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# Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor

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<sup>1</sup> The phrase “from margin to center” is from BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* (2d ed. 1984). bell hooks explains: “To be in the margin is to be part of the whole but outside the main body . . .” *Id.* at xvi. She continues by addressing feminist theory: “Much feminist theory emerges from privileged women who live at the center, whose perspectives on reality rarely include knowledge and awareness of the lives of women and men who live on the margin.” *Id.* at xvii. I borrow from the title to hook’s

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book to illustrate how domestic violence discourse should change in that women of color should be placed at the center of this discourse.

*Women of all class levels, educational backgrounds, and racial, ethnic and religious groups are battered.*<sup>2</sup>

*[T]he violence that many women experience is often shaped by other dimensions of their identities, such as race and class.*<sup>3</sup>

#### INTRODUCTION

A battered woman's<sup>4</sup> identity has far-reaching implications in the matter of domestic violence. Not only does it impact her particular experience of abuse, but it also affects the kind of assistance she receives, if any, should she seek help. This is especially true if she chooses to utilize the legal system as a means to deal with the abuse. Though the law is supposed to be a central player in stopping domestic violence, it has not proved to be the panacea that had been hoped, particularly for battered women of color.<sup>5</sup> A reason for this is simply that because of

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<sup>2</sup> *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 889 (1992). The United States Supreme Court made this statement based on testimony by numerous expert witnesses, and the district court's detailed findings of fact regarding the effect of a Pennsylvania statute requiring a woman to obtain her husband's permission before getting an abortion. *Id.* at 888-89.

<sup>3</sup> Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991).

<sup>4</sup> I use the term battered woman to mean those women and girls being victimized by intimate violence. This Article specifically focuses on women in heterosexual relationships who are battered by men because although I do acknowledge and understand that men in both same and different sex relationships are abused by their partners and that lesbian and bisexual women are victimized by their female partners as well, in this Article I want to focus on men's violence against women because intimate partner violence is primarily a crime against women. In 2001, women (in heterosexual relationships) accounted for 85% of the victims of intimate partner violence (588,490 total). Family Violence Prevention Fund, *Get the Facts*, <http://endabuse.org/resources/facts/> (last visited Oct. 28, 2005) (citing BUREAU OF JUST. STATS., CRIME DATA BRIEF, INTIMATE PARTNER VIOLENCE, 1993-2001 (2003), and U.S. DEP'T OF JUST., VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS (1998)). In addition, as I have written in a previous article, I believe that all domestic violence is gender-based violence; therefore this analysis applies in same-sex domestic violence and domestic violence where men are victimized by their female intimates. Adele M. Morrison, *Queering Domestic Violence to "Straighten Out" Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law's Conventional Responses to Domestic Violence*, 13 S. CAL. REV. L. & WOMEN'S STUD. 81 (2003).

<sup>5</sup> Partners, spouses and family members are still being abused at an alarming rate. Estimates range from 960,000 incidents of violence against a current or former spouse, boyfriend, or girlfriend per year to three million women who are physically abused by their husband or boyfriend per year. Family Violence Prevention Fund, *supra* note 4 (citing

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U.S. DEP'T OF JUST., VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS (1998), and THE COMMONWEALTH FUND, HEALTH CONCERNS ACROSS A WOMAN'S LIFESPAN: 1998 SURVEY OF WOMEN'S HEALTH (1999)).

The limited statistics on violence within communities of color indicate that women of color suffer from abuse equal to, or more than, that of white women.

Forty-eight percent of Latinas in one study reported that they experienced an increase in domestic violence since they immigrated to the United States. Mary Ann Dutton, Leslye E. Orloff & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Services Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 250 (2000).

Eugenio Arene, *Domestic Violence and Latina/os in DC*, DC NORTH 26-27 (2003), <http://www.consejo.org/pdf/Mar%202003%20Domestic%20Violence.pdf> (last visited Oct. 28, 2005). The Violence Policy Center found that Hispanic women in intimate relationships suffer the highest rate of domestic violence — 181 per 1,000 couples. *Id.* at 26 (citing VIOLENCE POLICY CTR., *HISPANICS AND FIREARMS VIOLENCE* (2001)). The Center compared that with white women who had a domestic violence rate of 117 per 1,000, and Black women who had a rate of 166 per 1,000. *Id.* In contrast, a Bureau of Justice Statistics' National Crime Victimization Survey suggests that no significant difference in intimate partner victimization among Hispanic and non-Hispanic women exists. *Id.* (citing BUREAU OF JUST. STATS., *NATIONAL CRIME VICTIMIZATION STUDY* (2000)).

One study found that American Indian/Alaska Native women and men report more intimate partner violence than do women and men of other racial backgrounds. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUST., *EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 56* (2000), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/181867.htm> (last visited Nov. 1, 2005). In addition, the study found that Hispanic women are more likely than non-Hispanic women to report instances of intimate partner rape. *Id.*

The Family Violence Prevention Fund produces a fact site entitled, "Get the Facts — Domestic Violence and Asian Pacific Islander Communities," <http://endabuse.org/programs/display.php3?DocID=194> (last visited Nov. 6, 2005). According to this site, Santa Clara County, California is comprised of 17.5% Asian Pacific Islanders ("API"). *Id.* (citing SANTA CLARA COUNTY DEATH REVIEW SUB-COMM. OF THE DOMESTIC VIOLENCE COUNCIL, *FINAL REPORT* (1997)). Almost one-third of the 51 deaths that occurred in Santa Clara between 1994 and 1997 due to domestic violence were among Asian women, the most cases of any ethnic group. *Id.* A survey of 150 Korean women in Chicago found that 60% reported physical abuse. *Id.* (citing Miriam Ching Louie, *Hope for Battered Asians*, NEW DIRECTIONS FOR WOMEN (Mar./Apr. 1997)). Asians in Massachusetts represented 13% of women and children killed due to domestic violence in 1991, but only accounted for 2.4% of the population that year. *Id.* (citing Virginia Huie, *BOSTON HERALD*, Aug. 8, 1993). In addition, a focus group of Southeast Asian Chinese estimated that 20-30% of Chinese husbands hit their wives. *Id.* (citing Christine Ho, *An Analysis of Domestic Violence in Asian American Communities: A Multicultural Approach to Counseling*, WOMEN & THERAPY, 9(1-2): 129-150 (1990)).

Finally, the Family Violence Prevention Fund has produced a handout directed at African American men entitled *It's Your Business*, available at <http://endabuse.org/programs/printable/display.php3?DocID=19> (last visited Nov. 1, 2005). The organization makes the following statement:

Domestic violence is a serious problem affecting all racial and ethnic groups - and the African American community is no exception. Nationwide, about one in

racial privilege, the law better serves white women than women of color. This is not to say that white women are perfectly served, or even well served, by domestic violence law, but that women of color are disserved, or even harmed, by the current legal system.

A number of scholars have critically theorized about the impact of gender and sexism in combination with race and racism on issues dealing with domestic violence.<sup>6</sup> They have each concluded that

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four women of all races and social backgrounds have been battered by their husbands and boyfriends at some point in their lives. Many of these women are African American. A New York City study of female homicides between 1990 and 1994 found that 52% of the victims were African American in a city that is only 25% Black. In Philadelphia, 60% of the violence-related injuries for which African American women sought emergency room care were inflicted by their husbands and boyfriends. Clearly, violence against Black women has become an epidemic. Domestic violence is taking the lives of women and children, destroying families, emotionally damaging the children who witness it, increasing the number of Black men in jail, and contributing to substance abuse and homelessness.

*Id.*

<sup>6</sup> See, e.g., Crenshaw, *supra* note 3 (beginning the articulation of intersectionality, a foundational theory of Critical Race Theory and Critical Race Feminism). Crenshaw writes of the problem with essentializing identity within the context of domestic violence. "Identity politics," she says, "[f]requently conflates or ignores intragroup differences." *Id.* at 1242. She further states, "[i]n the context of violence against women, this elision of difference in identity politics is problematic, fundamentally because the violence that many women experience is often shaped by other dimensions of their identities such as race and class." *Id.* Other scholars followed Crenshaw's critical-race-feminist-legal-theory lead. See, e.g., BETH RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* (1996) (presenting a feminist analysis of the ways incarcerated Black women have been victimized by gender, race oppression and male violence); Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003 (1995) (writing about Black women, racial imagery and use of battered woman syndrome testimony; asking question of whether it is a useful tool or a hindrance); Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navaho Peacemaking*, 47 UCLA L. REV. 1 (1999) (writing about culturally specific methods used to intervene in domestic violence cases in Navajo Nation); Michelle Decasas, Comment, *Protecting Hispanic Women: The Inadequacy of Domestic Violence Policy*, 24 CHICANO-LATINO L. REV. 56 (2003) (addressing Hispanic communities; writing of ineffectiveness of current domestic violence law and policy to address intimate homicide among that population); Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1 (1998) (specifically addressing racialization of gender stereotypes in violence against women); Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 (1994) (giving Lat-critical analysis of domestic violence in Latino/Latina communities and addressing issues of ethnic and racial stereotyping limiting access); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the Cultural Defense*, 17 HARV. WOMEN'S L.J. 57 (1994) (addressing different aspects of cultural defense and issues of race, ethnicity and immigration, specifically among Asians and Asian

battered women of color who live at the “intersections”<sup>7</sup> of gender and race oppression are more likely than white women to be entrapped in the cycle of abuse.<sup>8</sup> This Article is grounded in the critical race feminist theory<sup>9</sup> used by other scholars, as well as discourse analysis<sup>10</sup>

Americans).

<sup>7</sup> Crenshaw, *supra* note 3, at 1244, 1244 n.9. Crenshaw writes about what has become known as intersectionality theory, explaining its limitations but also its uses: “I should say at the outset that intersectionality is not being offered here as some new, totalizing theory of identity. Nor do I mean to suggest that violence against women of color can be explained only through the specific frameworks of race and gender considered here.” *Id.* at 1244. She goes on in the note to specifically use the term “intersections” in the way I use it here and throughout this Article. *Id.* at 1244 n.9. Crenshaw notes:

I consider intersectionality a provisional concept linking contemporary politics with postmodern theory. In mapping the intersections of race and gender, the concept does engage dominant assumptions that race and gender are essentially separate categories. By tracing the categories to their intersections, I hope to suggest a methodology that will ultimately disrupt the tendencies to see race and gender as exclusive or separable. While the primary intersections that I explore here are between race and gender, the concept can and should be expanded by factoring in issues such as class, sexual orientation, age, and color.

*Id.*

<sup>8</sup> RICHIE, *supra* note 6, at 69-100 (discussing how Black women can end up “trapped by violence” in their adult intimate relationships); Sally J. Scholz, *Moral Implications of the Battered Woman Syndrome*, PAIDEIA ARCHIVE (1998), available at <http://www.bu.edu/wcp/Papers/Soci/SociScho.htm> (last visited Nov. 2, 2005). Sholtz summarizes the Cycle Theory of Violence as follows:

The Cycle Theory of Violence, articulated by Lenore Walker . . . says that abuse tends to occur according to a particular pattern. There are three basic stages to this pattern. The first stage is characterized by tension between the pair. During this tension building stage, relatively minor incidents increase the tension in the relationship and culminate in the eruption of violence. The next stage in the cycle of violence is the violent incident. The violence may be short lived or last for a few days. Often it is at this stage that police are notified or legal proceedings begun. The third stage is referred to as the “honeymoon” or “loving contrition” stage. During this time, the abuser is often very loving and remorseful. Promises are made by the batterer that he will not violently abuse the woman again. This stage reinforces the woman’s hope that the relationship will get better or is at least salvageable. Since there is a sincere belief that the violence in the relationship has ended, civil and criminal legal proceedings may be dropped or otherwise aborted. The cycle repeats itself and violence becomes more intense, the tension building stage lengthens, and the honeymoon stage decreases or disappears entirely.

*Id.*

<sup>9</sup> Adriene Katherine Wing, *Critical Race Feminism and the International Human Rights of Women in Bosnia, Palestine, and South Africa: Issues for LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 337, 341 (1997) (explaining and defining Critical Race Feminism). Wing writes:

contextualized with cultural theory.<sup>11</sup> I place women of color at the center of domestic violence discourse analysis.<sup>12</sup>

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Jurisprudentially, C[ritical] R[ace] F[eminism] has much in common with Critical Race theory. It regards racism as an ordinary and fundamental part of American society, rather than an aberration. It utilizes the well-known narrative technique to construct alternative visions of reality and identity. CRF also adopts feminist notions focusing on the oppressed status of women within society. CRF adds to Critical Race theory and feminism by placing women of color at the center, rather than in the margins or footnotes, of the analysis. It attacks the notion of the essential woman, i.e., white middle class, and explores the lives of those facing multiple discrimination on the basis of their race, gender, and class, thereby revealing how all of these factors interact within a system of white male patriarchy and racist oppression. It seeks to explore and celebrate the differences and diversity within women of color and to articulate how the law might improve their status. Thus, while CRF is concerned with theoretical frameworks, it is very much centered on praxis and attempts to identify ways to empower women through law and other disciplines.

*Id.* (citations omitted).

<sup>10</sup> See MAGGIE HUMM, *THE DICTIONARY OF FEMINIST THEORY* 67 (2d ed. 1995) (explaining the Michel Foucault description of discourse analysis as “the investigation of the power structures and assumptions underpinning particular language practices . . .”). I am relying on the Foucaultian construction of discourse from MICHEL FOUCAULT, *A HISTORY OF SEXUALITY: AN INTRODUCTION VOLUME I* (1978) that is well summarized for the purposes of this Article by Nahda Y. Sh’hada, *Gender and Politics in Palestine: Discourse Analysis of the Palestinian Authority & Islamists*, 11 U. MIAMI INT’L & COMP. L. REV. 3, 17-18 (2003). Sh’hada writes:

Discourse is a comprehensive tool for examining the meanings underlying the actions and statements of various actors as well as the institutions and structures of which they are a part. . . . Unlike structuralists, who understand discourse as the study of smaller bits of language such as sounds, parts of words, meanings, and the order of the words, Foucault considers it as having more than linguistic meaning. “It is material in the sense that it is located in institutions and practices which define difference and shape the material world, including bodies.”

*Id.* (citation omitted). Thus, social meanings are produced within social institutions and practices in everyday life. *Id.* at 18 (citing C. WEEDON, *FEMINIST PRACTICE AND POSTSTRUCTURALIST THEORY* 25 (1987)). “We learn how to think and behave through discursive practices, which shape our bodies, minds, and emotions.” *Id.*; see also Frank Rudy Cooper, *Understanding “Depolicing”: Symbiosis Theory and Critical Cultural Theory*, 71 UMKC L. REV. 355, 373 (2003) (breaking down discourse to its most fundamental in context of power relations). Cooper writes: “A discourse is the means by which individuals or groups convince others to consent to a certain ordering of society.” *Id.*

<sup>11</sup> See Cooper, *supra* note 10, at 355-56 (“Cultural studies can help us understand that where [context] law operates is crucial to both how it operates, and on whom . . .”). Cooper states that “[t]o understand the difference context makes, we must use cultural studies to analyze how discourses were constructed and translated into practices in particular contexts.” *Id.* at 356 (citations omitted).

<sup>12</sup> See Elizabeth M. Iglesias, *Out of the Shadow: Marking Intersections in and Between*

A major factor in the legal system's underserving battered women of color is the discourse about domestic violence. Domestic violence legal discourse is racialized as white and thus fails to adequately respond to the needs of women of color who are victimized by intimate abuse.<sup>13</sup> Legal discourse racialized as white is not unique to domestic violence.<sup>14</sup> Though counter discourses have been constructed, they are responses to

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*Asian Pacific American Critical Legal Scholarship and Latina/o Critical Legal Theory*, 19 B.C. THIRD WORLD L.J. 349, 354 (1998) (discussing "calls to center Latinas/os and/or center 'the immigrant,'" and noting that "earlier calls to center 'women of color' [as] reflect[ing] affirmative efforts to construct an anti-subordination theory and praxis beyond essentialism that has thus far prioritized the racial fault-line between Black and white Americans at the expense of more expansive anti-subordination agendas and more inclusive coalition politics"). The earlier calls Iglesias may be referring to go back to the Third National Conference on Women of Color and the Law whose theme was "Women of Color at the Center." Selected articles were published in the *Stanford Law Review*. See 43 STAN. L. REV. 1175-1368 (1993). Many of the essays and articles reflected on the theme and discussed women of color "at the center" of the law. *Id.*

<sup>13</sup> See *infra* notes 54-58 and accompanying text (explaining that by racialized white, I mean that discourse is both constructed and responded to as if only the dominant culture was involved).

<sup>14</sup> See IAN F. HANEY-LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 111 (1996) ("Races are social products. It follows that legal institutions and practices, as essential components of our highly legalized society, have had a hand in the construction of race."). The law has a hand in constructing race and as Critical Race Theory ("CRT") argues, the dominant race is white. *Id.*; see Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 WASH. & LEE L. REV. 1485, 1486-87 (2004) ("Although CRT does not employ a single methodology, it seeks to highlight the ways in which the law is not neutral and objective, but designed to support White supremacy and the subordination of people of color."). According to Brown, "One of CRT's central tenets is the pervasiveness of racism in American society. At its core, CRT accepts the notion that even in the twenty-first century, if you are a person of color in America, you are the victim of racial subordination." *Id.* (citations omitted).

The analysis and exploration of white racialized law and legal discourse is the baliwick of CRT in which this Article is firmly grounded. See Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025, 1058 (2003) (succinctly explaining work of Critical Race Theory). Houh states:

First, critical race theory seeks to expose the entrenchment of White supremacy and the reality of the continued subordination of people of color in the United States (and throughout the world), and to unravel its relationship with the rule of law. More specifically, race crits examine how racial power constitutes and reproduces itself through the apparatuses of law and culture. Second, race crits are not satisfied with merely naming and understanding their observations and discoveries; they also are committed to transforming the relationship between law and hegemonic racial power in order to destabilize that power.

*Id.* (citations omitted).



the dominant legal discourse.<sup>15</sup> At its core, dominant legal discourse in the United States is white. It is constructed by, for and about whiteness.<sup>16</sup> Current domestic violence discourse was initially constructed as counter to the dominant; meaning that it was fundamentally feminist and challenged the patriarchy.<sup>17</sup> This male dominated discourse at least accepted and even condoned the abusive behaviors of men towards their wives and other female intimates.<sup>18</sup> Still, this feminist domestic violence construction was racialized white, meaning it was by, for, and about white women.<sup>19</sup>

This Article explores the way whiteness, as a hegemonic force, permeates domestic violence legal discourse to the detriment of all victims of intimate abuse, but particularly battered women of color. The racial vulnerability of battered women of color makes it harder for them to escape victimization at the hands of their male abusers because they are excluded from the domestic violence discourse. They are excluded because it is a white discourse.<sup>20</sup>

Even though the legal system has a particularly negative impact on women of color, the system currently fails not only them but white battered women as well. It holds all women back in their efforts to transition from victim to survivor by exerting complete control over the essential elements of domestic violence legal discourse: identity, process, and practice. This racialized dominant discourse results in a “white” approach to anti-domestic violence work.<sup>21</sup> This Article’s call is to move from a “white” approach to domestic violence intervention to a multi-cultural one.<sup>22</sup>

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<sup>15</sup> Cooper, *supra* note 10, at 374 (discussing counter-discourses as those that emerge from audiences decoding previous discourse).

<sup>16</sup> See *supra* note 14 (explaining that law has a hand in constructing race and dominant race is white).

<sup>17</sup> See, e.g., ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 20 (2000) (“Domestic violence was seen as part of the larger problem of patriarchy within the marital relationship.”).

<sup>18</sup> See *infra* Part I.A (discussing dominant domestic violence discourse prior to domestic violence movement).

<sup>19</sup> See *infra* Part I.B (regarding feminist construction of white domestic violence discourse).

<sup>20</sup> See discussion *infra* Part I.B (regarding white discourse).

<sup>21</sup> See discussion *infra* Part I.B (regarding elements of domestic violence legal discourse).

<sup>22</sup> I hyphenate multi-cultural, rather than write it as one word, because I mean to set off the prefix multi (meaning many) from the adjective cultural (meaning of or related to culture: “These patterns, traits, and products considered as the expression of a particular

There are three interconnected elements designed to intervene in and end violence in women's lives. They include: 1) the identity of the battered woman, which is a type of victim identity;<sup>23</sup> 2) the process by which one moves out of victim status, which I call the empowerment continuum;<sup>24</sup> and 3) domestic violence legal practice<sup>25</sup> under both state and federal law.<sup>26</sup> White racialization of these three essential elements, though harmful to all battered women, is especially detrimental to women of color. A shift from a white-dominated approach to one that is multi-cultural would result in improved and ultimately more effective legal remedies because the identity of the battered woman will change, the process — the empowerment continuum —<sup>27</sup> will work, and the domestic violence legal practice will meet its goals.

This Article addresses the interconnectedness of the battered woman's identity as white victim, the racialized empowerment continuum,<sup>28</sup> the use of the victim in legal practice, and how each impacts women, particularly women of color, seeking to escape the abuse in their lives.

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period, class, community, or population." See YAHOO! EDUCATION, DICTIONARY, <http://education.yahoo.com/reference/dictionary/entry/culture> (last visited Nov. 2, 2005). I hyphenate "multi-cultural" because I intend the word to simply mean many cultures. However, other scholars, addressing debates about multi-culturalism as a philosophy, educational methodology or ideology do not hyphenate. See, e.g., Linda S. Greene, *Multiculturalism as Metaphor*, 41 DEPAUL L. REV. 1173 (1992); Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?* 70 N.Y.U. L. REV. 36 (1995); Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001). Though a truly multi-cultural approach includes all genders and the myriad of other cultural identities, to have that discussion is beyond the scope of this Article. Thus, the focus here is on issues of race and white women and women of color.

<sup>23</sup> See *infra* Parts I.B.1, II.B.1 for a discussion of the battered woman identity.

<sup>24</sup> See *infra* Parts I.B.2, II.B.2 for a discussion of the empowerment continuum.

<sup>25</sup> See *infra* Parts I.B.3, II.B.3 for a discussion of domestic violence legal practice.

<sup>26</sup> All 50 states have domestic violence statutes. See FREDRICA L. LEHRMAN, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE 6-2 to -3 (1997); NANCY MCKENNA, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE: 2005 CUMULATIVE SUPPLEMENT 223-25 (2005) (citing to domestic violence arrest laws). For a table of state "Civil Protection Order" statutes, see LEHRMAN, *supra*, at 4-45 to -106, and MCKENNA, *supra*, at 139-98. The federal government has also enacted provisions to protect victims of domestic violence. See Federal Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103-322, 108 Stat 1796 (2000). *But see* United States v. Morrison, 529 U.S. 598 (2000) (holding that Congress was not authorized to enact civil remedies provision in VAWA under Commerce Clause).

<sup>27</sup> The empowerment continuum is essentially the process by which a woman moves from victim to survivor. See *infra* Part I.B.2 for a more detailed discussion of the empowerment continuum.

<sup>28</sup> Though as I argue, it is really a dis-empowerment continuum for women of color. See *infra* Part I.B.2.

Part I first explains the history and meaning of a racialized domestic violence legal discourse and then discusses the construction and racialization of the three discursive elements: identity, process, and practice. The discussion begins by analyzing the battered woman as an identity and exploring how it is racialized as white. It then describes the empowerment continuum, which is the process by which one moves from being a domestic violence victim to being a domestic violence survivor, and shows how the law interrupts that process to the detriment of women of color. Third, this section specifically addresses legal practice, briefly exploring the structure, substance and procedure of domestic violence law. Using orders of protection as an example, Part I closes by explaining how this practice itself is raced white and how it utilizes the white victim identity and empowerment continuum to underserve women of color.

Part II tackles changing the discourse. This part begins by explaining who might take on this task and by addressing why it might succeed. Then, using critical theories,<sup>29</sup> Part II explains how the three elements of identity, process, and practice can be reconstructed to change the current discourse, effectively making it less white-focused and more multicultural.

#### I. CONSTRUCTING DOMESTIC VIOLENCE LEGAL DISCOURSE: RACIALIZING IDENTITY, PROCESS, AND PRACTICE

Domestic violence legal discourse consists of and constructs the relationship between the reality of the lives of women living with abuse, the legal and non-legal language (in the broadest sense of the word) about these women, and domestic violence in general.<sup>30</sup> The purposes of domestic violence laws are to help those being victimized by intimate abuse to escape the abuse, to hold the abuser accountable for his actions, and to convey the message that the state forbids committing violence against intimates under penalty of civil and criminal sanction.<sup>31</sup> Though

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<sup>29</sup> Though this Article is broadly grounded in critical race feminist theory, as defined in *supra* note 9, I specifically look to Derrick Bell's Critical Race Theory principle of "interest convergence" and Nancy Ehrenreich's "symbiosis theory." See *infra* Part II.C; *infra* notes 220-21.

<sup>30</sup> See *infra* Part I (defining "discourse").

<sup>31</sup> See, e.g., 750 ILL. COMP. STAT. 60/102 (1)-(6) (2005):

Purposes; rules of construction. This Act shall be liberally construed and applied to promote its underlying purposes, which are to:

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the law articulates multi-racial inclusivity, it is systemically single-race focused. In other words, the discursive context of the legal system existing to fight domestic violence — as influenced by the battered women’s movement — talks a racial inclusivity talk, but walks an exclusively white walk.<sup>32</sup> This racial exclusivity works against battered women of color because they are not afforded the same access to any of the discursive elements as white women. This limited access to identity, process and practice disserves women of color, and may even harm

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(1) Recognize domestic violence as a serious crime against the individual and society which produces family disharmony in thousands of Illinois families, promotes a pattern of escalating violence which frequently culminates in intra-family homicide, and creates an emotional atmosphere that is not conducive to healthy childhood development;

(2) Recognize domestic violence against high risk adults with disabilities, who are particularly vulnerable due to impairments in ability to seek or obtain protection, as a serious problem which takes on many forms, including physical abuse, sexual abuse, neglect, and exploitation, and facilitate accessibility of remedies under the Act in order to provide immediate and effective assistance and protection.

(3) Recognize that the legal system has ineffectively dealt with family violence in the past, allowing abusers to escape effective prosecution or financial liability, and has not adequately acknowledged the criminal nature of domestic violence; that, although many laws have changed, in practice there is still widespread failure to appropriately protect and assist victims;

(4) Support the efforts of victims of domestic violence to avoid further abuse by promptly entering and diligently enforcing court orders which prohibit abuse and, when necessary, reduce the abuser’s access to the victim and address any related issues of child custody and economic support, so that victims are not trapped in abusive situations by fear of retaliation, loss of a child, financial dependence, or loss of accessible housing or services;

(5) Clarify the responsibilities and support the efforts of law enforcement officers to provide immediate, effective assistance and protection for victims of domestic violence, recognizing that law enforcement officers often become the secondary victims of domestic violence, as evidenced by the high rates of police injuries and deaths that occur in response to domestic violence calls; and

(6) Expand the civil and criminal remedies for victims of domestic violence; including, when necessary, the remedies which effect physical separation of the parties to prevent further abuse.

*Id.*

<sup>32</sup> See *infra* Part I.B.1 (discussing victim identity as being white identity); Part I.B.2 (discussing empowerment continuum as dis-empowerment continuum for women of color); Part I.B.3 (discussing domestic violence legal practice and how “necessary victim” is white woman).

them. This part begins by discussing the construction of domestic violence legal discourse. It then provides an explanation of each of the discursive elements — identity, process and practice — and how each is racialized as white.

A. *Domestic Violence and the Law: (Dis)Course and How It Got Here*

The reason a domestic violence discourse exists at all is due to the fact that the battered women's movement successfully convinced social institutions, and society as a whole, that it is wrong for a person to abuse an intimate. The legal system was one of those social institutions.<sup>33</sup> All 50 states, the District of Columbia and the Federal Government have laws criminalizing domestic violence and providing for civil remedies to protect those being victimized.<sup>34</sup>

Looking back a mere thirty years, one would be hard-pressed to find any laws that mention domestic violence.<sup>35</sup> The language of the discourse before the 1970s, if there were any words at all about the issue of violence in the home, may have been only whispers between the closest of female friends who changed the subject if the topic came up in public.<sup>36</sup> This discourse was about women keeping silent, men's denial, and the social status quo. There was no language; there were no words to describe who the person was that came to church wearing a long sleeved dress and tights in the middle of a hot summer.<sup>37</sup> There was no

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<sup>33</sup> See generally SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* (1982) (chronicling early years of battered women's movement, including changes that have taken place in legal system's response to battered women and issue of domestic violence).

<sup>34</sup> See *supra* note 26 for cites to state and federal law.

<sup>35</sup> See SCHNEIDER, *supra* note 17, at 13-20 (2000) (discussing history of ways legal system addressed domestic violence); Cheryl Ward Smith, "The Rule of Thumb," *A Historic Perspective?*, 1 FOCUS, Apr. 1988, reprinted in NANCY LEMON, *DOMESTIC VIOLENCE LAW* 1-2 (2001) (discussing "rule of thumb"); Virginia H. Murray, *A Comparative Survey of the Historic Civil, Common, and American Indian Tribal Law Responses to Domestic Violence*, 23 OKLA. CITY U. L. REV. 433, 435-43 (1998), reprinted in *DOMESTIC VIOLENCE LAW*, *supra*, at 2-3 (2001) (reviewing Judeo-Christian, Roman, English Common Law, and early American legal responses to domestic violence).

<sup>36</sup> See DEL MARTIN, *BATTERED WIVES*, at xiii-xiv (1976) (discussing "tacit acceptance" of "marital violence" and lack of public and private discourse on issue in early-to-mid 1970s); see also DENISE KINDSCHI GOSSELIN, *HEAVY HANDS: AN INTRODUCTION TO THE CRIMES OF FAMILY VIOLENCE* 38 (2d ed. 2003) (discussing that prior to 1970s, "[t]he dominant view held that marital violence was a 'private affair'").

<sup>37</sup> See *supra* note 36.

process to leave home; women just stayed.<sup>38</sup> Further, there were no laws specifically addressing this situation, except those laid down by the “man of the house.”<sup>39</sup>

Then things began to change. Women began to talk, to tell their stories, to speak up. Other women began to help. The anti-rape movement began to identify a need to help women who were physically injured, but who had not been raped. Many of these women had been hurt by their husbands and needed a safe place to stay. A safe-house network sprang up. Women spoke of their experiences in consciousness-raising groups,<sup>40</sup> finding commonality with other women who were regularly belittled, intimidated, threatened and battered. Initially, only a few women spoke, followed by more and more, and thus a movement was born.<sup>41</sup> The “Battered Women’s Movement” began to construct and control the discourse around the issue. The general responses to the topic of battered women were to deny there even being a problem or to refuse to engage on the issue at all.<sup>42</sup> But women kept speaking, writing, protesting and lobbying. Feminist academics and advocates, articulating that, “the personal is political,”<sup>43</sup> began theorizing about woman

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<sup>38</sup> See SCHECHTER, *supra* note 33, at 11 (noting that first battered women’s shelter opened in Minneapolis-St. Paul, Minnesota in 1974).

<sup>39</sup> MARTIN, *supra* note 36, at 87 (stating that there is an: “[A]mbigu[ity of the law] when the parties involved are husband and wife. . . . The sanctity of the family home pervades the world of law enforcement. A man’s home is his castle, and police, district attorneys, and judges hesitate to interfere with what goes on behind that tightly closed door.”).

<sup>40</sup> HUMM, *supra* note 10, at 46 (defining consciousness-raising as: “Beginning in the 1960s small, grassroots groups of women shared personal experiences and realised [sic] that individual experiences fitted into a general structure of common oppressions: that the personal *was* political.”).

<sup>41</sup> See SCHECHTER, *supra* note 33, at 53-79.

<sup>42</sup> See MARTIN *supra* note 36, at xiv (discussing how when one would raise the topic of: “[B]attered wives, [people] swiftly changed the subject or twisted it around to a safer, more socially acceptable topic — child abuse. Men put up their guard at the mention of battered wives . . . . Women, too, were reticent about discussing the issue.”). *But see* SCHECHTER *supra* note 33, at 75 (“Generalizing about agency and governmental responses to the battered women’s movement is difficult. In some locations, agencies . . . were extremely helpful; in others, similar agencies turned their backs or actively set up barriers . . . .”). Though, giving an example of how the battered women’s movement constructed and controlled a new domestic violence discourse, Schechter notes that responses to the battered women’s movement itself were mixed prior to “the 1970s, [when] feminists, community activists and former battered women increasingly responded in a new way, providing emotional support, refuge and a new definition of ‘the problem’ [of domestic violence].” *Id.* at 56.

<sup>43</sup> HUMM, *supra* note 10, at 204 (stating that phrase was first coined by Carol Hanisch, and published in *Notes for the Second Year* (1970)). The phrase “the personal is political”

battering, and developing models to help women escape the abuse. A shelter movement was born.<sup>44</sup> Service providing models and training tools were developed. Politicians began to take notice of the protests and respond to lobbying by introducing and ultimately passing resolutions and legislation to address the issue.<sup>45</sup> This was organized and guided by women. Ultimately, all of society was engaged in a domestic violence discourse that had been constructed by feminists — white feminists.

### B. Elements of Discursive Construction

Out of this discourse there developed an identity of the battered woman. There also developed a process, what I call the “empowerment continuum.”<sup>46</sup> Eventually, domestic violence law and legal practice emerged, which included restraining orders. Each of these tells its own story about domestic violence. Each element makes up the greater narrative of what we now know as domestic violence. Each woman’s face or name that is associated with intimate partner violence — Hedda Nussbaum,<sup>47</sup> Nicole Brown Simpson,<sup>48</sup> Sheila Hollabaugh,<sup>49</sup> for example

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became the main slogan of second wave feminism. *Id.* “Radical feminism used the slogan to argue that distinctions between the personal and the public realms are fallacious. . . . In addition, radical feminism argues that women’s personal experience, revealed in consciousness-raising groups, could provide the inspiration and basis for a new politics.” *Id.*

<sup>44</sup> See SCHECHTER, *supra* note 33, at 58-68 (discussing “shelter life” and “shelter philosophy and structure”).

<sup>45</sup> See *id.* at 126-27 (discussing failure of local grassroots efforts, but specifically stating: “In November 1976, the New York City Council passed resolution 491. . . . [T]his document urged city agencies to make concrete plans for providing specialized assistance to battered women.”) (citation omitted); see also Eve S. Buzawa & Carl G. Buzawa, *Introduction to DO ARRESTS AND RESTRAINING ORDERS WORK?* 1, 5 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (“From the late 1970s to date, an almost unprecedented wave of statutory change sought to alter official reaction to domestic violence. During this time, all states have enacted legislation designed to modify official behavior.”). Legislation designed to modify domestic violence behavior is often the result of the interplay of pressure from feminist groups, actions of concerned legislators, and professionals in the criminal justice system. *Id.* It has “markedly changed the underlying legal philosophy toward this problem.” *Id.*

<sup>46</sup> See *infra* Part I.B.2 (discussing empowerment continuum).

<sup>47</sup> See Mark Gado, *Hedda, the Battered Spouse*, CRIME LIBRARY, [http://www.crimelibrary.com/notorious\\_murders/family/lisa\\_steinberg/3.html?sect=12](http://www.crimelibrary.com/notorious_murders/family/lisa_steinberg/3.html?sect=12) / (last visited Nov. 1, 2005).

<sup>48</sup> Wikipedia, *Nicole Brown Simpson*, [http://en.wikipedia.org/wiki/Nicole\\_Brown\\_Simpson](http://en.wikipedia.org/wiki/Nicole_Brown_Simpson) (last visited Nov. 1, 2005) (“Nicole Brown Simpson . . . was murdered at her home in Los Angeles, California. Her murder (along with the murder of fellow victim Ronald Goldman on that same night) was notable because Simpson was the ex-wife of American football player O.J. Simpson. O.J. Simpson was criminally indicted for the Nicole and

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— constructs the identity of the battered woman, which helps construct the process and the practice of the law. Each of these particular faces is that of a white woman who only gained notoriety because of her association with domestic violence and the legal system, which helps to construct the face in the public eye.<sup>50</sup>

The white battered woman identity, the white-focused empowerment continuum and the white-dominated legal practice are the elements that construct a legal discourse. This legal discourse renders women of color invisible, and subjects victims of domestic violence who are not white to further abuse within a system purporting to exist to help them. Legal discourse includes language written in statutes and spoken in courtrooms, visual images and iconography, and the behavior of those involved with the system. Domestic violence legal discourse has all of these integrants contained within the three essential elements of identity, process and practice.

Each of these essential elements is interdependent and intertextual; they respond to and rely on each other. The identity is an essential part of moving along the empowerment continuum, going from victim to survivor. Naming and claiming the battered woman identity is one of the first markers of active engagement in the process. Another marker is the utilization of the legal system. Protective orders are a major component of the domestic violence legal process.<sup>51</sup> Obtaining an order of protection has become so much a part of the process that law school

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Goldman murders, tried and acquitted in a highly controversial verdict. In a subsequent civil trial, he was found financially liable for their deaths.”).

<sup>49</sup> Mother of Laura Hobbs, whom Jerry Hobbs is accused of killing in Zion, Illinois, in May 2005. There had been a history of complaints to child welfare organizations and court proceedings involving allegations of domestic violence against him. See Susan Kuczka, *Father Accused of Killing Daughter, Her Friend Pleads Not Guilty*, CHI. TRIB., June 9, 2005.

<sup>50</sup> The face in the public eye is white for two main reasons: 1) as Elizabeth M. Schneider writes, “[W]ork to protect women from battering has largely been shaped by the experiences and understanding of white women;” and 2) a reluctance on the part of battered women of color and their advocates to either air the so-called “dirty laundry” of either their already stereotyped communities or to avoid further involvement with the legal system of which such communities are rightfully suspect. SCHNEIDER, *supra* note 17, at 63-65. For a summary of these points as articulated by Kimberlé Crenshaw, Beth Richie, Angela Harris and others, see *id.*

<sup>51</sup> A recent report on domestic violence and sexual assault in Cook County, Illinois noted the following: “The Order of Protection . . . is the centerpiece of the Illinois Domestic Violence Act.” JODY RAPHAEL, DEPAUL COLL. OF LAW SCHILLER DUCANTO & FLECK FAMILY LAW CTR., *HARD FACTS: AN ANALYSIS OF INTIMATE PARTNER VIOLENCE AND SEXUAL ASSAULT DATA FROM THE COOK COUNTY LEGAL SYSTEM 11 (2005)* (report on file with author).



clinics have formed specifically to assist victims with it.<sup>52</sup> The process for obtaining an order of protection includes paperwork that asks for details of the abuse, essentially determining if someone is a battered woman or not.<sup>53</sup> This means the practice circles back to identity by demanding a description of how the individual has been victimized.

The battered woman identity, the process that involves utilizing the legal system, and the legal practice that includes obtaining protection orders are the building blocks of both domestic violence discourse and of the system constructed by the discourse. These elements both construct, and are constructed by, the identities of the players on this legal stage — those involved in working to end domestic violence. Each individual has a particular role to play and a particular way that role should be played. Each is supposed to work with the others to best serve those who are utilizing the law to escape and end the intimate violence.

The problem is that the elements, the players, and the discourse itself are racialized as white. By racialized white, I mean that the discourse is both constructed and responded to as if only the dominant culture was involved. This dominant culture has been labeled at various times as WASP,<sup>54</sup> Eurocentric,<sup>55</sup> “Euroheteropatriarchy,”<sup>56</sup> and “Red State.”<sup>57</sup>

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<sup>52</sup> E.g., N. Ill. Univ., Domestic Abuse Clinic, <http://law.niu.edu/go.cfm?do=Page.View&ID=395> (last visited Oct. 28, 2005) (explaining Northern Illinois University’s Domestic Abuse Clinic’s focus on obtaining orders of protection for victims of domestic violence).

<sup>53</sup> See *infra* note 107 (describing where one finds information on how to file order of protection).

<sup>54</sup> “A white Protestant of Anglo-Saxon ancestry.” Also, “[A] white, usually Protestant member of the American upper social class.” See YAHOO! EDUCATION, DICTIONARY, <http://education.yahoo.com/reference/dictionary/entry/WASP> (last visited Nov. 2, 2005).

<sup>55</sup> Centered or focused on Europe or European peoples, especially in relation to historical or cultural influence. See YAHOO! EDUCATION, DICTIONARY, <http://education.yahoo.com/reference/dictionary/entry/Eurocentric> (last visited Nov. 2, 2005).

<sup>56</sup> Francisco Valdes, *Outsider Scholars, Legal Theory & Outcrit Perspective: Postsubordination Vision as Jurisprudential Method*, 49 DEPAUL L. REV. 831, 840 (2000) (citing Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender and Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161 (1996)) (discussing meaning of Euroheteropatriarchy and its construction).

<sup>57</sup> Red State became synonymous with “republicanism” as the media outlets colored in states based on who the majority of voters there voted for in the 2000 election, red for republican and blue for democrat. As the “winners” the red staters (Republicans) have come to be the dominant political force and a dominant social one as well. See Stephen Clark, *Progressive Federalism? A Gay Liberationist Perspective*, 66 ALB. L. REV. 719, 749-50 (2003) (“The allusion [of red state, blue state] was to television coverage of the election night in which the networks depicted the states voting for George W. Bush or Al Gore as

Though the dominant culture is all those things, this Article simply labels it “white.”<sup>58</sup> Those who participate in the construction of the dominant domestic violence discourse could be of any race or ethnicity. It is the mindset produced by the dominant culture that is projected upon society and used to dominate and manipulate it that is racialized. Also true is that white racialization, while rendering color invisible, does not eliminate it. Subordinate discourses can counter the dominant mindset. Currently, the white mindset controls the domestic violence discourse, but that could change.

### 1. The Battered Woman Identity: White Victim

The first element of domestic violence legal discourse is a constructed identity to which the legal system relates and with which it interacts. The identity in question is that of the battered woman. The battered woman is a victim.<sup>59</sup> Victims are white.<sup>60</sup> Not being included in the battered woman category, or part of the community of battered women, means that one who is being victimized does not get the services she needs because she is not seen as a victim.<sup>61</sup> What can result from limited or ineffective services is the perpetuation of the abuse.<sup>62</sup> Not being able

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either red or blue.”). Clark explains that the “red state – blue state metaphor . . . seemed to describe more than simply the electoral outcome of the 2000 presidential election. It seemed to reflect a deeper political and cultural divergence . . .” *Id.*

<sup>58</sup> I want to note that when discussing white feminists, or the white battered women’s movement, I mean to indicate not only that there is a white mindset, but also that the majority of those constructing the discourse were/are actually part of the white race, meaning people of European descent.

<sup>59</sup> Nina Tarr, *Civil Orders for Protection: Freedom or Entrapment*, 11 WASH. U. J.L. & POL’Y 157, 167 (2003) (“When Lenore Walker first articulated the concept of the ‘battered woman’s syndrome’ and explained the ‘cycle of violence,’ the perspective shifted to seeing battered women as victims who had ‘learned helplessness.’” (citing Joan Meier, *Notes from the Underground: Integrating Psychological & Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1310 (1993))).

<sup>60</sup> As an example, Nicole Brown Simpson became in many ways the archetypical battered woman. See *supra* note 48 and accompanying text.

<sup>61</sup> See *infra* Part I.B.3.

<sup>62</sup> See generally EDWARD W. GONDOLF & ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS (1988). Gondolf and Fisher’s survivor theory of abuse speaks directly to the idea that those who are being victimized by domestic violence are often forced to remain at home if they seek help and fail to receive it. According to the study, women “increase helpseeking in response to more dangerous abuse.” *Id.* at 21. They state that it is the help providers who “need to be ‘treated’” rather than the women themselves. *Id.* at 11.

to access the identity also means that the process by which one moves out of victim status is off limits.<sup>63</sup>

The domestic violence victim identity — the “battered woman” — has been constructed in direct opposition to the identities of other subordinated groups. The essential victim of domestic violence, the essential battered woman, is a white, heterosexual, middle-class woman.<sup>64</sup> She is the essential battered woman because society imagines that it is she who needs protection.

This work is grounded in critical and cultural legal theories’ concepts of identity.<sup>65</sup> This Article explores a particularized notion of identity based on the general definition that identity is a “response to something external and different from it (an other).”<sup>66</sup> The victim claims the specific identity of “the battered woman” as a response to the abusive situation she is experiencing, as well as a response to the particular person abusing her. Claiming this identity is the first step along the empowerment continuum.<sup>67</sup> It is also essential to domestic violence legal practice that there is a “battered woman” because the legal system needs someone to protect.

The battered woman identity was first created during the second wave

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<sup>63</sup> *Id.* at 12 (“The survivor actively seeks help from a variety of informal and formal help sources. There is most often inadequate or piecemeal helpgiving that leaves the woman little alternative but to return to the batterer. The help seeking continues, however.”) *Id.* at tbl.2-1. This continuation of help seeking behaviors is also an indication that the victim is still in victim status and has yet to move into the role of survivor.

<sup>64</sup> See HUMM, *supra* note 10, at 80, for a definition and discussion of essentialism within feminism. I use essentialism here to characterize the image of the battered woman within the dominant discourse. See also Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (critiquing and criticizing the work of Catherine MacKinnon and Robin West as “gender essentialism,” and echoing Mari Matsuda’s call for “multiple consciousness”).

<sup>65</sup> See HUMM, *supra* note 10, at 127 (“Feminists argue that identity is not the goal but rather the point of departure of any process of self-consciousness.”); see also RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 148 (2001) (“Identity: That by which one defines oneself, such as a straight, college-educated, Filipina.”); CHERIS KRAMARAE & PAULA A. TREICHLER, *A FEMINIST DICTIONARY* 205 (1992) (defining identity as: “One’s conception of oneself as a woman is not an individual matter, but ‘part of the larger reality of one’s definition as a member of the sex-class woman.’ It is racially, economically and sexually determined.”); KEY CONCEPTS IN CULTURAL THEORY 183-87 (Andrew Edgar & Peter Sedgwick eds., 1999) (defining identity in cultural theory context).

<sup>66</sup> KEY CONCEPTS IN CULTURAL THEORY, *supra* note 65, at 184.

<sup>67</sup> See *infra* Part I.B.2 for a discussion of the empowerment continuum.

of the feminist movement.<sup>68</sup> The actual names given to this identity varied and grew more inclusive over time. The first was the battered wife,<sup>69</sup> then the battered woman, often referred to as the battered person today.<sup>70</sup> What was underlying the construction of this initial identity, of the battered wife, was the intent to give a name to what was happening as the victims themselves reported it.<sup>71</sup> The women speaking up at first were those being abused by their husbands. Essentially, by identifying an individual's experience, naming that experience and giving the individual an identity, she and others were able to formulate a way to respond because there is something to respond to and an actual person who needs something to happen.<sup>72</sup> Though one determines one's own identity, others also have a hand in constructing the identities individuals claim. Initially, battered women themselves, as well as advocates and activists, constructed the identity through discourse and determined who or what was or was not a battered woman.

Currently, the legal system constructs dominant domestic violence discourse, including the identity element. Even though it has been influenced by the battered women's movement's initial discourse, the system's control of the dominant discourse means that it constructs the battered woman identity. This battered woman is definitely a victim.

The battered woman identity is a victim identity because the legal system needs or only recognizes victims.<sup>73</sup> Because legitimate victims are generally assumed to be white, battered women are thought of as white.<sup>74</sup> The construction of the "battered woman" identity needs an

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<sup>68</sup> See generally JENNIFER BAUMGARDNER & AMY RICHARDS, *MANIFESTA: YOUNG WOMEN, FEMINISM, AND THE FUTURE* (2000) (differentiating between second wave and third wave feminism).

<sup>69</sup> See, e.g., MARTIN, *supra* note 36, at 1 (relaying "A letter from a Battered Wife").

<sup>70</sup> See, e.g., *United States v. Sachdev*, 279 F.3d 25, 29 (Mass. 2002) (referring to "battered person's syndrome"); *State v. Sharp*, No. 30275-6-II, 2004 WL 1329269, at \*3 (Wash. Ct. App. June 15, 2004) (discussing "battered person's perceptions").

<sup>71</sup> Though it was not only married women being abused. See MARTIN, *supra* note 36, at xiii (explaining author's choice of term "battered wife" as "any woman who is beaten by her mate").

<sup>72</sup> See, e.g., *NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING* (Kerry Lobel ed., 1986) (addressing concept of speaking out about what battered women endure).

<sup>73</sup> See *infra* Parts I.B.3, II.B.3 (discussing legal system's "need" for victims). See generally Melanie Randall, *Domestic Violence and the Construction of "Ideal Victims": Assaulted Women's "Image Problems" in Law*, 23 ST. LOUIS U. PUB. L. REV. 107, 109 (2004) (addressing use of "'victim' categories" in domestic violence law).

<sup>74</sup> A more recent national study based upon data drawn from the 1992 through 1994 National Crime Victimization Surveys (NCVS) on personal and household victimization similarly concluded that police are less likely to arrest in cases of intimate assault than in

“other,” which is an abusive man on the micro level, and patriarchal society on a macro level.<sup>75</sup> In response to the abusive other, be it a particular individual or society as a whole, an individual can lay claim to this identity. The battered woman is a necessary construction in the context of the law because of a need to have an individual who can assert her rights and/or needs to be protected. In the absence of a victim, there is no need for law. The “battered woman” as an identity has been constructed in opposition to the battering man. From this “brute,” as Del Martin calls him,<sup>76</sup> the white woman needs to be protected. In the absence of the brutalized victim identity of the battered woman, the law is left with a minor “domestic disturbance”<sup>77</sup> or simple marital discord that is normalized. When behavior is normalized, the legal system need not get involved.<sup>78</sup>

The battered woman identity is privileged because it is provided with certain benefits. Those benefits include access to a number of different services to escape that abuse, not the least of which are legal services. This is not to say that an individual is denied services if she fails to speak the words, “I am a battered woman.” However, the mere act of seeking services is the beginning of a claiming of the battered woman identity. It is a specific identity that is used both politically and personally, and having access to it is part of the process of moving out of the state of being abused. To have only limited access to that identity, or to be denied the ability to claim it, harms women of color. Having limited access to services designed to help victims of domestic violence restricts

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other assault cases. Edem F. Avakame & James J. Fyfe, *Differential Police Treatment of Male-on-Female Spousal Violence: Additional Evidence on the Leniency Thesis*, in 7 VIOLENCE AGAINST WOMEN 22, 29-34 (2001). While the study was limited to male-on-female violence, it also reported that in cases of intimate violence the probability of arrest increased: (1) with the increased age of the victims or offenders; (2) when the victim is white; (3) when the offender is Black; (4) when the offender is under the influence of drugs or alcohol; (5) when weapons are involved; and (6) with the increased wealth of the victim. *Id.*; see also Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1516-19 (1998) (noting that inclination against arrest in domestic violence context appears to continue although pro-arrest policies are increasing).

<sup>75</sup> See HUMM, *supra* note 10, at 200 (describing patriarchy as “[a] system of male authority which oppresses women through its social, political and economic institutions”); see also MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 14-15 (2d ed. 2003) (discussing male bias).

<sup>76</sup> MARTIN, *supra* note 36, at 44.

<sup>77</sup> See SCHNEIDER, *supra* note 17, at 20 (citing Elizabeth Pleck, discussing perceptions of battered women and domestic violence prior to 1970s and “the rebirth of feminism”).

<sup>78</sup> See *id.* at 13-20 (discussing the history of woman abuse and how the law implicitly or explicitly sanctioned such behavior).

women of color in being able to begin to claim the identity of battered woman, and in turn blocks access to further assistance in ending and escaping abuse. Being constructed as a battered woman can help them to begin moving through the empowerment continuum, which is the process that moves women out of an abusive relationship.<sup>79</sup> Not being constructed as such may mean a woman continues living with the violence.

Women of color and white women have very different experiences of abuse. A number of legal and social science scholars, as well as advocates and journalists, have written about how the intersection of racial and gender stereotypes impact the formulation of who is thought of as a battered woman.<sup>80</sup> A general point of these bodies of work is that, regardless of the rhetoric which states that domestic violence happens in all communities — regardless of race, ethnicity, socioeconomic status and sexual orientation<sup>81</sup> — the issue is that the battered woman, for whose benefit most anti-domestic violence laws and policies<sup>82</sup> were enacted, is white, heterosexual, and middle-class (and, as implemented, young and pretty).<sup>83</sup> Therefore, women of color, especially those who are

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<sup>79</sup> See *infra* Part I.B.2 for a discussion of the empowerment continuum.

<sup>80</sup> See *supra* note 5 (chronicling statistics addressing women of color and domestic violence); see also *supra* note 6 (addressing scholarship on race and domestic violence).

<sup>81</sup> The issue of sexual orientation has recently been added to the rhetoric. See Protective Order Project, *Domestic Violence Overview*, [http://www.law.indiana.edu/pop/domestic\\_violence/](http://www.law.indiana.edu/pop/domestic_violence/) (last visited Nov. 7, 2005).

<sup>82</sup> The laws and policies I refer to include the following: the Violence Against Women Act (VAWA), State Protective Order and Criminal Law Codes, Third Party Liability Statutes, and changes in the evidence code to allow expert testimony on Battered Person's Syndrome. See generally *supra* note 26 (looking at domestic violence laws).

<sup>83</sup> When it comes to media coverage of issues of violence against women, or potential violence against women (especially when women are missing), the younger and prettier the white woman is, the more likely there will be concern. See, e.g., Cynthia Tucker, *Media Doesn't Cover Everyone*, SANFORD HERALD, May 5, 2005, available at [http://www.uexpress.com/asiseeit/?uc\\_full\\_date=20050507](http://www.uexpress.com/asiseeit/?uc_full_date=20050507) (stating that a peculiar feature of early 21<sup>st</sup> century American culture is a: “[F]ixation on pretty, young, middle-class white women . . . . As American news consumers, we are discriminating about the sort of victims worthy of our concern. Pretty, middle-class, young, white – yes; old, ugly, poor, black, brown – apparently not.”); see also Mark Memmont, *Spotlight Skips Cases of Missing Minorities*, USA TODAY, June 15, 2005, available at [http://www.usatoday.com/news/nation/2005-06-15-missing-minorities\\_x.htm](http://www.usatoday.com/news/nation/2005-06-15-missing-minorities_x.htm) (discussing how the amount of media coverage of the disappearance of Tamika Huston, who is Black, was insignificant compared to white women and girls who had gone missing: “Holloway, like ‘runaway bride’ Jennifer Wilbanks, murder victims Laci Peterson and Lori Hacking, kidnap victim Elizabeth Smart and several other girls and women whose stories got significant airtime in recent years, is white. Tamika Huston is black.”).

immigrants,<sup>84</sup> poor,<sup>85</sup> or lesbian, bisexual or transgender,<sup>86</sup> and who are being victimized by abuse, are not as well served by the legal system.

What does this say about “battered woman” as an identity? This says the battered woman identity is white. It means that the victim of domestic violence, the woman domestic violence advocates and other service providers, including lawyers and judges, are serving, is a white woman. The identity is fundamentally white no matter how it is shaded. Thus, systems designed to serve that victim are designed for white women.

Because the “battered woman” is white, those women of color who are in abusive relationships are not included in the image of the victim. Stereotypes and myths exist, such as “Blacks just like to fight,”<sup>87</sup> “Latinas are hot blooded,”<sup>88</sup> and “Asian women are trained for this sort of thing.”<sup>89</sup> These stereotypes and cultural myths serve to place battered women of color in opposition to the image of the white battered woman, who is the norm. In fact, it is only the white “she” who is the real battered woman, who is the “real” victim. This is what I call the cult of true victimhood. This is an application of the concept of the “cult of true domesticity and true womanhood”<sup>90</sup> of the ante-bellum mid-19th Century. Dr. Catherine Lavender explains that “true womanhood” has “four characteristics any good and proper young woman should

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<sup>84</sup> See Sarah M. Wood, *VAWA's Unfinished Business: The Immigrant Women Who Fall Through the Cracks*, 11 DUKE J. GENDER L. & POL'Y 141 (2004) (regarding issue of women who are immigrants).

<sup>85</sup> See WOMEN'S INST. FOR LEADERSHIP DEV. FOR HUMAN RIGHTS, *THE TREATMENT OF WOMEN OF COLOR UNDER U.S. LAW*, <http://www.wildforhumanrights.org/publications/treatmentwomen/index.html> (last visited Nov. 7, 2005) (regarding women of color who are poor).

<sup>86</sup> See Nat'l Coalition of Anti-Violence Programs, NCAVP Members, <http://www.avp.org/ncavp.htm> (last visited Nov. 7, 2005) (regarding issues of lesbian, bisexual or transgender women).

<sup>87</sup> See Marcie Robinson, *Building Bridges: A Column to Promote Cultural Competency*, ARTE SANA (2001), [http://www.arte-sana.com/articles/cultural\\_competency.htm](http://www.arte-sana.com/articles/cultural_competency.htm) (regarding stereotypes about Black women in domestic violence situations).

<sup>88</sup> See Abuse, Counseling, and Treatment (“ACT”), *Latina Women: Barriers to Living Violence Free*, <http://www.actabuse.com/latinas.html> (last visited Nov. 7, 2005) [hereinafter *Latina Women*] (regarding stereotypes surrounding Latina women).

<sup>89</sup> See Abuse, Counseling, and Treatment (“ACT”), *Asian Women: Barriers to Living Violence Free*, <http://www.actabuse.com/asian.html> (last visited Oct. 28, 2005) [hereinafter *Asian Women*] (regarding stereotypes surrounding Asian women).

<sup>90</sup> See Catherine Lavender, *The Cult of Domesticity and True Womanhood*, <http://www.library.csi.cuny.edu/dept/history/lavender/386/truewoman.html> (last visited Oct. 28, 2005).

cultivate: piety, purity, domesticity and submissiveness.”<sup>91</sup> These characteristics also make up the cult of true victimhood. They have morphed into being essentially the characteristics of a woman suffering from learned helplessness, a dominant theory of why women are abused.<sup>92</sup>

The characteristics of learned helplessness describe a woman who is vulnerable and passive.<sup>93</sup> Men who choose to batter sometimes do so because of perceived violations of the four characteristics. They imagine “their woman” is not being devout enough either to him or to his god, is having affairs, doesn’t have dinner on the table like a good wife, and, fundamentally, does not submit to his rule. The legal system also prefers its victims to adhere to these same characteristics. There is no better plaintiff than a white, married, church-going, tee-totaling, homemaker, with no criminal record — not even a parking ticket. The law loves a perfectly constructed plaintiff.<sup>94</sup>

In the construction of the perfect plaintiff is the perfect victim. That victim is raced and gendered as a white woman.<sup>95</sup> The ramifications of

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<sup>91</sup> *Id.*

<sup>92</sup> See *supra* note 59, *infra* note 93, and accompanying text (describing learned helplessness).

<sup>93</sup> LENORE E. WALKER, *THE BATTERED WOMAN* 49-52 (1979).

<sup>94</sup> See, e.g., Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019, 1022-24 (1997) (discussing feminist critiques of “legal regime”). Shalleck explains that feminist critiques “have seen the harms women who have been abused suffer under the legal regime resulting from the changes that have been implemented, and confronted the conceptual problems revealed in the actualization of the new legal landscape.” *Id.* at 1022. Shalleck goes on to explain:

[b]attered women’ are portrayed as victims, as powerless and passive objects of another’s violence, helpless to free themselves from the constraints imposed by the ‘batterer.’ Women whose actions seem to fit into the stereotypical portrait are denied affirmation of their attempts to resist, to survive, to protect their children, or to create space to maneuver within the constraints they face.

*Id.* at 1024 (citations omitted).

<sup>95</sup> See, e.g., JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES* 133 (1999) (discussing perfect or ideal victim). Ptacek explains:

The “ideal victim profile” of a woman seeking protection from battering would describe a white woman who speaks English and has no material needs or who has the means to hire an attorney . . . . Women whose identity and circumstances fit this profile may have their needs more clearly recognized and may find greater support in restraining order hearings. But women of color, poor women, and non-English-speaking women who suffer battering in the context of racial and class entrapment may be only partially visible . . . .



this construction are far-reaching. While women of color fit the construction based on their gender, they do not fit based on race.<sup>96</sup> They ultimately cannot be victims of domestic violence because they are not white.<sup>97</sup> If a woman of color is involved in a situation of intimate violence, that situation, though a possible violation of the law, is not seen as truly being domestic violence because of how it is defined. Domestic violence is “a pattern of [power seeking] behavior where one person tries to control the thoughts, beliefs or actions of a partner.”<sup>98</sup> Because of racial stereotyping, women of color are seen as too powerful or too uncontrollable to be dominated by anyone. Therefore they cannot be victims.<sup>99</sup>

The identity is fundamental to both the victim herself and the domestic violence movement as well. It is fundamental to the victim

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*Id.*

<sup>96</sup> This is not to say that there is a separation between race and gender. The intersection of both is where the victim identity is located. See generally Crenshaw, *supra* note 3 (articulating that race and gender meet and that experiences of women of color exist at this meeting place or intersection).

<sup>97</sup> See *supra* note 6 (discussing scholarship about race, stereotyping and domestic violence); see also PTACEK *supra* note 95 (addressing ideal profile of a victim); Shalleck, *supra* note 94 and accompanying text (describing the perfect plaintiff and how she is connected to the perfect victim).

<sup>98</sup> Mass. Coalition Against Domestic Violence and Sexual Assault, *About Domestic Violence*, [http://www.janedoe.org/know/know\\_dv.htm](http://www.janedoe.org/know/know_dv.htm) (last visited Oct. 28, 2005); see also Domestic Abuse Prevention Project, *Power and Control Wheel*, reprinted in DOMESTIC VIOLENCE LAW, *supra* note 35, at 43 [hereinafter *Power and Control Wheel*] (displaying Power and Control Wheel, which is model designed to help visualize the dynamics that make up domestic violence). The Power and Control Wheel is a graphic of concentric circles with the words “power and control” at the center and the words sexual and physical violence as the outside ring. *Id.* Between them are listings of types of abuse and behaviors of those who choose to be abusive that are designed to obtain and maintain power and control all held together by the threat of and/or actual physical and sexual violence. *Id.*

<sup>99</sup> See Ammons, *supra* note 6 (discussing how stereotyping of African-American women may hinder them from using battered women’s syndrome when they are criminal defendants); see also Jill E. Adams, *Unlocking Liberty: Is California’s Habeas Law the Key to Freeing Unjustly Imprisoned Battered Women?*, 19 BERKELEY WOMEN’S L.J. 217, 226 (2004) (stating that: “[T]he image of the B[attered] W[omen’s] S[yn]drome victim stems from the traditional Anglo-American ideal of women as ‘pious, pure, submissive, and domestic,’ favoring white, middle-class, stay-at-home mothers. The implications of this skewed, exclusive model are especially detrimental to battered women of color, particularly African American women, who are stereotyped as strong, masculine, and angry - a discordant image that discourages judges and jurors from considering them ‘victims’ of B[attered] W[omen’s] S[yn]drome.”) (citations omitted); Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN’S L.J. 191 (1991) (discussing how Black women may not fit constructed behaviors that make up battered women’s syndrome).

because, as both a political and personal identity, acknowledging one's status as a battered woman means to take the first step along the empowerment continuum.<sup>100</sup> The identity is personally fundamental because in order to utilize all aspects of the empowerment continuum, including the legal remedies in orders of protection,<sup>101</sup> one must be able to explain why she should be protected by the laws designed with a particular type of person in mind. For both criminal and civil legal protections, one must be a victim — a particular kind of victim — in order to get help.<sup>102</sup> An inability to show one's victim status may result in a failure to obtain the assistance one needs. It is fundamental to the movement because this identity has been a way into the political structure and the legal system, which has been instrumental in changing social and institutional norms that have allowed domestic violence to continue. If the identity was not white, the current full range of state and federal laws, including the Federal Violence Against Women Act, might not exist.<sup>103</sup> The white identity is necessary because if the law is to take domestic violence seriously, or address it at all, it has to happen to white women. The identity is politically fundamental because there needs to be a face to attach to a lobbying effort, a person behind the reasons laws need to be passed.

Because the construct of the identity is white, the construction of the theory and practice is white as well. The feminist theories grounding the domestic violence movement and domestic violence law are constructed to include white, and, as a result, to exclude color.<sup>104</sup> As a result of the

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<sup>100</sup> See *infra* Parts I.B.2, II.B.2 for a discussion of the empowerment continuum.

<sup>101</sup> MCKENNA, *supra* note 26, at 141-98. Available remedies include: no further abuse, exclusive use and possession of parties' residence, stay away, no contact, prohibited from possessing or purchasing firearms, domestic violence or other counseling, temporary custody/visitation. *Id.*

<sup>102</sup> See *supra* Part I.B.1 discussing the battered woman identity.

<sup>103</sup> Federal Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103-322, 108 Stat 1796 (2000).

<sup>104</sup> See Ammons, *supra* note 6, at 1008-13 (specifically writing about battered women's syndrome and African American women). Ammons explains how Black women are essentially excluded from accessing expert testimony because they do not fit the "diagnosis" of one with "learned helplessness," which is Dr. Lenore Walker's theory that is at the very core of the "battered woman syndrome." *Id.* Because theories such as Walker's are raced white, domestic violence legal practice is also raced white. *Id.*; see LENORE E.A. WALKER, THE BATTERED WOMAN SYNDROME (2d ed. 1999) (discussing battered women's syndrome); see also State v. Kelly, 97 N.J. 178, 194-98 (1984) (discussing scientific research on domestic violence and psychological indications of battered women's syndrome); GONDOLF & FISHER, *supra* note 62, at 1-2 (discussing psychologizing of domestic violence and development of diagnoses); *id.* at 12 (detailing table comparing learned helplessness

theories being raced white, the practices on which they are grounded are white as well.

## 2. The Racialized Process: A Dis-Empowerment Continuum

The discourse begins with the battered woman identity that is necessary to fully access the second element of domestic violence legal discourse. The next element is the process necessary to transition out of an abusive relationship. A woman goes through this process to end the abuse in her life. This process is what I call the “empowerment continuum.” It is how a woman moves from victim to survivor to advocate.<sup>105</sup> This is the process by which the battered woman identity is transformed from that of battered woman to that of formerly battered woman. Originally, as part of the empowerment continuum, moving from victim to survivor was a process by which a person became part of the domestic violence community.<sup>106</sup> The current empowerment continuum uses the legal system, which has become part of the domestic violence community. Utilizing the legal system, often in the form of applying for an order of protection, has become central to the empowerment continuum.<sup>107</sup>

Still, the empowerment continuum is almost a rite of passage for someone being abused. It is a process that begins with a woman calling 911<sup>108</sup> or a crisis line,<sup>109</sup> or maybe visiting a legal advocate or lawyer.<sup>110</sup>

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and survivor theories); *infra* Parts I.B.3, II.B.3 (providing analysis of the racialization of domestic violence legal practice).

<sup>105</sup> Lauren Braswell, *Vigil Observes Victim's Rights*, VSU SPECTATOR, Apr. 26, 2001, at 2, available at <http://www.valdosta.edu/spec/20010426/front1.html> (“Moore said that [with] the help of The Haven, a shelter for battered women, and God she, ‘learned how to be a person, and an individual.’ She then explained how she ‘went from victim to survivor to advocate.’”); Jean Morrison, *Violence Prevention Education: The NEW Way to End Violence Against Women – Coming to a Neighborhood Near You*, <http://www.change-links.org/Prevention.htm> (last visited Nov. 2, 2005) (“They speak without shame, without guilt, without blame, and with complete freedom. And by this positive acceptance of ourselves we are demonstrating the path from victim to survivor to advocate.”)

<sup>106</sup> GONDOLF & FISHER, *supra* note 62, at 1 (discussing battered women’s shelter movement); SCHECHTER, *supra* note 33, at 62-80 (discussing organization of shelters and coalitions).

<sup>107</sup> For instructions on filing an order of protection, see Self Help Legal Ctr. of S. Ill., S. Ill. Univ., School of Law, *Protective Orders: Packets*, <http://www.law.siu.edu/selfhelp/info/protective/packets.htm> (last visited Nov. 2, 2005); Eastside Domestic Violence Program, Wash. State, *About Domestic Violence Protection Orders*, <http://www.edvp.org/aboutDV/protectionorders.htm> (last visited Nov. 2, 2005).

<sup>108</sup> The Family Violence Prevention Fund encourages victims to call “911” when they are in immediate danger because of a violent relationship and directs victims who make crisis calls to local programs and national hotlines for ongoing support. See Family

Or, at its worst, it begins with a trip to the emergency room.<sup>111</sup> Then the process has the battered woman moving on to a stay in a shelter, or has her seeking social services and/or a restraining order. She winds her way through support groups and ends by moving into the world of the survivor. This last step is frequently taken by facing her abuser in court. Regardless, this step is always taken by laying claim to an identity, which is that of an empowered, no-longer-victimized woman, a survivor, or a “formerly battered woman.” This is reflected in a slogan from the battered women’s movement: “From victim to survivor to advocate.”<sup>112</sup>

Part of the process is to name and claim the battered woman identity. A battered woman maintaining secrecy, keeping silent and feeling shame is a vestige of the suppression of the whole issue of abused women in the years before the domestic violence movement.<sup>113</sup> Secrecy, silence and shame are also aspects of the abuse itself. Abusers use shame and secrecy as tools to control those they are victimizing.<sup>114</sup> It is necessary for victims to speak up because of the secrecy, silence and shame surrounding domestic violence.<sup>115</sup> This naming and claiming was part of the process of becoming empowered and of becoming a part of the domestic violence community.<sup>116</sup> I use the past tense because, as the

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Violence Prevention Fund Resources, <http://endabuse.org/resources/gethelp/> (last visited Nov. 2, 2005).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> With regard to emergency room statistics for victims of domestic violence, see Family Violence Prevention Fund, *Seven Reasons Employers Should Address Domestic Violence*, <http://endabuse.org/workplace/display.php?DocID=33001> (last visited Nov. 2, 2005); Safety Net, Statistics, <http://www.thesafetynet.org/index.cfm?id=34> (last visited Nov. 2, 2005); Tenn. Economic Council on Women, Impact on the Healthcare Systems, [http://www.state.tn.us/sos/ecw/initiatives/impact\\_healthcare.htm](http://www.state.tn.us/sos/ecw/initiatives/impact_healthcare.htm) (last visited Nov. 2, 2005).

<sup>112</sup> See *supra* note 105.

<sup>113</sup> See *supra* Part I.A (discussing state of affairs prior to emergence of battered women’s movement).

<sup>114</sup> See *Power and Control Wheel*, *supra* note 98, at 43 (detailing Power and Control Wheel). The Power and Control Wheel is a visual tool, developed by Domestic Abuse Intervention Project in Duluth, Minnesota, which shows tactics batterers use to gain power over their victims. *Id.*

<sup>115</sup> NAMING THE VIOLENCE, *supra* note 72, at 1 (discussing speaking up).

<sup>116</sup> See SCHECHTER, *supra* note 33, at 29 (“The emerging feminist movement painstakingly detailed the conditions of daily life that would allow women to call themselves battered.”); see also Kerry Lobel, *Introduction* to NAMING THE VIOLENCE, *supra* note 72, at 2 (discussing battered lesbians telling their stories). Lobel exemplifies how the battered women’s movement creates actions and community. *Id.* According to Lobel,

legal system has come to construct the dominant discourse, the process has changed. That process of becoming empowered has turned into one where the individual may begin by going to a shelter, thus starting the journey from victim to survivor. However, the first time she encounters the legal system she moves back into the victim role, arresting her progress. Whether the first encounter is with a 911 operator or a court clerk, a battered woman must appear to be “The Battered Woman,” which means able to be read as white victim. Her identity is that of victim. As such, she is expected to behave in a certain way and have certain skills such as being fluent in the English language. She should have no issues with drugs and no criminal record and is also expected to avail herself of certain services, such as childcare, so she does not have children with her in court.<sup>117</sup>

The cult of true victimhood<sup>118</sup> is in full swing when a woman works with the legal system. Women who are not members of the “cult”, who do not perform the identity well enough (who are not read as white) will essentially be sent back to square one. If the first step she takes is to call 911, square one may be no response or a slow response to her request for assistance. If the police do arrive, square one means no arrest or dual arrests.<sup>119</sup> If she has found her way to the courthouse to get an order of protection and she does not speak English, square one may be no one there to help her who speaks her first language. Got a court date, but have no childcare? Step back a square. If she is Black,<sup>120</sup> she may never

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“[i]t was the battered women’s movement at its best, with survivors of violence giving direction and leadership to the presentation of issues that affected them.” *Id.*

<sup>117</sup> In over twenty years of domestic violence work, I have found that courtrooms are not very child-friendly environments, especially for young children. Many courts are so busy that the wait is long to have one’s case heard before a judge. Courtrooms themselves are often merely rooms with seats where no eating or drinking is allowed and in which people must be quiet and observe decorum. All of this is a hardship for children and their mothers. I have seen occasions when the difficulty of dealing with children in court has been the reason a woman has chosen not to follow through with an order of protection.

<sup>118</sup> See *supra* note 90 and accompanying text.

<sup>119</sup> Dual arrest is when both parties are arrested. For a discussion on the impact of dual arrests, see Holly Maguigan, *Wading into Professor Schneider’s “Murky Middle Ground” Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER SOC. POL’Y & L. 427, 442 (2003) (noting increased number of women arrested “either as the sole person arrested after an incident, or as the result of a ‘dual arrest’ of both parties”); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1680 (2004) (noting how mandatory arrest laws have led to an increase in dual arrests).

<sup>120</sup> I capitalize “Black” but do not capitalize “white” for two reasons. First, like some other feminists and critical race scholars, the capitalization of Black is done so because

find the right office because she is sent to the dependency courtroom as authorities assume she is there as a defendant in an abuse and neglect case.<sup>121</sup> Because of these impediments, she may choose to remove herself from the process and out of the empowerment continuum. In doing so, she either remains in the victim status, or she is never perceived as having really been a victim in the first place.

The legal system, as the foremost means for intervening in domestic violence, has a profound impact on individuals and communities. However, the relationships between communities of color and the legal system are often strained at best. This is especially true when people of color are dealing with family and criminal law issues.<sup>122</sup> Because of these

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"Black" refers to a specific cultural group whereas "white" does not refer to a specific cultural group. See, e.g., Crenshaw, *supra* note 3, at 1244 n.6 (1991); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988). Second, this Article argues for the centering of women of color and the capitalization of the names of those cultural groups of which the larger group consists to emphasize this point.

<sup>121</sup> See generally DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002) (focusing on disproportionate number of Black children involved in child welfare system).

<sup>122</sup> See, e.g., Maguigan, *supra* note 119 (discussing "race and the criminal justice system"). In addressing domestic violence, Maguigan writes:

The enactment of mandatory arrest statutes and regulations, and the adoption by prosecutors of no-drop policies, are parts of a process that has resulted in massive over-reliance on criminal strategies by advocates for battered women. The costs of that over-reliance have been distributed unevenly. For example, Anannya Bhattacharjee has pointed out that the strategy of more vigorous police response has sometimes backfired in communities of color, those in which law enforcement personnel themselves pose a threat of violence: "For women in this situation, the promise of police protection from battering is an empty one." The negative impacts on communities of color, of all classes, and on poor people, of all ethnicities, were entirely predictable many years ago. Racial disparities were already well established throughout the criminal justice system at the time battered women's advocates started working for more reliance on the system. They are starker now.

*Id.* at 431 (citing ANANNYA BHATTACHARJEE, *AM. FRIENDS SERV. COMM., WHOSE SAFETY? WOMEN OF COLOR AND THE VIOLENCE OF LAW ENFORCEMENT* 6 (2001)).

Maguigan gives statistics illustrating these negative impacts:

For example, a recent Bureau of Justice Statistics study found: At year end 2000, black males (572,900) outnumbered white males (436,500) and Hispanic males (206,900) among inmates with sentences of more than 1 year. More than 46% of all sentenced inmates were black males . . . Black non-Hispanic females (with an incarceration rate 205 of per 100,000) were more than 3 times as likely as Hispanic females (60 per 100,000) and 6 times more likely than white non-Hispanic females (34 per 100,000) to be in prison in 2000. . . . Professor Paula

strained relationships between the law and communities of color, women of color often never even get to enter into the empowerment continuum. The process of empowerment is denied to the victimized woman of color because: 1) she is never really considered a victim of domestic violence in the first place;<sup>123</sup> and 2) the process itself is designed not for women of color but for that battered woman described previously — a white woman. The empowerment continuum includes such legal tools as arrest and civil orders of protection.<sup>124</sup>

Looking at orders of protection/restraining orders, one sees how the system maintains the battered woman identity as that of victim. Because the act of filing for a restraining order constitutes an action taken by a battered woman, orders of protection are part of this empowerment continuum. The very language of many of the protective order statutes indicates to women that they have not moved into the autonomous world of the survivor, but only into a nether world where they are still victims who are now protected by the legal system. In a number of state statutes the individual is referred to as a “person to be protected” or “protected person.”<sup>125</sup> The terminology used in protective orders continues to maintain the status of the battered woman as someone in

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Johnson describes the growth in numbers of female prisoners as follows: [W]omen's overall imprisonment in state and federal institutions is characterized by sharp increases over the last twenty years. Women's imprisonment rose from just over 13,000 in 1980 to nearly 92,000 in 2000 . . . . Almost half (48 percent) of female inmates across the nation are African American, one-third (33 percent) are Caucasian, 15 percent are Hispanic, and 4 percent are women of other racial backgrounds.

*Id.* at 431 n.17 (citing Allen J. Beck & Paige M. Harrison, U.S. Dep't of Justice, *Prisoners in 2000*, BUREAU OF JUST. STATS. BULL., Aug. 2001, at 11, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p00.pdf>); PAULA C. JOHNSON, INNER LIVES: VOICES OF AFRICAN AMERICAN WOMEN IN PRISON 34 (2003)).

<sup>123</sup> See *infra* Part I.B.1 for a discussion of victim identity.

<sup>124</sup> See *supra* note 31 (providing example of state domestic violence statute); see also note 107 (relaying how to file for an order of protection); *infra* note 203 (explaining ex parte orders of protection).

<sup>125</sup> See, e.g., ALA. CODE § 15-13-190(b) (1975) (“[T]he alleged victim of domestic violence or the person protected by a protection order . . . .”) (emphasis added); CAL. FAM. CODE § 6383(d) (West 2004) (“[I]f the protected person cannot produce a certified copy of the order . . . .”) (emphasis added); 720 ILL. COMP. STAT. ANN. 5/1-8 (1993) (“[H]as been designated as either a respondent or a protected person.”) (emphasis added); LA. REV. STAT. ANN. § 46:2143(1) (1999) (“[D]omestic violence offender is within a certain distance of the protected person . . . .”) (emphasis added); N.J. STAT. ANN. § 2C:25-19 (1995) (“‘Domestic Violence’ means the occurrence of one or more of the following acts inflicted upon a person to be protected under this act . . . .”) (emphasis added); W. VA CODE, § 48-27-504 (2004) (“When the person to be protected . . . .”) (emphasis added).

need. If and when the battered woman moves along the continuum, out of victim status and on to being a survivor, she no longer is seen as someone in need and the law is finished with her.

### 3. Legal Practice and the Necessary Victim

The third element of domestic violence legal discourse, legal practice, is actually part of the empowerment continuum, but it also stands on its own. Legal practice consists of the structure, substance, and procedures of the law. Structure is what law is and how it works. Substance refers to the law as it is recorded in cases and statutes. Procedure is essentially the legal process itself. This process includes the standard and methodical, yet fast-paced and ever evolving, courses of action that take place everyday inside and outside courtrooms.<sup>126</sup> Domestic violence orders of protection are good examples of legal practice because they are central to preventing further abuse.<sup>127</sup>

For a battered woman to access a protection/restraining order, all three aspects of the system confront her. She encounters the structure immediately upon deciding to seek an order of protection. There are forms to be filled out to get into court, allegations to be drafted and attached to papers with boxes to check and lines to fill in, all of which need to be filed with the clerk. Then she must appear before a judge.<sup>128</sup>

The substance is what powers the structure. Substance is the state law addressing orders of protection<sup>129</sup> or the federal Violence Against Women Act's protective order provisions.<sup>130</sup> The elements of the violation generally include being in a particular relationship and a particular action. The relationship can be any of the following: married; formerly married; engaged; formerly engaged; cohabiting; formerly cohabiting; dating; formerly dating; related by blood, marriage or

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<sup>126</sup> For examples of what happens during the legal process in a domestic violence proceeding, see California Courts: Self-Help Center, <http://www.courtinfo.ca.gov/selfhelp/protection/dv/resda.htm> (last visited Nov. 2, 2005).

<sup>127</sup> LEHRMAN, *supra* note 26, at 4-45 to -106; MCKENNA, *supra* note 26, at 139-98 (showing that all 50 states have statutes providing for orders of protection).

<sup>128</sup> See, e.g., LEHRMAN, *supra* note 26, at 4-43 to -44 (explaining attorney representation for clients seeking to obtain restraining orders); EVELYN C. WHITE, CHAIN, CHAIN, CHANGE: FOR BLACK WOMEN IN ABUSIVE RELATIONSHIPS 52 (1985) (briefly describing process for obtaining an order of protection).

<sup>129</sup> See LEHRMAN, *supra* note 26, at 4-45 to -106 app.4A (detailing specific state civil protection order laws).

<sup>130</sup> See Federal Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103-322, 108 Stat 1796 (2000); LEHRMAN, *supra* note 26, at 5-1 to -48.



adoption; or a minor child in common.<sup>131</sup> Some statutes specifically do not cover same-sex couples.<sup>132</sup> Some state statutes do not specifically cover dating or non-cohabitating heterosexual couples.<sup>133</sup>

The procedure is the process by which one obtains an order of protection. This includes the courtroom processes, the length of time orders are in effect, and the difference between emergency, temporary, and permanent orders, which vary among jurisdictions.<sup>134</sup>

There is much discourse about orders of protection. Legal advocates and lawyers have created handbooks so women can represent themselves pro-se — without an attorney.<sup>135</sup> There are numerous websites published by a variety of organizations that address how to seek an order published by a variety of organizations.<sup>136</sup> From the

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<sup>131</sup> See LEHRMAN, *supra*, note 26 at 4-45 to -106 (relaying sections of tables addressing “necessary relationship”); see also 750 ILL. COMP. STAT. ANN. 60/103(6) (1993) (defining “family or household members”). An Illinois statute defines “family or household members” to include:

[S]pouses, former spouses, parents, children, stepchildren and other persons related by blood or by present or prior marriage, persons who share or formerly shared a common dwelling, persons who have or allegedly have a child in common, persons who share or allegedly share a blood relationship through a child, persons who have or have had a dating or engagement relationship, persons with disabilities and their personal assistants, and caregivers . . . .

*Id.*

<sup>132</sup> States exclude same-sex relationships with specific language of the relationship necessary to be eligible to seek an order of protection. *E.g.*, DEL. CODE ANN. tit. 10, § 1041(2) (1999) (“man and a woman co-habiting together”); MONT. CODE ANN. § 45-5-206(2)(b) (2004) (“dating or ongoing intimate relationship with a person of the opposite sex”); N.C. GEN. STAT. § 50B-1(b)(2-6) (2001) (including “[p]ersons of opposite sex who live together or have lived together,” parents and children, and “persons of the opposite sex who are in a dating relationship or have been in a dating relationship”); S.C. CODE ANN. § 20-4-20(b) (1976) (“male and female who are cohabitating or formerly have cohabitated”).

<sup>133</sup> See, *e.g.*, ALA. CODE § 30-5-2 (1975); ARIZ. REV. STAT. § 13-3601(A) (1956); DEL. CODE ANN. tit. 10, § 1041(2) (1999); FLA. STAT. § 741.28(2) (2005); GA. CODE ANN. § 19-13-1 (2004); IND. CODE § 34-26-5-2 (1976); IOWA CODE § 236:2 (1946); KY. REV. STAT. ANN. § 403.702 (1970); LA. REV. STAT. ANN. § 46:2132(4) (1999); ME. REV. STAT. ANN. tit. 19A, § 4002 (1964); MD. CODE ANN., FAM. LAW § 4-501 (2004); N.Y. FAM. CT. ACT § 812 (1939); OHIO REV. CODE ANN. § 3113.31 (1994); S.D. CODIFIED LAWS § 25-10-1(2) (2004); UTAH CODE ANN. § 30-6-1(2) (1953); VA. CODE ANN. § 16.1-228 (1950).

<sup>134</sup> LEHRMAN, *supra* note 26, at 5-18 (discussing concurrent and supplemental jurisdiction of VAWA).

<sup>135</sup> See, *e.g.*, Self Help Legal Ctr. of S. Ill., *supra* note 107 (providing free legal information and materials to pro se litigants on various legal matters governed by Illinois law).

<sup>136</sup> See generally About.com, <http://incestabuse.about.com/cs/restrainingorders/> (last

written law to judges' findings, domestic violence legal discourse has a profound impact on, and is shaped by, issues of race. In the public discourse, domestic violence law seems to be racially inclusive, but the legal system is set up to favor white and disfavor color. Each aspect of the system is racialized white.<sup>137</sup> The order-of-protection process incorporates structure, substance, and procedure.

This analysis of the racialization of domestic violence legal practice begins with structural whiteness. It is best for a woman seeking help in leaving an abusive relationship to get a lawyer to help with the restraining order because the paperwork is complicated.<sup>138</sup> Often, however, low-income communities of color lack access to legal assistance. Lawyers are just not there. Even with the existence of legal services, there are many battered women who fall through the cracks of the system because they do not qualify for these services based on income.<sup>139</sup>

Access to orders of protection is not only a problem of lack of finances or the inability to obtain legal representation, but also an issue involving limited availability of time to pursue these remedies. There is also limited municipal space to process the orders that are applied for, such as courtrooms. This is an issue for the poor, whether white or of color, rural or urban. But poor communities of color are particularly impacted because cultural sensitivity and culturally specific resources, such as translators, may be lacking.

The next step in this analysis of white racialized legal practice is to look at substantive whiteness. For women of color, there are problems with the way the statutes are written and/or interpreted, particularly when it comes to determining who is or is not a victim and whether or not mutual restraining orders<sup>140</sup> are issued. The categories that define

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visited Nov. 29, 2005) (describing how to file order of protection); Eastside Domestic Violence Program, *About Domestic Violence Protective Orders*, <http://www.edvp.org/AboutDV/protectionorders.htm> (last visited Oct. 28, 2005) (providing information on protective orders and describing how to file one); Tucson City Court, *Orders of Protection*, [http://www.cityoftucson.org/courts/How\\_To/Order\\_of\\_Protection/order\\_of\\_protection.html](http://www.cityoftucson.org/courts/How_To/Order_of_Protection/order_of_protection.html) (last visited Oct. 28, 2005) (describing how to file order of protection).

<sup>137</sup> See generally *supra* Part I.B (discussing how aspects of legal system are racialized white).

<sup>138</sup> See *supra* notes 107, 136 (providing examples of protective order paperwork and how to file).

<sup>139</sup> See Legal Services Income Guidelines, 45 CFR § 1611.1-1611.9 (2005); Legal Servs. Corp., *Eligibility: Income Level for Individuals Eligible for Assistance*, <http://www.lsc.gov/FOIA/frn/fr161102.htm> (last visited Nov. 2, 2005).

<sup>140</sup> LEHRMAN, *supra* note 26, at 4-36. Lehrman describes mutual orders as:

which persons have standing to seek an order, and from whom they may seek protection, constructs who is and who is not a victim. Some categories are exclusive in nature, such as those that specifically include spouses, thus leaving out anyone who is not, or cannot be, married.<sup>141</sup>

Studies show that some groups of women of color have been more likely than white women to fight back in a domestic violence situation, and/or to use defensive or retaliatory violence.<sup>142</sup> This often negates claims of victimhood and can result in the woman being the respondent in a protective order case or having mutual orders entered.<sup>143</sup> Some state statutes bar the issuing of mutual orders while others do not.<sup>144</sup> Some states require that either the police or a judge determine which party is the primary aggressor,<sup>145</sup> which may work against anyone who fights

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If the judge is confronted with conflicting facts from your client and the respondent, the judge may attempt to issue a mutual protection order, which orders the parties to stay away from each other. In some states, mutual protection orders are statutorily proscribed unless there is a petition filed by each party and the court makes findings that each party is entitled to a protection order.

*Id.* (citation omitted). States that proscribe the issuance of mutual orders include the following: Colorado, Kentucky, Maine, Michigan, North Dakota, Pennsylvania, and Utah. *Id.* In addition, “[t]he VAWA does not mandate full faith and credit be given mutual orders of protection unless due process requirements are met.” *Id.* at 5-9 (citing 18 U.S.C.S. § 2265(c)).

<sup>141</sup> See, e.g., Eric Johnston, *Ohio Marriage Ban Weakens Other Law*, PLANET OUT NETWORK, Mar. 24, 2005, <http://www.planetout.com/news/article.html?2005/03/24/2> (reporting that Ohio judge invalidated part of state’s domestic violence law that recognized “relationships between unmarried couples” based on constitutional ban on recognition of same-sex relationships: “Issue one was the most broad, prohibiting any state or local law that would ‘create or recognize a legal status for relationships of unmarried individuals.’”).

<sup>142</sup> See Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Women*, 81 N.C. L. REV. 211, 301 n.355 (2002) (noting that battered women of color are more likely to fight back and, as a result, an “explanation of battered women’s conduct from a ‘solely victimized perspective’ ignores the stories of such women” (citing DONALD A. DOWNS, *MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME, SOCIETY, AND THE LAW* 166-68 (1996))).

<sup>143</sup> See *supra* note 140 for discussion of mutual restraining orders and when/how they are barred. See also LEHRMAN, *infra* note 187 and accompanying text (discussing problems with mutual restraining orders).

<sup>144</sup> LEHRMAN, *supra* note 26, at 4-36.

<sup>145</sup> *Id.* at 6-16 to -17 (stating that “[t]o discourage the problem of dual arrest some statutes direct police to determine the ‘primary physical aggressor’ when there are mutual complaints of domestic abuse”) (citation omitted). Some statutes provide a list of factors to determine the primary physical aggressor. California, for example, directs officers to consider factors such as the intent of the law to protect domestic violence victims; threats creating fear of serious injury; history of domestic violence between the parties; and

back.<sup>146</sup> As domestic violence researchers Eve and Carl Buzawa write:

[A] woman who has been the victim in an ongoing pattern of violence may find that the police arrive only to misinterpret an act of self-defense on her part out of context, resulting in her arrest . . . . The true aggressor may not have struck a physical blow at the particular time that would allow the police to use a primary aggressor provision . . . . [T]he criminal justice system implicitly requires the identification of a crime with a defined victim and offender. Long-term abuse resulting in victim retaliatory violence is likely to be treated as domestic violence.<sup>147</sup>

This means that a victim who may be acting in self-defense could be determined to be the perpetrator of the violence and subject to arrest.<sup>148</sup>

Within the protective order context, the courts' determination of the petitioner's response is influenced by the construction of the battered woman as victim. If the petitioner fits the "archetypal battered woman"<sup>149</sup> image of a woman suffering from learned helplessness,<sup>150</sup> or the "battered woman syndrome,"<sup>151</sup> she will more likely be seen as a victim and will earn her protective order. If women of color have not learned to be helpless, and demonstrate as much by fighting back, for example, or appearing as anything but docile when police arrive (thus falling into stereotypical and expected behavior),<sup>152</sup> then laws drafted with the archetypal battered woman in mind do not go very far in protecting them.

Finally, there is procedural whiteness. The single most devastating example of procedural whiteness is the overtly racist judge. There are

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whether either party acted in self-defense. *Id.* (citing CAL. PENAL CODE § 836(c) (3) which states that where mutual protection orders have been issued, liability for arrest applies only to person reasonably believed to be primary physical aggressor).

<sup>146</sup> Even with the mandate to determine the primary physical aggressor, or if both parties have injuries, determining who acted in self-defense and who acted with offensive violence may be difficult to determine and may still result in mutual arrest. *See id.* at 6-16 (discussing mutual arrests, primary physical aggressor, and self-defense).

<sup>147</sup> EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 136 (3d ed. 2003).

<sup>148</sup> *See* LEHRMAN, *supra* note 26, at 6-18 (discussing self-defense).

<sup>149</sup> "Archetypal battered woman" is another way to describe the construction discussed in *supra* Part I.B.1.

<sup>150</sup> WALKER, THE BATTERED WOMAN, *supra* note 93, at 49-52.

<sup>151</sup> WALKER, THE BATTERED WOMAN SYNDROME, *supra* note 104.

<sup>152</sup> *See supra* notes 87-89 and accompanying text (discussing stereotypes of women of color).

more subtle forms of racism. For example, a case may be dismissed because a judge believes stereotypes about Black women and Latinas indicating that all violence between couples in these populations consists of fair fights.<sup>153</sup> Another example of procedural whiteness are those cases where the allegations in a petition for an order of protection includes the statement that physical violence left the petitioner with serious bruising. Judges have said that the photographic evidence entered in support of the allegations does not show that the bruises were very serious because there was not much discoloration. These women's very dark skin does not show fist prints with enough distinction to bring them within the judges' view of what constitutes serious physical abuse. Other examples of procedural whiteness occur when plaintiffs are required to provide their own translators.<sup>154</sup> Anecdotes such as these, which are related by domestic violence legal practitioners, clinic students, advocates and victims themselves are examples of procedural whiteness.<sup>155</sup>

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<sup>153</sup> See generally *supra* notes 5, 87-88, 95 and accompanying text, and *infra* note 154 for discussion on stereotyping of Black women and Latinas. The generalized bias or racist attitudes that are reflected in judges' reactions to women of color seeking legal assistance to escape battering has been noted. See, e.g., PTACEK, *supra* note 95, at 52 ("The most common acts of noncompliance [with Massachusetts law governing the issuance of restraining orders] attributed to judges were . . . a biased or racist attitude toward women . . ."); *id.* at 61 (discussing how in Massachusetts a report commissioned by Supreme Judicial Court "identified pervasive bias in the court system") (citation omitted); *id.* at 130 (noting that "there seems to be an assumption that poor and working-class women of color seeking legal redress are not 'honorable citizens'. . .") (citation omitted); *id.* at 132 (specifically identifying stereotype of "welfare mother" as "powerful racist image" that "may cause court officials to prejudge their credibility and the importance of their requests"). However, to my knowledge there has been no study of, or statistical reporting on, the specific instances of obvious or more subtle racism from judges hearing protective order cases.

<sup>154</sup> See Jenny Rivera, *The Availability of Domestic Violence Services for Latinas in New York State: Phase II Investigation*, 21 BUFF. PUB. INT. L.J. 37, 70-71 (2002-2003) (citing limited number of available translators in New York courts); Aili Mari Tripp & Ladan Affi, *Domestic Violence in a Cultural Context*, 27 FAM. ADVOC. 32, 34 (2004) ("Children who serve as translators in these situations suffer trauma, and family members who translate are not always truthful, depending on the power dynamics in the family.").

<sup>155</sup> These anecdotes come from a variety of sources. Two of these sources include the students and supervising attorneys in the domestic abuse clinic for which I teach the substantive domestic violence course. In this clinic, we review cases that students are handling and these stories are reported in class. Other examples come from cases I handled in practice or when employed in direct domestic violence services. Still others come from advocates, activists and survivors themselves.

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II. CHANGING THE DOMESTIC VIOLENCE DISCOURSE: TURNING TO MULTI-CULTURAL IDENTITY, PROCESS, AND PRACTICE

When it comes to legal intervention in domestic violence, neither the identity, the process, nor the practice, as they exist within and affect domestic violence legal discourse, are constructed to work for women of color as well as they do for white women. This means that women of color are not served as well as white women when they turn to the law as a way to escape domestic violence. Women of color are left wanting because the law and legal-related services that exist to assist battered women, though articulating multi-cultural inclusivity, are systemically single-race focused, with that single race being white. In other words, the legal system — as influenced by the battered women’s movement<sup>156</sup> — which exists to fight domestic violence, talks the racial inclusivity talk, but walks an exclusively white walk.

This racial exclusivity works against battered women of color because they are not afforded the same access to any of the discursive elements as white women. This limited access to identity, process, and practice disservices, and even harms women of color. The battered woman identity, which has been privileged by the battered women’s movement and therefore the legal system, is necessary in the process of moving those who have been abused from victim status through to survivor status along the empowerment continuum.<sup>157</sup> Domestic violence victims, survivors, and advocates have created and honed this process, this continuum, to save and restore the lives of those being abused.

Included as an important aspect of this continuum are both the criminal and civil legal systems. The law is now the central aspect of the empowerment continuum that utilizes the battered woman identity in order to effectuate the goals of resolving conflict, enforcing the law, protecting individual rights and holding violators accountable.<sup>158</sup> The law also plays an important role in initially determining the makeup of that identity. Who the battered woman is and how she is to behave is constructed and enforced through legal actors and practices: legislation, police, prosecutors, civil and criminal courtroom procedures, policies and practices,<sup>159</sup> rules of evidence,<sup>160</sup> local rules and expectations,<sup>161</sup> as

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<sup>156</sup> See SCHNEIDER, *supra* note 17, at 34-42 (discussing “theory,” “process,” and “experience” of “feminist [domestic violence] lawmaking”).

<sup>157</sup> See *supra* Part I.B.2. for a discussion of the empowerment continuum.

<sup>158</sup> See, e.g., *supra* note 31.

<sup>159</sup> See generally LEHRMAN, *supra* note 26; MCKENNA, *supra* note 26 (providing extensive

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well as the language and behavior of judges, attorneys and other legal system officials. All these people and their actions produce the domestic violence legal discourse.

This part argues for ways to change the discourse. First, feminists of the domestic violence movement are the parties who can and must intervene in and reconstruct the dominant domestic violence discourse. The elements of the dominant discourse include: identity — currently that of battered woman as white victim; process — an empowerment continuum that gauges whether an empowerment has occurred by what happens to, or the behavior of, the abuser; and domestic violence legal practice that needs a victim in order to operate. Each element needs to be made multi-cultural in order to alter the current discursive path. Secondly, this section explains that this change in (dis)course will not only have a positive effect for battered women of color who use the legal system as a tool to end the abuse in their lives, but also on the lives of white battered women. The entire discourse around domestic violence will be altered and all who seek the end of violence against women will benefit.

#### A. *Charting a Different (Dis)Course*

Feminists, as the force behind the movement against domestic violence, were those that constructed the original domestic violence discourse.<sup>162</sup> They helped women who were being abused in their homes by their husbands and boyfriends speak out about what was happening to them. There would be no domestic violence law without the women's movement. The existing laws, as written, reflect the feminist sensibility on which the anti-domestic violence movement was founded.<sup>163</sup>

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compilation of domestic violence policies, procedures, and practices).

<sup>160</sup> See, e.g., LEHRMAN, *supra* note 26, at 7-61 to -62, 7-64 to -65, 7-49 to -53, 1-26 to -27 (describing motions to exclude evidence of victim's character, exceptions to hearsay, abuse from previous partners, and admissibility of expert testimony).

<sup>161</sup> Local rules are the rules and procedures propagated by individual court systems in local jurisdictions, often controlled at the county level, but sometimes by individual judges in individual courtrooms. See, e.g., ILL. CT. C.P.R. (providing current text of statutes and court rules governing each judicial district in Illinois, including pretrial and post trial procedures and procedures for various types of proceedings).

<sup>162</sup> See *supra* Part I.A for a discussion of feminists, the origins of the battered women's movement, and domestic violence discourse.

<sup>163</sup> Though current enforcement of these laws generally does not reflect feminist theory or practice. See Morrison, *supra* note 4, at 93 ("Though influenced by the feminist battered women's movement, the focus now is on 'domestic violence . . . as a problem in isolation. . .

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The problem is that the legal system has distorted the fundamental aspects of the discourse, what I call the essential elements, and reshaped them to fit into an existing, white-dominated system. The domestic violence movement has been changed by the law rather than the law being changed by the fight to end violence against women. The legal system has begun to dictate the terms of the struggle to end violence against women, even though without the battered women's movement there would be no domestic violence law. Measurements of success now include the numbers of orders of protection issued and arrests made. The legal system must therefore construct an identity, process and a way of practice that enables it to be successful according to these more readily quantifiable standards.

In spite of the legal system's current control over the construction of the three essential elements, it is still possible to change the dominant domestic violence discourse for two reasons: 1) the fact that the domestic violence movement was able to influence the federal government to recognize the seriousness of domestic violence by bringing about the enactment and reauthorization of the Violence Against Women Act ("VAWA") indicates that the movement still has influence and can exercise its clout in the political arena; and 2) feminists of color, and others marginalized by the white domestic violence movement, have come to the forefront to challenge both the established movement and dominant social and political institutions to take all intimate violence more seriously. The current domestic violence movement, which now more fully includes those who had been marginalized by the early battered women's movement, has the political power to make a change in the (dis)course.

#### 1. Domestic Violence Movement Influences: The Violence Against Women Act

While VAWA<sup>164</sup> is as much a part of the white domestic violence discourse as any given state law, that does not negate the fact that its existence indicates the power of the battered women's movement. In

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. It is viewed as though it can be 'solved' or 'treated' through legal remedies or therapy alone, without considering the issues of women's equality or gender subordination.'" (citing SCHNEIDER, *supra* note 17, at 27-28)); *see also infra* Part II.B.2 (discussing what "success" means in legal context as opposed to "victimcentric" context of feminist-founded battered women's movement).

<sup>164</sup> Federal Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103-322, 108 Stat 1796 (2000).



1994, battered women's advocates were able to get federal legislation signed into law, which, among other things, codified that gender-related violence was subject to federal criminal penalties. This successful effort indicates that more recently than the 1970s and 1980s, those in the domestic violence movement had some power to shape the discourse about violence against women. In 2000, battered women's advocates, immigrant rights groups, lawyers and other advocates for the poor, worked to get expanded or restored protections for battered immigrant women.<sup>165</sup> As a result, VAWA was reauthorized, this time with those and other additional provisions.<sup>166</sup>

## 2. Moving From "Margin to Center"<sup>167</sup>

The success of obtaining additional provisions for battered immigrant women is an example of the influence of the domestic violence movement and the growth, both in numbers and in strength, of other groups mobilized to end intimate violence. These include groups focused specifically on individual communities of color,<sup>168</sup> as well as those working in coalition on the issue of violence in these communities as a whole,<sup>169</sup> or on behalf of immigrants.<sup>170</sup> Also included are groups organizing against same-sex domestic violence,<sup>171</sup> those working to end violence against men within heterosexual relationships,<sup>172</sup> as well as

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<sup>165</sup> Brennan Center, *The Victims of Trafficking and Violence Protection Act of 2000* (Oct. 20, 2000), <http://brennancenter.org/programs/lse/pages/> (locate article using search by title at above URL); Family Violence Prevention Fund, *VAWA: A History of the Violence Against Women Act*, <http://endabuse.org/vawa/display.php?DocID=34005> (last visited Nov. 26, 2005).

<sup>166</sup> VAWA's specific civil rights provisions were struck down in *United States v. Morrison*, 529 U.S. 598 (2000), however, and the discourse around the provisions at the time of enactment, as well as the decision itself, may be considered problematic in their comparisons between race and gender.

<sup>167</sup> See *supra* note 1 (describing origin of phrase).

<sup>168</sup> See generally Family Violence Prevention Fund, Ethnic Communities, <http://endabuse.org/links/?CategoryID=5> (last visited Oct. 28, 2005) (listing some organizations serving women of color).

<sup>169</sup> See Off. on Violence Against Women, Domestic Violence Coalitions of States and Territories, <http://www.ojp.usdoj.gov/ovw/state.htm> (last visited Oct. 28, 2005).

<sup>170</sup> See, e.g., The National Network to End Violence Against Immigrant Women Homepage, <http://www.immigrantwomennetwork.org/> (last visited Oct. 28, 2005).

<sup>171</sup> See generally National Coalition of Anti-Violence Programs Homepage, <http://www.ncavp.org/AVPs/default.aspx> (last visited Oct. 28, 2005) (listing affiliated same-sex domestic violence programs).

<sup>172</sup> See generally Stop Abuse for Everyone (SAFE), Resource List Abused Men, <http://www.safe4all.org/resource-list/index?category=1> (last visited Nov. 2, 2005).

queer and straight youth working to end dating violence.<sup>173</sup>

Where the activists go, the scholarship follows. Critical scholarship, particularly on the issues of race and men's violence against women, and racism in the domestic violence movement, has impacted the movement itself.<sup>174</sup> Now it is time for the movement to combine its political influence with a multi-cultural understanding of domestic violence legal discourse. It is time to begin to reclaim and reconstruct domestic violence legal discourse and domestic violence law.

To make that change, those currently active in the anti-domestic violence movement need to reclaim the discourse to make it more overtly feminist and political again, but with a difference. This feminism must be Critical Race Feminism,<sup>175</sup> and the politics must be that of inclusion and anti-subordination.<sup>176</sup> This approach will increase political power because of the inclusion of women of color who had been excluded. It is also the only way to create a truly multi-cultural discourse. This method will modify the current domestic violence process and practice because it will recreate the battered woman by moving the identity from that of white victim to that of multi-cultural survivor. Reconstructing the identity, process and practice changes the discourse.

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<sup>173</sup> See generally Family Violence Prevention Fund, Teen Dating Violence Resource List, <http://endabuse.org/programs/display.php3?DocID=347> (last visited Nov. 2, 2005) (providing list of hotlines devoted to teen dating violence).

<sup>174</sup> See *supra* notes 5-6; *supra* note 168 (presenting statistics and comments on service providing and scholarship addressing domestic violence); see also Beth Richie, *Forward to DOMESTIC VIOLENCE AT THE MARGINS: READINGS ON RACE, CLASS, GENDER AND CULTURE*, at xv, xv (Natalie J. Sokoloff & Christina Pratt eds., 2005) ("Academic and research institutions have been central in creating change by advancing new knowledge in the field."). Beth Richie further discusses how the work at hand is part of that effort to create change and advance knowledge and that it is a work that addresses issues of race, class and sexual orientation as well as other issues facing people at the margins of the domestic violence movement. *Id.*; see also SCHNEIDER, *supra* note 17, at 63 ("Although, within the battered women's movement, work to protect women from battering has largely been shaped by the experience and understanding of white women, battered women's advocates and women of color have done considerable work to expand definitions and perspectives to include women of color who have been battered." (citations omitted)).

<sup>175</sup> See *supra* note 9 (defining Critical Race Feminism).

<sup>176</sup> See Charles R. Lawrence, III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787, 792 (1992) (explaining that antisubordination theory is theory dedicated to working against "the purpose and effect of maintaining established systems of caste and subordination").

B. *Constructing Multi-Cultural Identity, Process and Practice*

The white “battered woman” identity, the white-focused empowerment continuum, and white-centered legal practice lead to and are the result of a legal discourse that both discounts battered women of color, and subjects victims of domestic violence who are not white to further abuse within a system purporting to be there to help them. But women of color have constructed other responses to both the violence in their lives and to the laws erasing their realities.<sup>177</sup> By decentering white and instead centering color, the battered woman identity will change from victim to survivor. This in turn will have a positive effect on the empowerment continuum, allowing for more cultural sensitivity and community involvement.

Legal practice is affected as well. Since the identity is now of a survivor and the process includes community, the law can place less emphasis on using orders of protection as a way to respond to serious violence and can use them for the intended purposes of protecting those being victimized. Centering color will allow the system to move from focusing on the needs of white victims to creating multi-cultural survivors.

1. The Battered Woman’s Survivor Identity

In order to create a multi-cultural survivor, the identity, the discourse, and the process must locate women of color at their respective centers. This entails shifting the focus away from white women and onto women of color. Both the walk and the talk must be multi-racial, with women of color as the starting point. Within the identity, the concept of the victim must be reconstructed to be one who, despite being beaten down, still survives.<sup>178</sup> This proposal is grounded in Gondolf and Fisher’s survivor

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<sup>177</sup> See *supra* note 5 (detailing scholarship discussing women of color and domestic violence); see also *supra* note 168 and accompanying text (describing organizations and strategies dedicated to ending domestic violence against women of color).

<sup>178</sup> GONDOLF & FISHER, *supra* note 62, at 17-18. Gondolf and Fisher’s hypothesis is the foundation of survivor theory. They describe it as follows:

The alternative characterization of battered women is that they are active survivors rather than helpless victims. . . . As suggested above, battered women remain in abusive situations not because they have been passive but because they have tried to escape with no avail. We offer, therefore, a survivor hypothesis that contradicts the assumptions of learned helplessness: Battered women increase their helpseeking in the face of increased violence, rather than decrease helpseeking as learned helplessness would suggest. More specifically,

theory,<sup>179</sup> and calls for a shift away from learned helplessness<sup>180</sup> as the core concept within domestic violence law. The effect on the legal system will be profound if the battered woman identity was to shift, at the intersection where race and the victim/survivor concept meet, moving away from white victim to that of multi-cultural survivor.

To make this discursive shift, the focus of battered women's stories must change. Currently, the standard is to concentrate on the victimization.<sup>181</sup> The idea behind this standard probably was that these stories would cause society (sometimes represented as members of a jury) or a judge to be appalled to see what some man did to some poor woman. But the reaction has been to ask the question, "why does she stay," or "why does she go back to him?"<sup>182</sup> Making the discursive shift to tell a survivor's narrative in which the focus is on what the woman did to endure reconstructs the battered woman identity as survivor, casts her in a more positive light, and places the emphasis on the violence of the man.<sup>183</sup> Essentially, the narrative becomes "she did everything right

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we contend that helpseeking is likely to increase as wife abuse, child abuse, and the batterer's antisocial behavior (substance abuse, general violence, and arrests) increase. This helpseeking may be mediated, as current research suggests, by the resources available to the woman, her commitment to the relationship, the number of children she has, and the kinds of abuse she may have experienced as a child.

The fundamental assumption is, however, that woman [sic] seek assistance in proportion to the realization that they and their children are more and more in danger. They are attempting, in a very logical fashion, to assure themselves and their children protection and therefore survival. Their effort to survive transcends even fearsome danger, depression or guilt, and economic constraints. It supersedes [sic] the "giving up and giving in" which occurs according to learned helplessness. In this effort to survive, battered women are, in fact, heroically assertive and persistent.

*Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> See generally VERA ANDERSON, *A WOMAN LIKE YOU: THE FACE OF DOMESTIC VIOLENCE* (1997) (including photographs and short first person narratives about women who are survivors of domestic violence, though most of stories' foci are on violence and/or what each woman's abusive partner did).

<sup>182</sup> See, e.g., Editorial, *Why Didn't She Just Leave?*, CHI. TRIB., May 18, 2005, § 1, at 22 (referring to Sheila Hollabaugh whose abusive partner Jerry Hobbs was arrested for killing their eight year old daughter, Laura Hobbs). There had been a history of complaints to child welfare organizations and court proceedings involving allegations of domestic violence against Jerry Hobbs. *Id.*

<sup>183</sup> See GONDOLF & FISHER, *supra* note 62 (stating that battered woman identity as

because she is still alive.” The focus then can shift to the real issue, which is his abusive behavior. And the question becomes, “why is he so violent?”

Reconstructing the battered woman as survivor will not only shift the focus to the perpetrator’s violence, but may also have a positive effect on some of the unintended and difficult circumstances that have arisen for battered women in conjunction with their involvement with the legal system. Two of those circumstances are addressed here: 1) charging a woman with failure to protect her children<sup>184</sup> and 2) a judge issuing mutual orders of protection.<sup>185</sup> These unintended circumstances, among others, cause the already battered woman additional harm under the current system.

a. Unintended Circumstances: Failure to Protect

When it comes to charges of failure to protect children, the general perception seems to be that no matter what is happening to a woman, she is an adult, and usually the mother. Therefore, she is expected to be able to protect her children. This is a problematic assumption in and of itself. The image of the battered woman as victim exacerbates the problem because of a backlash against “using” victimization as an excuse.<sup>186</sup> The image of the battered woman as survivor changes the

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survivor is supported by research).

<sup>184</sup> See 18 PA. CONS. STAT. ANN. § 4304(a) (West 2005) (endangering child’s welfare is committed “by violating a duty of care, protection or support”); Brooke Kintner, *The “Other” Victims: Can We Hold Parents Liable for Failing to Protect Their Children from Harms of Domestic Violence?*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 271, 274-75 (2005) (explaining that laws imposing liability upon parents, who have a duty to protect their child, when they fail to prevent abuse of their child at the hands of known offender, are sometimes referred to as failure-to-protect laws, and take form of “omission statutes, which criminalize the passive conduct of those who expose a child to a risk of maltreatment or fail to protect or care for a child when they have an affirmative duty to do so” (citing Linda J. Panko, *Legal Backlash: The Expanding Liability of Women Who Fail to Protect Their Children from Their Male Partner’s Abuse*, 6 HASTINGS WOMEN’S L.J. 67, 69 (1995))). One can commit this offense by passively allowing a child’s welfare to be endangered, whether or not one actually commits the abuse or neglect his or herself. For a discussion of the civil equivalent, removal of children by a child protective services agency, see also *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002) (resolving case where mothers sued city, officers, and employees of city administration for children services (“ACS”), individually and on behalf of their children, alleging that ACS’s removal of children from mothers’ custody under New York law solely on grounds that mothers were victims of abuse violated substantive and procedural due process).

<sup>185</sup> See *supra* note 140; *infra* note 187 (discussing mutual orders of protection).

<sup>186</sup> ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND*

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construction to that of a woman who is fighting to save her children from an abusive man.

It is important to remember that these are images that are being constructed in order to change the discourse in such a manner that will have a positive material effect on the outcome of a battered woman's interaction with the legal system. As such, what a battered woman actually does is not the point. Take, for example, a hypothetical situation in which a mother of two, who has been physically and verbally abused for 10 years, seeks help but is turned away dozens of times. One day, during a particularly severe beating, her oldest child intervenes and is killed by his father. If this woman is constructed as a victim who allowed her 12-year-old child to fight her battles for her, there may be a failure-to-protect charge, regardless of what actions she did or did not take. If she is constructed as a survivor, a person who sought help and was turned away, who protected her children for over a decade to the best of her ability but for whom the system ultimately failed, then the odds that criminal charges will be brought against her decrease significantly. This mother did not change her behavior and yet what happens to her within the legal system can change based on the constructed identity.

b. Unintended Circumstances: Mutual Orders of Protection

Construction of identity may affect the issuance of mutual orders of protection. These are orders that apply to victim and perpetrator. Both parties are mandated to comply with the specific orders contained therein, such as staying away from each other. One problem with these orders is that they "suggest that [the one being victimized] is as much to blame for the violence as the perpetrator."<sup>187</sup> These orders allow the legal

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EVASIONS OF RESPONSIBILITY 57-60 (1994) (discussing Lorena Bobbit's claim that her husband had raped her twice as her excuse as to why she cut off his penis); *id.* at 322-33 (including "Battered Persons Syndrome" in glossary of abuse excuses).

<sup>187</sup> LEHRMAN, *supra* note 26, at 4-36 to -37. The discussion about mutual orders continues as follows:

The issuance of a mutual protection order validates the abuser's tendency to shift the blame for the abuse to the abused person. Moreover, enforcement is concluded: when police officers are called to a scene of domestic violence and both parties present a civil protection order, who is arrested? Police officers often respond by arresting no one or by arresting both parties. Neither of these alternatives serves the purpose of a civil protection order which is to keep [the abused person] safe. Mutual protection orders fail to keep petitioners safe. Therefore, they should be avoided.

system to continue victimizing the woman by blaming her for what has happened, much in the same way the abuser does. When it comes to mutual orders of protection, the battered woman, constructed as victim, is not able to assert herself and ensure that they are not issued. This is so because if she advocates on her own behalf, asserting that she is in no way to blame, she would be stepping outside the role she has been assigned. Doing so challenges the cult of true victimhood because she did not remain submissive to the abuser or the court.<sup>188</sup> A survivor, however, is expected to step up and assert herself. The performance demands a different behavior that yields more positive results. In this case, the survivor refuses to be blamed and challenges the notion that the perpetrator needs to be protected from her.

To locate women of color at the center of the survivor identity is on one hand, to play into existing counterproductive stereotypes of women of color as too strong to be victims. The idea is that if women of color are strong enough to survive then there is no need for the legal system to protect them. However, if the battered woman is a survivor and the construction of the battered woman survivor is that of a woman of color, then the stereotypes, though maybe false, become productive and actually help women of color gain access to the legal system, getting the protection they deserve. The construct of the multi-cultural survivor consists of images illustrating what it means for women of many cultures to survive. The identity allows for a range of the behaviors women find necessary in order to protect themselves and their children. Centering women of color simply means that the aspects of any given culture, race, or ethnicity become part of the core identity. The actions taken by any who identify with a particular culture, that collectively have kept those women excluded from being seen as battered, are also central to the survivor identity. The image then becomes inclusive and women of color are able to access any positive results the legal system might offer. The very act of moving women of color "from margin to center"<sup>189</sup> of the survivor identity alters the image that helps to lead to these positive results.<sup>190</sup>

This changed identity also helps to negate the criticisms leveled at

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*Id.*

<sup>188</sup> See *supra* notes 87-99 and accompanying text for a discussion of the concept of the cult of true victimhood.

<sup>189</sup> See *supra* note 1 (defining term).

<sup>190</sup> See *supra* Part II.A.2.

battered women in particular, and women and other subordinated groups in general, that say battered women use victimhood as an excuse for many of their own failures and shortcomings, such as failing to protect their children.<sup>191</sup> Constructing the battered woman as a survivor highlights the difference between speaking out against one's own victimization and the victimization of other women by "naming the violence"<sup>192</sup> and using victimhood as an excuse. Though both may tell their stories, a victim's story is interpreted as a tale of woe about how badly she has been treated whereas a survivor's narrative is interpreted as a story of overcoming great odds to persevere, even though they may be the same story. All in all, the language, images, and behavioral expectations of legal discourse must recreate the survivor as the default image turning away from the image of a victim who has learned to be helpless.

## 2. Multi-Cultural Process: An Actual Empowerment Continuum

The construction of the battered woman identity as a white victim is not exclusive to the domestic violence legal system or the battered women's movement. For communities of color, the victim of domestic abuse is also a white woman because the dominant discourse of the victim being white has permeated these communities. Those who are abusive say to those they victimize that everyone knows Black women like getting beat.<sup>193</sup> That it is okay because it is part of the culture of machismo for Latinos to hit Latinas.<sup>194</sup> It is about honor.<sup>195</sup> That it is their hot temperedness.<sup>196</sup> Asian men simply are not aggressive; therefore, it never happens within Asian communities.<sup>197</sup> Of-color batterers and their targets believe this abuse is not a violation of any law because only domestic violence is a violation of the law, and within their respective communities those behaviors of perpetrators of color are not considered to be domestic violence. Abusers use the construction of the battered

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<sup>191</sup> See *supra* note 184 and accompanying text (discussing failure to protect).

<sup>192</sup> See LOBEL *supra* note 72 (titled book "Naming the Violence," referring to speaking out against, specifically, lesbian battering).

<sup>193</sup> See generally Robinson, *supra* note 87 (discussing societal images of African American victims of domestic violence).

<sup>194</sup> See *Latina Women*, *supra* note 88 (discussing cultural barriers Latina women may face in trying to live free of violence).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> See *Asian Women*, *supra* note 89 (discussing stereotypes surrounding Asian women).



woman as white, and the existing stereotypes about women and men, to control their partner's behavior. Communities of color also silence the victimized by perpetuating both the racial stereotypes and the identity of the truly battered, i.e. the true victim, as being white.<sup>198</sup>

Though the true victim is constructed as white, there is a counter discourse within communities of color; a discourse that acknowledges that women of color are abused.<sup>199</sup> Even though the dominant discourse does permeate majority and minority groups, communities of color have stepped up to create the very organizations that serve battered women of color.<sup>200</sup> These examples show that a change in the behavior can affect the discourse and vice versa.<sup>201</sup> This is not to say that the organizations and programs designed to assist battered women of color have all made the discursive shift, but rather that the fact they have organized specifically around violence facing women of color signifies a change in the discourse itself. Further, it indicates that it is possible to return the process element of domestic violence discourse to a state where it is again focused on community and creating survivors.

The original empowerment continuum<sup>202</sup> was a process by which a woman moved from victim to survivor to advocate, and came to join a community. The continuum was seamless in that the choices any woman needed to make for her safety and survival were honored. A woman was a survivor by virtue of having survived. She was deemed an advocate by working with other women in shelters and by learning to advocate for herself. A woman may have chosen not to seek a divorce from the husband who had been abusing her, or to reconcile with him, but it was her choice to make, and making that determination for herself did not mean she was not a survivor. She may have chosen not to cooperate with the prosecutor or to end her involvement with the civil

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<sup>198</sup> See, e.g., WHITE, *supra* note 128, at 15-24 (discussing how Black battered women are impacted by stereotyping and expectations within Black community).

<sup>199</sup> See *supra* note 5 (providing statistics addressing domestic violence in communities of color); see also Family Violence Prevention Fund, *supra* note 168 (listing organizations serving women of color); *supra* note 6 (citing scholarship on subject of women of color and domestic violence).

<sup>200</sup> See Family Violence Prevention Fund, *supra* note 168 (listing organizations serving women of color).

<sup>201</sup> See *supra* Part I.B.3; *infra* Part II.B.3 (discussing interaction between discourse and legal practice).

<sup>202</sup> See *supra* note 105 and accompanying text.

legal system at the emergency order of protection<sup>203</sup> stage, not seeking a plenary/permanent order.<sup>204</sup> Yet this was not an automatic determinant that she was not moving along the empowerment continuum, because becoming an autonomous decision maker was part of the process. As such, how one moved through the empowerment continuum was self-determined by the individual doing so. As the battered woman was an identity which was named and claimed, so too was the survivor identity. Under the domestic violence movement's empowerment continuum, it was the battered woman herself who determined when she was a survivor and when she was empowered.

As the empowerment continuum is currently constructed, it is the legal system making the determination of when a battered woman is empowered. This process is located within the system itself rather than within a community. That community could be part of the domestic violence movement or made up of people who share ethnicities, identities, politics or interests, such as communities of color. This means that the system defines when and if a battered woman is empowered, and does so by measuring the outcome of her case and the behavior of the perpetrator. The legal system looks to whether or not an order of protection was granted, whether an abuser was arrested or sent to jail. The legal system looks to these outcomes regardless of whether the battered woman desired them, or whether they do anything to move her out of victim status and into the status of survivor. This definition of empowerment relies on a resolution to the specific legal case. It is not based on what actually happened to, or for, the battered woman. In this situation empowerment happens to her. She is passive in the process and thus not truly empowered.

Another way a battered woman ends up being passive in the

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<sup>203</sup> Emergency Orders of Protection, Protective Orders, or Temporary Restraining Orders are short-term orders available *ex parte*. For an explanation of Emergency Orders of Protection, see 750 ILL. COMP. STAT. ANN. 60/221 (1993) (providing that Emergency Order of Protection must contain reason that respondent was not notified of entrance of remedy against respondent, and that it must contain, among other requirements, finding that named petitioner was exploited, neglected and/or abused by respondent who is member of petitioner's household or family; "notice, printed in conspicuous type" of potential range of state and federal criminal penalties imposed if respondent violates order which may forbid "physical abuse, neglect, exploitation, harassment, intimidation, interference with personal liberty, willful deprivation, or entering or remaining present at specified places when the protected person is present"; and may grant petitioner exclusive possession of residence).

<sup>204</sup> Plenary Orders of Protection are orders issued for up to two years in the state of Illinois. See *id.* at 60/219.

empowerment process is when her “empowerment” is determined by the perpetrator’s responses to court orders. A battered woman may also be considered to have been empowered by the legal system because her abusive partner has not violated the order of protection, or because he is regularly attending batterer’s counseling,<sup>205</sup> or because he has not shown up to a scheduled visitation intoxicated.<sup>206</sup> These behaviors are considered to be successes, and successes indicate empowerment within the law. Though such results are good, and may very well help a woman feel much safer, they are not indications that she is becoming an autonomous decision-making survivor. The battered woman’s life has always been about what *he* does and how *he* feels. These remedies, though obviously helping the battered woman to be in a much better circumstance than the one in which she was previously placed, are still all about *him*. Even though the remedies are about him, they do little to facilitate reaching one of the stated goals of some domestic violence statutes to “hold the batterer accountable.”<sup>207</sup> These outcomes seek to change his life for the better, not make him answer for his violence.

Like the multi-cultural identity itself, a multi-cultural empowerment continuum places the woman of color at the center because she is a woman discursively, and in reality, not divorced from her communities or identities. The original empowerment continuum was structured in such a way that to “join” the domestic violence community, one needed to abandon, even if only temporarily, any other communities of which she was a part. The starkest example of this was the battered women’s shelter. A woman left her home and neighborhood to go to a secret place often far away from friends, family and support (if she had any left). The shelter system has been criticized for being a model that lacks cultural sensitivity,<sup>208</sup> and devalues the importance of community and

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<sup>205</sup> See, e.g., ELLEN PENCE & MICHAEL PAYMAR, EDUCATION GROUPS FOR MEN WHO BATTER: THE DULUTH MODEL (1993) (detailing methodology for working with abusive men).

<sup>206</sup> See *supra* note 101 (explaining that other counseling is also a possible remedy, which can include treatment for alcohol or drug addiction and in turn require that the respondent abstain from drinking, specifically before or during visitation with children).

<sup>207</sup> See *Nicholson v. Williams*, 203 F. Supp. 2d 153, 229 (E.D.N.Y. 2002) (stating finding of fact that city administration for children services “unnecessarily and routinely fails to engage the batterer, demand that the batterer participate in needed services, attempt to remove the batterer from the household, or otherwise *hold the batterer accountable*” (emphasis added)); see also WASH. REV. CODE ANN. § 70.123.140(e) (1961) (stating that “[p]olice and courts should *hold the batterer accountable* for his or her crimes” (emphasis added)).

<sup>208</sup> SCHECHTER, *supra* note 33, at 88-98 (discussing “key issues” for shelters including

family for women of color and immigrants.<sup>209</sup> But it is true that shelters have saved lives<sup>210</sup> and are a part of the empowerment continuum. They are safe places and safety is essential.

Creating a multi-cultural empowerment continuum does not mean eliminating shelters or eliminating the concept of success (i.e. the win) from the legal system. It is about constructing a process and sustaining discourse that truly empowers, again, with women of color at the center. A multi-cultural process is one that incorporates the multi-cultural survivor into determining what defines success. This has been described as having victim-centric processes,<sup>211</sup> but I prefer to refer to them as

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dealing with issues of racism). Cultural sensitivity is often a demand from women of color and immigrant women who want to see changes to shelters and other battered women's services.

<sup>209</sup> See Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1027 n.70 ("Indian women and other women of color confront the same cultural insensitivity and racism at urban domestic violence shelters as they do elsewhere. These shelters can be unaware of the cultural resources which should be used to assist Indian victims of domestic violence." (quoting Gloria Valencia-Weber & Christine P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN'S L. REV. 69, 130 (1995))). See generally Crenshaw, *supra* note 3, at 1262-65 (describing way in which shelters for battered women fail to meet needs of women of color); Zanita E. Fenton, *supra* note 6, at 11 (describing manner in which racial and gender based stereotypes interact in stereotypes of women's victimization); Beverly Horsburgh, *Schrdegreesodinger's Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing an Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-Income Women of Color*, 17 CARDOZO L. REV. 531, 577 (1996) (noting that strategies against domestic violence "are inclined to reflect the experiences of white women" and "seldom deal with the economic and workplace discrimination issues that beset women of color"); Kimberly A. Huisman, *Wife Battering in Asian American Communities*, in 2 VIOLENCE AGAINST WOMEN, *supra* note 74, at 260, 267 (1996) (noting that services for battered women frequently do not have workers who are linguistically and culturally competent to assist Asian American battered women, particularly recent immigrant women); Rivera, *Domestic Violence Against Latinas*, *supra* note 6 (finding that domestic violence policies and laws do not account for Latina battered women's experiences); *id.* at 253 (noting that shelters sometimes refuse admission to monolingual Spanish speakers and few shelters have bilingual and bicultural staff); Susan Girardo Roy, *Restoring Hope or Tolerating Abuse? Responses to Domestic Violence Against Immigrant Women*, 9 GEO. IMMIGR. L.J. 263, 286 (1995) ("[M]any shelters remain culturally biased toward English-speaking, or American women.").

<sup>210</sup> Renee M. Yoshimura, *Empowering Battered Women: Changes in Domestic Violence Laws in Hawaii*, 17 U. HAW. L. REV. 575, 592-93 (1995) ("But the most crucial resource offered to these women is the break from the abuse so desperately needed to start the healing process. Shelters save women's lives by providing various services and referrals to many community resources." (emphasis added)).

<sup>211</sup> Victim-centric is also known as victim centered advocacy. NATIONAL VICTIM ASSISTANCE ACADEMY TEXTBOOK (2002), available at <http://www.ojp.usdoj.gov/ovc/assist/nvaa2002/toc.html>. Victim-centered advocacy is described as follows:

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survivor-centric processes. The success is measured by whether or not the outcome is what the individual intended or wanted. Measuring success based on what the battered woman wants is multi-cultural because it means that the survivors who are involved will bring to bear their own cultural norms and standards into contexts of success. The discourse about a successful outcome to the process a battered woman goes through then becomes one measured not against a white standard, but one that is constructed by women of color.

### 3. The Multi-Cultural Survivor and Legal Practice

One may wonder what effect constructing a multi-cultural discourse will have on domestic violence legal practice. The discourse around identity and process has been reconstructed to define the multi-cultural survivor working her way through a multi-cultural empowerment continuum. As part of the empowerment continuum, she encounters legal practice. As currently constructed, domestic violence law — made up of structure, substance and procedure — is racialized white.

Creating a multi-cultural structure means building a system that recognizes there are barriers to access that are racialized. The job is first to educate the system's actors on the issues; second, to identify what actions need to be taken and; finally, to implement that action plan. Because local communities are different, this is a task best left to local communities made up of domestic violence service providers and advocates and activists within communities of color rather than having the entire movement attempt a universal overhaul. As noted above, community-focused solutions may themselves be multi-cultural if

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Victim-centered advocacy involves engaging in a risk analysis with the client based on her perceptions. An advocate needs to find out what a client perceives as risks, and how the advocate can most effectively use this information to advance the woman's plans and priorities. The advocate and the woman may be working at cross-purposes, either deliberately, because they have different goals, or inadvertently, because the advocate does not know enough to ask about the client's concerns.

Victim-centered advocacy involves a three-step process: (1) help the client identify what she perceives as batterer-generated risks and what the effect of staying or leaving may be on those risks; (2) help the client identify life-generated risks and identify how the abuser may manipulate these risks to further his control; and (3) assess the client's past and current safety plans.

*Id.* at ch. 9.

communities of color are involved.

The process of obtaining an order of protection can illustrate the idea of reconstructing the discourse around legal practice, and the practice itself, as multi-cultural. In these cases addressing barriers to access for women of color may be as simple as addressing the location of where orders can be obtained. A county could locate courtrooms dedicated to issuing orders of protection in of-color neighborhoods, thus making them easily accessible to community members as long as safety is the first priority. Ensuring access to lawyers and legal information is another simple solution. Having translators and child care available can also help make remedies more readily obtainable.<sup>212</sup>

Such practical changes in structure show that the legal system is, and those who make up the legal system are, more open to serving a broader range of battered women. This newly found openness could lead to changes in domestic violence legal discourse because it indicates a reconstruction of the identity of the battered woman. Making access to restraining orders easier for a diversity of individuals indicates recognition that these individuals need those orders. This recognition speaks to the notion that the law acknowledges that more women than just white women are battered.

Making the law more substantively multi-cultural may actually be one aspect of the legal system already in effect to a limited extent. As noted before, domestic violence laws talk the multi-cultural talk. This is illustrated by the fact that domestic violence laws are not racially exclusive, though not specifically racially inclusive.<sup>213</sup> However, the face of the law is not the problem. The difficulty comes when laws are written with certain requirements that result in a differential impact on women of color. This may include defining persons who have standing to seek orders as citizens of the United States who reside in a given state. This definition excludes non-citizens, who may be disproportionately Asian or Latina. Another example may be a statute indicating that evidence of physical injury is a factor that shall or may be taken into consideration when granting an order of protection. This may exclude

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<sup>212</sup> These particular barriers to access are not unique to women of color. These are issues for poor women and rural women too. Still, this does not mean that location, translators, information, legal assistance, and childcare are non-issues for battered women of color.

<sup>213</sup> See LEHRMAN, *supra* note 26; MCKENNA, *supra* note 26 (citing to texts of state domestic violence arrest statutes, civil protection order laws, and text of VAWA, none of which specifically mention race).

darker-skinned women with injuries that are not visible to a judge at the time of the order of protection hearing. Construction of multi-cultural domestic violence law substance may not be as simple as redefining laws to specifically include women of color. Many of the problems lie not in the words themselves, but in the practices of the courts.<sup>214</sup>

This brings us to the order of protection procedure. The practices of the legal system, from local to supreme court rules, leave much discretion in judges' hands. There have been numerous calls for judicial training regarding domestic violence.<sup>215</sup> Some judicial organizations have provided an opportunity for judges to heed that call through the provision of bench books, articles, and training.<sup>216</sup> Training on cultural sensitivity should also be part of this education. The inclusion of issues particular to battered women of color would begin to send a message that their issues were taken seriously, thus affecting the discourse, which may, in turn, affect the practice.

Fundamentally, the discourse of domestic violence legal practice is the most difficult to reconstruct. But at the same time, a reconstructed identity and process (of which legal practice is part) will have a major impact on the law itself. A system that needs a victim who has a consistent story cannot help but change when the person before it is no longer constructed as a white victim but as a multi-cultural survivor. The legal practices will be altered when the empowerment continuum process of which they are a part, focuses on the survivor as an autonomous decision maker instead of a helpless victim who needs the system to make decisions for her. Much of the focus of the domestic violence movement to this point has been on creating, enhancing and outright changing domestic violence law and legal practices.<sup>217</sup> The aim

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<sup>214</sup> The wording of domestic violence statutes is race-neutral. See *supra* note 26 (referencing list of domestic violence civil and criminal statutes). However, see LEHRMAN, *supra* note 26, at 4-45 to -106 for a listing of the conduct necessary for a civil order of protection to be issued. For example, at 4-45 on the table for Alabama, the eligible conduct includes, "[c]ausing or attempting physical injury;" and at 4-49, Arkansas lists "[p]hysical harm, bodily injury," and "assault." Though non-physical abuse is generally covered by domestic violence statutes. LEHRMAN, *supra* note 26, at 4-14 (noting that orders of protection may be ordered to protect persons from non-physical conduct such as threats, or attempted physical injury).

<sup>215</sup> See generally Nat'l Ctr. for State Courts, Family Violence: Benchbooks & Tools for Judges: Resource Guide, <http://www.ncsconline.org/WC/Education/FamVioBenchGuide.htm> (last visited Nov. 20, 2005) (listing resources and trainers).

<sup>216</sup> *Id.* (showing available information and training).

<sup>217</sup> For a comprehensive look at, and documentation of, domestic violence law, see generally LEHRMAN, *supra* note 26, and MCKENNA, *supra* note 26.

of this Article is to change the discourse around domestic violence, which, in turn, will have an effect on the law itself.

C. *If We Build It, Will White Women Come?*<sup>218</sup>

The intent of a multi-cultural domestic violence legal discourse is to be inclusive and accessible, thus increasing positive outcomes for all battered women. Looking toward two theories, respectively produced by Derrick Bell and Nancy Ehrenreich,<sup>219</sup> it is clear that white battered women will still be included if the discourse is reconstructed as multi-cultural for the following reasons: 1) the interests of white battered women and battered women of color have converged;<sup>220</sup> and 2) multi-cultural domestic violence discourse produces “symbiosis”<sup>221</sup> between white battered women and battered women of color.

The first reason white women will be included is because of the convergence of interests of white and of-color battered women. Derrick Bell wrote of “the principle of interest convergence,”<sup>222</sup> which in sum is that “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”<sup>223</sup> Applying interest convergence to the context of changing domestic violence legal discourse in order to better serve battered women, it is clear that the interests of white battered women in ending violence in women’s lives converge with the interests of battered women of color.

Changing the discourse away from white victim alters the image of white women from all socio-economic strata who have been abused,

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<sup>218</sup> This heading is borrowed from the line, “If you build it, he will come,” from the movie *FIELD OF DREAMS* (Universal Studios 1989).

<sup>219</sup> Derrick A. Bell Jr. is a Visiting Professor of Law at the New York University School of Law. Nancy Ehrenreich is a Professor of Law at the University of Denver, College of Law.

<sup>220</sup> See Derrick A. Bell Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). Bell writes of interest convergence in the context of judicial remedies for racial inequality, such as segregation in schools, where the interests of poor southern whites and southern Blacks are to have the best schools and educational opportunities. Similarly, battered white women and battered women of color are both interested in preventing and ending violence in their own lives while battered women’s advocates of all races (many of whom are battered or formerly battered women themselves) seek to end all violence against women.

<sup>221</sup> Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 267 (2002) (defining symbiosis as “the mutually beneficial connection between living organisms”).

<sup>222</sup> Bell, *supra* note 220, at 523.

<sup>223</sup> *Id.*



whether she is Sheila Hollabaugh, Hedda Nussbaum' or Nicole Brown Simpson.<sup>224</sup> Focusing on the empowerment continuum as a process meant to create autonomous decision makers who are connected to their communities and cultures (the multi-cultural empowerment continuum), allows white women a way to remain connected to their communities and moves the question off of 'why does she stay' and on to 'why is he violent.' When the discourse is multi-cultural, the elements of identity and process include white women because of the existence of "cultural whiteness," and since whiteness in America also consists of a number of cultures.<sup>225</sup> Multi-cultural is "multidimensional"<sup>226</sup> in that it covers the multiple cultures which shape individuals. This means that class, nationality, sexual orientation and other aspects of the socially constructed identities of white women, including their whiteness itself, is incorporated into the discourse.<sup>227</sup>

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<sup>224</sup> See *supra* notes 47-49.

<sup>225</sup> See *supra* notes 11-14 and accompanying text (discussing white culture as dominant culture); *supra* note 22 (defining culture); see also HANEY-LÓPEZ *supra* note 14, at xiii (noting that culture is part of legal construction of whiteness as a race); Adam Cornford, "Colorless All-Color": Notes on White Culture, BAD SUBJECTS, Sept. 1997, <http://bad.eserver.org/issues/1997/33/cornford.html> (discussing cultural whiteness: "To some extent, cultural whiteness in the US, as in other mulatto societies, is Europeanness in America.").

<sup>226</sup> Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 566-67 (1997) (coining term "multidimensional"). In this article, Hutchinson:

[I]nvite[s] gay and lesbian legal theorists and political activists to engage in a conversation around sexual, racial, and class inequality and to adopt a "multidimensional framework" -- or multidimensionality -- to analyze and challenge sexual subordination. By offering multidimensionality to gay and lesbian legal theorists and political activists, I wish to provide them with a methodology by which to analyze the impact of racial and class oppression (and other sources of social inequality) upon sexual subordination and gay and lesbian experience and to cease treating these forces as separable, mutually exclusive, or even conflicting phenomena. In time, gay and lesbian scholars and activists may begin to see the terms "gay," "lesbian," and "homophobia" as multilayered. Furthermore, a multidimensional construction of sexual identity oppression can enrich gay and lesbian legal theory and political action by permitting a deeper analysis of power inequality among gays and lesbians and between gays, lesbians, and heterosexuals. Finally, multidimensionality will allow gay and lesbian legal theorists and political activists to reformulate their theories and activism so that they no longer relegate people of color and the poor (and racism and poverty) to "shadows and silence."

*Id.* I borrow the term multidimensional here as a way to amplify the comprehensiveness of multi-culturalness.

<sup>227</sup> See Ehrenreich, *supra* note 221, at 273 (discussing how white women's race impacts

In the case of battered women, some might contend that a reason to maintain a white-racialized legal discourse is for the sake of legal practice. They may believe that the powerbrokers care more about issues that affect whites than they do about issues affecting women of color. It is thus important to keep the connections open between battered women's advocates and those who make and enforce the law by maintaining a white discourse with which they identify. However, between battered women of color and battered white women, the "needs of the[se] two groups differ little,"<sup>228</sup> and the results both groups are currently getting from the legal system do not meet either group's needs. The converged interests of white women and women of color are to have a legal practice that is responsive to them as survivors who are working through the empowerment continuum. A multi-cultural practice includes the removal of barriers, which can result in preventing not only battered women of color from gaining access to the necessary remedies, but white women as well. A racialized practice impacts white women as well as women of color, even though women of color have a greater burden under a white racialized system.

Ehrenreich's symbiosis theory sheds light on why white women may be inclined to join in on calling for and working toward a multi-cultural legal discourse, even if a white racialized discourse offers them a modicum of privilege. It is because, as Ehrenreich states, "privilege often comes at a price."<sup>229</sup> The price white battered women pay is that they, too, are less well served by a white-racialized discourse. Their image as battered women is not actually more privileged than battered women of color in any ways other than race. The identity white women

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their lives in connection with other aspects of their identity). Ehrenreich states: "[J]ust as we cannot understand the situation of women of color without understanding the combined effect of their race, class, and gender, so we cannot truly understand the situation of white women without similarly exploring the impact of their own race and class, with gender, on their lives." *Id.* (quoting Nancy Ehrenreich, *Colonization of the Womb*, 43 DUKE L.J. 492, 502 (1993)). As Trina Grillo stated: "For a Black woman, race and gender are not separate, but neither are they for white women." *Id.* (quoting Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 19 (1995)).

<sup>228</sup> See Bell, *supra* note 220, at 528. Bell notes that: "[P]oorer whites [do not] gain from their opposition to the improvement of educational opportunities for blacks: [because] the needs of the two groups differ little" and the educational system was serving neither well. Similarly, white battered women do not benefit from the continuation of a white discourse because neither white victims of domestic violence, nor victims of color, benefit from the way legal discourse is currently constructed. *Id.*

<sup>229</sup> Ehrenreich, *supra* note 221, at 257.

must assume in order to take advantage of the protections offered by the system and with which they are most connected when dealing with domestic violence law is that of the battered woman, an identity which holds a subordinated status. All women coming before the court for orders of protection under domestic violence acts are constructed first as battered women. The domestic violence legal discourse has seen to this: "Because these discursive systems construct identities in relation to one another — as opposites — identity groups are inextricably bound to each other. The entire set of associations must be challenged in order to eliminate its effect on any one category of individuals."<sup>230</sup> This Article challenges and changes the entire set of associations, by positing a way to change the domestic violence legal discourse.

Fundamentally, white women are fully part of a multi-cultural domestic violence legal discourse because, for these purposes, multi-culturalism is essentially the inclusion of the plurality of cultures.<sup>231</sup> A white racialization not only excludes those distinct races but also ethnic groups. By including white women, white ethnics are incorporated as well. Not only are white women included in this multi-culturalism, but also as the dominant group among battered women, these discursive and practical shifts cannot exclude them. If those Ehrenreich calls the "doubly (or multiply) burdened members of a group",<sup>232</sup> (in this case battered women of color), are helped, those she refers to as the "singly burdened,"<sup>233</sup> (white battered women) are helped as well. Fundamentally, multi-cultural domestic violence legal discourse is not about excluding white women, but including and centering women of color.

#### CONCLUSION

The battered woman identity is a victim identity and because victims are white, battered women are white. Being a victim, and assuming the identity of a battered woman, is a necessary part of moving out of an abusive relationship, especially if one is using the legal system as part of

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<sup>230</sup> *Id.* at 310.

<sup>231</sup> HUMM, *supra* note 10, at 180 ("[M]ulti-culturalism is based on the belief that all cultural groups should be socially represented and can coexist, and that racism can be reduced by the provision of positive images of ethnic diversity and knowledge of other cultures.").

<sup>232</sup> Ehrenreich, *supra* note 221, at 273.

<sup>233</sup> *Id.* at 256.

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that escape route. The system needs a victim. The process needs a victim. In order to obtain an order of protection, a woman must articulate how she has been victimized. In order to move through the empowerment continuum as it currently exists, one must name and claim that battered woman identity, which is a white identity.

However, it does not have to be that way. The battered woman, the necessary victim, can actually be a survivor. Shifting to a multi-cultural survivor by locating women of color at the center of, and thus central to, the identity can have a positive impact on all those who are surviving domestic violence. Changing the fundamental nature of the three essential elements of the discourse — identity, process and practice — alters who the battered woman is, what she experiences, and the people and institutions that are part of her experience. Interests have converged in this symbiotic relationship and it is time for feminists of the battered women's movement to reclaim and change the domestic violence discourse and move the battered woman along the empowerment continuum from white victim to multi-cultural survivor.