find another,<sup>100</sup> and that she is free to end her victimization at any time without assistance.<sup>101</sup> This is contrary to “good girls” who do not need to defend themselves; that is what their good (white) male protectors are for.<sup>102</sup> With this ideology circumscribing the perception of women, by definition domestic abuse must have been “asked for,” and thus only levied against “bad girls.” The mere fact that a woman is engaged in a relationship where she is abused triggers the “bad girl” stereotype. Christine Littleton most vividly describes how this stereotype operates in this regard:

If only she had been a better wife, a more submissive helpmate, a more compliant sexual partner, then her nose would not have been broken, her eye would still be uncut, the bruises would not have

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<sup>100</sup> An example of how this stereotype operates to the detriment of battered women is in a 1991 Michigan termination of parental rights case. Sharon Benn, diagnosed with battered women’s syndrome, had her parental rights terminated because of the concern that she would “enter into another abusive relationship, with resulting damage to her children if they were to be returned to her,... based on the view that ‘once a battered woman, always a battered woman.’” In the Matter of Farley, 437 Mich 992, 469 N.W.2d 295 (1991) (Levin, J. dissenting from an order denying review).

<sup>101</sup> Lenore E. Walker, *supra* note 33, at 18-31 (1979). Unfortunately, the myths described by Lenore Walker have endured and still persist today.

<sup>102</sup> A woman in our society is socialized to believe that “she is, and ought to be, gentle and weak and helpless; that she needs to be protected from pain and injury; that she cannot really rely on her own strength to save her from danger; that male violence is profoundly to be feared but cannot be defended against ....” Cynthia K. Gillespie, Justifiable Homicide, 116 (1989).

been broken, her eye would still be uncut, the bruises would never have marked her thighs.<sup>103</sup>

A woman has to prove herself to be a “victim” before she can obtain justice.<sup>104</sup> Given that violence against women has, in the least, sexual overtones (making chastity an unspoken issue), and given that the stereotypes for women paint them as less credible than men (especially where sexuality is an issue), this is a monumental task.<sup>105</sup> Stereotype is a web that pulls in the object of the violence, subjecting her further to violence: if she is in an abusive relationship, she must have deserved it, even precipitated it, and is therefore a “bad girl”; bad girls are not considered victims or deserving of protection. If she fights back to protect herself, she is “too strong”<sup>106</sup> to be a victim, or strong enough not to have been in that situation in the first place. So, only a woman who is fortunate enough not to have someone beat on her, or not strong enough to do something about it, is accorded the coveted status of victim.<sup>107</sup>

Although subject to deliberately opposing stereotypes, black women and white women are subject to the same framework of conceptual and literal violence that serves to victimize them both. Battered women, black and white, have the additional burden of dealing with the control from physical violence and the social limitations imposed by stereotype.<sup>108</sup>

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<sup>103</sup> Littleton, *supra* note 27, at 328.

<sup>104</sup> See Gillespie, *supra* note 102, at 191 (“Women are apt to be regarded as inherently less credible than men and, when they appear in court seeking justice as victims of violence, they are frequently the targets of the most callous sort of victim blaming.”).

<sup>105</sup> See, e.g., Final Report of the Michigan Supreme Court Task Force on Gender Issues in the courts 23, 81 (1989) [hereinafter Michigan Gender Report].

<sup>106</sup> Any woman who chooses to exhibit strength is not typically perceived of as a “victim.” This is a contributing factor in why the battered woman’s syndrome is not readily accepted as a valid state of mind in murder trials. See Littleton, *supra* note 27, at 332.

<sup>107</sup> The status of “victim” is important as it is a means for claiming remedies from an entitled position. See generally, Minow, *supra* note 92.

<sup>108</sup> See Littleton, *supra* note 27, at 329-332 (describing the law’s picture of battered women); see generally Linda L. Ammons, Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome, 1995 Wis. L.Rev. 1003 (specifically discussing the experiences in the justice system of black women who have been battered); Michigan Gender Report, *supra* note 105, at 23-24, 31.

Of the Bar studies that include considerations of the interaction of race and gender, the general conclusion is that race and gender influence people’s experiences and perceptions

In addition, victims of domestic abuse have the extra impediment of the traditional relegation of “domestic issues” to the private sphere. Domestic violence is, and needs to be, regarded as a matter of public concern. Aside from a general policy objective of preventing the perpetuation of such conduct, domestic violence exacts tremendous costs of both its victims and of society.<sup>109</sup> In addition, our system of justice depends on the community’s

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of justice; the experiences of women as a group differ from those of men; the experiences of white women and minority women, as groups, differ; the experience of white women differ from those of white men; the experiences of minority women differ from those of minority men. What is most telling about these reports is the gulf in perceptions of differential treatment between the respondents, corresponding to their race and gender. See, e.g., Final Report of the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race and Ethnic Bias, in I The Gender, Race, and Ethnic Bias Task Force Project in the D.C. Circuit (1995), reprinted in 84 Geo. L.J. 1657, 1706-08, 1738-39 (1996) [hereinafter D.C. Federal Gender Report]; Final Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias, in II The Gender, Race, and Ethnic Bias Task Force Project in the D.C. Circuit (1995), reprinted in 64 Geo. Wash L. Rev. 189, 263-324 (1996) [hereinafter D.C. Federal Race and Ethnicity Report]; Michigan Gender Report, supra note 105; Final Report of the Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts (1989) [hereinafter Michigan Racial Report]. Unfortunately, these studies are based on attorney surveys, not surveys of the litigants/defendants. Thus, conclusions about the treatment of lay people within the justice system is based on second hand information and extrapolation.

<sup>109</sup> The costs associated with domestic abuse are potentially phenomenal. If we assess both the direct costs (including emergency room care, hospitalization, doctor visits, child protective services, foster care, shelters and subsidized housing, police and court resources, counseling, and property damage), indirect costs (including job loss and unemployment, lost productivity, disruption of the work place by the batterer, lost home production, lost promotion and advancement, loss of control over one’s environment, alienation from friends, family, and community, mortality), and transfer payments (though not considered a “cost” under economic analyses, welfare payments to victims of domestic abuse diminish the resources available for other public expenditures). See generally, Louise Laurence and Roberta Spalter-Roth, Institute for Women’s Policy Research, Measuring the Costs of Domestic Violence Against Women and the Cost-Effectiveness of Interventions: An Initial Assessment and Proposals for Further Research (1996).

Domestic crime against adults accounts for approximately \$67 billion per year, almost 15% of the total crime costs. Ted R. Miller, Mark A. Cohen and Brain Wiersema, U.S. Dep’t of Justice, Victim Costs and Consequences: A New Look (1996). Of all persons treated for violence related injuries in U.S. hospital emergency departments, approximately 17% were attributable to a spouse or ex-spouse, or current or former boyfriend or girlfriend. Emergency Departments, supra note 93 (noting that a higher percentage of women than men were injured by someone with whom they shared an intimate relationship).

Of the violence perpetrated at the workplace, women are more likely to be attacked by someone known to them, and five percent of all women attacked in the workplace are victimized by a husband, ex-husband, boyfriend, or ex-boyfriend. Ronet Bachman, Ph.D., U.S. Dep’t Of Justice, Violence and Theft in the Workplace: A National Crime Victimization Survey

sense of fairness. What can be disheartening is that the community's sense of fairness is often informed by a belief in stereotypes developed well before a case reaches the courtroom or garners media attention. When the violence reaches the point where the justice system intervenes, stereotype and prejudice affect courtroom dynamics and the ability to obtain justice.<sup>110</sup> Then, courtroom lawyers may manipulate popular conceptions and stereotype.<sup>111</sup> Therefore, the community needs to *really* understand the issues, prior to intervention by the justice system. In addition, for the cases that do not reach the courtroom, society is the jury judging the actors and permitting the outcomes—accepting, without meaningful condemnation, the actions of the abuser, while holding responsible the victim for staying in the relationship.<sup>112</sup>

In a symbiotic manner, the justice system has the ability to affect society's perceptions of justice, just as the perceptions held within society influence the achievement of justice.<sup>113</sup> For this reason, the actors in the justice system have the highest responsibility to affect attitudes, prejudices, and stereotypes as they affect the administration of justice. Manipulation of stereotypes, for whatever end, perpetuates the concepts of violence and allows the intendant continuation of literal violence.

Prevention of violence and victimization is just as important a function of justice as our response to it. Lawyers are leaders in society and

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(1994).

<sup>110</sup> See generally, Ammons, *supra* note 108; Johnson, *supra* note 76.

<sup>111</sup> Lawyers will continue to manipulate stereotypes, unless we re-educate them and society not to accept them. The Model Code of Professional Responsibility provides no guidance on the use of stereotypes, save Canon 1, stating that "a lawyer should assist in maintaining the integrity and competence of the legal profession." In fact, most attorneys view the use of stereotype as fair game in representing their client zealously within the bounds of the law, as stated in Cannon 7. See Johnson, *supra* note 76 at 1790-1792. Federal Rule of Evidence 402, and corresponding state rules, cannot be viewed as sufficient restraints based on the lack of probative value of stereotypes, if judges and lawyers accept stereotypic representations as factual. See *id.* at 1770-1776. Even though lawyers are part of society and subject to the same stereotypic beliefs, we can, and should, expect more from them. See e.g., D.C. Federal Gender Report, *supra* note 108; D.C. Federal Race and Ethnicity Report, *supra* note 108; Michigan Gender Report, *supra* note 105; Michigan Racial Report, *supra* note 108.

<sup>112</sup> See *supra* text accompanying note 98.

<sup>113</sup> For an interesting discussion of social construction of meaning and social reality, see Lawrence Lessig, The Regulation of Social Meaning, 62 U. Chi. L. Rev. 943 (1995); see also Dan M. Kahan, Social Influence, Social Meaning, and Deterrence, 83 Va. L. Rev. 349 (1997).

influence perceptions in society and society's concepts of justice.<sup>114</sup> These actors must endeavor to undermine stereotypes that victimize individuals instead of exploiting them. This responsibility must include the newest actor in our system of justice, the media.

In theory, the community has always been an intended participant in our system of justice;<sup>115</sup> as technology has advanced, the media has increasingly been the avenue for that participation. With the advent of cameras in the courtroom, the community has the ability to participate in the justice system as never before. Court TV and CNN have made court proceedings accessible to most Americans in their living rooms. Lawyers and judges have become commentators and "sound-bite" educators. Some of these legal commentators participate with the explicit intention of influencing outcomes.<sup>116</sup> There is no doubt that the media's interaction affects our perceptions of justice. A good example of this is the criminal trial of O.J. Simpson. One of the reasons the O.J. criminal trial has been referred to as the "trial of the century" is because of the breadth of media coverage.<sup>117</sup>

#### **D. The Persistence of Stereotype—Perspective, Juries, and Justice (or "Just Us")**

Within the setting of the O.J. trials and the surrounding issues of domestic violence, these stereotypes were played out in a modern context. Nicole Simpson was charged with carrying the banner for "real battered women." "The name Nicole Brown Simpson has now become synonymous with the image of the battered wife—a young, beautiful woman, unable to

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<sup>114</sup> In addition to providing counter-stereotypic information, leaders in society have a tremendous impact on our perceptions of others. *See generally*, Y. Bar-Tal, *supra* note 47. Given society's general obsession with the courtroom, lawyers as a group are considered leaders in society and have the ability to change perceptions both inside and outside of the courtroom.

<sup>115</sup> *See generally*, Akhil Reed Amar, *The Bill of Rights as Constitution*, 100 Yale L.J. 1131 (1991) (discussing the Fifth, Sixth, and Seventh Amendments, Madison's proposed Fourteenth Amendment, an early version of Article III, and all state constitutions penned between 1776 and 1787).

<sup>116</sup> For example, in representing his client, Dr. Jack Kevorkian, in matters concerning physician-assisted suicide, attorney Geoffrey Fieger has mastered "sound-bite oration" in presenting his case through the media. *See* George Cantor, *Assisted Suicide: Geoffrey Fieger's political quest*, *Detroit News*, Jul. 12, 1997, at C6.

<sup>117</sup> *See* Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being A Commentator* 69 S. Cal. L. Rev. 1303, 1303-1307 (1996).

escape her abuser, and unable to get the criminal justice system to respond to her pleas.”<sup>118</sup> With this portrayal, she became the image of the quintessential victim, deserving the protection of, or at least retribution by, the justice system.

This is not to suggest that Nicole’s image only benefitted from the use of stereotypes associated with “white womanhood.” Consistent with a psychological understanding of stereotype dichotomies (e.g., white/black; good/bad), Nicole being married to, and having the children of (*i.e.*, having sex with), a black man meant she had broken social taboos and could not be considered the “good chaste white girl.”<sup>119</sup> In addition, Nicole was portrayed by O.J., by O.J.’s defense team,<sup>120</sup> and by the media as deviating from the “good girl” stereotype and therefore not deserving of protection from violence. “Attempts by the Simpson defense team to paint Nicole as a partying drug user are part of a time-worn tradition of depicting victims of male violence as bad girls who deserved it.”<sup>121</sup> She was portrayed as a “promiscuous goldigger who provoked her own abuse,”<sup>122</sup> a provocateur who led a fast lifestyle that would bring violence on herself through enumerable possibilities.<sup>123</sup> Though the use

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<sup>118</sup> See Laurie L. Levenson, Stereotypes of Women in the O.J. Simpson Case, 1994 WL 681370 (O.J. Comm.); see also, Ammons, *supra* note 108, at 1006-7 (“Nicole Simpson was white, beautiful, rich, portrayed as a good mother, and brutalized.”). This characterization just begs for comparison to women who do not fit the same profile, regardless of the reality of their abuse. See *id.* (discussing a Cleveland prosecution of a black woman for killing her boyfriend where the prosecutor, in closing arguments, compared the woman to Nicole Simpson, as if to suggest the woman in this case was not a “real battered woman,” like Nicole).

<sup>119</sup> See Cheryl I. Harris, Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith—Spectacles of Our Time, 35 Washburn L.J. 225, 224-43 (1996).

<sup>120</sup> See Larry Rubenstein and Donna Foote, Playing the Victim Card: the O.J. Defense Outs Nicole’s Reputation on Trial, Newsweek, Nov. 4, 1996, at 64. The defense team even went so far as to hire Lenore Walker as an expert on battered women’s syndrome, purportedly to show that Nicole probably did not suffer from the syndrome and that O.J. did not fit the “profile” of a batterer. See Sheryl McCarthy, O.J. on Trial: One More Sellout in the O.J. Case?, Newsday, Fri., Jan. 27, 1995, at A4.

<sup>121</sup> Ehrenreich, *supra* note 4, at 933.

<sup>122</sup> Deborah L. Rhode, Simpson Sound Bites: What Is and Isn’t News About Domestic Violence, in Postmortem: The O.J. Simpson Case 83, 89 (Jeffrey Abramson ed., 1996).

<sup>123</sup> See Levenson, *supra* note 118; Rubenstein & Foote, *supra* note 120.



of the “race card” in the criminal trial was both denounced and defended, use of the “gender card” (in its racialized state) was silently accepted.<sup>124</sup>

Criticisms of the (black women on the) O.J. criminal trial jury included that they could not understand the issues of domestic abuse adequately and that “their verdict” was not “just.” Given the stereotypes infused within the coverage of this trial, this perception of this jury is no surprise.

To reemphasize the historical impetus for the stereotypes of black women, lynch mob ideology was not intended for the protection of black women, but to facilitate their physical and sexual exploitation.<sup>125</sup> Through many years of activism, extrajudicial lynchings diminished considerably,<sup>126</sup> but judicial proceedings continued to allow for “legal lynchings,” and stereotypes continued to be reinforced.<sup>127</sup> The patent unfairness of such proceedings led to the inclusion of black men,<sup>128</sup> along with the gradual inclusion of women,<sup>129</sup> on juries, diminishing the number of “legal lynchings.” What has not diminished is the pervasive belief in stereotypes.

Now, even though we allow all citizens to physically participate in the jury system, we accept their verdict as “just” only if it ideologically comports

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<sup>124</sup> “Gender card” refers to the use of stereotype to disempower and discredit women. Specifically, “bad girl” stereotypes were infused within the trial to suggest that Nicole was less than deserving of protection or sympathy. See *supra* text accompanying notes 77-80 and 102-106. Stereotypes of black women (lack of intelligence and ability to sustain great physical punishment making them less likely to understand domestic violence), were used to suggest that the jury was incompetent and biased. See *infra* note 216 and accompanying text.

<sup>125</sup> See *supra* text accompanying note 84.

<sup>126</sup> Prior to World War I, the number of lynchings in this country diminished due primarily to the efforts of Ida B. Wells-Barnett. See generally, Ida B. Wells-Barnett, On Lynchings (1969).

<sup>127</sup> See *supra* note 76.

<sup>128</sup> See Kennedy, Race Crime and the Law 172-180 (1997) (discussing the history of the inclusion of blacks on juries, including Strauder v. West Virginia, 100 U.S. 303 (1880) (establishing the Constitutional right to be free of racial exclusion in jury selection) and Norris v. Alabama, 294 U.S. 587 (1935) (celebrated for repudiating the fraud used to cover up racial discrimination in jury selections); see also, Abramson, *supra* note 6, at 105-112.

<sup>129</sup> See Brownmiller, *supra* note 27, at 232, 245-48 (noting that women did not win the right to sit on Alabama juries until 1966 or Mississippi juries until 1968). 1898 is conventionally considered to be the date women were allowed to participate on any modern jury in the United States when Utah authorized their participation; see also, Abramson, *supra* note 6, at 112-15. See generally, Carol Weisbrod, Images of the Woman Juror, 9 Harv. Women's L. J. 59 (1986).

with the perspectives of “mainstream” America. Understanding this, the perception of “justice” is governed purely by one perspective,<sup>130</sup> belying any notion of justice formed in a democracy. In this way, stereotype continues to operate as a method of control, replicating the old system of “just us.”

One of the broad intentions of the use of juries within our democracy is that it be a “body truly representative of the community.”<sup>131</sup> Even prior to the inclusion of minorities, including women, on juries, the jury was intended to reflect the morals, values, and common sense of the people through their various perspectives and as a component of democratic justice.<sup>132</sup> Certainly with the 1975 case of Taylor v. Louisiana<sup>133</sup> and the cases leading up to it,<sup>134</sup> the requirement that a jury be drawn from a representative sample of the community has come to mean full representation<sup>135</sup> of groups and the various

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<sup>130</sup> See Albert W. Alschuler, Our Faltering Jury, in Postmortem: The O.J. Simpson Case (Jeffrey Abramson ed., 1996) (“Whites have begun to experience a glimmer of the fear of our justice system that blacks and other minorities have experienced throughout our history.”).

<sup>131</sup> Abramson, *supra* note 6, at 115 (citing Smith v. Texas, 311 U.S. 128, 130 (1940), extending the right of representation to all groups in the community). Akhil Reed Amar discusses de Tocqueville’s envisionment of the jury as populist and majoritarian where “the real direction of society [is] in the hands of the governed,... and not in that of the government....” Amar, *supra* note 114, at 1185 (1991) (citing, 1A. de Tocqueville, Democracy in America 293-94).

<sup>132</sup> See Abramson, *supra* note 6, at 22-33. In discussing the evolution of the jury, Abramson also notes the common law tradition of the mixed jury, which was composed of half the peers of one party and half the peers of the other. *Id.* at 106. Clearly, this was to ensure fairness by including both perspectives. See also, Amar, *supra* note 115, at 1187 (discussing the jury as a means of democratic participation for ordinary citizens).

<sup>133</sup> 419 U.S. 522 (1975) (holding that the requirement that a petit jury be selected from a representative cross-section of the community is fundamental to the Sixth Amendment).

<sup>134</sup> See e.g., Strauder v. West Virginia, 100 U.S. 303 (1880); Virginia v. Rives, 100 U.S. 315 (1880); Smith v. Texas, 311 U.S. 128 (1940); Ballard v. United States, 329 U.S. 197 (1943). See also, Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193, 1280-81 (1992) (“If women and blacks were central speakers in the Reconstruction paradigm, would a jury of twelve white men be in every sense a jury of their “peers”?”).

<sup>135</sup> I take no position on whether justice is satisfied when the selection procedures ensure all persons are equally eligible for jury duty or only when there is proportional representation on a jury or when there is some combination of the foregoing using legal preemptory challenges. See Abramson, *supra* note 6, at 102; see also, Batson v. Kentucky, 476 U.S. 79 (1986).

perspectives within them, whether political, social, or ethnic.<sup>136</sup> Even in efforts to seat an “impartial” jury, it is understood that perspective is unavoidable. Jurors are expected to bring their own experiences and perspectives into the deliberation process.<sup>137</sup> If we accept this premise, we must accept each jury’s interpretation of the facts in reaching their verdicts. This does not necessarily implicate jury nullification, where jurors resist the apparent application of law to fact.<sup>138</sup> I am merely suggesting that jurors stick to their convictions and perspectives in ascertaining what is “apparent” in applying the law to the facts. There are times when jury nullification is not necessary: when, based on the honest evaluation of jurors from their own experiences and perspectives, the jury interprets the facts such that they are insufficient to justify application of the law in that case. After all, the case where the facts are not absolutely clear is precisely the situation for which juries were created. Of course, where the result is not consonant with the majority perspective, there is the danger that verdict will be labeled nullification. Unless we have full information, the operation of nullification should not be presumed and the pronouncement of the jury should be accepted.

Thus, we have a dilemma both for black women on juries and for those perceiving their verdicts. Justice and the smooth continuation of our system of justice depends on both the community’s perception of it *as just*,<sup>139</sup> and the ability of all members of this community to meaningfully participate. Therefore, we need to fashion a new understanding of “justice” through

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<sup>136</sup> See Abramson, *supra* note 6, at 102, 118; see also, Amar, *supra* note 115, at 1188 (pointing out that the jury was intended to be a political, not merely judicial, institution).

<sup>137</sup> I am not suggesting that jurors should be permitted to deliberate on the basis of any bias, whether gender, race, or any other factor that would reduce the likelihood of a fair trial. See J.E.B. v. Alabama, 511 U.S. 127 (1994); Batson v. Kentucky, 476 U.S. 79 (1986); Ham v. South Carolina, 409 U.S. 534 (1973).

<sup>138</sup> See Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 Yale L.J. 677 (1995) (advocating the moral responsibility of black jurors to emancipate non-violent black defendants in response to pervasive racism within the justice system).

<sup>139</sup> During the reign of the lynch mob, there were instances when lynch mobs would kill a victim despite, or perhaps because, he was acquitted by a jury (even one which was all white). Wells, A Red Record, *supra* note 71, at 36 (describing such an occurrence). Even though the violence is no longer literal, the conceptual continues to have an affect on the defendants, their juries, and our overall perception of justice.

greater inclusion of the perceptions developed in a multicultural community,<sup>140</sup> rather than relying on stereotype as a method of controlling the “consistent” outcomes of jury deliberations.

With the interaction of the media, we have the opportunity to move these very important issues of domestic violence into greater public concern. Despite this opportunity, the issues of domestic violence will remain removed from mainstream society if the stereotypes associated with violence are not erased, or at least minimized. Unfortunately, media representations have significantly contributed to the perpetuation of stereotypes associated with race, gender, and domestic violence.<sup>141</sup> The jury used to be one of the primary means of educating the populace for their civic roles.<sup>142</sup> Now the media has overtaken that role and serves as the primary means of educating the populace, before during, and after trials, informing perceptions of justice.

Juries, and representations of them and to them, are fundamental to our perceptions of justice, enabling our system of justice to function; now, so is the media. Lawyers, as advocates and media commentators, contribute to the exploitation of the stereotypes that harm individuals and perpetuate violence by leaving the conceptualizations of domestic abuse in place. Lawyers, whether in the court room or through the media, need to be responsible for educating the public about legal issues, like domestic violence, and for eradicating stereotypes that impede the realization of real justice.<sup>143</sup>

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<sup>140</sup> See Abramson, *supra* note 6, at 241-50 (discussing the trials of Coontz, *et al.* (for the beating of Rodney King), Bernhard Goetz, the Menendez brothers, Lorena Bobbit, Lemmerick Nelson, and a 1992 Massachusetts trial of a Catholic priest for blocking access to abortion clinics, to name a few, where different perspectives have had a role in our perceptions of justice).

<sup>141</sup> Documentation by FAIR (Fairness & Accuracy In Reporting), a national media watch group, provides strong evidence that the use and manipulation of stereotypes in news reporting is wide-spread. FAIR, Focus on Racism in the Media, 5 EXTRA!, Jul./Aug. 1992; see also Kirk A. Johnson, Objective News and Other Myths: The Poisoning of Young Black Minds, 60 J. Negro Educ. 328 (1991).

<sup>142</sup> See Amar, *supra* note 115, at 1187.

<sup>143</sup> See Johnson, *supra* note 76 at 1794 (advocating “race-shield” laws to remedy the prejudicial effect of racial imagery on jury deliberations).

### III. PITTING RACE AGAINST GENDER—THE CHOICE...

#### A. The Dynamics of Power

Because dichotomous thinking is one-dimensional,<sup>144</sup> it does not fully explain how stereotypes operate within dynamic, multi-dimensional, competing hierarchies. Power is the defining essence of the dualisms. The dualisms are also placed in hierarchy dependent upon the context. Within a given hierarchy, the dualism with the most power relative to the situation determines which stereotype is dominant. Reality circumscribed by normative expectations directs “choice” in a particular situation towards the foundation of power.<sup>145</sup> So, for example, Nicole could be negatively characterized in that she was challenging male power; simultaneously, O.J. could be negatively characterized to the extent he challenged white social order and class structures; the predominantly black female jury could be denounced for the perception that they were acting counter to the interests of white women or for announcing a verdict contrary to “mainstream” expectations.

One consequence of one-dimensional, dichotomous, oppositional thinking is that feminist and anti-racist efforts are systematically portrayed as competing interests.<sup>146</sup> As already demonstrated, race and gender stereotypes are interdependent. Therefore, it is counterproductive to work singly towards the eradication of sexism without also eradicating racism.<sup>147</sup> The construction

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<sup>144</sup> The attraction of either/or thinking is its simplicity. See Minow, *supra* note 56, at 16. Unfortunately, this simplicity *forces* a fit into the resulting, limited concepts, perpetuating the conceptual violence. See *supra* note 35.

<sup>145</sup> Frances Olsen describes available choices as being limited to the ways in which women’s relationship to a dualism is perceived. See Olsen, *supra* note 20 at 1576; see also, Minow, *supra* note 56, at 16 (“[J]ustice is the quality of human engagement with multiple perspectives framed by, but not limited to, the relationships of power in which they are formed.”)

<sup>146</sup> Competition between the oppressed is an age old impediment to the efforts of anti-oppression movements. Brownmiller, *supra* note 27, at 254; Harris, *supra* note 12, at 606. See also Devon W. Carbado, The Construction of O.J. as a Racial Victim, 32 Harv. C.R.-C.L. L.Rev. 49, 79 (1997) (pointing out that maleness is normalized in antiracist discourse just as whiteness is normalized in feminist discourse). What is most interesting here is that this framework forces competition within a single individual (or individuated category— *i.e.*, black women). See Crenshaw, *supra* note 12, at 1242.

<sup>147</sup> See bell hooks, *supra* note 12, at 13 (“[T]he struggle to end racism and the struggle to end sexism were naturally intertwined, that to make them separate was to deny a basic truth of our existence, that race and sex are both immutable facets of human identity.”); Dorothy

that characterizes racism and sexism as mutually exclusive phenomena, misperceives the power impetus from which both arise. If competition between the two efforts is engaged, the most privileged relative to the situation may win the battle, but the competition itself perpetuates the existence of both mutually reinforcing systems and stereotypes.

I am aware that this discussion itself has the potential to perpetuate stereotypes, merely by pointing them out.<sup>148</sup> Nonetheless, recognizing the function of stereotype and the reality it imposes is also a means of demonstrating how the power structure simultaneously operates to privilege some and disprivilege others.<sup>149</sup> All identity and its relative position in the social power hierarchies are socially constructed. That is, gender, race, class, religious affiliation, sexual preference, *etc.* only have meaning through what we in society assign.<sup>150</sup> Thus, the power dynamic creating privilege is potentially shared by *all* who are oppressed.<sup>151</sup>

Though my intention is to be inclusive, I do not mean to suggest that all oppressions are equal, either in degree or kind. I only mean to suggest that contextually, the privilege/disprivilege paradox may *function* substantially the same in any given mode of oppression. What differentiates oppressions is the relationship of the social constructs and the manner in which the power balance is imposed. The specifics of the oppression are individualized by external characteristics and context.

Just as stereotype is a form of conceptual violence,<sup>152</sup> a dynamic that “normalizes” or “essentializes” one perspective is the dynamic that forces competition among the disprivileged for the position of privilege and actually operates to perpetuate the oppression inherent in the dynamic itself.<sup>153</sup> Thus,

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Roberts, *supra* note 21, at 3; Matsuda, *supra* note 21, at 1189 (“As we look at these patterns of oppression, we may come to learn, finally and most importantly, that all forms of subordination are interlocking and mutually reinforcing.”).

<sup>148</sup> Minow, *supra* note 21, at 12.

<sup>149</sup> See *id.*, at 56. (“[C]hallenging the hidden privileging of one perspective privileges another in its place.”).

<sup>150</sup> See generally, Lakoff, *supra* note 46.

<sup>151</sup> See Robin West, *supra* note 20, at 57 (suggesting that although men do not live within the parameters of the oppressive conditions of patriarchy, they do live within those of capitalism).

<sup>152</sup> See *supra* note 35 and accompanying text.

<sup>153</sup> See Minow, *supra* note 21, at 38-45 (discussing the power of unstated norms).

an extension of “dominance theory”<sup>154</sup> would consider the dynamic of dominance as a complex system that changes depending on the relevant context and is able to deal with more than the male/female paradigm.<sup>155</sup>

## **B. The Dynamic in Context**

In the aftermath of the O.J. trials, the reactions and opinions of African American women were framed in terms of a choice between racial solidarity and gender activism. Specifically, the verdict of the predominantly black female jury in the criminal trial was characterized as the consideration of race winning out over considerations of gender.<sup>156</sup> Some commentators suggested that black women have split loyalties to race issues and gender issues and will generally choose the former. This presupposes that a “choice” can be made and that the power exists to make it meaningful. Certainly, the so-called “choice” between race and gender is much more complicated than as represented by the media. In fact, the “choice” is often determined by the way events are portrayed by the media and by which events are considered news worthy.

Comparison of the O.J. trials to the Senate hearing of Anita Hill and Clarence Thomas may demonstrate the power dynamics of stereotype more clearly. The media portrayal of these occasions predictably played into stereotypes directing them in favor of the dominant power structure.

The Hill/Thomas hearings were a high profile event<sup>157</sup> in our recent history dealing with both race and gender issues.

All of us knew that white America would hear this story not just as a lesson about the ubiquity of sexual harassment in the workplace but as a story about oversexed black men... There was another part of the story of black sexuality that all of us heard but few of us

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<sup>154</sup> See generally, MacKinnon, *supra* note 20.

<sup>155</sup> See Harris, *supra* note 12, at 592-601 (suggesting that a complete theory is one which “can shift focus from gender to race and other facets of identity and back again...”).

<sup>156</sup> See Mike Littwin, Found Guilty of Ignoring Battered Women, Baltimore Sun, Oct. 9, 1995 (“It has been said enough times, and by more than enough pop psychologists, that black women feel protective of the embattled black male.”).

<sup>157</sup> As in the O.J. trials, the national media played a significant role in the administration and perception of justice. See Anna Deveare Smith, The Most Riveting Television: The Hill-Thomas Hearings and Popular Culture, in Race, Gender, and Power in America 248 (Anita Faye Hill and Emma Coleman Jordan eds., 1995).

acknowledged: the story of the “unchaste” black woman who has no right to refuse the sexual advances of any man.<sup>158</sup>

Understanding that violence against women is a unified concept that manifests itself in several ways,<sup>159</sup> it is no surprise that the stereotypes associated with sexual harassment resemble those of domestic violence. A “victim” of sexual harassment also has to be a “good girl.” This means she cannot be single, she cannot dress attractively, and she cannot be engaged in a typically “male” job.<sup>160</sup> Even if she is “objectively” a “good girl,” it is represented that she likely misinterpreted the comment or occurrence, can’t take a joke, or is lying about the whole thing.<sup>161</sup>

Professor Hill was subjected to an amalgam of stereotypic images. “Many senators dismissed her testimony of having been sexually harassed by Clarence Thomas with outright accusations that she was lying, and with sly innuendos that she was a scorned, vengeful, and psychotic woman.”<sup>162</sup> Invoking further stereotypes, the “question”<sup>163</sup> asked of Anita Hill was “why had she remained silent for ten years.”<sup>164</sup> Thus, throughout the hearings, Professor Hill was forced to prove her status as “victim,” constantly being compared to the virtuous “good girl” image, and simultaneously viewed and depicted through the stereotypes which provide that black women can neither be “good girls” nor “victims.”

<sup>158</sup> Charles R. Lawrence, III, The Message of the Verdict: A Three-Act Morality Play Starring Clarence Thomas, Willie Smith, and Mike Tyson, in Race, Gender, and Power in America 107 (Anita Faye Hill and Emma Coleman Jordan eds., 1995).

<sup>159</sup> See *supra*, note 34 and text accompanying notes 51-53.

<sup>160</sup> Cf. note 88 and accompanying text.

<sup>161</sup> Once again, the effect is to place the blame with the victim of the harassment. Cf. note 34. And, once again, stereotype operates as a powerful tool of control, practicably limiting the number of women who report harassment.

<sup>162</sup> See A. Leon Higginbotham, Jr., The Hill-Thomas Hearings—What Took Place and What Happened: White Male Domination, Black Male Domination, and the Denigration of Black Women, in Race, Gender and Power in America 32 (Anita Faye Hill and Emma Coleman Jordan, eds., 1995).

<sup>163</sup> This question parallels that most often asked of victims of domestic abuse, “why didn’t she leave?”. See *infra* note 186 and accompanying text.

<sup>164</sup> “Why didn’t she display the emotions of outraged virtue? Her critics failed to remember that such protestations by black women have rarely been taken seriously.” Alexander *supra* note 64, at 17.



The stereotypes of black women, as promiscuous liars, contrary to the image of the “victim,” were specifically invoked in the Hill/Thomas hearings through the explicit use of lynch mob ideology by the Supreme Court nominee: the racial imagery of the so-called “high tech lynching.”<sup>165</sup>

Surely, the lynching metaphor worked on a number of levels because it offered multiple and contradictory characterizations. On the one hand, Thomas could evoke sympathy in the black community and guilt among whites by recalling the horrors of “lynch law.” At the same time, he could remind the Senate committee subliminally that Anita Hill was no white woman on whose word a black man should be punished—<sup>166</sup>

This defensive technique was effective, not because there was the remotest possibility of a true lynching or because the situation was even close to a metaphorical correlation,<sup>167</sup> but because racialized gender stereotypes are so embedded in our culture and accepted as truth without regard to reality. This demonstrates the complex way in which the power structure of stereotype operates. Since both Anita Hill and Clarence Thomas are African American, the position of relative power in the situation was male. Thus, Clarence Thomas benefitted from the imagery in that he became the “victim” of a wrongful stereotype.<sup>168</sup> Once this position was established in the dichotomy, Anita Hill had to be molded to the oppositional structure: the “bad girl” who

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<sup>165</sup> In addition, once race became a primary issue, gender issues were obscured. See Emma Coleman Jordan, *The Power of False Racial Memory and the Metaphor of Lynching in Race Gender and Power in America: The Legacy of the Hill-Thomas Hearings* 37, 38 (Anita Faye Hill and Emma Coleman Jordan, eds., 1995) (“When Clarence Thomas asserted that he was the victim of a high-tech lynching at the hands of the all-white male Senate Judiciary Committee, he not only played the race card against whites, he trumped the gender card of a black woman’s claim of intraracial sexual harassment.”).

<sup>166</sup> See *id.*

<sup>167</sup> See generally, Kendall Thomas, *Strange Fruit in Race-ing Justice, Engendering Power* 364 (Toni Morrison ed., 1992); see also, Higginbotham, *supra* note 162, at 32 (noting that there is no recorded instance of a black man being lynched for abusing a black woman).

<sup>168</sup> As Martha Minow points out, claims of victim status often invite the rejoinder, “I’m a victim too,” and invoke competition for the status entitled to sympathy and redress. See Minow, *supra* note 92, at 1431.

was trying to subvert male power. In this way, Clarence Thomas acquired the coveted role of the victim.<sup>169</sup>

In comparison, in the O.J. criminal trial, the defensive technique was the racial imagery invoked by the use of the epithet, “nigger” by police detective, Mark Fuhrman. This in turn also invoked the framework of lynch mob ideology. The intention of emphasizing this information was to invoke images of the history of police brutality and injustice in the legal system to the jury. The defense accomplished this end and successfully portrayed O.J. as the victim.<sup>170</sup> However, within the dynamic of our stereotype framework, this “race card” also reminded the rest of society that O.J. was a black man, not just a white man in black face,<sup>171</sup> who had wealth and power, and relations with white women. This situation superficially correlates with the core essence of lynch mob ideology, invoking all of the stereotypes there associated. With the visceral reactions elicited from both the use of the “race card” and the verdict, there is no doubt that these stereotypes affected our collective psyches.

In both the Hill/Thomas hearings and the O.J. case, black women were criticized for “choosing” counter to the relative power position. It was perceived, at the time of the hearings, that Anita Hill had made a “choice” of gender commitment over her racial identity.<sup>172</sup> That is, by publicly making accusations of sexual harassment against a black man who had the potential to be on the Supreme Court, she was forsaking racial solidarity. Since, in the

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<sup>169</sup> An unfortunate consequence of “either/or” thinking is that we often accept the existence of only one “victim,” necessitating a struggle over victim status and precipitating blame-shifting. *See id.*, at 1429-30; *see also*, Carbado, *supra* note 146, at 79. This mode of conceptualization belies the more complex understanding that an individual may be simultaneously privileged and disprivileged. Minow points out, “Paradoxically, this blurs the distinctions between degrees of harm, leveling all suffering to the same undifferentiated plane of equal seriousness and triviality.” Minow, *supra* note 92, at 1430.

<sup>170</sup> *See generally*, Carbado, *supra* note 146 (discussing generally how men are privileged in the construction of racial victim).

<sup>171</sup> A good example of how we were reminded of his identity is the subsequent cover of Time magazine, serving as background for articles concerning the O.J. criminal trial where they had darkened his face. Time Magazine, Cover, Jun. 27, 1994.

<sup>172</sup> Paula Giddings, *The Last Taboo*, in *Race-ing Justice, En-gendering Power* 441, 442 (Toni Morrison ed., 1992) (“For many, what was *inappropriate* was that a black woman’s commitment to a gender issue superseded what was largely perceived as racial solidarity.”); Crenshaw, *supra* note 34, at 1473; Alexander *supra* note 64, at 16 (“Many black people condemned her because she failed to uphold the ‘solidarity of the race’—a solidarity that has been crucial in the face of this country’s longstanding and pervasive racism.”).

Hill/Thomas hearings, both players in this media drama were African American, popular support was given to the one who was gendered male.<sup>173</sup>

This is the apparent opposite of the perception of the predominantly black female jury of the O.J. criminal trial where the predominantly black, female jury was castigated for “choosing” racial identity over gender issues. It would seem, however, that after the attacks on Professor Hill, cost avoidant black women would then “choose” race issues as primary. Nonetheless, prior responses would be irrelevant since the focus of power in the particular situation is determinant. Thus, as between the domestic violence issues, portrayed as “white,” and the predominantly black jury and black defendant, the court of popular support was for the “white” issues.

The final comparison made here concerns the race and gender composition of the relevant juries. In the Hill/Thomas hearings the “jury” was the almost exclusively white, male Senate (and a completely all white, male confirmation committee). I suggest that the Senate was “choosing”<sup>174</sup> gender identity, when they tendered their support to Clarence Thomas because they could identify with his predicament.<sup>175</sup> Perhaps also because they had the option of ignoring the race issues (*i.e.*, both actors were African American), the white men on the Senate “chose” to support their rights as men. That is, since they could identify with Thomas in his situation, they were essentially protecting themselves.<sup>176</sup> What’s more, they could not even indirectly identify with Anita Hill. “They could not see her as one of their own mothers, sisters, wives, or daughters—honest, virtuous ‘ladies’ worthy of both protection and respect—and they could not escape the weight of centuries of assumptions

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<sup>173</sup> See Cornell West, Black Leadership and the Pitfalls of Racial Reasoning, in Racing Justice, En-gendering Power 390, 392 (Toni Morrison ed., 1992) (“The idea of black people closing ranks against hostile white Americans reinforces black male power exercised over black women (*e.g.*, to protect, regulate, subordinate, and hence usually, though not always, use and abuse women) in order to preserve black social order under circumstances of white-literal attack and symbolic assault.”).

<sup>174</sup> This was not the popular characterization even though we all have both a gender and a racial identity.

<sup>175</sup> One often cited example, but not the only, is the reputation of Senator Edward M. Kennedy, generally alluded to through reference to Chappaquidick. See *e.g.*, Adam Clymer, The Thomas Vote: Analysis, San Diego Union-Tribune, Oct. 16, 1991.

<sup>176</sup> See Jordan, *supra* note 165, at 38 (“A somewhat less obvious message of the lynching comparison casts Thomas as a white man seeking solidarity with other powerful white men who might see themselves confronted with similar allegations of past sexual harassment of women employees.”).

about and abuse of African American women.”<sup>177</sup> Thus, they were also “choosing” to support racialized gender stereotypes by implication of their decision.<sup>178</sup>

The answer (or lack thereof) to one additional question summarizes this discussion better than any conclusion I could formulate: If we can characterize the verdict of the O.J. trials solely in terms of race, or in terms of only gender, how should we characterize the subsequent backlash and attack<sup>179</sup> on the predominantly black female jury?

#### IV. DISMANTLING THE STEREOTYPES

##### A. Acknowledging Perspectives

The presumption that the dominant perspective is the only valid perspective is the basis for the criticism of black women on the O.J. criminal trial jury. Those in positions of relative social power expect the world to coincide with their own view and expect that their view is that of everyone else.<sup>180</sup> Making this assumption validates one’s own perspective over those of others and establishes privilege.<sup>181</sup> Necessarily, the perspectives of others

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<sup>177</sup> Alexander, *supra* note 64, at 18.

<sup>178</sup> Senators on the Judiciary Committee explicitly supported and perpetuated stereotypes. Senator Arlen Specter repeatedly accused Anita Hill of perjury. Clymer, *supra* note 175; *cf.*, *supra* text accompanying notes 77-80. Senator James Exon expressed that he could not believe Anita Hill since she stayed in her employment for so long despite the vulgar behavior. Clymer, *supra* note 174.

<sup>179</sup> One Los Angeles Times columnist said “wouldn’t know DNA from the PTA” of the predominantly black female jury. *See* Wilkerson, *supra* note 11, at 4. “The same jurors who were praised for their attentiveness and thoughtfulness during the trial have been maligned, second guessed, grilled and disparaged since the verdict, simply for carrying out their responsibilities as jurors....” To the Contrary, Herald (Rock Hill, S.C.) Oct. 21, 1995, at 7A.

<sup>180</sup> Martha Minow, Different Beginnings: Making All the Difference in Making All the Difference: Inclusion, Exclusion and American Law, 379 (1990).

<sup>181</sup> *See* Stroeb and Insko, *supra* note 18, at 29 (self-categorization and positive differentiation is dependent upon out-group derogation to establish positively valued distinctiveness).

must be discounted/devalued in this process and stereotype is an effective means that allows detachment from the bases of those perspectives.<sup>182</sup>

Context allows us to avoid the pure abstraction of stereotype that privileges some and excludes others.<sup>183</sup> Context facilitates an understanding of the perspectives of others. This section examines in context the particular dilemma of black women jurors in trials concerning violence against women, especially where the defendant is black. Specifically, this section explores the multi-faceted reactions, as opposed to the one unitary voice, of African American women to the issues of domestic violence<sup>184</sup> infused within the O.J. Simpson trial. In the very least, the interaction of race, gender, and class affecting the lives of African American women within mainstream culture must be explored to understand differences in perspectives.<sup>185</sup> Exploring the differing life situations affecting the members of society powerfully combats widespread acceptance of stereotypes.

## B. Applying Context

African American women are affected by mainstream culture and popular media just like everybody else. Indeed, most Americans have little or

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<sup>182</sup> See Mari J. Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 14 Women's Rts. L. Rep. 297, 299 (1992) ("[a]bstraction and detachment are ways out of the discomfort of direct confrontation with the ugliness of oppression.").

<sup>183</sup> For example, Mari Matsuda challenges us to use a multiple consciousness to deliberately see the world from the standpoint of the oppressed, to use the details of existence in conjunction with the abstractions of standard jurisprudential discourse. *Id.*, at 299. Martha Minow suggests, "[a] useful strategy is to pay attention to competing perspectives on a given problem, and to challenge unstated points of view that hide their assumptions from open competition from others." Minow, *supra* note 21, at 56. Learning the perspective of another, she adds, not only allows us to understand difference as a function of comparisons between people, but also to "reject distinctions drawn between people which express or confirm the distribution of power in ways that harm the less powerful." *Id.*

<sup>184</sup> For an account of the real stories of battered black women, see Beth E. Richie, Compelled to Crime (1996).

<sup>185</sup> See Lettie L. Lockhart, Spousal Violence: A Cross-Racial Perspective in Black Family Violence: Current Research and Theory (1991) (explaining that in order to understand differences in domestic violence occurrences by race, other variables, such as income, education, employment status, and cultural expectations and values must be understood and controlled); Kimberlé Williams Crenshaw, Panel Presentation on Cultural Battery in 25 U. Tol. L. Rev. 891 (1995).

no understanding of domestic violence issues.<sup>186</sup> The most common reaction to the plight of a women affected by battered women's syndrome<sup>187</sup> is disbelief and the question, "Why didn't she just leave?"<sup>188</sup> That African

<sup>186</sup> As Elizabeth Schneider points out, "[e]mpirical studies of jurors in cases involving battered women who have killed their assailants suggest that jurors harbor widespread misconceptions about domestic violence. Jurors tend to blame the woman for the abuse, and for failing to leave the abuser, do not recognize the risks of escalated violence in leaving, and trivialize the abuse." Schneider, *supra* note 24, at 178; *see also* LynNell Hancock, Why Batters So Often Go Free, Newsweek, Oct. 16, 1995, at 61 ("Jury Studies show that women have a particularly hard time sympathizing with battered women who bring their attackers to court. Female jurors are more likely than men to blame the accuser for her injuries.") Thus, these views about domestic violence are not new, are not limited to the O.J. trials, are not limited to one gender, and are not limited to one race, much less to only women of color.

<sup>187</sup> As described by Lenore Walker, the battered women's syndrome is a three phase cycle of psychological and/or physical abuse: 1) the tension building phase during which time minor battering incidents may occur and escalate and the woman tries to placate the abuser; 2) the acute battering phase during which an acute battering incident will take place and the woman experiences emotional collapse and feelings of helplessness; and 3) the conciliation phase where the abuser is contrite and loving and obtains her forgiveness. Walker, *supra* note 33, at 55-70.

<sup>188</sup> The question assumes that controlling male violence or putting an end to it is the woman victim's

responsibility, not the man's. If she fails to do so, she must leave, not he; and if she stays, she deserves—or must want—whatever she gets. The question assumes as well that the family home is not her home but his, and he has the right to drive her out of it. She is the one who must abandon her home, her treasured possessions, possibly her children, and often her personal freedom to hide behind locked doors in some miserable, overcrowded shelter. It is a measure of how far we have yet to go that 'why didn't she leave?' is so seldom recognized as the outrageous question it is.

Gillespie, *supra* note 102, at 192.

In addition, a battered women is more likely to be killed when seeking help or leaving the abusive relationship. *See generally*, Mahoney, *supra* note 27; Hart, *supra* note 27; *see also*, Violence Against Women II, *supra* note 4, at 4 ("Among victims of violence committed by an intimate, the victimization rate of women separated from their husbands was about 3 times higher than that of divorced women and about 25 times higher than that of married women."). Thus, many battered women are afraid to leave, or worse, stay or return to their abusers, thinking they have a better chance of controlling the level of violence while they are with them.

Many victims of domestic abuse must also consider the care of their children, or they lack the financial and emotional resources to be out on their own, or they succumb to the psychological pressures to be the perfect family from their spouse, their families, and society.

American women are a part of greater society and feed into its biases and ignorances<sup>189</sup> is at least one partial explanation for some reactions. In fact, one could easily suggest that the failure of the justice system is not so much in this one, rather overly publicized case where the defendant was acquitted and the issues of domestic violence obscured,<sup>190</sup> but in the multitude of cases<sup>191</sup> year

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Sex role socialization, economic dependency, and unsupportive institutions combine to make the task of leaving an abusive relationship particularly difficult. But despite mythology to the contrary, battered women are actively engaged in changing their lives. Many leave their husbands, hoping this will convince him that he must change. Some turn to family networks that, through threats or physical retaliation, pressure him into stopping his violence.... Women want their marriages to work, and sometimes returning is an active attempt to put matters under their control.

Schechter, *supra* note 27, at 232.

<sup>189</sup> “Thus, if O.J. Simpson did in fact kill his wife, there’s nothing particularly unusual about that. From the feminist vantage point, the thought of O.J. as a killer is not shocking, given his history of spousal abuse. In fact, the thought of him killing his wife is rather mundane, predictable—in short, nothing new. Men kill their partners (and ex-partners) every day.” Ehrenreich, *supra* note 4, at 933; *see also*, Violence Against Women I, *supra* note 4, at 1.

<sup>190</sup> Simpson was arrested in 1989 for beating and threatening to kill Nicole. She had a black eye, swelling cheek, bruises, and scratches about her head. *See* Ellen Goodman, *The Boston Globe*, Jun. 21, 1994. Ehrenreich points out that O.J.’s abusive behavior received little attention while it was happening and the penalties were rather small for his plea of *nolo contendere*: \$700 fine and some community service and counseling. Ehrenreich, *supra* note 4. None of Simpson’s corporate benefactors thought the evidence of Simpson’ abusive behavior (before Nicole’s death and the trial) or his plea of *nolo contendere* to charges of domestic abuse was of concern for his image. “Hertz never considered the charge of wife-beating enough of a character flaw to sully his image. Neither did NBC. And, this is the heart of it, neither did his friends.” Goodman, *supra*. This is indicative of the national complicity in domestic violence.

One student note points out the connection between domestic violence and professional sports. It seems that these “incidents” receive fleeting attention while the accused continue in their careers unaffected. Note, Out of Bounds: Professional Sports Leagues and Domestic Violence, 109 *Harv. L. Rev.* 1048 (1996) (arguing in favor of league-wide domestic violence policies). In addition to the now infamous O.J. Simpson and the well publicized actions of Minnesota Vikings quarterback Warren Moon, the list of prominent sports figures accused of domestic violence includes “Chicago Bulls forward Scottie Pippen, San Francisco Giants outfielder Barry Bonds, Colorado Rockies outfielder Dante Bichette, Atlanta Braves manager Bobby Cox, Florida Panthers goalie Mark Fitzpatrick, Cincinnati Bengals defensive lineman Dan Wilkinson, Denver Broncos receiver Vance Johnson, and former Kansas City Chiefs receiver Tim Barnett.” *Id.* 1, n. 14 (citations omitted).

<sup>191</sup> “On average each year, women experience 572,032 violent victimizations at the hands of an intimate....” Violence Against Women I, *supra* note 4, at 6. “Over two-thirds of the violent victimization against women were committed by someone known to them.” *Id.* at 1.

after year where violence in the domestic context is overlooked<sup>192</sup> or under penalized,<sup>193</sup> marginalizing the plight of victims of domestic abuse.<sup>194</sup> American society is in a collective state of denial concerning the issues of domestic violence and has been for many years.

Consistent with the understanding that African American women are part of a societal whole, many African American women have had exposure to, or experience with, domestic violence. Thus, some reactions may be of understanding, consistent with empathy based on a similar experience to Nicole's. Despite the lack of media attention given to these women, I am sure there were many African American women who were also watching the O.J. trials for its potential impact on issues of domestic violence in this country as they may have had to deal with its aftermath.<sup>195</sup> In fact, there is a lack of media attention to domestic violence issues in general and to those specifically in minority and poor communities. One black woman pointed out, "There has been domestic violence going on in South-Central Los Angeles for years.... How come when it happens in Brentwood it's such a big issue?"<sup>196</sup> Why aren't we interested in the violence that occurs among the poor of same race? Are we only intrigued by the implication of power created stereotypes of wealth and interracial relationships?<sup>197</sup>

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<sup>192</sup> Police are more likely to make formal reports if the offender is a stranger rather than someone known to the victim and are also more likely to search the scene for evidence in this situation. See Violence Against Women I, *supra* note 4, at 10.

<sup>193</sup> Through her research, Barbara Hart has demonstrated that, "[m]any battered women who earnestly seek prosecution find substantial resistance to the appropriate charging of defendants. National data reveal that law enforcement routinely classifies domestic assault as misdemeanors even though the criminal conduct involved actually included bodily injury as serious or more serious than 90% of all rapes, robberies, and aggravated assaults." Hart, *supra* note 27, at 627.

<sup>194</sup> The rate of violence against women has remained constant for the last two decades. See Violence Against Women I, *supra* note 4, at 1. This rate will continue to remain constant if we do not find better ways for society to deal with the issues.

<sup>195</sup> See *supra* note 3.

<sup>196</sup> Charrisse Jones, Nicole Simpson, In Death, Lifting Domestic Violence to the Forefront as National Issue, N.Y. Times, Oct. 13, 1995, at A28.

<sup>197</sup> See *infra*, text accompanying notes 220 and 221.



Because of the interaction of gender, race, and class, creating a personal dynamic quite different from that of Nicole,<sup>198</sup> some African American women may have been inclined to disbelief. In addition to the classic victim's cycle of domestic abuse, which is almost a paralyzing force preventing a woman from leaving her abuser,<sup>199</sup> many African American women also stay in abusive relationships to "present a unified front." That is, because the national media and politicians have historically assaulted the black family as degenerating in a "tangle of pathology,"<sup>200</sup> many African American women feel the need to stay in their relationships, keep their families together, and be unified against outside oppressions and stereotypic representations.<sup>201</sup> They feel that to break up their families would just add to the problems of both their own families and the problems of the black community.<sup>202</sup>

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<sup>198</sup> Women of color are subject to both ideological and literal violence of sexism and racism in ways that do not appear from just one in isolation. Crenshaw, *supra* note 12; Caraway, *supra* note 15, at 1306 ("Many of the types of violence that women of color experience plague our society generally. The difference in the case of women of color is the degree to which these types of violence combine us.").

<sup>199</sup> See *supra* note 188.

<sup>200</sup> See Office of Policy Planning and Research, U.S. Department of Labor, The Negro Family: the Case for National Action 29 (1965) reprinted in The Moynihan Report and the Politics of Controversy: A Transaction Social Science and Public Policy Report (Lee Rainwater and W.L. Yancey eds., 1967); but see, Waheema Lubiano, Black Ladies, Welfare Queens, and State Minstrels: Ideological War by Narrative Means in Race-ing Justice, En-gendering Power 337-338 (ed., Toni Morrison) (discussing how the Moynihan Report contributed to the perpetuation of stereotypes like the "welfare queen" and the "culture of poverty"); Carl Ginsburg, Race and Media: the Enduring Life of the Moynihan Report (1989) (discussing media endorsement of the images created by the Moynihan Report); William Ryan, Mammy Observed: Fixing the Negro Family in Blaming the Victim 63 (1976).

<sup>201</sup> Since there is already so much negative information about black families, the task of calling attention to violence in the African American community is a painful one. Richie, *supra* note 27, at 41.

<sup>202</sup> *Id.* Thus, the desire to fight the stereotype of the broken African American family actually traps black women in abusive relationships. Conversely, perhaps because the stereotypic image of the white family is one of stability and tranquility, white women who are abused may have the problem of being taken seriously, also trapping them in the situation.

African Americans are also disproportionately represented among the poor.<sup>203</sup> Breaking up the family means breaking up the potential resources.<sup>204</sup> Because Nicole would not have had to deal with the same kinds of oppression in her life (*i.e.*, she experienced white privilege and an affluent lifestyle),<sup>205</sup> it may have been just as difficult for an African American woman experiencing domestic abuse to understand why Nicole didn't stay away from her abuser.<sup>206</sup>

Just as Nicole's personal dynamic was different from those of many black women subjected to domestic abuse, O.J. also was not subject to the same personal dynamic and oppressions to which most African American men are subjected. O.J.'s affluence allowed him to escape much of the stress associated with racism in society, eliminating one of the pressures that contributes to the cycle of violence in communities of color.<sup>207</sup> In fact, because of his celebrity status, O.J. was not viewed as "black" by mainstream Americans.<sup>208</sup> Taking this in tandem with the historic reverence for white

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<sup>203</sup> See Dynamics of Poverty, *supra* note 87, at 5 ("Blacks were almost three times as likely to be poor in an average month.").

<sup>204</sup> Lenore Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America 54-61 (1985).

<sup>205</sup> See Hancock, *supra* note 186. ("If gender biases were not enough to keep the jury skeptical, Nicole was also rich. She owned a condo, a flashy car and sexy clothes. She wasn't trapped by poverty,.... She could, less affluent women may think, have bought herself a bodyguard.").

<sup>206</sup> In fact, as bell hooks points out, "[t]he vast majority of poor black women in this society find they are continually subjected to abuse in public agencies, stores, *etc.* These women often feel that abuse will be an element in most of their personal interactions. They are more inclined to accept abuse in situations where there are some rewards or benefits, where abuse is not the sole characteristic of the interaction." bell hooks, *supra* note 12, at 125.

<sup>207</sup> See *infra* note 214.

<sup>208</sup> As Cheryl Harris points out, "as a racially androgynous (Black) man—one accorded the status of honorary white because of his value as a commodity (not unlike the Michaels—Jordan and Jackson)—he was granted a cloak of racial invisibility. For a time, he was permitted to function as the special exemption and allowed to share that which patriarchy has so often sought to protect—sexual access to white women." Harris, *supra* note 119, at 236. In fact, "To the extent that Simpson had been given the status of honorary white, many whites reject the possibility that he could be the target of racism." *Id.* at 239; *But see, supra* note 169.

O.J.'s "honorary white" status intensified the sense of betrayal by mainstream white America. Harris, *supra* note 119, at 239; see also Susan Estrich, O.J. is Crying Wolf on Race// He's No Victim of Racism; He's Profiting From it, USA Today, Jan. 26, 1995, at 13A ("Forget about the fact that what made O.J. different was that nobody treated him like he was black."). This sense of betrayal precipitated the subconscious default to the classic stereotype of the "Black brute assaulting a virginal white female." Harris, *supra* note 119, at 244. Thus,

womanhood (or, for the stereotypes there associated),<sup>209</sup> many African American women may understand that O.J.'s relationship with Nicole was part of the indica of his success.<sup>210</sup> So, even if African American women believed that Nicole would not necessarily have stayed away from her abuser, she may not have believed that O.J. would abuse his "prize."<sup>211</sup>

Interaction of the justice system, especially the police, with communities of color is a major factor contributing to a dynamic that cannot be ignored in understanding the broad picture of domestic violence as it pertains to women of color.<sup>212</sup> There is a general distrust of the justice system by people of color that is well founded in history. This includes both legal and extra-legal persecution of the hyper-sexualized black male for perceived indiscretions with chaste white women, an ideology which permitted and entire era of extrajudicial lynching.<sup>213</sup> Violence perpetrated on people of color by the police or other persons of authority is not a new or waning phenomenon. We have only scratched the surface when we consider the high profile cases of police brutality against people of color.<sup>214</sup> Thus, there is the

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"domestic violence—was not constructed as harm done to an autonomous individual but as harm done to a white woman's body—a body which has traditionally been considered the exclusive property of white men." *Id.* at 243.

<sup>209</sup> See *supra* text accompanying note 78.

<sup>210</sup> In addition to the other stereotypes to which Nicole was subjected, see *supra* text accompanying notes 118-123, she was also portrayed as a "trophy wife," an opportunist who served best as a reward or an ornament for a successful man. Levenson, *supra* note 118, at 1.

<sup>211</sup> See *supra*, note 72.

<sup>212</sup> See Richie, *supra* note 27, at 43 ("How can blacks in the domestic violence movement reconcile the reality of police brutality and blatant racism in the criminal justice system with the need for police and court intervention on behalf of battered women?").

<sup>213</sup> "As we have seen, in many instances mobs did away entirely with even the form of due process by simply lynching Negroes accused of raping white women. In the event that a suspect escaped a real lynching, he often faced the prospect of a "legal lynching": an execution sanctioned by the forms of judicial process absent the substance of judicial fairness." Kennedy, *supra* note 128, at 88-90 (citing two case examples of "legal lynchings").

<sup>214</sup> See Gregory Howard Williams, The Rodney King Incident: Isolated Occurrence or a Continuation of a Brutal Past?, 10 Harv. BlackLetter J. 79 (1993) (discussing the use of non-deadly force in communities of color, citing several incidents); see also, Johnson, *supra* note 76, at 1740 (noting the animal imagery used to describe the victim in the criminal trial where the four white police officers were acquitted).

The beating of Rodney King has become an infamous reference for the treatment of black men by the justice system. It is nonetheless not so unique or only a reference to past practices. A recent example of police brutality against black men is in the torture case of a

very real possibility of inviting violence against men accused,<sup>215</sup> extending and exacerbating the violence. There is also reticence in reinforcing gender specific racial stereotypes of the inherently violent black male.<sup>216</sup> Inviting

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Haitian man by Brooklyn Police, where the officers sodomized the man with the wooden handle of a toilet plunger, puncturing his intestines and bladder from shoving it into his rectum and then breaking his teeth from ramming it into his mouth. See David Kocieniewski, Injured Man Says Brooklyn Officers Tortured Him in Custody, N.Y. Times, Aug. 13, 1997, at B2; David Kocieniewski, Relatives, Not Officers, Were First To Complain, N.Y. Times, Aug. 14, 1997, at B6; John Kifner, Thousands Call on City Hall to Confront Police Brutality, N.Y. Times, Aug. 30, 1997, at A3.

<sup>215</sup> “Minority offenders are sentenced to prison more often and receive longer terms than whites convicted of similar crimes and with similar records.” Charles J. Ogletree, Does Race Matter In Criminal Prosecutions, The Champion, Jul. 1991, at 14 (citations omitted). As of February 9, 1997, “[o]nly four white defendants have been put to death for killing black victims in the United States, while 91 black defendants have been put to death for killing whites.” Scott Richardson, Deadly Debate // Legal Experts Differ on Capital Punishment Ban, Pantagraph (Bloomington, Ill.), Feb. 9, 1997; see also Randall L. Kennedy, McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court, 101 Harv. L. Rev. 1388, 1391 (1988) (noting that based on empirical research on race and capital sentencing, the state places a higher value on the lives of whites than blacks.) This discussion of race and capital sentencing becomes particularly poignant when you also consider that prior to the 1977 case of Coker v. Georgia, 433 U.S. 584, capital punishment was permitted for rape and traditionally reserved for black men who were convicted of raping white women. See Estrich, *supra* note 27, at 107 n. 2.

<sup>216</sup> A common view that black battered women hold is that black men only batter because they need a place to release the anger and frustration that comes with dealing with a racist outside world. “[Domestic violence], like substance abuse, crime, and unwanted adolescent pregnancy, are symptoms of living in a systematically deprived society that is designed to dominate and control third world people.” Richie *supra* note 27 at 41. As one African American woman put it, “[t]he reason a black man may beat his wife is because he is facing racism on his job and racism in America, .... What is the reason a white man beats his wife? It’s certainly not because of oppression in America.” Wilkerson, *supra* note 11. From this perspective, eliminating racism in society and the violence intendant would in turn eliminate sexism and its intendant violence. Richie, *supra* note 27, at 42; Crenshaw, *supra* note 12, at 1258; see also, *supra* note 198 and accompanying text. This view of battery belies the concept of sexual oppression and rests responsibility for violence in white society.

This view is not unlike (white) feminist views that women will not be able to understand their true selves and differences, including any racial differences, until women are free from male domination. In discussing Feminism Unmodified, Katharine Bartlett points out that MacKinnon

speaks of “women’s point of view,” “woman’s voice,” “woman’s distinctive contribution,” of standards that are “not ours,” of empowering women “on our own terms,” and of what we “really want.” These references all suggest a reality beyond social construct that women will

police involvement would provide one more reason for the perpetuation of such stereotypes,<sup>217</sup> and would in turn perpetuate racism and continue the conceptual cycle of societal violence.

Second, women of color often have a lack of confidence in the systems ability to serve their needs. There is both a real and perceived lack of interest by the police in the complaints of black women.<sup>218</sup> Generally, there

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discover once freed from the bonds of oppression.

Katharine T. Bartlett, MacKinnon's Feminism: Power on Whose Terms? (Book Review), 75 Calif. L. Rev. 1559, 1566 (1987) (citations omitted); Angela Harris, *supra* note 12, at 491-92, n.47.

<sup>217</sup> There was no widespread mainstream outrage from cases taking advantage of perpetuated stereotypes and falsely accusing black men, like the Charles Stuart case where Stuart, a white man, fabricated the story that a black man shot him and his pregnant wife when, in fact, he himself was the murderer of his wife. In response, the police instigated a manhunt directed at black males, while insufficiently investigating the inconsistencies in Stuart's story. Stuart Dies in Jump off Tobin Bridge After Police Are Told He Killed His Wife; Image Proved Unjust, Boston Globe, Jan. 5, 1990 at 1; *See also* Johnson, *supra* note 76, at 1744.

Nor was there outrage in the case of Susan Smith case, where Susan Smith created a mythic black assailant who kidnaped her children at gun point in a carjacking. The national media and the country believed her story. A sketch of the suspect was even publicized. The police picked up and interrogated several black men before she confessed, nine days after she made up the story. *See* Rick Bragg, An Agonizing Search for Two Boys, N.Y. Times, Oct. 28, 1994; Terry Don, A Woman's False Accusation Pains Many Blacks, N.Y. Times, Nov. 6, 1994; Jesse J. Holland, Nation Grapples With Racism Question Following Confession, L.A. Sentinel, Nov. 16, 1994; Same Old Song: "A Black Man Did It", L.A. Sentinel, Nov. 16, 1994.

Lack of popular concern or meaningful responses for the injustices against people of color give reason for communities of color to believe that the perpetuation of violence on communities of color will not change any time soon. Incidents like these reinforce stereotype in several ways: the black man as the perpetual perpetrator (*see* text accompanying notes 91-92; note 93), and the propensity of whites (particularly women) to lie (*see* notes 81-82).

<sup>218</sup> Even though activism has begun to change the way the police are trained and the protocols by which they are governed, the police are not exempt from the attitudes about race and gender that pervade society. "Two of the most common beliefs and the ones most likely to affect your interaction with the police as an abused black woman are 1) domestic violence is a private 'family matter' in which the police shouldn't interfere and 2) violence is a 'natural' part of black culture." Evelyn C. White, Chain Chain Change: For Black Women Dealing with Physical and Emotional Abuse 36 (1985).

"After one acknowledges the limitations of statistical correlations, however, there remains the patterns plus anecdotal evidence which adds plausibility, if not probability, to the fear that legal systems continue to regard the victimization of black women with less concern than the victimization of white women." Kennedy, *supra* note 128, at 73-74 (discussing the 1988 commissioned study, *reported in*, Race Tilts the Scales of Justice. Study: Dallas Punishes Attacks on Whites More Harshly, Dallas Times Herald, Aug. 19, 1990 and the work of Gary D. LaFree in Rape and Criminal Justice: The Social Construction of Sexual Assault (1989)).

is a pattern of not treating very seriously the complaints of domestic related violence by any women, as it is usually dismissed as a private affair.<sup>219</sup> For black women the problem is exacerbated by the racialized gender stereotypes of them: the uncontrollable, promiscuous black woman who is capable of sustaining greater physical abuse than her white counterpart, and who is herself capable of violence.<sup>220</sup>

This is also compounded by a belief that shelters and institutions established to help battered women are only for the needs of white women.<sup>221</sup> Understandings, real and perceived, that resources are primarily available for white women and the necessity that they themselves take care of their

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“Evidence concerning police behavior also documents the fact that the claims of Black rape victims are taken less seriously than those of whites.” Wriggins, *supra* note 27, at 122 (citing a study on the treatment of rape victims); *see also* Brownmiller *supra* note 27, at 212-214; hooks, *supra* note 12, at 51-86. “In sum, Black women who are raped are racially discriminated against because their rapists, whether Black or white, are less likely to be charged with rape, and when charged and convicted, are less likely to receive significant jail time than the rapists of white women.” Crenshaw, *supra* note 12, at 1277. In other words, just as society values the lives of black men less than others (*see* Kennedy, *supra* note 215, at 1391), society does not value black women victims very much. *See* Gary D. LaFree, The Effect of Sexual Stratification by Race on Official Reactions to Rape 45 Am. Soc. Rev. 842, 847-48 (1980) (after accounting for the effects of other variables, rapists (black or white) of black women were penalized less harshly than rapists of white women).

<sup>219</sup> Barbara Hart points out that “[u]nlike other victims of violent crime, battered women are often viewed by the police, the prosecutor, judges, jurors, and probation/parole staff as responsible for the crimes against them—responsible either because battered women are believed to ‘provoke’ the perpetrator into violence or because they are believed to have the power to avoid the criminal assault through accommodating the perpetrator’s demands.” *See* Hart, *supra* note 27, at 626-7; *see also* Rhode, *supra* note 122, at 88.

<sup>220</sup> *See supra* notes 86-87.

<sup>221</sup> *See generally*, Schecter, *supra* note 27, at 271-81. “Speaking of the racism within the battered women’s movement, one white woman says:

Our idea of including women of color was to send out notices. We never came to the business table as equals. Women of color join us on our terms....

Knowing that we grew up in a society permeated with the belief that white values, culture, and lifestyle is superior, we can assume that regardless of our rejection of the concept, we still act out of that socialization. The same anger and frustrations that as women we have in dealing with men whose sexism is subtle, not blatant, is the frustration an anger women of color must feel toward us.

*Id.* at 271 (citation omitted).

domestic problems without such resources, would make it difficult to believe that Nicole could not have dealt with her own situation with greater ease.

In addition there is no confidence in a public outcry for wrongs against women of color as there would be for wrongs against a white woman by a black man. The visceral nature of mainstream white responses to the acquittal of the O.J. criminal trial reaffirms this conceptualization. It is also interesting to note that the same responses did not exist for the acquittals of William Kennedy Smith for the rape of a white woman<sup>222</sup> or of the affluent Claus Von Bulow for the murder of his white wife.<sup>223</sup> The juxtaposition of these responses to cases should at least give us pause.

Even more disturbing are the media choices in which cases are "news," formulating our collective perception of reality for us. In 1990, during the same week as the Central Park rape of a white woman jogger, the rape of a woman of color, who was also sodomized and thrown from the top floor of a four story building, was relegated to the back pages.<sup>224</sup>

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<sup>222</sup> William Kennedy Smith's acquittal was facilitated by the media portrayal of his rape victim as a "bad girl." See *supra* text accompanying notes 77-79. Specifically, Kennedy Smith's attorney's claimed that she had "a troubled background and emotional problems that may have spurred her to fabricate her charge..." William Kennedy Smith's Attorneys Question Alleged Rape Victim/Defense Claims Woman has Troubled Past, and Fabricated the Charges, Baltimore Evening Sun, Oct. 15, 1991, at A3. Charles Lawrence uses a very appropriate metaphor: "The noble's sexual access to the serf's daughter and the lord's dalliance with the downstairs maid are also stories of the rape of powerless women by powerful men, justified by the portrayal of the victim as wanton and unchaste, without any wish, much less any right to say no." Lawrence, *supra* note 158, at 114. "By portraying her as sexually aggressive, the defense transforms her from the white woman on the pedestal to the fallen white woman, no better than the inherently unchaste black woman whose veracity is always questioned." *Id.* at 115.

<sup>223</sup> Claus Von Bulow was accused of twice trying to murder his millionairess wife, Martha "Sunny" Von Bulow, by injecting her with too much insulin in order to inherit her millions. He was convicted in a first trial, which verdict was overturned. He was acquitted in a second trial, due in great measure to the exclusion of evidence permitted in the first trial. See Suit Seeks to Cut Von Bulow From Will, Record, N. N. J., Jul. 21, 1985, at A54. Von Bulow could easily afford such a successful defense.

Perhaps the lack of outrage stems from the power structures inherent in the stereotypic perceptions. White men are supposed to have wealth and power that enable them to succeed, in the justice system or otherwise. Black men are not supposed to challenge white supremacy by having wealth and power, and certainly not by having access to white women, and most importantly, not by having the ability to successfully navigate the justice system.

<sup>224</sup> See Crenshaw, *supra* note 12, at 1268 (discussing the selection of media coverage of the 28 rapes which occurred in the same week as the white jogger by black and Latino males as being premised on race). Sheri Lynn Johnson asks, "why is the Central Park jogger case so much more compelling than the intra racial rape of a poor black woman (also fairly dramatic

### C. Creating New Norms

Stereotypes affects everyone in society: judges, lawyers, jurors, and other citizens who participate in the direction of government and society.<sup>225</sup> Many of the stereotypes that affect individuals have been socially ingrained for generations.<sup>226</sup> This is in part due to the fact that stereotypes are part of our cognitive processes that condition how we understand the normative.<sup>227</sup> Thus, finding concrete ways to counteract the use of stereotype and affect normative applications will be a broad and difficult problem to address. Since providing disconfirming information<sup>228</sup> and leadership<sup>229</sup> are two ways that cognitive psychology literature identifies to combat stereotyping, the legal system, in its capacity for education,<sup>230</sup> and lawyers, in their leadership roles within this system, are the best means of addressing stereotypes as they affects the attainment and perception of justice.

Since stereotype is a fairly broad concept, it is difficult to define and therefore difficult to regulate. As a general matter, stereotype subject to regulation should not be categorically limited, but evaluated according to context. Because of the nature of stereotype, a bright-line approach would be arbitrary. An appropriate gauge in evaluating whether a statement should qualify as regulated stereotype would be the prejudicial nature of the statement under the circumstances.<sup>231</sup> To place limits on the regulated speech, evidence supporting the assertion at issue would serve to refute its identification as stereotype. This limitation might work in the same way that "truth" serves as a defense to a defamatory statement and effectively limits the causes of action brought.

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because her attackers forced her to jump from a twenty-one story building and she survived only because she caught a television cable) that occurred that same year?" *supra* note 76, at 1745, n.16.

<sup>225</sup> See Trope, *supra* note 39, at 133.

<sup>226</sup> Stroeb and Insko, *supra* note 18, at 16.

<sup>227</sup> *Id.* at 5.

<sup>228</sup> See Hewstone, *supra* note 18; Stephan, *supra* note 31.

<sup>229</sup> See Y. Bar-Tal, *supra* note 47, Hewstone, *supra* note 18.

<sup>230</sup> See Amar, *supra* note 115, at 1186-87 (discussing de Tocqueville's concept of the role of the jury as a means of educating citizens on their role in governing).

<sup>231</sup> *Cf. infra* text accompanying note 239.



I will use an example to demonstrate how stereotype should be evaluated: unwed fathers are poor care-takers for young children.<sup>232</sup> As a general proposition, this stereotypic statement is over-broad. It might be statistically accurate<sup>233</sup> that most unwed fathers are inferior care-takers in comparison to unwed mothers or other parents, married or divorced, but would not necessarily apply to an individual within a particular situation.<sup>234</sup> It is quite possible, and known to be true, that some unwed fathers are superior care-takers of their children, raising them as well, if not better than other parents do. Thus, evidence supporting a stereotype is generally not sufficient to rebut the presumption that its use in reference to a particular individual or situation is inappropriate.<sup>235</sup> Thus, my earlier suggestion that evidence supporting an alleged stereotypic statement might serve as a defense to its assertion should only apply to a general statement, never one intended to affect the assessment of an individual.<sup>236</sup> That is not to say that a more *specific* statement of a similar nature would not be accurate. For instance, that father, who happens to be unwed, does not clothe or feed his children, allows his home to remain filthy, and emotionally ignores his children is a poor care-taker of children. In this description, evidence independent of the stereotype or to prove the stereotype is used to demonstrate his unfitness, not his status

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<sup>232</sup>See Stanley v. Illinois, 405 U.S. 645 (1972) (holding that the State cannot merely presume that unwed fathers in general, and petitioner in particular, are unsuitable and neglectful parents).

<sup>233</sup>A high statistical correlation between the alleged characteristic and some conduct might demonstrate a causal relationship and therefore would be probative evidence relevant to an individual situation. If such a causal relationship could be demonstrated, the connection would not be stereotypical. As a general matter, stereotypes, as this article contemplates them, are widely held beliefs without a substantive or provable factual basis. Mere correlation between the alleged characteristic and some conduct would be more speculative than probative and therefore prejudicial.

<sup>234</sup>See *supra* note 232, at 654 (discussing the State's argument that putative fathers are generally disinterested in their illegitimate children and that in most instances the natural father is a stranger to his children).

<sup>235</sup>See *supra* note 232.

<sup>236</sup>Not all general statements are stereotypes, see *supra* note 18. Thus, explanations concerning battered woman syndrome, for example, are not "commonly held, well-learned and established associations among groups that comprise a standardized conception or image invested with special meaning." *Id.* In fact, battered women's syndrome serves to counter the commonly held beliefs about self-defense that usually do not apply to the situation of a battered woman. In addition, its use might be considered a "rationality-enhancing" reference and therefore appropriately asserted. See *infra* text accompanying notes 243-48.

as an unwed father. Only evidence specific to that individual or situation is appropriately used to demonstrate the truth of a situation.

This section endeavors to develop methods within current procedural norms to allow for the acceptance of new norms. Even though one purpose of this article has been to criticize the limitation of normative and standardized approaches, it has not been to advocate the abandonment of our legal culture, but to reform it. Addressing the problems associated with stereotype within current legal norms may be the best way to affect fundamental changes in the most acceptable fashion. Thus, the following proposals are ones that comport with, and explicitly borrow from, current legal procedural norms.

### *1. Rules of Ethics*

Establishing rules of ethics is one way of affecting norms accepted in society. Since the legal system is at the core of our democracy, lawyers should have a high degree of responsibility in effectuating these norms and in our collective perceptions of justice. Limitations on the public use of stereotype by lawyers would have two potentially beneficial effects on the harmful affects of stereotype, both generally in society and specifically within the courtroom. First, the conduct of lawyers, as leaders in society, may constructively affect the conduct and cognitive reception of stereotype by others.<sup>237</sup> Second, even though this may not be a means of actively providing counter-stereotypic information,<sup>238</sup> it would diminish the amount of stereotype-confirming information available in society.

I propose a three tiered-approach to ethics rules concerning stereotype: rules for lawyers actively engaged in litigation; rules for lawyers not actively engaged in a controversy, but relying on their specialized knowledge to comment publicly on the matter; and rules for non-lawyers commenting on a matter in controversy. This tiered approach is intended to address the First Amendment issues necessarily implicated by the restrictions on speech.

Lawyers who are actively engaged in a matter of litigation should not explicitly use stereotypes or stereotypic innuendo concerning the subject matter of, or any of the participants in, that case. Since stereotype is a fairly broad concept, it is difficult to define and therefore difficult to regulate. As a general matter, stereotypes subject to regulation should not be categorically

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<sup>237</sup> See Hewstone, *supra* note 18; Stephan, *supra* note 31; Y. Bar-Tal, *supra* note 47.

<sup>238</sup> *Id.*

limited, but evaluated according to context. Because of the nature of stereotypes, a bright-line approach would be arbitrary. An appropriate gauge in evaluating whether a statement should qualify as a regulated stereotype would be the prejudicial nature of the statement under the circumstances.<sup>239</sup> To limits on regulated speech, evidence supporting the assertion at issue would serve to refute its identification as a stereotype. This limitation might work in the same way that “truth” serves as a defamatory statement and effectively limits the causes of action brought.

Since stereotypes, by their function of avoiding the real situation and obscuring the fact finding process, have a “substantial likelihood of materially prejudicing an adjudicatory proceeding,” such a rule could easily be included within the ambit of Model Rules of Professional Conduct Rule 3.6.<sup>240</sup> The Supreme Court, in Gentile v. State of Nevada,<sup>241</sup> specifically addressing Rule 3.6, held that this standard is a permissible regulation of attorney speech. To the extent that stereotype is prejudicial, regulation of such speech should also be permissible under Rule 3.6 to meet the objective of fair judicial proceedings. Rule 3.6 should be amended to specifically include stereotype as regulated speech.

The most difficult case for regulation is within the second tier, rules for lawyers not actively engaged in the controversy, but relying on their specialized knowledge to comment publicly on the matter. Rule 3.6, as amended in the paragraph above, should apply in this case as well. Objections to extending the rule in this manner will be that these lawyers are acting as private citizens, and perhaps as members of the press, and therefore their speech should be protected and not subject to any exceptions under Gentile. Considering the history of protecting the speech of individuals and most especially that of the press, this is a reasonable argument. Nevertheless, the Court in Gentile determined that the state has an interest in protecting the

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<sup>239</sup> Cf. *infra* text accompanying note 246.

<sup>240</sup> Rule 3.6 provides that lawyers who participate in the litigation of a matter “shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding in the matter.”

<sup>241</sup> 501 U.S. 1030 (1991).

“integrity and fairness”<sup>242</sup> of the justice system and that trial verdicts are to be decided by “impartial jurors.”<sup>243</sup>

Since the objective of preserving the justice system by affecting societal perceptions is an important governmental concern, attorney commentators not directly involved in any controversy should also be included within the above rule. Indeed, the regulations proposed in this section may be easier for lawyers not directly involved in a controversy to follow than those who are. Attorneys who are not actively engaged in the matter of controversy do not have the conflicting obligation of “zealous” representation of their clients,<sup>244</sup> and could therefore focus exclusively on the ideals of justice impartially.

We need to move beyond the exclusively adversarial paradigm for legal interactions. Lawyers need to work toward the reduction of externalities and maximization of social utility within the judicial process. Since lawyers shape the formation and interpretation of the law, they *must* care about justice. In other words, the law’s relationship to justice must not be accidental.

The third tier for consideration is the possible regulation of non-lawyers who engage in commentary concerning litigated matters. It would not be permissible to regulate the speech of non-lawyers in this context. Nonetheless, a voluntary code of ethics,<sup>245</sup> patterned after the above suggestions for attorneys, could effectively meet the objectives of preserving the justice system and perceptions of it. Certainly, if lawyers followed the above rules of ethics, it would be much easier for lay-people to do so as well, both through following example and through available stereotype-free legal information.

## 2. Rules of Evidence

Since litigation is considered the core of the judicial process, rules of evidence may be the most effective means of affecting the impact of stereotype on the judicial process and on perceptions of justice. Rules of

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<sup>242</sup> *Id.* at 1075

<sup>243</sup> *Id.* at 1070.

<sup>244</sup> Both the Code of Professional Conduct and the Model Rules of Professional Responsibility require zealous representation of a client’s interests. See EC 7-1 and Comment, Model Rule 3.1

<sup>245</sup> See generally Chemerinsky and Levenson, *supra* note 117 (providing a more detailed voluntary code of ethics for legal commentators in the media).

evidence directly impact an individual's ability to obtain justice in a particular case by determining both the quality and quantity of the avoiding prejudicial effects on jurors. These rules also have the potential for determining the perceptions of outside observers by curtailing the kinds of information widely available to the public.

As described by Jody Armour, there are two potential uses for stereotype within a judicial proceeding: "rationality-enhancing" and "rationality-subverting" group references.<sup>246</sup> Rationality-subverting references are "group references that exploit, exacerbate, or play on the prevailing stereotypes that fact finders carry with them into the jury box."<sup>247</sup> Rationality-enhancing references are "references that challenge the fact finders to reexamine and resist their discriminatory responses."<sup>248</sup> The Court needs a standard for distinguishing between the two. I suggest that statements, allusions, or inferences that invoke stereotypic images and ideology should be evaluated by the court using the same guidelines as for the admissibility of evidence. The general rule would read:

Although relevant, stereotypic statements, innuendo and allusions may be excluded if their probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.<sup>249</sup>

This standard would allow evaluations of the prejudicial nature of the stereotypic reference, allowing the admission of rationality-enhancing references, while excluding rationality subverting references.

The rule concerning general admissibility might be supplemented with rules modeled after evidence of character. Such a rule might read:

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<sup>246</sup> This terminology was originally coined by Jody Armour to distinguish the potential affects of stereotype on jury proceedings. See Armour, *supra* note 18, at 768.

<sup>247</sup> *Id.* See also Johnson, *supra* note 76 (describing the affects of racial imagery and stereotype in the justice system). This article has focussed almost exclusively on "rationality-subverting" references.

<sup>248</sup> Armour *supra* note 18. Armour uses examples, including a murder trial where Clarence Darrow directly challenges jurors to examine their prejudices by first allowing them to admit they have them, and the fictional trial in the movie Philadelphia where the attorney used anti-gay epithets so that the fact finders were directly confronted with their habitual stereotype congruent responses to gays. See *id.* at 762-3, 769-70.

<sup>249</sup> *Cf.* Federal Rules of Evidence, Rule 403.

Evidence tending to label an individual or influence others to treat them categorically or prove traits that are stereotypic is not admissible for the purpose of proving an action in conformity therewith, except: Evidence or information intended to counteract stereotypic effects for the purpose of evaluating the circumstances of the case at hand within context...<sup>250</sup>

Though an imprecise standard, it would operate with the same effectiveness as the general rule for the admissibility of evidence. Other general rules and protocol would then also apply, including corrective instructions, appeals, and mistrials, where the weight of prejudicial effect would be determinative.

In addition to having the ability to distinguish between rationality-subverting and -enhancing stereotypes, these rules also have the advantage of equitable application. That is, all parties would be subject to the restrictions and would benefit from the enhancement of the justice-seeking process. All members of society, whether in the mainstream or on the margins, would have better perceptions of the justice process. For example, some have suggested that the use of the "race card"<sup>251</sup> by the O.J. defense team precipitated the mainstream backlash against the verdict in the criminal trial and against the efficacy of the jury system as a whole. One view of this might be that the defense team successfully used stereotypes originally meant to oppress him to his advantage.<sup>252</sup>

### 3. *Jury Instructions*

Another opportunity to minimize the harmful affects of stereotypes occurs prior to jury deliberations in the instructions to the jury. As a routine matter, judges should include a statement about stereotypes in their preliminary instructions. A suggested instruction might be:

Ladies and gentlemen, your task is to evaluate this case based on the facts presented, not on your beliefs, assumptions or stereotypes concerning a particular group of people or a particular situation. Only the facts and details, for which you have been presented concrete information, should enter into your evaluations.

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<sup>250</sup> Cf. Federal Rules of Evidence, Rule 404.

<sup>251</sup> The characterization of the L.A.P.D. as racist and discriminatory is not necessarily stereotype since there was evidence both of past practices and of practices in this case.

<sup>252</sup> *But cf. supra* note 118 and accompanying text.

In addition, judges should give more specific instructions tailored to the context of the particular case where obviously needed or as requested by the litigants, keeping in mind the distinctions between rationality-enhancing and rationality-subverting references. An example relevant to the content of this article might include an instruction regarding the nature of abusive relationships as distinguishable from other relationships:

Each of you are engaged in some form of relationship, whether it be with a spouse, partner, sibling, or child. Certainly you should draw upon your own experiences in your deliberations; however, you should be aware that the (prosecution/plaintiff) is arguing that the relationship here is different than other relationships in that it is dependent upon the control of one individual over the actions of the other. The question for you to resolve is not whether there are arguments and disagreements, as there are in most relationships, but whether the manner in which their problems were resolved was appropriate.

Another instruction might address the operation of battered women's syndrome:

Battered women's syndrome, as presented by the defendant in this case, is intended to assist you in determining whether the defendant acted in self-defense. Self defense requires that you find the defendant *reasonably* believed her life was in imminent danger. Your evaluation of the defendant's state of mind is critical to this defense. Evidence of the battered women's syndrome was provided to help you understand whether the defendant's belief was reasonable given her specific circumstances.

The above suggested instructions should only serve as guides. Advocates, in particular, must be vigilant about their use. These instructions, or instructions intended to have a similar affect, are only useful where the jury has already been educated about the relevant stereotypes in the preceding case. In addition, the instructions given must be appropriate for the context of each case and should be tailored specifically for it. For example, as demonstrated in earlier sections of this article, the stereotypes for black women and white women may be different. Also, the instructions should not be so rigid that its

subject will only be addressed if there is a perfect fit.<sup>253</sup> For example, it should not be necessary for a victim of domestic abuse to be diagnosed with battered women's syndrome in order to successfully assert self defense.

These instructions are the last opportunity to influence the perceptions of stereotype by jurors in their deliberations. It is to be hoped that, in combination with the other normative suggestions made above, the harmful affects of stereotype will be minimized, favorably affecting the attainment of justice and society's perceptions of it.

## V. CONCLUSION

During and after the O.J. trials, many commentators discussed, with apparent shock, how racially polarized this nation continues to be. These discussions usually ended with the history of differential experiences in the legal system or the disproportionality of minority representation among the poor. And, in fact, these may be good reasons for such polarization. However, the shock is rather misplaced when the media coverage of events seeks the angle that demonstrates racial difference, using sound bites that perpetuate stereotypic perceptions.<sup>254</sup>

Stereotypes trap their victims in a system of conceptual violence compounding the physical. Every means of accepting or perpetuating a stereotype, evading reality for the sake of convenience, is a form of violence. The means for avoiding complicity in this system of violence, is to seek context, not default understandings; to allow more than one's own perspective to inform our perceptions. Making the effort to see situations as they *really* are and truly hearing the stories of the individuals involved, instead of relying on default assumptions and stereotypes is the first and hardest step in achieving justice.<sup>255</sup>

Conceptualizations that reduce situations and individuals to an abstraction is how we achieve the appearance of objectivity without

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<sup>253</sup> As with stereotype, I believe any rote categorizations should be guarded against.

<sup>254</sup> See FAIR, *supra* note 141.

<sup>255</sup> "Surely, some if not most of those viewers understood that O.J. Simpson was not a typical defendant and that they needed a context within which to understand and to judge what they were seeing. If and when television goes on to provide this context, by attracting similar-sized audiences for the trials of ordinary, indigent defendants, then it will have turned the corner from entertainment toward education." Jeffrey Abramson, The Pros and Cons of Televising Trials, in Postmortem: The O.J. Simpson Case (Jeffrey Abramson ed., 1996).



responsibility for the intendant violence.<sup>256</sup> Dichotomous thinking is a form of abstraction that creates stereotype. Reality is much more complex and deserves a more dynamic approach. We need to approach our norms as being dynamic and allowing context to be the guide. To achieve this objective, education is the method. Lawyers must take a leadership role to educate the citizenry, both in the traditional manner, to the jury, and through the now prevalent means, through the media. This should include broader education concerning the realities of domestic violence, as it exists everyday, not just as a marginal issue in a highly publicized event. It needs to be accomplished through community awareness that only the national media can effectuate. Lawyers and the legal system must be active participants in this education. With greater education, the stereotypes concerning domestic violence and its victims will diminish, according real justice.

Education is also the means to provide for the acceptance of a broader range of perspectives. The ability to accept various perspectives as informed by their respective contexts is important to our system of justice, ensuring sovereignty of the people.<sup>257</sup> It informs the public's perception, and acceptance, of justice, and allows for the meaningful participation of everyone in society, which has always been an integral part of the legitimacy of our justice system and government.

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<sup>256</sup> See *supra* note 35.

<sup>257</sup> See Amar, *supra* note 115, at 1210 (suggesting that, to ensure the sovereignty of the people, the idea of popular education continually resurfaces in the Bill of Rights).