AIN'T I A VICTIM? THE INTERSECTIONALITY OF RACE, CLASS, AND GENDER IN DOMESTIC VIOLENCE AND THE COURTROOM

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INTRODUCTION

African American women who seek protection from law enforcement and the courts encounter a legal system that has fixed notions of African Americans as more susceptible and amenable to violence. Race and gender stereotyping affect how successfully African American women can avail themselves of the full panoply of services and protections offered to victims of intimate-partner violence. If African American women engage in self-defense in battering relationships, they are viewed as culpable for the abuse at the hands of their intimate partners. If African American women seek the protection of law enforcement, the encounters with police officers can be caustic. If African American women seek orders of protection, the narrative must contain the battered woman paradigm, which does not reflect their experiences. The legal system disregards African American women as victims of intimate-partner violence. Class, intermingled with race and gender, exacerbates these negative consequences.

Kimberle Crenshaw identified the unique, and often ignored, political and social assumptions to which African American women are subjected because they are neither white women nor African American men. White feminist legal theory assumes that women are white and uses African American women only as a source for anecdotal information. Crenshaw uses "intersectionality" to specify the subject positions inhabited by African American women. Crenshaw explicates that, at the nexus of race and gender,

> [t]he experiences Black women face are not subsumed within the traditional boundaries of race or gender discrimination as these boundaries are currently understood, and that the intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately.[1]

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[1] Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence*

Poor African American women do not, in general, benefit from legal intervention in seeking protection from intimate-partner violence. Violent partners are removed from the home, but law enforcement interactions with the African American community can lead to violence and or incarceration. African American women who are victims of intimate-partner violence are stigmatized by community members for bringing their partners into the criminal justice system. The same stigma can attach to African American women who seek orders of protection. Orders of protection remove the abuser from the home and give the victims a perceived zone of safety in their everyday lives. However, the cessation of violence comes at a high economic price. Courts wonder why abused women stay in violent relationships because they fail to understand that economic abuse is a component of intimate-partner violence. Race and poverty compound the complexities of intimate-partner violence.

This Article reviews the treatment of one client of the Domestic Violence (DV) Clinic that I direct who sought an order of protection. The family court treated my client with disdain, and it took several hearings before the court would fully enforce an order of protection. The court expressed doubt as to her legitimate fear and abuse, and treated her more harshly than other women I have represented. My client was a poor, African American woman, and the court did not let her forget her status. She would ask me, "What does it take to get justice?" I did not have an answer then, but this Article is the response.

This Article will explain why my client, as a poor, African American woman, could not receive access to justice by petitioning the court for safety. The intersectionality of race, class, and gender at times dictates outcomes and can have lethal consequences for a vulnerable population. In Part I, I explain the impact of poverty and victimization on courts that purport to be fair and impartial. In Part II, I review the hearing that denied my client the safety she sought through an order of protection. Part III reviews the effects of race and inequality in the lives of African American women. In Part IV, I present race, class, and gender as extralegal factors that affect access to justice. Finally, in Part V, I analyze cases such as *Castle Rock* that illustrate a negative due process paradigm, resulting in restricted remedies for poor women who seek protection.

I. POVERTY AND VICTIMIZATION

Record economic inequality exists in the United States.[2] In 2009, median income declined for all family households, with African Americans suffering the

Against Women of Color, 43 STAN. L. REV. 1241, 1244 (1991).

[2] *See* PAUL TAYLOR & RICHARD FRY, PEW RESEARCH CTR., THE RISE OF RESIDENTIAL SEGREGATION BY INCOME (2012), http://www.pewsocialtrends.org/files/2012/08/Rise-of-Residential-Income-Segregation-2012.2.pdf; *See also* PETER EDELMAN, SO RICH, SO POOR: WHY IT'S SO HARD TO END POVERTY IN AMERICA (2012) (analyzing how although the United States is wealthy there is a growing number of poverty).

greatest income decline.[3] The income decline exacerbated the ongoing problem of the African American median income trending as the lowest in the United States, recorded in 2009 at $32,584.[4] The disparity in median income between African Americans and other ethnic groups evidences the increase in wealth disparity and economic inequality. The discrepancy in income has grown since the 2001 recession.[5] The U.S. Poverty Report noted that the top 20% of income generators ($100,000+) earned 50.3% of all income and the lowest 20% of income generators ($20,453) earned 3.4% of all income generated.[6] The African American community, with the median income of $32,584, produces minimal wealth. The low median income of the black community means that African Americans fall in the bottom half of wealth generation in the United States.[7] Black income generates merely 13% of all income in the United States.[8] The implications of economic inequality are wide-ranging for the African American community, as legal scholar Patricia Hill Collins noted:

> Arguing that the economic inequality that characterized the United States at its inception continues to influence contemporary institutional practices, structural discrimination perspectives argue that American social institutions routinely discriminate against Native-Americans, African-Americans, Puerto Ricans, and Mexican-Americans. Limited to segregated neighborhoods, educated in inferior schools, and lacking access to the good jobs that are increasingly located in inaccessible suburban neighborhoods, these groups bear an unfair share of the costs of economic development and American economic restructuring. Thus, the disproportionate placement of these groups in the bottom twenty percent of American households reflects less on their abilities and motivation and more on historical, sedimented racial discrimination.[9]

While women are bearing the brunt of poverty, income inequality is especially devastating for single women of color. Single African American women

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[3] The median income for U.S. households in 2009 was $49,777 with a decline from 2008 for all family households of 1.8%. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2009, at 11, *available at* http://www.census.gov/prod/2010pubs/p60-238.pdf (2010). However, black households had the largest decrease with a 4.4% decline. *Id.* at 5.

[4] *Id.*

[5] *Id.* at 6.

> [C]omparing the change in household income between 1999, the year that household income peaked before the 2001 recession, and 2009 suggests income inequality is increasing. Income at the 50th and 10th percentiles declined—5.0 percent and 9.0 percent, respectively—while the change in income at the 90th percentile was not statistically significant. Between 1999 and 2009, the 90th-to-the-10th-percentile income ratio increased from 10.42 to 11.36. *Id.* at 9.

[6] *Id.*

[7] *Id.* at 6.

[8] *Id.*

[9] Patricia Hill Collins, *African American Women and Economic Justice: A Preliminary Analysis of Wealth, Family and Social Class*, 65 U. CIN. L. REV. 825, 827 (1997) (citations omitted).

have an average personal wealth measured at $100.[10] Single Latinas have an average personal wealth of $120.[11] Single African American women aged thirty-six to forty-nine have a personal wealth of $5.[12] In contrast, single white women have a personal wealth of $41,500.[13] Nearly half of all single African American and Latino women have negative personal wealth, as their debts exceed their assets.[14] The statistics are compounded when motherhood is added to the equation. On average, single women of color with children under the age of eighteen have no measurable wealth.[15]

Structural and institutional racism contribute to and create economic inequality. The incongruity of racism is reflected in how those in the bottom socio-economic rung of society are also blamed for their circumstances. African American women are impoverished at rates disproportionate to the total U.S. population. For example, African American women are six percent of the U.S. population but represent nearly thirty-seven percent of impoverished females in the United States.[16] Further, African American women account for nearly the largest number of women living in poverty.[17]

Women living in poverty are among the most vulnerable and victimized populations according to crime statistics.[18] The Department of Justice found that African American women are more likely than white women to be victims of intimate-partner violence and that African American women are twice as likely to be killed by a spouse as white women.[19] The legal and political implications of being an African American woman become apparent when one examines the violence these women suffer. Despite the perilous nature of being an abused African American woman, seeking redress is difficult. An African American woman walks into a courtroom not as an individual but as an assemblage of racial and gender stereotypes. The stereotypes work to her detriment. Mario Barnes argues that courts use official narrative[20] to disguise biased social construction of

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[10] Insight Ctr. for Cmty. Econ. Dev., LIFTING AS WE CLIMB: WOMEN OF COLOR, WEALTH, AND AMERICA'S FUTURE 5 (2010), http://www.cunapfi.org/download/198_Women_of_Color_Wealth_Future_Spring_2010.pdf.

[11] *Id.*

[12] *Id.* at 8.

[13] *Id.* at 5.

[14] *Id.*

[15] *Id.* at 7.

[16] *See* CARMEN DENAVAS-WALT, *supra* note 3, at 59.

[17] *Id.* Female-headed households are one of the major barometers of gender and poverty. African American women as female heads of household are 45% of the total African American household population. White women as female heads of household are 7% of the total white household population and other women of color—Latinas, Asian American/Pacific Islander, Native Hawaiian, and American Indian—as female heads of household are 22% of the total households of color. *Id.*

[18] *See infra* notes 104-127.

[19] SHANNAN CATALANO ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, NCJ 228356, FEMALE VICTIMS OF VIOLENCE 2-3 (2009) [hereinafter FEMALE VICTIMS].

[20] Critical legal scholars use narrative to construct alternative realities and critique normative legal structures. *See* Mario Barnes, *Black Women's Stories and the Criminal Law: Restating the Power of*

minority identities—the individual is erased and the group stereotype will reconstitute individual identity.[21] The courts use stereotypes and the societal significance of race, class, gender, and other identity variables to perform a legal construction of identity.[22] Individual narratives are reduced to oppressive stereotypes with stock stories.[23] Consequently, courts do not view poor, battered African American women as individuals but as an amalgam of stereotypical constructs of race, class, and gender. The court treated my client as another stock story of an abused, poor African American woman.

II. MY CLIENT

Lake County, Indiana is the second largest and most diverse county in Indiana.[24] My students in the Domestic Violence ("DV") clinic assist petitioners when they arrive in the clerk's office to petition for an order of protection. A.J. is an African American woman in her mid-thirties and a mother of two sons. A.J. had an order of protection in place, yet her ex-boyfriend, J.B., continued to harass her. J.B. is a twenty-five-year-old white male who had dated A.J. for one year. A.J. contacted me after I introduced myself to her months earlier about assistance. The DV clinic assisted A.J. with a motion for contempt based on J.B.'s continued contact and harassment, including death threats. The contempt hearing juxtaposed two legally constructed identities—the court perceived A.J. as an African American single mother who had chosen to enter into a tumultuous relationship with J.B., a young, white male whose violent acts the court downplayed because of his racial and gender identity.

On direct examination, A.J. described the violence she endured during and after the relationship:

> It was very abusive. He displayed—put a gun in my mouth, cocked it—like cocked the trigger back and he a number of times—25 times he had put guns to my chest, my rib cage, telling me he was going to chop my body

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Narrative, 39 U.C. DAVIS L. REV. 941, 953 (2009) (citing Robert L. Hayman, Jr. & Nancy Levit, *The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality*, 84 CALIF. L. REV. 377, 421 (1996) (reviewing RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE (1995)) ("Judicial opinions are one form of storytelling in that they recount events, selectively offer facts in a narrative framework, and sometimes draw moral conclusions about the human actors in the stories.") (quoting David R. Papke, *Discharge and Denouement: Appreciating the Storytelling of Appellate Opinions*, 40 J. LEGAL EDUC. 145, 146-48 (1990))); Robert A. Ferguson, *Untold Stories in the Law*, *in* LAW'S STORIES 84-85 (Peter Brooks & Paul Gewirtz eds., 1996) ("[T]rials always function through a framework of storytelling.").

21 Barnes, *supra* note 20, at 966.

22 IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 111-53 (1996). López noted that "legislatures and courts have served not only to fix the boundaries of race in the forms we recognize today, but also to define the content of racial identities and to specify their relative privilege." *Id.* at 10.

23 *See id.*

24 *USA Counties IN Profile*, STATS INDIANA, http://www.stats.indiana.edu/uspr/a/us_profile_frame.html (select county "Lake"; select "State" to "Compare Within"; then press "Get Data" button; then follow "Population" hyperlink).

> up, pull my teeth out, throw me in the Calumet River and to tell my mother that; that that's where I'd be at.[25]
>
> He choked me until I passed out. And he said that he was going to chop up my body and pull my teeth out so no one would identify me—be able to identify me.[26]
>
> [H]e said he was going to kill us and displayed a gun.[27]

J.B. countered A.J.'s violent portrayal by bolstering his credibility as a father, provider, and future husband:

> I'm engaged. I'm supposed to be married before Christmas. I have another daughter on the way. I haven't been bothering with [A.J.]. You can check my phone records. You can do anything. I haven't bothered her. I'm not this . . . "menace to society" . . . I've been too busy with my kids. My baby's mother's been working full time, you know . . . I have been there everyday watching my kids like I'm supposed to.[28]

J.B. appealed to the judge to empathize with him by highlighting their shared white, middle class identity, an identity that A.J. obviously did not share. The judge then engaged J.B. in a colloquy about his upcoming marriage plans:

> Q: And you said you're engaged or you're getting married?
> A: Yes, I am. I'm engaged.
> Q: And your fiancée, where does she live?
> A: [address omitted]
> Q: When is the wedding set?
> A: We were just coming down to the court office before Christmas. We were gonna pay the $60 to get married.[29]

J.B. thus successfully turned the judge's attention away from his history of violent conduct. While the court conversed with J.B. about his personal life and future plans, it ignored the personhood of my client. The court never directly engaged in any comparable colloquy with A.J., leaving her personhood invisible to the court. A.J.'s experience exemplified how African American women are invisible in the court system and American society.[30] As I attempted to redirect the court's

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[25] Transcript of Record at 9, A.J. v. J. B., 45D11-0901-PO-00020 (2009) [hereinafter A.J. v. J.B].

[26] *Id.* at 10.

[27] *Id.* at 13-14.

[28] *Id.* at 27-28.

[29] *Id.* at 41.

[30] Angela Mae Kupenda, Letitia Simmons Johnson, and Ramona Sebron-Johnson argue that black women are treated as a subclass of race and gender combined and that the subclass category leads to unequal treatment and disempowerment. *See* Angela Mae Kupenda, Letitia Simmons Johnson & Ramona Sebron-Johnson, *Political Invisibility of Black Women: Still Suspect but No Suspect Class*, 50 WASHBURN L.J. 109, 110-12 (2010). Legal scholars argue that African American women should be a separate suspect class as their concerns are either race or gender based but not the combination. Few courts have granted the unique protected class that combined race and gender. *See* PAULA GIDDINGS,

attention to my client's concerns, the respondent basked in the court's attention because of his racial and gender identity—an identity that sought to appeal to the court's power. Cheryl Harris argues that, even though the power of whiteness is somewhat diminished by the amelioration of racial stratification, whiteness still has material significance.[31] J.B. can still draw the court's attention to his whiteness; A.J. cannot. Harris describes this appeal as a claim of relative privilege against a person of color.[32] J.B.'s father testified, which further bolstered his association with whiteness and therefore his legitimacy.[33]

I cross-examined J.B. about his arrests for violation of the order of protection and battery to my client. I questioned J.B. about his gun-wielding death threats to A.J. and her family. J.B. claimed that each allegation was false, though some were documented and bolstered by eyewitness testimony.[34] I produced A.J.'s cell phone records, which showed eighty-four phone calls to A.J. after the court granted the order of protection. J.B. claimed that A.J. had herself created the records of the phone calls by accessing his cell phone account via the Internet.

Before making a ruling, the judge addressed J.B.'s father about his employment and J.B.'s employment:

Q: Does your son live with you?
A: Yes. He also lives with the . . . he also stays where his two children are.
Q: Is he employed?
A: Not at this time. He is searching for a job.

The judge then addressed J.B. about whether evidence existed to meet the legal threshold to have his right to possess firearms prohibited.

Q: Do you have any weapons?
A: No sir. No, your Honor.
Q: Didn't you say you work at a hospital?

WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA (1984); Carole H. Hofstein, Note, *African American Women and the Limits of Law and Society*, 1 CARDOZO WOMEN'S L.J. 373, 390 (1994); Ann C. McGinley, *Hillary Clinton, Sarah Palin, and Michelle Obama: Performing Gender, Race, and Class on the Campaign Trail*, 86 DENV. U. L. REV. 709, 722-23 (2009); Deborah W. Post, *Cultural Inversion and the One-Drop Rule: An Essay on Biology, Racial Classification, and the Rhetoric of Racial Transcendence*, 72 ALB. L. REV. 909, 923 (2009); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place; Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 10-11 (1989); Judy Scales-Trent, *Equal Rights Advocates: Addressing the Legal Issues of Women of Color*, 13 BERKELEY WOMEN'S L.J. 34, 52-54 (1998); Deleso Alford Washington, *Critical Race Feminist Bioethics: Telling Stories in Law School and Medical School in Pursuit of "Cultural Competency"*, 72 ALB. L. REV. 961, 970 (2009).

[31] *See* Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1742 (1993) [hereinafter Harris, *Whiteness as Property*].

[32] *Id.* at 1714-15.

[33] J.B.'s father testified to A.J. having had contact with J.B. after the court granted the order of protection. A.J. v. J.B, *supra* note 25, at 26-30. According to battered women experts, it is not unusual for women to feel conflicted about terminating a violent relationship or to continue with relationships. *See infra* notes 104-127.

[34] A.J. v. J.B., *supra* note 25, at 30-38. A.J.'s son and fiancé testified to witnessing death threats and J.B. possessing a gun. *Id.* at 19-25, 43-47.

> A: [name of hospital omitted], full time and [name of hospital omitted], part time.[35]

The judge sought to further J.B.'s claim of legitimacy and white privilege by asking questions that comport with middle class values of employment and residency. As Cheryl Harris has shown, "jobs, entitlements, occupational licenses, contracts, subsidies, and indeed a whole host of intangibles" are all indicia of the bundle of rights known as whiteness.[36] The judge's questions about J.B.'s class status, work status, marital plans, residence, etc. enabled the judge to find the commonalities he sought in order to justify his ruling.

The judge found J.B. had violated the order of protection; however, the court sought to equalize the blame for the violations:

> THE COURT: We're here for two things today. One is a petition to modify the order of protection that was entered on February 20th, 2009 and the other is a petition for contempt; Plaintiff alleging that—or Petitioner alleging that the Respondent violated the protective order.
> I'm gonna grant the petition to modify the protective order, first. And I'm gonna make the protective order mutual because I find that—
> THE COURT REPORTER: We can't do it mutual.
> THE COURT: Can't do it mutual?
> THE COURT REPORTER: You can't. Not any longer.
> THE COURT: Really? Okay.[37]

The judge attempted to enforce a mutual order of protection against A.J. and J.B. The judge did not articulate his rationale for such a bizarre outcome, but I surmised that the judge sought to elevate the concerns of J.B. over those of my client, the actual victim of the abuse. The race and gender implication of the case became clear. The judge then extended the order of protection, suspended a seven-day jail term, and denied the request to prohibit J.B. from having weapons or surrendering weapons during the pendency of the order of protection.[38] I inquired to the judge about the denial of the prohibition of firearms:

> MS. BROWN: [A]re you denying the request for a prohibition of firearms and surrender of weapons?
> THE COURT: Well, I haven't heard any evidence that he has any. So, yes.[39]

Despite A.J.'s extensive testimony regarding J.B.'s repeated use of firearms to threaten her, the court did not find sufficient evidence to prohibit J.B. from possessing weapons. The judge weighed the credibility of A.J. versus J.B. and

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[35] *Id.* at 68-69.

[36] *See* Harris, *Whiteness as Property*, *supra* note 31, at 1728.

[37] A.J. v. J.B., *supra* note 25, at 72.

[38] *Id.* at 72-4.

[39] *Id.* at 74.

found J.B. more credible, despite pending criminal charges and eyewitness testimony of death threats and gun possession.

Ian Haney López finds that unconscious racism undergirds the current legal construction of race in two interrelated ways: "[f]irst it fosters the racially discriminatory misapplication of laws that themselves do not make racial distinctions[;] and second, it engenders the design and promulgation of facially neutral laws that have racially disparate effects."[40] A.J. was unable to obtain the full force of the order of protection because the court weighed her safety against the infringement of J.B.'s right to possess a weapon, and consequently sided with J.B. I asked A.J. on direct examination why J.B. should not have a gun, and she responded: "I think that he will kill me. In my heart, I believe that he will kill me."[41] A.J.'s fear was palpable yet the court declined to give her the additional protection she required. If the courts will not fully enforce orders of protection, domestic violence victims have no recourse.

III. EFFECTS OF RACIAL AND ECONOMIC INEQUALITY

A. Introduction

Economic inequality has its roots in the birth of United States. The poor have always been part of the American panoply. England profoundly influenced how America treated its poor. Colonial America inherited four principles from the English approach to poverty: (1) poor relief was a public responsibility; (2) relief was local; (3) kin responsibility denied public aid to individuals with families who could assist them; and (4) pauper children were handed over to farmers and artisans.[42] Two institutions developed in assisting the poor as a consequence of English influences: outdoor relief and poor houses.

Outdoor relief was "'relief given from the public funds to the poor in their homes not including medical care.'"[43] It was thought to be kindly, as it did not break up poor families; economical because it aided families in supporting themselves; and pragmatic because it placated the demands for assistance that outnumbered institutions available.[44] Outdoor relief had many critics including taxpayers resentful of paying relief to those whom they considered able-bodied. Philadelphia abolished forms of outdoor relief in 1793.[45] Public officials and reformers found outdoor relief spawned idleness and laziness in the poor.[46] New York reformers attempted to abolish outdoor relief in the 1820s with limited

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40 HANEY LÓPEZ, *supra* note 22, at 138.

41 A.J. v. J.B., *supra* note 25, at 15.

42 MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE 13-14 (1986).

43 Charles Russel Lowell et al., *Public Outdoor Relief*, 6 Am. J. Soc. 90 (1900) (quoting PROFESSOR WARNER, AMERICAN CHARITIES (1894)).

44 KATZ, *supra* note 42, at 13-16.

45 *Id.* at 40.

46 *Id.*

success.[47] Poor houses developed with the growth of cities throughout the colonies. Boston built one of the first poorhouses in 1664; Phildalphia followed in 1732, and New York, in 1736.[48] Poorhouses were a reaction to the harsh treatment the poor received in many communities. The poor were auctioned off as cheap labor, most often in country towns.[49] States contracted with private service providers who maintained the poorhouses.[50] Administrators placed the poor, without family or homes, into poorhouses.[51]

The quality of the relief depended upon whether the impoverished person was seen as virtuous or worthy. Those committed to dangerous, brutal, and demoralizing poorhouses were categorized as degraded.[52] One had to be seen as being a worthy member of the local community to receive aid. Otherwise, the poor were shunned as vagabonds and beggars.[53] The "deserving" and "undeserving" distinctions became apparent with the development of the modern American economy. A laissez-faire approach to poverty cultivated a view of the impoverished as weak, intemperate, indolent, deviant, and evil because of a ready supply of mobile and eager laborers present and ready to work.[54] The deserving poor were seen as worthy of assistance and the undeserving poor were seen as morally deficient and punished for their status.[55] Society began to treat the undeserving poor as paupers and allowed them to exist in substandard living conditions under the veil of moral degradation. Female aid recipients became the prototype of the deserving/undeserving poverty categorization.

B. Women and the Welfare State

The poverty distinctions for women determined the depth and quality of services they received. Widows of working, productive men were the pinnacle of the morally deserving for assistance whereas unmarried women were ostracized and condemned.[56] The welfare state began with private charities and later became

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[47] *Id.*

[48] *Id.* at 14.

[49] *Id.* Critics attacked auctions as brutal where paupers were treated with barbarity and neglect by their keepers. Keepers were known to kill their charges. *Id.* at 19-20.

[50] KATZ, *supra* note 42, at 45.

[51] *See id.* The initial design of poorhouses was to reduce expenditures to the poor, enforce discipline, and help regulate labor markets and wages. *Id.* at 20.

[52] *Id.* at 32.

[53] *See* Ann Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 126 (2002) [hereinafter Smith, *Sexual Regulation*] (citing WALTER TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 11-12, 51-52 (1974)). *See also* MICHAEL KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE 11-15 (1989) (detailing the distinction between poverty and pauperism); Jacobus TenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. I), 16 STAN. L. REV. 257, 258-98 (1964).

[54] Smith, *Sexual Regulation*, *supra* note 53, at 126.

[55] *Id.* (citing JOEL E. HANDLER & YEHESKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA 45-48 (1991)).

[56] *Id.* at 126 (citing MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE

funded through government grants and benefits. In the late nineteenth century and early twentieth century, reformers waged campaigns to have benefits for "worthy" mothers.[57] Special allowances were made for widowed mothers so that they could stay home and raise their children.[58] Women had to endure intense scrutiny to be deemed worthy of state implemented benefits. Middle class White Anglo-Saxon Protestant (WASP) social workers determined eligibility for benefits based on the mothers' household budgeting skills, drinking habits, and child-rearing practices. The reformers' and the social welfare administrators' suspicions of single mothers and immigrants were especially pernicious. Single women were not allowed to cohabitate or have sexual relations outside of marriage.[59] Single mothers in particular were stigmatized for their status. Single mothers received no assistance and divorced women received a modicum of assistance.[60] Social welfare administrators pressed foreign-born immigrant recipients to become "Americanized" to receive aid. They were encouraged to apply for citizenship and prepare "American" meals, while administrators frowned upon immigrants who spoke in their native languages or failed to maintain "proper" household standards.[61] The New Deal established the federal government as the deliverer of assistance to families; nevertheless, the moralism remained.

The 1935 Social Security Act established Aid to Dependent Children ("ADC"), and later Aid to Families with Dependent Children ("AFDC"), which allowed states to be the delivering—and screening—bodies for assistance to

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FROM COLONIAL TIMES TO THE PRESENT 3-4 (1996)); Linda Gordon, *The New Feminist Scholarship on the Welfare State, in* WOMEN, THE STATE AND WELFARE 9, 18 (Linda Gordon ed., 1990).

[57] *See* THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 425 (1992). They proposed special allowances for widows that would allow them to keep their children at home, rather than relinquishing them to orphanages. *Id.* at 424. The reformers aimed to provide widows with enough support such that they would not have to enter the paid labor force or to send their children out to work. *See id.* Their arguments found favor in part because it was widely believed that the children of working women would become deviants and criminals. *See id.* 424-68 (1992) (discussing the remarkable mobilization of women's organizations and the media in support of mothers' pensions several years before women obtained the right to vote).

[58] *Id.* at 424-25.

[59] *See* LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935 43-46 (1994) [hereinafter GORDON, PITIED]; GWENDOLYN MINK, THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917-1942 27-52 (1995).

[60] *See* SKOCPOL, *supra* note 57, at 467.

[61] *Id.* at 469. One can point out the ethnocentric character of the assumptions behind this "Americanization" campaign without losing sight of the fact that women from different racial groups have in fact played different roles in their families throughout American history. *See* BONNIE THORNTON DILL, CTR. FOR RESEARCH ON WOMEN, OUR MOTHERS' GRIEF: RACIAL ETHNIC WOMEN AND THE MAINTENANCE OF FAMILIES (1986), *available at* http://tigertech.memphis.edu/crow/pdfs/Our_Mother_s_Grief_-_Racial_Ethnic_Women___the_Maintenance_of_Families.pdf, for a feminist study of the differences between mothers from white, African-, Chinese-, and Mexican-American families in the nineteenth century that emphasizes the role minority women have played in encouraging resistance against racial oppression. *See* CAROL STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY (1974), for a classic study of the ways in which informal cooperative networks of kin, friends, and neighbors are crucial to poor black families' adaptation to poverty. *See* Maxine Baca Zinn, *Family, Race and Poverty in the Eighties*, 14 SIGNS 856, 858 (1989), for a more general refutation of the argument that African American families are deviant, dysfunctional, and pathological.

impoverished families. States denied single mothers assistance for not providing a suitable home and for fraternizing with men.[62] New Deal reformers sought to recreate the patriarchal family structure of the family wage system through welfare.[63] Women were to remain in the home taking care of the children, and the state provided for the care of family until a pension was available for widows or married men found employment to care for the families.[64] New Deal reformers had a narrow definition of family and did not anticipate the progeny of single, never-married mothers who would be future ADC/AFDC recipients. All women did not benefit from the New Deal welfare programs. African American women faced restrictions on accessing ADC based on state restrictions.[65] Decades later, African American women who did receive AFDC would become the lightning rod for race relations, welfare policy, and the future of the African American community.

C. The Moynihan Report and the Culture of Poverty

Senator Patrick Moynihan drafted a report on poverty in the African American community in 1965.[66] The report "emphasized that the socioeconomic system in the United States was ultimately responsible for producing unstable poor black families."[67] The Moynihan Report caused immediate controversy. The major tumult surrounding the report centered on the percentage of unwed births by

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[62] *See* GORDON, PITIED, *supra* note 59, at 298-99. Women's sexual histories were scrutinized under the guise of whether a suitable home existed. Ann Marie Smith noted:

> Because an "absent father" was a condition of eligibility, any adult male present in the home could be considered a "substitute father." Investigative procedures—which sometimes included night-time raids and police surveillance—were widely adopted to monitor the number of adults living in the assistance unit home. Several states deliberately used the "suitable home" rule to limit the number of families on the welfare rolls.

Smith, *Sexual Regulation, supra* note 53, at 129 n.33 (citing JOEL HANDLER, REFORMING THE POOR: WELFARE POLICY, FEDERALISM AND MORALITY 34-36 (1972)). Some states restricted or banned welfare payments where parents were not "ceremonially married," single mothers were exposed to potential penalties for bearing children out of wedlock, and single mother welfare recipients could be subjected to sterilization. *See* GWENDOLYN MINK, WELFARE'S END 35-36, 47-49, 142 n.8 (1998) [hereinafter MINK, WELFARE'S END].

[63] *See* GORDON, PITIED, *supra* note 59, at 299.

[64] *See id.* at 45.

[65] *See id.* at 299. Scrutiny over sexual relationships prohibited a number of African American women from receiving aide. *See id.* (citing MINK, WELFARE'S END, *supra* note 42, at 47). New Deal programs in general had the taint of racial discrimination when they excluded jobs that were dominated by African American and Latino women, such as domestic workers and agricultural workers. GORDON, PITIED, *supra* note 59, at 275. Southern legislatures successfully lobbied to have the authority to set local standards for federal programs that excluded recipients based on race. *See id.* (citing JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY 17-25 (1994)).

[66] DANIEL P. MOYNIHAN, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965) [hereinafter MOYNIHAN REPORT].

[67] WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS 172 (1996) [hereinafter WILSON, WHEN WORK DISAPPEARS].

African American women and Moynihan's use of terminology such as "pathology" to describe the state of African American families.[68]

Social conservatives focused on what they termed the "culture of poverty" and contended that values and behaviors, and not intergenerational poverty, were the root cause of African Americans' plight.[69] The culture of poverty belief persisted as liberal social scientists retreated from academic discussions of race and poverty.[70] Conservatives in the Reagan era sought to blame the innercity dislocation during the 1980s, after years of liberal policies, on the liberal policies themselves. George Gilder, Charles Murray, and Lawrence Mead argued that liberal policies exacerbated, rather than alleviated, ghetto-related tendencies.[71] Liberal programs were discredited and labeled self-defeating because they ignored the behavioral problems of the underclass. Liberal social scientists did not respond, and conservative claims that were not scientifically proven were repeated and unchallenged.[72] William Julius Wilson reopened the debate with the publication of his book, *The Truly Disadvantaged*.[73] Wilson refocused attention on the instability of the African American family and its role in undermining changes for African American children.[74] Wilson distinguished the African American middle class, which he saw as advancing in socioeconomic terms, versus the African American lower class, which he saw as losing ground.[75] Despite Wilson's work, the damage was already done. Conservatives appropriated the Moynihan Report and used it to trumpet welfare reform, citing examples of African Americans lacking personal responsibility and welfare dependency.

D. The Public Face of Welfare

Charles Murray's *Losing Ground* showed that he was an expert on the culture of poverty belief.[76] Murray argued that the increased number of single, female head-of-households was the primary cause of poverty, especially among African American women.[77] Murray identified the higher birth rates for single African American women as compared with white women as a major cause of African American poverty.[78] Murray further postulated that existing welfare programs caused dependency and created incentives for anti-social behavior and out-of-

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[68] Sara McLanahan, *Fragile Families and the Reproduction of Poverty*, 621 ANNNALS AM. ACAD. POL. & SOC. SCI. 111, 112 (2009).

[69] *Id.*

[70] WILSON, WHEN WORK DISAPPEARS, *supra* note 67, at 176.

[71] *Id.* at 175.

[72] *See id.* at 176.

[73] *See* McLanahan, *supra* note 68, at 112.

[74] *Id.*

[75] *Id.*

[76] CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980 (1984).

[77] *Id.* at 125.

[78] *Id.* at 125-26.

wedlock births.[79] The depiction of single, poor African American mothers as the root of the society's ills gave the perception that they were unable to conform to white middle class standards because of their deviant behavior.[80] The groundwork was laid for a welfare reform agenda.

Conservatives crafted their version of welfare reform, which included the key components: (1) reduction in welfare expenditures; (2) decrease in government bureaucracies; and (3) allowance for privatization.[81] Conservatives lobbied Congress to grant states more autonomy to redesign welfare programs with moral and religious underpinnings.[82] States enacted workfare programs to make program recipients work for their benefits.[83] Other reforms would allow for religious organizations to participate in the delivery of social services.[84] The lynchpin, however, was transforming welfare to reflect normative family structure and values.[85] Families that reflected normative values were upheld as exemplary, and those that deviated, such as single parent households, were blamed for poverty. Traditional family values became the foundation for welfare reform. Family-oriented reforms included promotion of marriage and fathers' rights; aggressive child support enforcement; and a family cap to benefits.[86] Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) in 1996.[87] The passage of PRWORA can be linked to images of undeserving poor

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[79] *Id.* at 162.

[80] *See id.*

[81] Smith, *Sexual Regulation*, *supra* note 53, at 133-34 (citing FRANCES FOX PIVEN & RICHARD A. CLOWARD, THE BREAKING OF THE AMERICAN SOCIAL COMPACT 61 (1997)); *see also* Marc Bendick, *Privatizing the Delivery of Social Welfare Services: An Idea to be Taken Seriously*, *in* PRIVATIZATION AND THE WELFARE STATE 97, 104-06 (Sheila Kamerman & Alfred Kahn eds., 1989); Evelyn Brodkin & Dennis Young, *Making Sense of Privatization: What Can We Learn from Economic and Political Analysis?*, *in* PRIVATIZATION AND THE WELFARE STATE 121, 148-49 (Sheila Kamerman & Alfred Kahn eds., 1989); Joel Handler, *Reforming/Deforming Welfare*, 4 NEW LEFT REV. 114, 116-17 (2000); Ronald Thiemann et al., *Risks and Responsibilities for Faith-Based Organizations*, *in* WHO WILL PROVIDE? THE CHANGING ROLE OF RELIGION IN AMERICAN SOCIAL WELFARE 51, 54-55 (Mary Jo Bane et al. eds., 2000).

[82] *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

[83] *See* Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988) (requiring single mothers who were AFDC recipients to work for their benefits); PRWORA also mandated participation in a work or vocational training program as part of its TANF requirements. Temporary Assistance for Needy Families, Pub. L. No. 104-193 § 103, 110 Stat. 2105, 2129-34 (1996).

[84] Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 104. PRWORA allowed states to contract with religious organizations for delivery of TANF services. *Id.*

[85] *See* DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY (1996); Council on Families in America, *Marriage in America: A Report to the Nation*, *in* PROMISES TO KEEP: THE DECLINE AND RENEWAL OF MARRIAGE IN AMERICA 293, 294-98 (David Popenoe et al. eds., 1996) [hereinafter *Marriage in America*]; Smith, *Sexual Regulation*, *supra* note 53, at 136 (citing GARY BRYNER, POLITICS AND PUBLIC MORALITY: THE GREAT AMERICAN WELFARE REFORM DEBATE 164 (1998)).

[86] *See* BRYNER, *supra* note 85, at 74; *Marriage in America*, *supra* note 85, at 314; Nancy A. Wright, *Welfare Reform Under the Personal Responsibility Act: Ending Welfare as We Know It or Governmental Child Abuse?*, 25 HASTINGS CONST. L.Q. 357, 376-84 (1998).

[87] Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

African American women living unrepentant and degenerate lifestyles at the expense of hardworking U.S. taxpayers.

E. Welfare Queens and Racial Stigma

Race can be used to distinguish groups of individuals without harm or consequence, but imposing attitudes and behaviors in terms of race is often problematic. Economist Glen Loury defines race as:

> [A] cluster of inheritable bodily markings carried by largely endogamous group of individuals, markings that can be observed by others with ease, that can be changed or misrepresented only with great difficulty and have come to be invested in a particular society at a given historical moment with social meaning.[88]

Loury not only embraces the social construction of race, he highlights how human behavior is organized around race categorization.[89] Influential observers—police officer, bankers, and realtors—hold schemes of race classification in their minds and act based on those classifications.[90] Thus, the problem of racial stereotyping is negative racial classifications. These negative racial classifications have implications beyond the attitudes held by their believers. Negative stereotypes have a direct impact on the affected person. Loury suggests that while overt discrimination has diminished for African Americans, racial injustice in the United States persists. Present day discrimination that affects social, economic, and political life, though less transparent, is harder to root out.[91] Racial classifications and stereotypes are the first step towards discriminatory actions.

Historically, there are myriad racial stereotypes that continue to harm African American women's psyches. Beginning with the historical caricatures of Mammy,[92] Aunt Jemima,[93] and Jezebel,[94] African American women have been

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[88] GLENN LOURY, ANATOMY OF RACIAL INEQUALITY 20 (2002).

[89] *See id.* at 22.

[90] *Id.*

[91] *Id.* at 20.

[92] Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotype: The African American Woman and Battered Woman's Syndrome*, 1995 W. L. REV. 1003, 1049 (1995). Ammons describes the mammy stereotype as "a Negro woman engaged as a nurse to white children or as a servant to a white family." *Id.* at 1049 n.170; RANDOM HOUSE COLLEGE DICTIONARY 811 (1988). The asexual mammy image was designed to obscure the exploitation of the black woman domestic. *See* Mae King, *The Politics of Sexual Stereotypes*, 4 BLACK SCHOLAR 12, 16 (1973). This persona was introduced in American literature in the eighteenth century by author Washington Irving and other writers, including James Fenimore Cooper, William Gilmore Simms, Henry Timrod, William Faulkner, Allen Tate, and Robert Penn Warren. Sondra O'Neale, *Inhibiting Midwives, Usurping Creators: The Struggling Emergence of Black Women in American Fiction*, *in* FEMINIST STUDIES, CRITICAL STUDIES 139, 146 (Teresa De Lauretis ed., 1986).

[93] *See* Brent Staples, *Aunt Jemima Gets a Makeover*, N.Y. TIMES (Oct. 19, 1994), *available at* http://www.nytimes.com/1994/10/19/opinion/editorial-notebook-aunt-jemima-gets-a-makeover.html. Staples mentions one of the best known mammies, Hattie McDaniels, who won the Academy Award for playing "Mammy" in the ever-popular Gone With the Wind. *Id.* Aunt Jemima, portrayed by a mammy whose real name was Lois Gardella, was created for the Chicago Columbian Exposition in 1893. Aunt Jemima has appeared on pancake boxes for years. *Id.*; *see also* DONALD BOGEL, TOMS, COONS,

subjected to these negative stereotypes throughout U.S. history. Modern caricatures of the Sapphire,[95] the matriarch,[96] and the welfare queen[97] serve the

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MULATTOES, MAMMIES AND BUCKS: AN INTERPRETIVE HISTORY OF BLACKS IN AMERICAN FILMS (1973) (explaining the ways in which the depiction of blacks in American movies has changed); K. SUE JEWELL, FROM MAMMY TO MISS AMERICA AND BEYOND: CULTURAL IMAGES AND THE SHAPING OF US SOCIAL POLICY (1993) (discussing the history of blacks in American films and how that art form has perpetuated myths and negative images of black Americans).

[94] *See* Ammons, *supra* note 92, at 1050. Ammons notes the sexual nature of Jezebel as a wanton, sensuous, "wicked, shameless woman." *Id.* at 1050 n.172; *see* RANDOM HOUSE COLLEGE DICTIONARY 719 (1988). The original Jezebel was the wife of King Ahab of Israel. *See* 1 *Kings* 16:31. Jezebel was known for her evilness and her animosity toward the prophet Elijah. At one point, Elijah became so afraid of her that he fled to the wilderness to escape her wrath. *See* 1 *Kings* 19. The Jezebel characterization—i.e., woman as a whore—was given to African women before they reached the new colonies. *See* WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 27-28 (1968). Jordan says:

> By the eighteenth century a report on the sexual aggressiveness of Negro women was virtually *de rigueur* for the African commentator. By then, of course, with many Englishmen actively participating in the slave trade, there were pressures making for descriptions of "hot constitution'd Ladies'" possessed of a "temper hot and lascivious," . . . And surely it was the Negro women who were responsible for lapses from propriety: "If they can come to the Place the Man sleeps in, they lay themselves softly down by him, soon wake him and use all their little Arts to move the darling Passion."

Id. (quoting WILLIAM SMITH, NEW VOYAGE TO GUINEA 221 (1744)). The character Aunt Jezebel appears in Willa Cather's 1941 novel, SAPPHIRA AND THE SLAVE GIRL.

[95] *See* Ammons, *supra* note 92, at 1050. Ammons traces the history of the Sapphire character as being created on the *Amos and Andy* radio and television shows. *Amos and Andy* began as a radio comedy about two black males. The original Amos and Andy were white males mimicking blacks. *See* B. ANDREWS & A. JULLIARD, HOLY MACKEREL!: THE AMOS 'N' ANDY STORY (1986). When the show was brought to CBS-TV in 1951, black actors were hired. Sapphire was the wife of a character named Kingfish and has come to symbolize a black woman who is "the counterpart to Aunt Jemima." *See* BELL HOOKS, AIN'T I A WOMAN: BLACK WOMAN AND FEMINISM 85 (1981). Hooks says, "[a]s Sapphires, black women were depicted as evil, treacherous, bitchy, stubborn and hateful, in short all that the mammy figure was not." *Id.*; *see also* Jean Carey Bond & Patricia Perry, *Is the Black Male Castrated?*, *in* THE BLACK WOMAN: AN ANTHOLOGY 113 (Toni Cade Bambara ed., 1970). Bond and Perry state: "Movies and radio shows of the 1930's and 1940's invariably peddled the Sapphire image of the black woman: she is depicted as iron-willed, effectual, treacherous toward and contemptuous of Black men, the latter being portrayed as simpering, ineffectual whipping boys." *Id.* at 116; *see also* Patricia Bell Scott, *Debunking Sapphire: Toward a Non-Racist and Non-Sexist Social Science*, *in* ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE 85 (Gloria T. Hull et al. eds., 1982); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539 (1989).

[96] Ammons, *supra* note 92, at 1050. Ammons describes the black woman as matriarch as symbolizing the black mother in her home. The matriarch is the mammy gone bad, a failed mammy, because she has spent too much time away from home, has not properly supervised her children, is overly aggressive, and emasculates the men in her life. *See* PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT 74 (1990). The matriarch was the centerpiece of the Moynihan Report of the mid-1960s. *See* MOYNIHAN REPORT, *supra* note 66, at 29-34. Daniel Patrick Moynihan blamed the educational, economic, and social decline of the black family on the black women's preference for a matriarchal system, and later advised the Nixon administration that civil rights issues should be treated with "benign neglect." Moynihan stated:

> At the heart of the deterioration of the fabric of the Negro society is the deterioration of the Negro family. It is the fundamental source of the weakness of the Negro community . . . In essence, the Negro community has been forced into a matriarchal structure which, because it is so out of line with the rest of American society, seriously retards the progress of the group as a whole.

Id. at 5. The black, female, single, head-of-household position was seen as the cause of the lack of black economic progress, rather than oppression and poverty. For a variety of responses to the Moynihan Report from civil rights leaders (including Martin Luther King, Jr., James Farmer, and Bayard Rustin),

same purpose of attempting to represent the lives of African American women as problematic and/or inconsequential. Linda Ammons argues that the stereotypical images of African American women are so powerful that they connote violence, disdain, fear, or invisibility, suggesting that "black women are ever cognizant of the possibility of humiliation just because of who they are."[98] Stereotypes negatively influence how stakeholders in the legal system treat impoverished African American women when they seek access to justice.

IV. RACE, CLASS AND GENDER AS EXTRALEGAL FACTORS

A. Introduction

African Americans have a turbulent history in the U.S. court system. Legal scholars have documented the travails of African American men in the criminal justice system.[99] African American women have fared no better.[100] Beyond the

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intellectuals, and others who challenge its validity, see LEE RAINWATER & WILLIAM L. YANCEY, THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY (1967). Black female scholars have also repudiated the matriarchy thesis. *See* JOYCE LADNER, TOMORROW'S TOMORROW: THE BLACK WOMAN (1972); Rose Brewster, *Black Women in Poverty: Some Comments on Female-Headed Families*, 13 SIGNS 331-39 (1988); Harriette Pipes McAdoo, *Strategies Used by Black Single Mothers Against Stress, in* SLIPPING THROUGH THE CRACKS: THE STATUS OF BLACK WOMEN 153-66 (1986); Carrie Allen McCray, *The Black Woman and Family Roles, in* THE BLACK WOMAN 67-78 (La Frances Rodgers-Rose ed., 1980). Angela Davis, among others, has disagreed with the use of the adjective of matriarchal to describe black households headed by females because females do not predominate economic or political influence. *See* Leroy Woodson, Jr., *So Says: Angela Davis*, L.A. TIMES (Mar. 2, 1986), *available at* http://articles.latimes.com/1986-03-02/magazine/tm-1167_1_black-family.

[97] *See* Trina Jones, *Race and Socioeconomic Class: Examining and Increasing Complex Tapestry*, 72 LAW & CONTEMP. PROBS. 57, 66 (2009); Dorothy Roberts, *The Value of Black Mother's Work*, 26 CONN. L. REV. 871, 873 (1996); *see also* Catherine Albiston & Laura Bether Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 HOW. L.J. 473, 477 (1995) ("The facets of the 'welfare queen' image become fused together so that poor always means black, black always means poor, and these characteristics attached to 'woman' symbolize sexual irresponsibility, defective parenthood, and deviancy."). Although Blacks are overrepresented on welfare and AFDC relative to their numbers in the population, in absolute numbers there are many more Whites than Blacks on welfare. Yet in the 1980s the "Black welfare queen" became the poster child for failures of the U.S. social-welfare system. *See* Nathalie A. Augustin, *Learnfare and Black Motherhood: The Social Construction of Deviance, in* CRITICAL RACE FEMINISM 144 (Adrien K. Wing ed., 1997); Morgan Doran & Dorothy Roberts, Symposium, *Welfare Reform Ends in 2002: What's Ahead for Low-Income and No-Income Families? Welfare Reform and Families in the Child Welfare System*, 61 MD. L. REV. 386, 402 (2002) (describing the effects of racial stereotypes on welfare policy and reform); Rose Ernst, *Localizing the "Welfare Queen" Ten Years Later: Race, Gender, Place, and Welfare Rights*, 11 J. GENDER RACE & JUST. 181 (2008) (examining the ways in which welfare has been racialized); *see also* Naomi Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965, 993 (1997) ("[The 1996] welfare reforms would affect all poor women, black and white, and . . . may not appear 'raced.' Because, however, images of black recipients of welfare seem to motivate welfare reform, and given the impact of welfare reform on the black community, a race-conscious lawyering strategy may be warranted.").

[98] Ammons, *supra* note 92, at 1052-1053.

[99] *See* Devon Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); Floyd D. Weatherspoon, The *Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23 (1994) (providing a broad picture of the perilous position black men hold in American society, and the role played by the criminal justice system in creating and reinforcing that peril). *See also* FLOYD D. WEATHERSPOON, AFRICAN-AMERICAN MALES AND THE LAW: CASES AND MATERIALS (1998); Nathaniel R. Jones, *For Black Males and American*

facially neutral application of the law, discretion lies within the domain of the judge and jury based on extralegal factors that include race, class and gender. African American women who interact with the court system face a unique experience that cannot be explained by either their race or their gender separately.[101] Kimberlé Crenshaw identifies the often ignored political and social stance that African American women endure as being neither white women nor African American men.[102] White feminist legal theory constructs women as white and mines the experience of African American women for anecdotal information.[103]

Society—The Unbalanced Scales of Justice: Costly, 23 CAP. U. L. REV. 1 (1994). Some commentators have characterized black American males as an "endangered species." *See* JEWELLE TAYLOR GIBBS, YOUNG, BLACK, AND MALE IN AMERICA: AN ENDANGERED SPECIES xiii (1988); Thomas A. Parham & Roderick J. McDavis, *Black Men, an Endangered Species: Who's Really Pulling the Trigger?*, 66 J. COUNS. & DEV. 24 (1987); Sylvester Monroe, *Brothers*, NEWSWEEK, Mar. 23, 1987, at 54. The idea has even made its way into popular culture. *See* ICE CUBE, *Endangered Species (Tales from Darkside), on* AMERIKKKA'S MOST WANTED (Priority Records 1990). While Parham & McDavis's work is important in providing an indication of the particular ways in which black men experience racism, it is not always sensitive to how gender shapes black women's experiences. *See generally* Devon W. Carbado, *The Construction of O.J. Simpson as a Racial Victim*, 32 HARV. C.R.-C.L. L. REV. 49 (1997); Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

[100] *See generally* CATHERINE FISHER COLLINS, THE IMPRISONMENT OF AFRICAN AMERICAN WOMEN (1997); CLARICE FINEMAN, WOMEN IN THE CRIMINAL JUSTICE SYSTEM 50 (Clarice Feinman ed., 3d ed. 1994); WILLA MAE HEMMONS, BLACK WOMEN IN THE NEW WORLD ORDER: SOCIAL JUSTICE AND THE AFRICAN AMERICAN FEMALE 223 (1996); PAULA C. JOHNSON, INNER LIVES: VOICES OF AFRICAN AMERICAN WOMEN IN PRISON (2003); Deborah Binkley-Jackson, Vivian L. Carter & Garry L. Rolison, *African American Women in Prison, in* WOMEN PRISONERS: A FORGOTTEN POPULATION 65 (Beverly R. Fletcher et al. eds., 1993); Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777 (2000); Paula C. Johnson, *Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER SOC. POL'Y & L. 1 (1995).

[101] *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) [hereinafter Harris, *Race and Essentialism*]. My concern is to pursue my claims while limiting my reliance upon essentialism, a vantage point which Angela Harris describes as the belief in a "monolithic 'women's experience' that can be described independent of other facets of experience like race, class, and sexual orientation . . . ." *Id.* at 588 (1990); *see also* ELIZABETH V. SPELMAN, INESSENTIAL WOMAN 159 (1988); Sumi K. Cho, *Essential Politics*, 2 HARV. LATINO L. REV. 433, 433 n.1 (1997) (describing essentialism as the view that all members of a group share a common essence); Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 356–61 (David Kairys ed., 3d ed. 1998) (discussing multidimensionality of black women's experiences and how courts have found it difficult to deal with claims existing at intersection of race and gender).

[102] *See* Jennifer C. Nash, *From Lavender to Purple: Privacy, Black Women and Feminist Legal Theory*, 11 CARDOZO WOMEN'S L.J. 303, 308 (2005). Nash explains the dearth of diversity in prior waves of feminist thought by stating that:

> We currently inhabit a "post-feminist" or "third wave feminist" cultural moment. A moment that is ostensibly marked by multiculturalism, diversity, and racial and ethnic plurality. Nevertheless, the second-wave feminist critique remains a potent one as there continues to be a dearth of meaningful feminist scholarship that integrates and draws on the voices, narratives, and experiences of women of color.

Id.

[103] *See* Harris, *Race and Essentialism*, *supra* note 101, at 595 (addressing concerns of gender essentialism in the feminist theories of both Catharine MacKinnon and Robin West).

B. Domestic Violence and African American Women

Dr. Lenore Walker, in her groundbreaking book, *Battered Women*, found nine traits battered women share: (1) low self-esteem; (2) belief in common myths of battering relationships; (3) belief in the traditional feminine sex-role stereotype; (4) acceptance of responsibility for their batterers' actions; (5) guilt and denial of feelings of terror and anger; (6) public passivity combined with the ability to manipulate the home environment to stave off violence or death; (7) severe stress reactions; (8) the use of sex to establish intimacy; and (9) refusal to seek outside assistance.[104] Walker utilized Martin Seligman's learned helplessness to underscore why women stayed in abusive relationships.[105] Walker describes the cognitive effects on battered women as follows:

> [The] learning ability is hampered and the repertoire of responses from which people can choose is narrowed. In this way, battered women become blind to their options . . . . Repeated batterings, like electrical shocks, diminish the woman's motivation to respond. She becomes passive. Secondly, her cognitive ability to perceive success is changed. She does not believe her response will result in a favorable outcome, whether or not it might.[106]

Lenore Walker created the normative battered woman against which all other battered women are measured. Battered women who are not white,[107] passive,[108]

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[104] LENORE WALKER, THE BATTERED WOMAN 31 (1979). Dr. Walker's seminal study in the late 1970s sought to explain why women stay in abusive relationships. *Id.* She interviewed more than 120 women and found consistent themes in their stories. *Id.* The women interviewed were a mixed group that represented all ages—seventeen to seventy-six years of age—races, religions, educational levels, cultures, and socioeconomic groups. *Id.*

[105] Martin E.P Seligman et al., *The Alleviation of Learned Helplessness the Dogs*, 73 J. ABNORMAL PSYCHOL. 256 (1968). Seligman and fellow researchers placed dogs in cages and administered electrical shocks at random and varied intervals. *Id.* The dogs quickly learned that no matter what response they attempted, they could not control the shocks. *Id.* Initially, the dogs sought escape through various movements that did not lessen the shocks. *Id.* Eventually, the dogs ceased further voluntary activity and became compliant, passive and submissive. Even when the researchers gave the dogs an escape route, the dogs would not respond. *Id.* Seligman's theory was further refined and reformulated, based on later laboratory trials with human subjects. *Id.*

[106] WALKER, *supra* note 104, at 48-50.

[107] *See* HILLARY POTTER, BATTLE CRIES: BLACK WOMEN AND INTIMATE PARTNER ABUSE (2008); Sharon Angela Allard, Essay, *Rethinking Battered Woman's Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191, 193-94 (1991) ("While battered woman's syndrome furthers the interests of some battered women, the theory incorporates stereotypes of limited applicability concerning how a woman would and, indeed, should react to battering. To successfully defend herself a battered woman needs to convince a jury that she is a 'normal' woman—weak, passive and fearful."); Zanita E. Fenton, *Silence Compounded: The Conjunction of Race and Gender Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 271 (2003); Darnell Hawkins, *Devalued Lives and Racial Stereotypes: Ideological Barriers to the Prevention of Family Violence Among Blacks*, *in* VIOLENCE IN THE BLACK FAMILY 189 (Robert Hampton ed., 1987). Traci West states:

> The sex role socialization of white middle-class women, [for example,] that often affords them more opportunities to live out the feminine ideal of calling for dependence on men, can poorly prepare them to survive on their own to escape battering. In this view, ideologies of race, gender, and class collude to erect salient obstacles that can impact all women's struggles to escape domestic violence.

or straight,[109] will have difficulty being configured into the battered woman standard.[110] Compounding the predicament for poor, battered African American women is a court system that historically has been a barrier for equal treatment in the administration of justice for African Americans.[111]

TRACI C. WEST, WOUNDS OF THE SPIRIT: BLACK WOMEN, VIOLENCE, AND RESISTANCE ETHICS 118-19 (1999) (citing SUSAN SCHECTER, WOMEN AND MALE VIOLENCE 237-38 (1982)).

[108] *See* EDWARD W. GONDOLF & ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS 17-18 (1988); ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 80 (2000); Geneva Brown, *When the Bough Breaks: Traumatic Paralysis–an Affirmative Defense for Battered Mothers*, WM. MITCHELL L. REV. 189 (2005); Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 221 (2002); Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75 (2008). *Contra* Shamita Das Dasgupta, *A Framework for Understanding Women's Use of Nonlethal Violence in Intimate Heterosexual Relationships*, 8 VIOLENCE AGAINST WOMEN 1364, 1372 (2002); L. Kevin Hamberger & Theresa Potente, *Counseling Heterosexual Women Arrested for Domestic Violence: Implications for Theory and Practice*, 9 VIOLENCE AND VICTIMS 125, 128 (1994); Daniel G. Saunders, *When Battered Women Use Violence: Husband-Abuse or Self-Defense*, 1 VICTIMS AND VIOLENCE 47, 56 (1986). Michael Johnson and Kathleen Ferraro suggest the term "violent resistance" to describe women's violence that is not motivated by a desire to control their partners, given the parameters of the term "self-defense" under the law. Michael P. Johnson & Kathleen J. Ferraro, *Research on Domestic Violence in the 1990s: Making Distinctions*, 62 J. MARRIAGE & FAMILY 948, 949 (2000).

[109] *See* Marnie J. Franklin, Essay, *The Closet Becomes Darker for the Abused: A Perspective on Lesbian Partner Abuse*, 9 CARDOZO WOMEN'S L.J. 299 (2003). Battered women consistently express feelings of shame because same-sex relationships are taboo and battered lesbians are emotionally devastated by the fact that their intimate partner abused them. *Id.*; Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence*, 64 GEO. WASH. L. REV. 582 (1996) (an analysis of the meaning and effect of the exclusion of gays and lesbians from domestic violence literature); Krisana M. Hodges, Comment, *Trouble in Paradise: Barriers to Addressing Domestic Violence in Lesbian Relationships*, 9 LAW & SEXUALITY 311, 318 (1999). The precarious discretion of the judges and prosecutors in each case creates a dangerous legal environment where lesbian battered women are unable to predict the responses they may receive if they seek out legal protection; "[w]hile heterosexual women are not guaranteed a safe and receptive legal environment, lesbian battered women experience the courts as a legal crapshoot in a way that heterosexual battered women do not." *Id.*; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) (describing "[l]esbian battering [as] that pattern of violent and coercive behaviors whereby a lesbian seeks to control the thoughts, beliefs or conduct of her intimate partner or to punish the intimate for resisting the perpetrator's control over her"); 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) (introducing a "queered" approach to domestic violence prevention that is more nuanced, and therefore more effective in seeking to end lesbian battering).

[110] *See* ROBBIN S. OGLE & SUSAN JACOBS, SELF-DEFENSE AND BATTERED WOMEN WHO KILL: A NEW FRAMEWORK 53-54 (2002) (explaining that non-confrontational cases where the abuser is killed are the most troubling for the court to allow defense counsel to use self-defense claims and allow expert testimony on battered woman syndrome); *see also* Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1 (1994) (critiquing the feminist view of the battered woman syndrome defense); David L. Faigman, Note, *The Battered Women Syndrome and Self Defense: A Legal & Empirical Dissent*, 72 VA. L. REV. 619 (1986) (addressing the relationship of the battered woman syndrome and the self-defense doctrine). Both authors argue against the accepted notions of battered woman syndrome. Coughlin finds that men are not allowed defenses that explain the pressures exerted by their spouses in similar situations. Coughlin, *supra* note 110, at 5. Faigman strongly argues against the general acceptance of battered woman syndrome considering it is not scientifically sound research. Faigan, *supra* note 110.

[111] DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 140-88 (1990) (noting racial disparity in administration of death penalty); HANEY LÓPEZ, *supra* note 22, at 111-16, 136-41; Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227, 2231–36 (2001) (providing examples of racism in the criminal justice system); Mario Barnes,

Donna Coker examined four problems with domestic violence laws when addressing the intersection of race, gender, and poverty: (1) the significance of race or ethnicity in shaping the efficacy of universal intervention strategies;[112] (2) the tendency to ignore the importance of women's economic subordination in their vulnerability to battering;[113] (3) the trend to develop increasingly punitive criminal measures against batterers without evidence that these measures improve the well being of victims;[114] and (4) the pervasive presumption that women *should* leave battering partners and that doing so will increase their safety.[115]

Universal intervention strategies, such as mandatory arrest of the abuser, have proven to be ineffective deterrent strategies in poor African American communities. Early studies of mandatory arrest policies evinced greater recidivism if the abuser was unemployed and—depending upon the city—whether the abuser was African American.[116] Racially charged encounters between law enforcement and the African American community make mandatory arrest laws highly controversial.[117] In severe cases of abuse, the mandatory arrests could place the

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Black Women's Stories and the Criminal Law: Restating the Power of Narrative, 39 U.C. DAVIS L. REV. 941, 959 (2006) (citing ANTHONY G. AMSTERDAM & JEROME BRUNER, *Race, the Court, and America's Dialectic from* Plessy *Through* Brown *to* Pitts *and* Jenkins, *in* MINDING THE LAW 247 (2000)) (noting that the construct of race serves the hegemonic purpose of disempowering constructed "other" and empowering in-group); Ruth E. Friedman, *Statistics and Death: The Conspicuous Role of Race Bias in the Administration of the Death Penalty*, 4 AFR.-AM. L. & POL'Y REP. 75, 75-81 (1999) (discussing racially significant consequences of supposedly race-neutral application of death penalty); Christian Haliburton, *Neither Separate Nor Equal: How Race-Sensitive Enforcement of Criminal Laws Threatens to Undo* Brown v. Board of Education, 3 SEATTLE J. FOR SOC. JUSTICE 45, 50–53 (2004) (explaining how biased decision-making at each critical juncture in the criminal legal system results in gross overrepresentation of blacks on death row, particularly for those convicted of killing whites); William T. Pizzi et al., *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327, 339-40, 348-52 (2005) (reporting results of a study of Florida inmates that revealed that when one controlled for previous criminal record, race did not account for significant variance in sentence length between black and white offenders, but that study participants did manifest bias against Afro-centric features, which served as a predictor for increased sentence length); Randall Robinson, *What America Owes to Blacks and What Blacks Owe to Each Other* (pt. 1), 6 AFR.-AM. L. & POL'Y REP. 1, 2 (2004) (citing statistics indicating blacks make up only 14% of nonviolent drug offenses, but 35% of arrests, 55% of convictions, and 75% of prison admissions for nonviolent drug offenses).

112 Donna Coker, *Shifting Power for Battered Women: Law, Material Resources and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1014-15 (2000) [hereinafter Cooker, *Shifting Power*]. Coker notes policies mandating that police arrest whenever they find probable cause that a crime of domestic violence has occurred may benefit some women whose abusers are deterred from future violence, but arrest may escalate the violence experienced by women married to unemployed men. *Id.* at 1015-16; *see* LAWRENCE W. SHERMAN ET AL., POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS 185 (1992).

113 Coker, *Shifting Power*, *supra* note 112, at 1015.

114 *Id.* at 1015-16.

115 *Id.* at 1017.

116 Joan Zorza, *Mandatory Arrest for Domestic Violence, Why It May Prove to Be the Best First Step in Curbing Repeat Abuse*, 10 CRIM. JUSTICE 2, 5-6 (1995) (citing a study conducted by researchers Lawrence W. Sherman and Richard A. Berk, *From Initial Deterrence to Long-Term Escalation: Short-Custody Arrest for Poverty Ghetto Domestic Violence*, 29 CRIMINOLOGY 821 (1991)) (describing that short arrest had a substantial initial deterrent effect, but the effect ended at thirty days, and was followed by higher long-term recidivism effects than no arrest).

117 Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001) [hereinafter Coker, *Crime Control*] ("[M]andatory policies

abuse victim in danger for future violence.[118] Another irony of mandatory arrest laws has been the arrest of the abuse victim if she defended herself against her abuser.[119]

Economic vulnerability is a pronounced racial differential in the experiences of battered women. Poor African American women are the most vulnerable of domestic violence victims because they are the lowest on the socioeconomic scale.[120] Being poor leaves this subset of domestic violence victims principally dependent upon the abuser for financial support. Beth Ritchie described the plight of battered African American women who turned to crime, explaining that "[p]oor African American battered women in contemporary society are increasingly restricted by their gender roles, stigmatized by their racial/ethnic and class position and constrained by the competing forces of tremendous unmet need and very limited resources."[121] However, economics is not the only consideration that influences choices made by poor, battered African American women.

Punitive measures also help determine whether poor, battered African American women will seek protection of the state. Increasing criminal sanctions against batterers which do not benefit the battered victim alienate both abuser and the victim from the system. Donna Coker analyzed the Miami-Dade County clerk of court requirement that abusers' employers be contacted if a domestic violence conviction resulted.[122] Coker noted that the program did not benefit the victim and produced economic hardship if the abuser lost his job. She noted, "professional men are not likely to lose their jobs if their boss is notified of a misdemeanor conviction, but men working in low skill jobs, where men of color are disproportionately represented, are likely to be fired."[123] The abuse victim is vulnerable because she loses financial support and faces potential retaliation by the abuser who subsequently blames her for his loss of employment.

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offer the battered women's movement some control over state response by increasing the likelihood that police and prosecutors will not reject battering cases . . . [but the] policies make irrelevant battered women's preferences regarding arrest and prosecution, mandatory policies limit the control of individual women.").

[118] *Id.* at 815 (citing Robert C. Davis et al., *The Deterrent Effect of Prosecuting Domestic Violence Misdemeanors*, 44 CRIME & DELINQ. 434, 440 (1998)) ("Both prior misdemeanor convictions and battery arrests without conviction contributed independently to an increased risk of recidivism."); EVE BUZAWA ET AL., U.S. DEP'T OF JUSTICE, RESPONSE TO DOMESTIC VIOLENCE IN A PRO-ACTIVE COURT SETTING 176 (1999), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/181427.pdf ("[T]he [domestic violence] offender's prior criminal history and age at first offense are the real keys to predicting re-offending . . . ").

[119] *See* Goodmark, *supra* note 108, at 96-104. Goodmark notes African American women are more likely to fight back because they perceive that no outside assistance is available. Some African American women refuse to turn to formal social services because they have had past negative encounters with the social service provision system. *Id.* at 106.

[120] *See supra* notes 29-45.

[121] BETH RITCHIE, COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN 2 (1996).

[122] *See* Coker, *Shifting Power*, *supra* note 112, at 1016.

[123] *Id.*

The most pernicious example of how conventional feminist theory fails to connect to the lives of poor, battered women is the fallacy that battered women should leave the abusive relationships and they will then be safe.[124] Access to services and state intervention are contingent upon the battered woman permanently severing herself from her battering partner.[125] First, poor women cannot easily uproot themselves and their children for safety when they are economically dependent upon the batterer. Moreover, because poor battered women cannot afford to cut themselves off entirely from social and familial sources of support, separation does not lead to safety for poor African American women. Separating from an abusive partner may prove dangerous for some women, especially African American women. Women who leave relationships are often at high risk for homicide or severe violence for the first year after they leave or when the abusers know their partners are leaving for good.[126] The danger is far more significant for African American women. In 2007, African American women were four times more likely to be killed by boyfriends or girlfriends than white women.[127]

Some battered women seek to end the violence in the relationship but not end the relationship. State intervention means not only ending the relationship but cooperating with law enforcement and prosecutors. However, many battered women have orders of protection removed and refuse to cooperate with prosecutors because the threat of state intervention was successful in ending the abuse.[128]

C. Battered African American Women and Identity Construction

How do judges perceive poor African American women who appear before them requesting legal intervention involving a violent relationship? Will the judges' responses be as fair and impartial as they would be if a wealthy white male stood before the bench requesting legal assistance?[129] How can racial stereotypes

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[124] *Id.* at 1017.

[125] *Id.* at 1019.

[126] *See* JACQUELYN C. CAMPBELL, ASSESSING DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS 87 (2007); Helen M. Hendy et al., *Decision to Leave Scale: Perceived Reasons to Stay in or Leave Violent Relationships*, 27 PSYCHOL. WOMEN Q. 162 (2003); Kim K. Lacey et al., *A Comparison of Women of Color and Non-Hispanic White Women on Factors Related to Leaving a Violent Relationship*, 26 J. INTERPERSONAL VIOLENCE 1036 (2011); Robert Walker et al., *An Integrative Review of Separation in the Context of Victimization: Consequences and Implications for Women*, 5 TRAUMA, VIOLENCE, ABUSE 143 (2004).

[127] CATALANO, *supra* note 19, at 4. *See also* CAMPBELL, *supra* note 126, at 85. Campbell notes that homicide is the second leading cause of death for African American women aged fifteen to thirty-four. *Id.* The rate of homicide per 100,000 for young African American women was 13.3 in the year 2000 as compared to 1.3 per 100,000 for females overall. *Id.* The homicide rate for African American women of all ages is higher than that of men of all races (10.3 per 100,000 vs. 10 per 100,000). *Id.*

[128] Coker, *Shifting Power*, *supra* note 112, at 1018.

[129] *See* Harris, *Whiteness as Property*, *supra* note 31, at 1737. Harris defined the origins of white privilege as:

> The law assumed the crucial task of racial classification, and accepted and embraced the then-current theories of race as biological fact. This core precept of race as a physically

exist in the courts when laws are facially neutral and judges are impartial? Ian Haney López has explained that legal actors are "simultaneously ignorant and informed participants in the construction of races."[130] Social and legal conceptions of race and racism shape judges' understandings and their resulting views. Presented as neutral perceptions, these views are actually heavily biased.[131]

Mario Barnes describes how legal actors perceived his grandmother as a defendant in the courtroom:

> Court papers from my grandmother's case reflect that legal actors made repeated references to my grandmother's identity traits. These references minimized her individual identity, while she became hypervisible as a function of stereotypes associated with the race, class, and gender categories the court concentrated upon. The documents of the case suggest a particularized vision that legal authorities had of my grandmother. It was an image constructed by linking attitudes about the meaning of the identity categories she inhabited to some behaviors which had limited relevance to her case and to others which were only helpful to diminishing her social status.[132]

As poor African American women stand before the bench requesting legal intervention to end violence in their relationships, judges wrestle with unconscious racism regarding the person appearing before them.[133] Unconscious racism does not seek to intentionally harm certain groups; however, the effect of judicial decisions based on racially prejudiced beliefs and desires still produces harmful outcomes.[134]

In short, racism prevents poor, battered African American women from seeking assistance, even though they are the population that is at the highest risk for violence, including lethal violence.[135] African American women, battered and non-battered, have negative perceptions of law enforcement,[136] and the legal system that affects their attempts to obtain assistance.[137]

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defined reality allowed the law to fulfill an essential function—to "parcel out social standing according to race" and to facilitate systematic discrimination by articulating "seemingly precise definitions of racial group membership." *Id.*

130 HANEY LÓPEZ, *supra* note 22, at 134.

131 *Id.* at 136-37.

132 Barnes, *supra* note 111, at 968. Barnes' grandmother was a defendant charged with murder and armed robbery in People v. Spencer, No. CR 12844 (Cal. Super. Ct. May 1, 1968).

133 *See generally* Charles Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

134 *See* HANEY LÓPEZ, *supra* note 22, at 138.

135 *See* Doris Campbell et al., *Intimate Partner Violence in African American Women*, 7 ONLINE J. ISSUES IN NURSING 1 (2002), http://www.bvsde.paho.org/bvsacd/cd41/africa.pdf (reviewing intimate-partner violence and abuse against African American women by examining existing empirical studies of prevalence and health outcomes of intimate-partner violence against women—African American women, specifically).

136 *See* Edem F. Avakame & James J. Fyfe, *Differential Police Treatment of Male-on-Female Spousal Violence*, 7 VIOLENCE AGAINST WOMEN 22, 35-36 (2001) (noting if the victim was poor or non-white or lived in a central city, the police were less likely to arrest the spouse than if the victim was

V. NEGATIVE RIGHTS AND LIMITED REMEDIES

A. Negative Rights

Castle Rock is but the latest in a series of cases in which the Supreme Court has enumerated the limits of procedural due process rights or affirmed negative rights.[138] The Fourteenth Amendment only restricts the freedom of states to make certain types of laws or take certain actions.[139] The Supreme Court will review either procedural or substantive due process claims. Procedural review requires the court to review if the government entity has taken an individual's life, liberty, or property without fair procedure or due process.[140] A substantive review requires a judicial determination of whether the substance of the legislation is constitutional.[141] The Due Process Clause is one of the most litigated clauses in the Constitution.[142] It is incumbent upon the courts to balance individual rights against laws created by state government. Congress drafted the Fourteenth Amendment without listing specific rights to grant leeway to future congresses and future courts to deal with circumstances not anticipated in 1866.[143] Constitutional rights are either negative or positive.[144] Negative constitutional rights limit government intervention and positive rights define what the government must do or

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white, wealthier, or lived in a suburban area); David Eitle, *The Influence of Mandatory Arrest Policies, Police Organizational Characteristics, and Situational Variables on the Probability of Arrest in Domestic Violence Cases*, 51 CRIME & DELINQ. 573, 590-92 (2005) (detailing that even where mandatory arrests laws existed, police were reluctant to make arrests in crimes involving domestic violence).

137 *See* Robert L. Hampton et al., *Evaluating Domestic Violence Interventions for Black Women*, 16 J. AGGRESSION, MALTREATMENT & TRAUMA 330 (2008); Vetta Sanders Thompson & Anita Bazile, *African American Attitudes Toward Domestic Violence and DV Assistance*, NATIONAL VIOLENCE AGAINST WOMEN PREVENTION CENTER, http://www.musc.edu/vawprevention/research/ attitudesdv.shtml (last visited Oct. 13, 2012) (discussing African American women's distrust of the legal system).

138 *See infra* notes 143-64.

139 JOHN E. NOVAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 374-75 (2000).

140 *Id.* at 375. *See also* Mathews v. Eldridge, 424 U.S. 319 (1976), where the Court described three distinct factors it weighs in determining procedural due process requirements: 1) the private interest that will be affected by the official action; 2) the risk of erroneous deprivation of such interest through the procedures used; and 3) the Government's interest, including function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

141 *Id.*

142 *See* JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT (1983); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2d ed. 1977); JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT (1997); GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA (2006); RONALD M. LABBÉ & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT (2003); EARL M. MALTZ, THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION (2003); MICHAEL J. PERRY, WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT (1999); JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951).

143 Eric Foner, *The Original Intent of the Fourteenth Amendment: A Conversation with Eric Foner*, 6 NEV. L.J. 425, 428 (2005).

144 Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990).

provide for its citizens.[145] The Framers used negative rights to limit the power of national government. Prior to the ratification of the Fourteenth Amendment, the Framers phrased the Bill of Rights in negative terms. The Framers sought to protect citizens from a self-interested state or federal government.[146] Professor Michael Gerhardt noted that the passage of the Fourteenth Amendment radically altered the federalism concept underlying the Bill of Rights. A tension and legal conundrum began with the expansion of federalism:

> For every negative right the Fourteenth Amendment protects, the power of the federal courts is increased with a corresponding decrease in the power of state government. For every positive right that [the Fourteenth] [A]mendment imposes, the federal courts' power increases with a corresponding decrease in both state autonomy and resources.[147]

The Fourteenth Amendment is a complex doctrine that seeks to balance protection of individual rights against guarantees of the appropriate procedures if rights are infringed, or as constitutional scholar Erwin Chemerinsky states:

> The simplest, and perhaps most elegant, way of understanding the Fourteenth Amendment is to view the Privileges or Immunities Clause as protecting rights from interference, the Equal Protection Clause as assuring equal treatment, and the Due Process Clause as prescribing the procedures that government must follow when it takes away life, liberty or property. At a minimum, the Due Process Clause seems to define how government must act when it deprives people of their rights.[148]

The negative rights interpretation means that citizens have no constitutional right to government services, and thus, because government has no duty to provide

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[145] *See, e.g.*, William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975) (asserting that "judicial deference to congressional interpretation of the Constitution" would "[stand] *Marbury v. Madison* on its head"). The positive or negative rights interpretation of the Constitution is heavily debated by many constitutional scholars. Some scholars argue it is the exclusive domain of the courts to interpret constitutional matters and the Supreme Court has enforced a negative rights doctrine. *See id.*; *see also* Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 867 (1999) (quoting Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975)) (addressing the notion that the Supreme Court often imposes rules that go beyond what the Constitution requires).

[146] *See* Michael Kent Curtis, *The Bill of Rights and the States: An Overview from One Perspective*, 18 J. CONTEMP. LEGAL ISSUES 3, 4-42 (2009); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges and Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071 (2000); Michael Kent Curtis, *Two Textual Adventures: Thoughts on Reading Jeffrey Rosen's Paper*, 66 GEO. WASH. L. REV. 1269, 1272-75 (1998); Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361 (2009); Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867–73*, 18 J. CONTEMP. LEGAL ISSUES 153, 283-84 (2009); Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L.J. 1509 (2007).

[147] Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of the Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 416 (1990).

[148] Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143, 1151-52 (1992).

services, it need not do so competently.[149] In declining to hold the Winnebago County Department of Social Services negligent in its failure to protect a child from a severe abuse, Justice Rehnquist's opinion expounded on the negative rights:

> The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text . . . . The purpose of [the Clause] was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political process[.]
>
> Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid . . . . If the Due Process Clause does not require the State to provide its citizen with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.[150]

Justice Rehnquist's rationale for rejecting positive rights was not new. The Supreme Court has long rejected attempts at creating positive rights claims for welfare benefits,[151] education,[152] housing,[153] and medical services.[154] The accumulated denial of positive rights by the Supreme Court became the underpinning for decisions that many in the legal community view as morally reprehensible.

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[149] *See* ROBERT E. GOODIN, REASONS FOR WELFARE: THE POLITICAL THEORY OF THE WELFARE STATE 184-85 (1988) (explaining that some rights are both negative and positive); Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 122-44 (1969) (setting forth the conventional distinction between negative and positive rights); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999) (reviewing the premises of federal rationality review as applied to the adjudication of claims to welfare assistance under state constitution poverty clauses); JEREMY WALDRON, *Liberal Right: Two Sides of the Coin*, *in* LIBERAL RIGHTS 1, 6 (1993) (discussing this distinction, and emphasizing the importance of positive rights to material well-being).

[150] DeShaney v. Winnebago Cnty. Dep't Soc. Servs., 489 U.S. 189, 195-97 (1989).

[151] Dandridge v. Williams, 397 U.S. 471, 485, 487 (1970) (rejecting the claim that the right to welfare was a constitutional right).

[152] *See* Lindsey v. Normet, 405 U.S. 56, 74 (1972) (rejecting the idea of a fundamental right to housing).

[153] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (rejecting education as a fundamental constitutional right).

[154] *See* Harris v. McRae, 448 U.S. 297, 318 & n.20 (1980).

1. *Harris v. McRae*

Title XIX of the Social Security Act of 1965 established the Medicaid program to provide federal reimbursement for states that provided medical assistance to the needy.[155] However, in 1976, Congress passed the Hyde Amendment, which severely curtailed reimbursement of federal funds for the costs of abortions under the Medicaid programs.[156] A group of indigent pregnant women from New York, along with other parties, sued in federal court. They sought to enjoin enforcement of the Hyde Amendment citing violations of the Due Process Clause of the Fifth Amendment and the Religion Clause of the First Amendment.[157] The plaintiffs also sought to have states continue to provide funding for medically necessary abortions.[158] The District Court granted injunctive relief.[159] In *Harris v. McRae*,[160] the Supreme Court denied that Title XIX of the Social Security Act entitled states to pay for medically necessary abortions of impoverished women where the Hyde Amendment would have left the abortions unreimbursed.[161] The Court found that Congress did not intend to shift the entire costs of medically necessary abortions to participating states. The Hyde Amendment restriction did not, in the Court's view, impinge upon any liberty protected under the Due Process Clause of the Fifth Amendment.[162] It did not restrict women from obtaining medically necessary abortions; rather, it only encouraged alternate activities in the public interest. The Court further elucidated that a woman's choice to terminate her pregnancy did not create a constitutional entitlement to financial resources that would give her a full range of protected choices.[163]

The restriction on the federal funding placed a greater burden on indigent women's abilities to obtain abortions. Lawrence Tribe determined that even under a negative and individualistic constitutional scheme there are exceptional affirmative rights.[164] The *Harris* Court, however, determined that the state can

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155 *Id.* at 301.

156 *Id.* at 302.

157 *Id.* at 303.

158 *Id.*

159 *Id.* at 304.

160 Harris v. McRae, 448 U.S. 297 (1980).

161 *Id.* at 309.

162 *Id.* at 318.

163 *Id.* at 323.

164 Lawrence Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties and the Dilemma of Dependence*, 99 HARV L. REV. 330, 333 (1985). Tribe uses the Sixth Amendment as an example of affirmative rights guarantees to:

> '[T]he accused' the right to 'enjoy . . . a speedy and public trial, by an impartial jury' and 'to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic].' Consider, too, the requirement of article I, section 2, that the House of Representatives 'shall be composed of Members chosen . . . by the People of the several States'; the mandate of article I,

restrict access to abortions by cutting off funding because the Equal Protection Clause is not a source of substantive rights and poverty is not a suspect class under the Fourteenth Amendment. Therefore, the women have no property interest in obtaining funding for an abortion. Lawrence Tribe espoused that the Constitution—and the scheme of negative and individual rights—was "written largely with a view to the rights of self-sufficient adult white propertied males."[165] Tribe notes that only with the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments does the Constitution make a plausible effort to give rights through affirmative government action "to those whom biology or history condemns . . . to conditions of dependence and relative helplessness."[166] *Harris* became the foundation for future decisions that would leave vulnerable populations without the protection and duty of affirmative rights that government should or would enforce.

2. *DeShaney v. Winnebago County Department of Social Services*

Joshua DeShaney was brutally abused by his father, which left him severely brain damaged.[167] Doctors predicted that Joshua would spend the rest of his life in an institution as a result of the abuse.[168] The defendants, including the State of Wisconsin Department of Social Services ("DSS") social workers and other local officials, had reason to believe that the father was abusing the petitioner because Joshua had been admitted to the hospital for bruises on several occasions.[169] The local emergency room notified DSS of the boy's treatment for injuries and Joshua's DSS caseworker also had observed evidence of injuries on his head during home visits.[170] The DSS caseworker noted that she suspected child abuse and recorded these suspicions in her files; however, she took no action, and none of the officials acted to remove the petitioner from his father's custody.[171] Joshua DeShaney asserted that he had a substantive due process fundamental right under the liberty component of the Due Process Clause to be protected by the Winnebago County Social Services once they became aware of the abuse by the father.[172] As noted earlier, the Supreme Court held differently. The state's failure to protect an individual from private violence did not violate the Due Process Clause, and the

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> section 9, clause 7, that 'a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time'; or the requirements of article IV, section 4, that the 'United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Id. at 332. These commands obviously entail recognition of positive and not merely negative rights.

165 Tribe, *supra* note 164, at 342.

166 *Id.*

167 DeShaney v. Winnebago Cnty. Dep't Soc. Servs., 489 U.S. 189 (1989).

168 *Id.* at 193.

169 *Id.* 191.

170 *Id.* at 192-193.

171 *Id.* at 193.

172 *Id.* at 195.

state's knowledge of the danger that existed for Joshua DeShaney and its attempts to protect him did not create a special relationship that would give rise to an affirmative constitutional duty to protect.[173]

Michael Gerhardt noted three important findings in Justice Rehnquist's opinion: (1) the Due Process Clause was clearly stated to be a negative rights doctrine; (2) a substantive due process violation would not be recognized unless the victim was in the state's physical custody, thus limiting the potential flood of cases into federal courts; and (3) the Court preserved state autonomy by limiting federal court oversight.[174] Two troubling aspects exist about the *DeShaney* decision. First, Professor Gerhardt notes that even if Justice Rehnquist chose to make the claim that the Due Process Clause grants negative rights, states still have an affirmative duty not to deprive a person of the "'life, liberty and property.'"[175] Second, Justice Rehnquist distorts the history of the Due Process Clause of the Fourteenth Amendment and compares it with the Framers' goal of limiting the power of the federal government, an interest grounded in the Due Process Clause of the Fifth Amendment.[176] The purpose of the Due Process Clause of the Fourteenth Amendment was to *expand*—not limit—federal power by investing the federal government with the oversight to guarantee that states did not deprive their citizens of their rights to "life, liberty or property" without fair procedures. Legal scholars have argued that the Fourteenth Amendment should be used not only to assert affirmative rights but also to assert the rights of the poor.[177] Justice Rehnquist

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[173] DeShaney v. Winnebago Cnty. Dep't Soc. Servs., 489 U.S. 189, 199-201 (1989).

[174] Gerhardt, *supra* note 147, at 422-24.

[175] *Id.* at 425 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[176] *Id.* at 426.

[177] *See* Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); *see also* CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 131-39 (1997) (justifying a constitutional right to livelihood); Kenneth L. Karst, *Citizenship, Race, and Marginality*, 20 WM. & MARY L. REV. 1, 43 (1988) (defending a constitutional duty "to protect equal citizenship against the worst ravages of material want"); EDWARD V. SPARER, THE RIGHT TO WELFARE, IN THE RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE 65, 83-84 (Norman Dorsen ed., 1971) (stating that constitutional "ground rules" must guarantee a "right to live" and protection to "all of its citizens against starvation"); Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37, 41-42 (1990) (grounding a right to minimal entitlements in the republican theory of the Thirteenth Amendment); C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 760 (1986) (justifying federal "constitutional protection of individual claims to a certain quantum of property"); Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1110 (1986) (quoting Palko v. Connecticut, 302 U.S. 319, 327 (1937)) (contending that "the rights to freedom from gnawing hunger and from preventable sickness . . . form 'the matrix, the indispensable condition, of nearly every other form' of freedom"); Erwin Chemerinsky, *Making the Case for a Constitutional Right to Minimum Entitlements*, 44 MERCER L. REV. 525, 526-27 (1993) (identifying a seven-step argument for "a constitutional right to minimum entitlements"); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 19-28 (1987) (arguing that the right to subsistence is a precondition to the rights of family and personhood); William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1790 (1994) (reviewing CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993)) (describing a concept of social citizenship that entails "decent work" and a "social minimum"); Thomas C. Grey, *Procedural Fairness and Substantive Rights*, *in* DUE PROCESS

sought to ignore or rewrite the intent of the Fourteenth Amendment and Joshua DeShaney was granted no recourse from the failure of the state to protect his life.

3. *Town of Castle Rock v. Gonzales*

Jessica Gonzales obtained a restraining order against her husband, Simon Gonzales, during divorce proceedings.[178] She had three daughters with her husband and the divorce court ordered Simon Gonzales not to disturb the peace of the petitioner or her children.[179] Three weeks after the issuance of the order, Simon Gonzales took the children without the permission of Jessica Gonzales.[180] After two hours, Jessica Gonzales informed the police of her suspicion that Simon Gonzales had taken her daughters.[181] Ms. Gonzales sought to have the restraining order enforced; however, the Castle Rock police told Ms. Gonzales they would not look for her husband or children and told her to wait for their return.[182] After seven hours, Ms. Gonzales again sought to have her restraining order enforced and have the police locate her children, only to be told again by the Castle Rock police to be patient.[183] At three o'clock in the morning, Simon Gonzales appeared at the Castle Rock police station and opened fire with a semi-automatic handgun.[184]

182, 197-201 (J. Roland Pennock & John W. Chapman eds., 1977) (deriving a substantive right to welfare from procedural due process); Wayne McCormack, *Property and Liberty—Institutional Competence and the Functions of Rights*, 51 WASH. & LEE L. REV. 1, 43 (1994) (articulating a "right to livelihood"); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 678-85 (1979) (arguing for a right to welfare as a necessary part of a constitutional democracy); Frank I. Michelman, *States' Rights and State' Roles: Permutations of "Sovereignty," in* National League of Cities v. Usery, 86 YALE L.J. 1165, 1185 (1977) ("[T]he role of providing social services either is one of the 'powers' reserved to the states under the Tenth Amendment, or is implicitly ascribed to states by the Constitution as a whole."); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 989 (1982) (sketching a theory of "the needs of personhood"); Lawrence Sager, *The Domain of Constitutional Justice, in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 235, 255 (Larry Alexander ed., 1998) (presenting an argument for the "inclusion of some concern for material well-being" in the Federal Constitution).

178 Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 752 (2005).

179 *Id.* at 752. The order of protection also gave notice to law enforcement indicating enforcement authority:

> YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED OR ATTEMPTED TO VIOLATE ANY PROVISION OF THIS ORDER AND THE RESTRAINED PERSON HAS BEEN PROPERLY SERVED WITH A COPY OF THIS ORDER OR HAS RECEIVED ACTUAL NOTICE OF THE EXISTENCE OF THIS ORDER.

Id.

180 *Id.* at 753.

181 *Id.*

182 *Id.*

183 *Id.* at 754.

184 Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 754 (2005).

Castle Rock police shot and killed him. The police later located the bodies of the three daughters inside Simon Gonzales's truck.[185]

Jessica Gonzales filed a Section 1983 suit against the Castle Rock Police department. The Tenth Circuit ruled for Ms. Gonzales, finding that Colorado's statute established clear intent to abrogate the traditional presumption of police discretion and thereby required the police to enforce restraining orders.[186] The Town of Castle Rock appealed to the Supreme Court, which overruled the Tenth Circuit. The Court held that the procedural component of the Due Process Clause does not protect everything that is described as a "benefit"; rather, there must be a legitimate claim to an entitlement to create a property interest.[187] The Court further held that a benefit is not protected if officials have the discretion to grant or deny the benefit.[188] Therefore, the Colorado law did not create a personal entitlement to enforcement of restraining orders, even if the enforcement was mandatory by law.[189]

The *Castle Rock* decision was one of the last decisions for the term of Chief Justice Rehnquist. Douglas Kmiec notes, "[i]n drawing the line as crisply as he does between negative and positive liberty, Rehnquist arguably understates and perhaps even disserves the most basic moral right that he had framed in relation to the very purpose of government."[190] The negative rights doctrine grew more perverse as the Court allowed government's obligation to protect its citizens to be so narrow in interpretation that a mandatory-enforced restraining order was not seen as a protected interest. Roger Pilon theorized that Mrs. Gonzales had a right of protection for her and her children under a social contract and delegated its enforcement to the government.[191] The Town of Castle Rock broke that contract and the Supreme Court upheld its decision.

B. Underenforcement and State Power

Many critical race theorists and criminologists have criticized the criminal justice system for overenforcement.[192] The disproportionate presence of law

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185 *Id.*

186 Gonzales v. City of Castle Rock, 366 F.3d 1093, 1107, 1109 (10th Cir. 2004) ("For us to hold otherwise would render domestic abuse restraining orders utterly valueless.").

187 *Town of Castle Rock*, 545 U.S. at 757.

188 *Id.* at 756.

189 *Id.* at 765-66.

190 Douglas Kmiec, *Young Mr. Rehnquist Theory of Moral Rights: Most Observed*, 58 STAN. L. REV. 1827, 1858 (2006) (reviewing of the substantive legal theory of Chief Justice Rehnquist before and during his term on the Supreme Court).

191 Roger Pilon, *Town of Castle Rock v. Gonzales: Executive Indifference, Judicial Complicity*, 2005 CATO SUP. CT. REV. 101 (2005).

192 *See* Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 884 (1997); Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 UCLA L. REV. 143, 154 (1996); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the*

enforcement in communities of color and its disparate effect on convictions and sentencing leaves communities wary of police presence. A corresponding problem is underenforcement. Professor Lawrence Sager developed the theory of underenforcement of constitutional rights.[193] His thesis is that a gap exists as to whether federal courts will fully enforce constitutional rights; federal courts use theories or concepts of rights to limit the actual application or conception of rights.[194] Therefore, a federal court may agree with a constitutional right in concept yet limit enforcement of that right.[195] Underenforcement also influences government response. Underenforcement is a weak state response to law breaking and victimization.[196] It can be linked to official discrimination and deprivation. The state routinely failing to enforce the law and protect citizens in impoverished and high-crime areas leaves an already vulnerable population further victimized. Police failure to respond leads to increased violence, legal failure, and

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Broken Windows Theory, and Order-Maintenance Policing New York Style, 97 MICH. L. REV. 291, 295-300 (1998); Eric J. Miller, *Role Based Policing: Restraining Police Conduct "Outside the Limited Investigation Sphere,"* 94 CAL. L. REV. 617 (2006); Charles J. Ogletree, Jr., *The Burdens and Benefits of Race in America*, 25 HASTINGS CONST. L.Q. 219, 228 n.45 (1998); Asit S. Panwala, *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 FORDHAM URB. L.J. 639, 646 (2003) (picking on poor and minority suspects as targets for police brutality); Katheryn K. Russell, *"What Did I Do to Be So Black and Blue?": Police Violence and the Black Community*, *in* POLICE BRUTALITY 135-48 (Jill Nelson ed., 2000) (minor incidents "set the tone for the more egregious acts of police brutality"); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 312-15 (1997); Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 52 (1994) (charting the "foreseeable disparate impact on Blacks" of targeting cocaine usage).

193 Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1214-15 (1978).

194 *Id.*

195 Prof. Sager uses Equal Protection standards of review to exemplify how the federal courts parse concepts versus conceptions of constitutional rights.

> In its present incarnation, the federal judicial construct for the application of the equal protection clause appears to comprise three distinct strands. First, there is the permissive strand reflected in the "rational relationship test," which is applied in most situations. Application of this level of review is in fact tantamount to a reflexive validation of the challenged classification, because the "test" incorporates a theory and practice of extreme deference to the judgment of the enacting official or body. A classification qualifies for this judicial deference unless it can be shown to require more demanding review under one of the remaining two strands of doctrine. Second, there is a strand of the doctrine which singles out a few types of classification for the severe scrutiny of the "compelling state interest test," a test which precious few enactments can survive. And third, there is a highly amorphous intermediate strand of equal protection analysis. Sometimes referred to as a "rational relationship test with bite," this last doctrinal strand has afforded the means by which a few classifications have been subjected to serious review, with some attempt made to measure their basic fairness. Gender-based and illegitimacy-disfavoring classifications aside, it is quite unclear which enactments qualify for this intermediate level of scrutiny. It seems likely, however, that only a very restricted class of cases involving unusual threats to groups or interests of special concern to the Court will enjoy this treatment. Under this federal judicial construct of the equal protection clause, only a small part of the universe of plausible claims of unequal and unjust treatment by government is seriously considered by the federal courts; the vast majority of such claims are dismissed out of hand.

Id. at 1215-1216.

196 Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715 (2006).

undemocratic treatment of the poor—hallmarks of discrimination.[197] Deprivation can be measured by race, class, gender, and political powerlessness.[198] Communities of color suffer higher crime and victimization rates than affluent white communities,[199] and African American communities are disproportionately victimized.[200]

Serious crimes go unsolved because of underenforcement in poor communities and fewer services are offered to victims. In Los Angeles, homicides are concentrated in the racially segregated neighborhoods of Compton and South L.A.[201] While African Americans are 12% of the U.S. population, they are 47% of U.S. homicide victims.[202] These homicide statistics include African American women who are victims of intimate-partner violence. African American homicide rates are six times higher than for whites.[203] While the national clearance rate for homicides is 64%, more than half of homicides from Los Angeles remain unsolved.[204] Where underenforcement exists, criminals grow bold and residents become uncooperative with law enforcement. Underenforcement is danger to communities and manifests itself in the court system as well.

Underenforcement can be determined by five triggering factors: (1) official discriminatory intent; (2) group disadvantage; (3) interference with basic life functions; (4) undermining civilian relations with law enforcement; and (5) lack of countervailing values.[205] Underenforcement of protection orders after *Castle Rock* is now sanctioned by the courts. State and federal courts have denied relief where police refused to arrest a violent boyfriend after a 911 call and he later killed his girlfriend.[206] They also denied relief where a domestic violence victim, shot by her husband, sought relief because the police refused to arrest after initial order of protection violations.[207] Courts have followed the *DeShaney/Castle Rock* precedent to the detriment of domestic violence victims.[208]

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[197] *Id.* at 1717.

[198] *Id.* (citing Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 707, 720-21 (2005)).

[199] *See* JENNIFER L. TRUMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 235508 CRIMINAL VICTIMIZATION, 2010, at 11 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cv10.pdf.

[200] *See* RANDALL KENNEDY, RACE, CRIME AND THE LAW 19-20 (1997).

[201] Natapoff, *supra* note 196, at 1725.

[202] ALEXIA COOPER & ERICA L. SMITH, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 236018, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, at 12 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/htus8008.pdf.

[203] *Id.* at 11.

[204] *Id.* at 31. *See also* Jill Leovy & Doug Smith, *Mortal Wounds: Getting Away with Murder in South LA's Killing Zone*, L.A. TIMES (Jan. 1, 2004), *available at* http://articles.latimes.com/2004/jan/01/local/me-unsolved1 (discussing unsolved homicide cases in South L.A.).

[205] Natapoff, *supra* note 196, at 1753-54.

[206] *See* Howard *ex rel.* Estate of Howard v. Bayes, 457 F.3d 568 (6th Cir. 2006).

[207] Burella v. City of Philadelphia, 501 F.3d 134 (3d Cir. 2007).

[208] *See* Hamilton v. Aubrey, 2008 WL 1774469 (D. Nev. 2008) (denying remedy for a judge who misinformed a protection order petitioner that she was not entitled to an extension of the order and her

The five triggering factors for underenforcement are met. First, no court will ever admit to official discriminatory intent; however, when vulnerable populations are denied due process constitutional protections, a form of discriminatory intent manifests itself. When the state knowingly fails to protect abused children or when law enforcement refuses to enforce a mandatory restraining order, a second-class citizenry exists that is not equally protected by the state, and the court gives full endorsement. Second, domestic violence victims now have a group disadvantage. Professor Alexandra Natapoff notes that underenforcement is a problem when it reinforces group disadvantage.[209] Law enforcement can now choose as a policy to limit enforcement of orders of protection while allocating resources to more "worthy" crime victims.[210] Public resources are redistributed away from vulnerable, politically weak populations, such as domestic violence victims. Third, underenforcement of orders of protection does interfere with the basic life functions of domestic violence victims. Domestic violence victims must operate with hyper-vigilance, which interferes with employment and education, and makes them economically vulnerable. A domestic violence victim can neither work nor educate herself without fear of looming violence. Basic life functions become maladjusted. Natapoff finds that underenforcement hinders engagement in fundamental functions, such as employment or forming institutional relations, which in turn stunts full societal participation.[211] Fourth, the lack of enforcement of orders of protection undermines civilian relations with law enforcement. If law enforcement fails in its basic function of serving and protecting vulnerable populations, such as domestic violence victims, the enforcement of law-abiding norms is meaningless. Social disorganization exists when laws are not enforced and crimes are overlooked. Impoverished communities have high levels of social disorganization and high crime rates, and they fail to cooperate with law enforcement. When law enforcement fails to properly enforce orders of protection, a social norm is thus created that gives permission for batterers to continue the abuse of their victims undaunted by any potential sanctions. Finally, a countervailing value does not exist for lack of enforcement of orders of protection. In the distribution of law enforcement resources, reviewing the necessity to protect vulnerable citizens from violence versus allocating resources elsewhere does not justify an equal or distinct value that would leave domestic violence victims potential homicide victims. As Natapoff summarizes, although "normal political competition will often lead to unequal distributions, when those distributions result in unjustified group handicaps

abuser killed her and himself the next day); The police returned weapons to husband after domestic violence arrests which he subsequently used to kill his wife and son, and the court found no due process rights were violated. Starr v. Price, 385 F.Supp.2d 502 (M.D. Pa. 2005).

209 Natapoff, *supra* note 196, at 1753-54.

210 *See* Barry Goetz, *Organization as Class Bias in Local Law Enforcement: Arson-for-Profit as a "Non Issue,"* 31 LAW & SOC'Y REV. 557 (1997); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699 (2005).

211 Natapoff, *supra* note 196, at 1754.

or pervasive disadvantages, the political process alone cannot validate such results."[212] The lives of domestic violence victims are at risk because of systemic underenforcement.

How effective can an order of protection be when the Supreme Court limits the remedies vulnerable populations have if law enforcement or state employees fail in their duties? Ensuing cases prove that seeking remedies becomes a fruitless effort. Jessica Gonzales—now Jessica Lenahan—sought an international venue to seek redress. In 2005, the American Civil Liberties Union and Columbia Law School filed a petition on behalf of Lenahan with the Inter-American Commission of Human Rights ("IACHR") asserting human rights violations based the Castle Rock Police Department inaction on the order of protection and the subsequent Supreme Court decision.[213] The IACHR is an autonomous organ of the Organization of American States ("OAS"), the purpose of which is to promote the observance and defense of human rights.[214] The OAS considers claims of human rights violations and issues written decisions on state responsibility.[215] The OAS is not a court of last resort and has no enforcement power; nevertheless, its decisions have significant moral and political impact.[216] The United States has not ratified any Inter-American human rights treaties; therefore, human rights complaints are brought before the IACHR under the American Declaration and the OAS charter.[217] The IACHR issued a report in 2011 finding that the United States failed to act with due diligence to protect the lives of Jessica Lenahan and her daughters, Leslie, Katheryn, and Rebecca.[218] The impact of the decision should bolster advocates to use international bodies to attempt to influence U.S. policy. As counsel for Jessica Lenahan, Lenora Lapidus gave the following recommendations:

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[212] *Id.* at 1754-55.

[213] *See* Petition Alleging Violations of the Human Rights of Jessica Gonzales by the United States of America and the State of Colorado, with Request for an Investigation and Hearing of the Merits at 7–20, Gonzales v. United States, Petition No. 1490-05, Inter Am. C.H.R., Report No. 52/07, OEA/Ser.L./V/II.128, doc. 19 (2007), https://www.law.columbia.edu/focusareas/clinics/humanrights?exclusive=filemgr.download&file_id=93473&rtcontentdisposition=filename%3DGonzales%20Petition%20Dec%2005.pdf.

[214] Statute of the Inter-Am. Comm'n H.R. art. 1(1), O.A.S. Res. 447 (IX-0/79), 9th Sess., O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, vol. 1 at 88 (1979).

[215] *Id.* art. 1(2).

[216] *See* Caroline Bettinger Lopez, Jessica Gonzales v. United States*: An Emerging Model for Domestic Violence & Human Rights Advocacy in the United States*, 21 HARV. HUM. RTS. J. 183 (2008). Lopez is one of the attorneys representing Jessica Lenahan along with Emily J. Martin, Lenora Lapidus, Stephen Mcpherson Watt, and Ann Beeson. *Id.* at 183 n.a1.

[217] *See* American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, Int'l Conference of Am. States, 9th Conference, OEA/Ser.L/V/I.4 Rev. XX (May 2, 1948); Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3 (entered into force Dec. 13, 1951); Statute of the Inter-Am. Comm'n H.R., *supra* note 214, art. 1(2)(b).

[218] Jessica Lenahan (Gonzales) et al. v. United States, Case 12.626, Inter-Am. C.H.R., Report 80/11, Merits (July 21, 2011), http://www.oas.org/en/iachr/decisions/merits.asp.

> [A]dvocates must first publicize those proceedings, observations, and recommendations to make the public aware of the mechanisms and their operation as well as the substantive abuses that are at issue in the proceedings before these bodies. Furthermore, advocates must cite as persuasive (though not controlling) authority the concluding observations in other legal proceedings–both in domestic courts and before international bodies–and must use the recommendations as support for policy changes at the state and federal legislative and executive levels.[219]

VI. CONCLUSION

Stereotypes and racial stigmas hamper poor African American women who seek intervention in violent relationships. The most poor and susceptible to lethal violence are exposed to a court system that does not understand or address the urgency of domestic violence in the lives of poor African American women. Courts must be more culturally competent in dealing with the intersection of race, class, and gender with the additional component of domestic violence.

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219 Lenore M. Lapidus, *The Role of International Bodies in Influencing U.S. Policy to End Violence Against Women*, 77 FORDHAM L. REV. 529, 553 (2008).