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# Silence Compounded - The Conjunction of Race and Gender Violence

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# SILENCE COMPOUNDED – THE CONJUNCTION OF RACE AND GENDER VIOLENCE

ZANITA E. FENTON\*

## PROLOGUE

*These remarks were first prepared for this conference, originally scheduled for September 13, cancelled because of the events of 9/11.<sup>1</sup> I note the date because of the unfortunate irony in cancelling a conference concerning one form of violence because of the perpetration of another. This fact is perhaps the best prologue to my remarks as I prepare to discuss the conceptual distinctions for public and private violence. The events of 9/11 were of immediate and profound national and international concern. The events of 9/11 also served to deflect attention from a form of “domestic”<sup>2</sup> violence that was a severe and prolonged series of events, yet recognized only as secondary to 9/11 events. I do not mean to minimize the tragedy of that day nor do I intend for us to*

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1. See, e.g., Paul Moses, *TERRORIST ATTACKS; A Day of Infamy; Hijacked Planes Hit WTC and Pentagon*, *NEWSDAY*, Sept. 12, 2001, at W02 (“[T]wo hijacked jets on a horrifying suicide mission slammed into the World Trade Center yesterday—killing thousands in the nation’s worst terrorist assault—and another crashed into the Pentagon.”).

2. In many instances, terrorism is a form of “domestic violence,” understood politically. See generally Dorothy Q. Thomas & Michele E. Beasley, *Symposium on Reconceptualizing Violence Against Women by Intimate Partners: Critical Issues: Domestic Violence as a Human Rights Issue*, 58 *ALB. L. REV.* 1119 (1995). It is also the case that domestic violence, commonly understood as spousal or relationship abuse, is a form of terrorism. See *WEBSTER’S REVISED UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE* 1489 (1913) (citing the word terrorism as “Ter\*ror\*ism” [Cf. F. terrorisme] The act of terrorizing, or state of being terrorized; a mode of government by terror or intimidation. *Jefferson*. <— 2. The practice of coercing governments to accede to political demands by committing violence on civilian targets; any similar use of violence to achieve goals.”), available at [http://humanities.uchicago.edu/forms\\_unrest/webster.form.html](http://humanities.uchicago.edu/forms_unrest/webster.form.html); see also 20 *INDEX TO LEGAL PERIODICALS*, Sept. 1980–Aug. 1981 (Stephen Rosen ed., 1982) (referring to the fact that in the *INDEX TO LEGAL PERIODICALS*, “domestic violence” did not appear as its own subject until 1980; it previously appeared under the topic “Husband and Wife”).

*ignore the fact that the plight of Afghani women<sup>3</sup> was brought to the forefront of the international stage, in part, by these events; however, I can't help wondering how things might have turned out if we had paid more attention to domestic forms of violence against women rather than characterizing them as a matter of cultural difference and an issue of internal affairs.<sup>4</sup>*

#### INTRODUCTION

Challenging and contravening borders is both difficult and important for the work that we do as feminists. The borders to which I refer include the conceptual division between public and private, race and/or class categorizations, the practice/scholarship divide,<sup>5</sup> and the frequent disconnect between feminist theory and "mainstream" jurisprudence. These distinctions can be both illuminating and obscuring, sometimes simultaneously. Domestic violence is a fertile place to explore these borders.

In numerous ways, Professor Elizabeth M. Schneider has explored these borders through her life's work—perhaps most especially in the area of domestic violence. Successfully moving from practitioner and activist to academic and scholar, Professor Schneider has been able to use insights from practice to both ground and inform her

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3. See Anna Mulrine, *Unveiled Threat: The Taliban is Relentless in Its Oppression of Afghan Women*, U.S. NEWS & WORLD REP., Oct. 15, 2001, at 32 (identifying the oppression of women through the stories of a former female medical student who had both witnessed and experienced beatings administered by the Taliban and Afghan men for petty crimes such as walking briskly or going outside without a male escort or burka).

4. I mean to parallel the treatment of Afghani women to the use of the doctrine of family privacy to ignore spousal abuse in the United States. See Nomi Maya Stolzenberg, *The Return of the Repressed: Illiberal Groups in a Liberal State*, 12 J. CONTEMP. LEGAL ISSUES, 897, 930-31 (2002) (defining family privacy as protecting the traditional hierarchical structure of the family rather than protecting the rights of individual family members to "pursue their own conception of the good family life"). See generally Reva B. Siegle, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) (examining the history of the laws and regulations prohibiting spousal abuse and the manner in which local authorities enforce the law). But see ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 56 (2000) [hereinafter SCHNEIDER, *BATTERED WOMEN*] (proposing that internationally, woman abuse must become public to broaden our vision of domestic violence so "[i]deally, these efforts can strengthen both our international work and our understanding of the inextricable link between violence and equality in the United States").

5. In this area especially, there tends to be tension between practitioners and scholars. See Jennifer L. Rosato, *All I Ever Needed to Know about Teaching Law School I Learned Teaching Kindergarten: Introducing Gaming Techniques into the Law School Classroom*, 45 J. LEGAL EDUC. 568, 579 (1995) (citing Elizabeth M. Schneider, *Rethinking the Teaching of Civil Procedure*, 37 J. LEGAL EDUC. 41 (1987) in discussing the need for connecting theory and practice in teaching civil procedure by using techniques such as role playing instead of simply reciting cases or doctrine).

work.<sup>6</sup> She has also shown that the work in a single area can have broad implications for feminist theory, mainstream jurisprudence and ultimately for the (re)formation of laws.<sup>7</sup> With this introduction, you may have guessed that in this symposium piece I will focus on *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman Abuse*.<sup>8</sup> This is one of my favorites because it has the potential to enrich all legal thinking and theories.<sup>9</sup> It insists that we deal in the abstract and reality; the ideal and the contextual; and the detailed and the conceptual.<sup>10</sup> In describing this work, Professor Schneider says:

I use the term 'particularity' here to mean the importance of accurately describing and detailing the complexity of women's experiences; in the context of woman abuse, this means understanding the problems of intimate violence that are unique to women. At the same time, we must explore the 'general' dimensions of woman abuse: first, that it is a facet of women's subordination in society; and second, that it is linked to larger problems of societal violence.<sup>11</sup>

In this short tribute to her work, I focus on this aspect of Professor Schneider's work to give my own ideas structure, going further in both the general and the particular from my article, *Mirrored Silence*.<sup>12</sup>

In *Mirrored Silence*, the solutions I proposed, especially through social disclosure, made generic suggestions and stopped short of dealing directly with the issues of private violence confronted by

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6. See generally Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 591-92 (1986) [hereinafter Schneider, *Dialectic of Rights*]. Integrating her knowledge as a women's rights activist through the evolution of the women's movement, Professor Schneider utilizes her own experience as an activist and a lawyer to explore the role of rights discourse in the development of social movements, concluding that the rights discourse is a vital aspect of any political and legal strategy for change.

7. See *id.* at 648-49 (discussing how the women's movement's experience with legal rights shows how rights emerge from political struggle and how this experience mirrored the experience of the women's movement in general).

8. Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Women-Abuse*, 67 N.Y.U. L. REV. 520 (1992) [hereinafter Schneider, *Particularity and Generality*].

9. See *id.* at 567-68 (arguing that in both our feminist theory and our feminist practice, in order to grapple with lesbian-battering, elder-abuse, the problems of battered women with abused children, and the complex issues battered women face as mothers, feminist theory and jurisprudence must shape legal reform).

10. See SCHNEIDER, BATTERED WOMEN, *supra* note 4, at 187 (citing Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 48-49 (1999) and positing that the ideal model for intervention proposed by battered women's advocates has been a "coordinated community response").

11. *Id.* at 60.

12. Zanita E. Fenton, *Mirrored Silence: Reflections on Judicial Complicity in Private Violence*, 78 OR. L. REV. 995 (1999) [hereinafter Fenton, *Mirrored Silence*].

“those on the borders.”<sup>13</sup> In other words, my first attempt at reformative proposals only addressed the general without looking close enough at the particular. The question here is whether the suggestions which attempt to “make the private public” are workable solutions for every survivor of abuse. To answer this question we must better understand the role of the “public” in conceptualizations of violence.

I suggest in *Mirrored Silence* that courts ought to write more about the facts in these cases to point out the inadequacies of the law for domestic violence in the hope that the legislature will take notice.<sup>14</sup> In fashioning remedies and solutions, I suggest that both the courts and the legislature should take note of how some women who are battered successfully end the violence, with or without courts’ assistance, while many times maintaining their relationships. These suggestions include: (1) social disclosure, (2) self-defense efforts, and (3) intervention.<sup>15</sup> In this discussion, I will only focus on social disclosure.

Since many batterers continue their abusive behavior because of ratification by their peers, often in the form of silent assent, social disclosure in the form of public condemnation can be an effective component in ending violence by refusing to allow it to remain private. The rationale behind the explicit use of social disclosure<sup>16</sup> by the courts as part of an overall means to ending private violence is

13. See *id.* at 1004 (advocating that in order to better assist domestic violence the legal system should speak frankly in court opinions about the facts giving rise to the incident, judges must elaborate on the black letter of the law so as to protect victims from additional violence, and the remedies proposed must be designed around allowing the victim to escape from the abuse).

14. See *id.* at 1004; see also SCHNEIDER, BATTERED WOMEN, *supra* note 4, at 33 (discussing the role of the judiciary: “Judges have considerable difficulty in genuinely ‘hearing’ and taking in women’s experiences, and consequently in modifying the law to take them into account”).

15. See Fenton, *Mirrored Silence*, *supra* note 12, at 1052-58 (examining these three ideas as strategies for helping battered women successfully end the abuse being inflicted upon them).

16. See *id.* at 1054 (defining the concept of social disclosure as “finding actions to make private violence a public matter” including disclosure to neighbors, relatives, friends and others). “Courts have the ability to use the strategy, first by writing complete stories of the violence into the public record with some strong form of condemnation, and second through the use of appropriate punishment that makes the perpetrators’ actions more public.” *Id.* A useful analog is publication of the names of drunk drivers. *Id.* at 1055. For example, both DWI and DUI offenders are often published in the local newspapers as a form of public sanction. This has also been a form of sanction for long-term child-support delinquents. *Id.* Names of people convicted of solicitation are also published in some jurisdictions. *Id.* Other possibilities for public shaming include signposts, sandwich boards, or bumper stickers. *Id.* Public apology has specifically been employed as a form of public sanction against a wife beater. *Id.*

that courts act authoritatively to “make the private public,”<sup>17</sup> hence ending some of the silence.

The success of “making the private public” is intrinsically dependent on our association of the “private” with gender, especially in the context of domestic abuse. However, the correlation of gender labels to private and public do not complete the picture in societal conceptualizations of violence. Social conceptualizations of violence include the “public” as one associated with race<sup>18</sup> and “otherness”<sup>19</sup> within the public/private dichotomy.

The suggestion of social disclosure is a good general proposition, but has many potential failings when it is applied to particularized situations or particular individuals.<sup>20</sup> What is not explicitly discussed is that this proposed solution does not fully take into account the potential for the perpetuation of harmful stereotypes. Of course, stereotypes are contextual. Within the context of modern day American society, stereotypes range from gender roles, conduct and character of the various races and cultures, character associated with sexuality and sexual orientation, and associations with class and social status to name a few. In addition to these stereotypes being

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17. *Id.* at 1054.

18. My focus here is on the interaction of race and gender, specifically the experiences of Black women. However, where this discussion is specific to this level of categorization, it is primarily intended as an example that might serve useful for any other categorizations outside the “normative.” Discussion of other locations is too ambitious for this piece. See Schneider, *Particularity and Generality*, *supra* note 8, at 531.

Just as the term ‘battered woman’ is a static, inaccurate account of the many life experiences of a woman who has been battered, so too is the notion that there exists one paradigmatic ‘battered woman.’ Feminist legal theory has become more sensitized to the problem of essentialism—the view that there is one single ‘woman’s’ experience. Many feminist critics have written powerfully about the way in which the notion of womanhood has been described as a single uniform experience, and the way in which that has excluded a multiplicity of experiences based on race, class, ethnicity, age, sexual orientation, and other dimensions.

*Id.*

19. “Others” implicitly refers to those marginalized in American society for reasons of identity, including for race, gender, religion, sexual orientation, and disability.

20. The example discussed in *Mirrored Silence* is that when the level of violence used by the abuser is high, legal and social sanctions are generally ineffective and may even lead to further escalation. See Fenton, *Mirrored Silence*, *supra* note 12, at 1056-58 (citing Jeffrey Fagan, *Cessation of Family Violence: Deterrence and Dissuasion*, FAMILY VIOLENCE 377, 391 (Lloyd Ohlin & Michael Tonry eds., 1989)) (noting that incarceration of the abuser with simultaneous protection of the victim is the best option in this situation); see also Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1016 (2000) (“[The] uncritical resort to increasing criminal sanctions serves to hide the social and political conditions that foster battering.”).

associated with an individual in any given situation, the individuals charged with administering justice are also affected. These individuals, including judges, have personal biases and experiences that will color the ways in which they tell the story. This point may be the greatest practical barrier to transforming the laws and norms affecting domestic violence as it affects individuals.<sup>21</sup> These considerations explain why here I am constrained to use only the single example of Black women in abusive relationships to demonstrate the complexities within the general theory.<sup>22</sup> However, I then hope the general theory can be used and applied by analogy for other individuals.

### PUBLIC/PRIVATE; RACE/GENDER<sup>23</sup>—OBSCURING THE DICHOTOMIES

The absencing of violence from society happens in at least two ways, both dependent on our conceptualizations . . . where the violence is public, we make the act into a spectacle and the individual committing the act into a deviant . . . where the violence is private, we ignore, hide and silence the violence as much as possible. Thus, our treatment of public violence removes us from responsibility for the violence without, while our treatment of private violence shields us from the potential violence within.<sup>24</sup>

Feminists have focused fairly extensively on the gendered nature of the public/private dichotomy.<sup>25</sup> Therefore, I will not reiterate what others have stated so well. To state the general understanding in the

21. See Fenton, *Mirrored Silence*, *supra* note 12, at 1044-45 ("Judicial opinions may be only one part in the realization of justice, but it is a very important part and the final step in legitimate norms."); see also SCHNEIDER, *BATTERED WOMEN*, *supra* note 4, at 109-10 ("[E]ven if good rules are passed by a legislature, judges' interpretations can eviscerate them.").

22. See, e.g., Christine E. Rasche, *Minority Women and Domestic Violence: The Unique Dilemmas of Battered Women of Color*, in *THE CRIMINAL JUSTICE SYSTEM AND WOMEN: OFFENDERS, VICTIMS, AND WORKERS* 246-61 (Barbara R. Price & Natalie J. Sokoloff eds., 1995) (describing how minority women found themselves sharing common concerns as well as peculiar ethnic problems to those faced by non-minority women); see also Linda L. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 *WIS. L. REV.* 1003, 1056-76 (1995) (discussing, specifically, the experiences in the justice system of Black women who have been battered); Coker, *supra* note 20, at 1014 (advocating a "material resources" test to find the best policies and intervention strategies for poor women of color).

23. My choice of dichotomous categories begins the obfuscation. The traditional oppositions are public and private, black and white, male and female with the corresponding position in relative power.

24. Fenton, *Mirrored Silence*, *supra* note 12, at 1028.

25. See, e.g., Elizabeth M. Schneider, *The Violence of Privacy*, 23 *CONN. L. REV.* 973 (1991) [hereinafter Schneider, *Violence of Privacy*]; Kathleen Mahoney, *Theoretical Perspectives on Women's Human Rights and Strategies for their Implementation*, 21 *BROOK. J. INT'L L.* 799 (1996); SCHNEIDER, *BATTERED WOMEN*, *supra* note 4.

context of violence, I easily cite Professor Schneider's work on the nature and conceptualization of privacy—" [p]rivacy says that what goes on in the violent relationship should not be the subject of state or community intervention. Privacy says that it is an individual, and not a systemic problem. Privacy operates as a mask for inequality, protecting male violence against women."<sup>26</sup> She goes on to say, "the decision about what we protect as 'private' is a political decision that always has important 'public' ramifications."<sup>27</sup>

When the underlying context of the public/private dichotomy is the home/marketplace, it is easy to see how "[t]he dichotomy of 'public' and 'private' has shaped our understanding of gender."<sup>28</sup> In addition, once our initial focus is on gender, the experienced realities of violence dictate the associations of the private with women and the public with men: "Women are about *6 times more likely* than men to experience violence committed by an intimate . . . men [are] about twice as likely as women to experience acts of violence by strangers."<sup>29</sup> However, when the initial focus is on violence (read:

26. Schneider, *Violence of Privacy*, *supra* note 25, at 984-85. For a comprehensive discussion of the feminist critique of privacy, see Debra Morris, *Privacy, Privation, Perversity: Toward New Representation of the Personal*, 25 *SIGNS* 323 (2000) (explaining that privacy, in the current social critique, has been defined negatively, especially in radical critiques, as a place where collective action cannot reach and can thus be oppressive and repressive to women).

27. Schneider, *Violence of Privacy*, *supra* note 25, at 978; see also Thomas & Beasley, *supra* note 2, at 1123-26 (discussing a lack of state responsibility and enforcement of laws pertaining to actions by private individuals); Mahoney, *supra* note 25, at 842-45 (arguing that the private/public dichotomy traditionally associated with the inapplicability of human rights law to gender violence is a myth and that the doctrinal tools must be used to address women's rights in human rights).

28. See SCHNEIDER, *BATTERED WOMEN*, *supra* note 4, at 87-88. In *BATTERED WOMEN*, Professor Schneider says of the public/private dichotomy, "[t]he traditional notion of separate spheres is premised on a dichotomy between the private world of family and domestic life (the 'women's sphere'), and the public world of the marketplace (the men's sphere')." *Id.* at 87-88 (citing Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497, 1499-1501 (1983)).

29. RONE BACHMAN & LISA E. SALTZMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 1, 3* (Aug. 1995) (emphasis added); see also DIANE CRAVEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *SEX DIFFERENCES IN VIOLENT VICTIMIZATION*, 1994 4 (Sept. 1997) (noting that for male victims a stranger committed a majority of victimizations (63%), while a non-stranger committed 37%). For female victims the distribution was reversed. *Id.* The offender was most often someone known to them (62%), whereas a stranger committed 38% of the violence against females *Id.*; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *VIOLENT CRIME 2* (Apr. 1994) (finding that "a third of all violent victimizations of women but a twentieth of all violent victimizations of men are committed by a relative or intimate"); LAWRENCE A. GREENFELD ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *VIOLENCE BY INTIMATES 4* (Mar. 1998) ("Although less likely than males to experience violent crime overall, females are five to eight times more likely than males to be victimized by an intimate.").



public violence), social conceptualizations are associated most closely with poverty and race,<sup>30</sup> while violence perpetrated by those in the “mainstream” (read: moneyed, white and male) are obscured and treated as aberrational.<sup>31</sup> This is consistent with the quotation beginning this section<sup>32</sup> in that where the alleged perpetrator of the violence is not in the “mainstream,” it is a public matter; where the perpetrator is within the mainstream, it is obscured. Thus, whomever holds the relative position of power controls normative conceptualizations of violence, its legitimacy, and the “righteousness” of those in control.<sup>33</sup>

Compare the bias demonstrated by the above statistics most relevant to gender with the bias demonstrated by those most relevant to race. “African American boys are *six times more likely* than their white counterparts to be incarcerated for crimes against people, *four times more likely* to be locked up for property crimes or *30 times more likely* to be confined in a state facility for drug offenses.”<sup>34</sup> I chose to

30. See generally Jon Hurwitz & Mark Peffley, *Public Perceptions of Race and Crime: The Role of Racial Stereotypes*, 41 AM. J. POL. SCI. 375 (1997) (examining experiments linking perceptions on race associated with crime and discussing implications of such perceptions with public policy).

31. See Fenton, *Mirrored Silence*, *supra* note 12, at 1028-29.

Our common understanding of public violence is that which is unjustified and occurs to and by other people who do not appear to be in an intimate relationship. . . . [The conceptualization of] public violence [as] perpetrated by and to ‘others’ . . . allows us to view violence in our society as deviant, exceptional occurrences of which ‘normal’ civilized individuals are incapable.

*Id.*

32. See *supra* note 24 and accompanying text.

33. See Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER L. 1, 37 (1998) [hereinafter Fenton, *Racialized Gender Stereotypes*].

Because dichotomous thinking is one-dimensional, it does not fully explain how stereotypes operate within dynamic, multi-dimensional, competing hierarchies. Power is the defining essence of the dualisms. The dualisms are also placed in hierarchy dependent upon the context. Within a given hierarchy, the dualism with the most power relative to the situation determines which stereotype is dominant.

*Id.*

34. William Raspberry, *Race, Crime and Punishment*, WASH. POST, May 14, 1999, at A33 (emphasis added) (“African American youths constitute 15% of 10-17 year-olds but account for 26% of juvenile arrests. . . . This same 15% accounts for 41% of those detained as delinquents, 46% of the juveniles in corrections institutions and 52% of the juveniles transferred to adult criminal court after judicial hearings.”). The author interprets these figures as most indicative of *dissimilar treatment*.

I don't mean to suggest that disproportionate minority confinement results solely from the willful unfairness of bigoted authorities. It results from all sorts of things—including the greater likelihood that minority parents will be poor, uneducated or politically unconnected, which means they will be less likely to have their children released to their custody by police officers and

use statistics for black youths because theirs have become the stereotypic faces of violence.

While the statistics for gender and those for race describe reality to a degree, they are also determined to a great extent by social expectations. In addition to the fact that scholars generally acknowledge that domestic violence offenses are greatly under-reported,<sup>35</sup> other scholars also believe that race statistics suffer from over-reporting of crime by minority individuals in combination with under-reporting of victimizations of minorities.<sup>36</sup> In other words, public understandings of violence are substantially created by stereotype. "Stereotypes, on an individual or collective basis, are a means of defining 'self' by deflecting certain characteristics onto 'others'"<sup>37</sup> and "undermining perceptions of within-group variability."<sup>38</sup>

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judges. It may result as well from the greater tendency of white officials to see white juvenile offenders as 'troubled youth' and black offenders as troublemakers, gangbangers or predators. . . . A California study, for example, revealed that minority youths routinely get stiffer punishments and are more likely to get jail time than white kids who commit the same offenses. Another study in Portland, Oregon, found minority youngsters being locked up at rates several times higher than their arrest rates. (One result of the Portland study is that arrest and confinement rates for black juveniles are close to equal.

*Id.*; see also LORI DORFMAN & VINCENT SCHIRALDI, BUILDING BLOCKS FOR YOUTH, OFF BALANCE: YOUTH, RACE & CRIME IN THE NEWS 1 (Apr. 2001) ("More than two-thirds of youths confined in America are minority youth, even though minorities make up only about one-third of America's youth population."), available at <http://www.buildingblocksforyouth.org/media/media.html>.

35. See, e.g., Sharon Wofford Mihalic & Delbert Elliot, *If Violence is Domestic, Does it Really Count?*, 12 J. FAM. VIOLENCE 293 (1997) (discussing how underreporting of domestic abuse is due in great measure to the respondents' unwillingness to characterize intimate violence as criminal); R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST PATRIARCHY 164-67 (1979) (noting that out of 109 women interviewed who experienced over 32,000 assaults during their marriages, only 517 of these assaults, less than 2%, were actually reported to the police).

36. See, e.g., DORFMAN & SCHIRALDI, *supra* note 34, at 13-17 (citing evidence that newspapers are more likely to identify race in a crime story when an African-American is the suspect and illustrating that white victims received greater media coverage than black victims).

37. Fenton, *Racialized Gender Stereotypes*, *supra* note 33, at 17; see DAVID L. HAMILTON ET AL., SOCIAL COGNITION AND THE STUDY OF STEREOTYPING IN SOCIAL COGNITION: IMPACT ON SOCIAL PSYCHOLOGY 291, 295 (Patricia G. Devine et al. eds., 1994) (explaining that stereotyping is a response to an inability to make intimate acquaintance, relying on a noticeable trait marking a well-known type and filling in the rest of the mind's details with rigid stereotypes).

38. HAMILTON ET AL., *supra* note 37, at 295; see also Fenton, *Racialized Gender Stereotypes*, *supra* note 33, at 11.

Stereotypes serve as a proxy for the character of the person and for the truth of a situation. . . . Stereotypes maintain the status quo by preventing those who subscribe to those views from adequately dealing with the situation, keeping the objects of the stereotypes bound in their prescribed roles, and

Contributing most prominently to stereotype are media representations.<sup>39</sup> From a study of a range of media,

[o]verall, the studies taken together indicate that depictions of crime in the news are not reflective of either the rate of crime generally, the proportion of crime which is violent, the proportion of crime committed by people of color, or the proportion of crime committed by youth. . . . Most studies that examine race and crime find that the proportion of crime committed by people of color (usually African Americans) is over-reported and that Black victims are under-represented.<sup>40</sup>

Thus, in the public, we have invisible black victims and visible black suspects, while simultaneously having invisible white (male) perpetrators, and visible (white) women victims.<sup>41</sup>

Society's perception of a publicly violent individual creates a self-fulfilling prophecy: those who are considered to be violent are more

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perpetuating misconceptions.

*Id.*

39. See DORFMAN & SCHIRALDI, *supra* note 34, at 3.

The public depends on the media for its pictures of crime. Three-quarters (76%) of the public say they form their opinions about crime from what they see or read in the news, more than three times the number who state that they get their primary information on crime from personal experience (22%).

*Id.*

40. *Id.* at 6 (stating that the news presents the public with a false picture of higher frequency and severity of crime than actually takes place).

41. See Hurwitz & Peffley, *supra* note 30, at 376 (1997) (citing Robert Entman, *Blacks in the News: Television, Modern Racism, and Cultural Change*, 69 JOURNALISM Q. 341, 341-61 (1992)) (discussing the portrayal of black criminals as a nameless threat in news broadcasts and stories); see also Fenton, *Mirrored Silence*, *supra* note 12, at n.138 (referring to Entman text). Notice that gender statistics are generally not identified by race and racial statistics are generally not identified by gender.

'[P]ersons of color are represented in the crime category primarily for their contributions to crime,' whereas Whites 'are shown for their reaction to and suffering from crime.' [The authors] conclude that these depictions overemphasize the harm people of color inflict on White victims, perpetuate tension between groups, and inhibit cooperation.

DORFMAN & SCHIRALDI, *supra* note 34, at 13 (quoting Romer et al., *The Treatment of Persons of Color in Local Television News: Ethnic Blame Discourse or Realistic Group Conflict?*, 25 COMMUNICATION RESEARCH 298-99 (1998)).

[V]iolent crimes committed by blacks comprised a substantial portion of news stories centrally featuring blacks. Just as important, in video presentation black criminals were portrayed quite differently from white criminals. The former were more likely to remain unnamed, to be seen in handcuffs, in physical custody, and were less likely to speak for themselves. These findings strongly suggest that the media contribution is one of both linking blacks to the issue of crime and, moreover, rendering stereotypes of blacks more negative.

*Id.*

often suspected,<sup>42</sup> accused, charged, and quite often given harsher sentences.<sup>43</sup> Where this phenomenon directly affects primarily young

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42. Racial profiling is prevalent in current society. See, e.g., DJ Silton, *U.S. Prisons and Racial Profiling: A Covertly Racist Nation Rides a Vicious Cycle*, 20 LAW & INEQ. 53, 54-55 (citing HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 2000: EVENTS OF 1999 393 (2000)) (highlighting the disproportionate number of African-American inmates, compared to the general population); Kathryn Russell, "Driving While Black": Corollary Phenomena and Collateral Consequences, 40 B.C. L. REV. 717, 725 (1999) (discussing the phenomenon of "driving while black" and possible solutions, such as requiring police officers to record every traffic stop); Frank Rudy Cooper, *The Un-balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 869-72 (2002) (discussing how racial profiling seems acceptable if authorities are assuming that certain races are more likely to be involved in gangs or drugs and therefore more violent); Rene Bowser, *Racial Profiling in Health Care: An Institutional Analysis of Medical Treatment Disparities*, 7 MICH. J. RACE & L. 79, 96-97 (2001) (highlighting the problem of "race-based research" in the medical field); Ira Glasser, 30 SUM BRIEF 30, 37 (2001) (reflecting on the effects and inaccuracies of racial profiling in various areas, including drug users or automobile drivers); Gregory M. Lipper, *Racial Profiling*, 38 HARV. J. ON LEGIS. 551, 555-56 (2001) (noting the role the Supreme Court has taken in upholding the possibilities for occurrences of racial profiling, such as in *Whren v. United States*, 517 U.S. 806 (1996), which held that courts do not need to take into account the individual motivations of a police officer who stopped a car when the court determines whether a traffic stop was reasonable).

43. African-Americans constitute approximately 13% of the U.S. population and 13% of its drug users; however, African-Americans constitute 35% of drug arrests, 55% of drug convictions, and 74% of drug imprisonments. Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703, 719 (2000) (citing U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 14 (1999)); see also Lisa Walter, *Eradicating Racial Stereotyping from Terry Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255, 258 (2000) (reiterating that "[t]he anti-drug crusade, which has served as a useful political vehicle to rally support against the problem of crime in the inner cities—a problem in the eyes of society at large—primarily involves racial minorities."). Incarceration rates of young black males are at tragic proportions in great measure because of differential drug policies and racial profiling in law enforcement and elsewhere. See Silton, *supra* note 42, at 54 (citing HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 2000: EVENTS OF 1999 393 (2000) (proposing that "[the prison boom's] effect on African-Americans is devastating: while making up only approximately 12% of the U.S. population, African-Americans constitute 49% of its inmates."). See generally Noel C. Richardson, *Is there a Current Incarceration Crisis in the Black Community? An Analysis of the Link Between Confinement, Capital, and Racism in the United States*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 183, 211 (1997) (comparing the U.S. prison population figure in 1970, which was less than 200,000, to 1,053,000 in 1994); MARC MAUER & TRACY HULING, SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 4 (1995) (focusing on African-American males between the ages of twenty and twenty-nine who were in prison, jail, or on probation or parole.); Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 743-44 (1993) (stating that the rate of incarceration for blacks is seven times that of whites); Debra Daily, *Prison and Race in Minnesota*, 64 U. COLO. L. REV. 761, 761 (1993) (pointing out that the United States incarcerates black males at a rate four times that in South Africa). "Minority offenders are sentenced to prison more often and receive longer terms than whites convicted of similar crimes and with similar records." Charles J. Ogletree, *Does Race Matter in Criminal Prosecutions*, CHAMPION, July 1991, at 14 (reporting that under new federal sentencing guidelines, African-American males between the ages of eighteen to thirty-five will serve an average of 68.5 months in prison, while White males will serve an average of 44.7 months). Profiling and disproportionate incarceration has the full range of effects, up to and including capital punishment. See, e.g., Michael B. Blankenship & Kristie

black men, the impact extends throughout the entire community. "Interaction of the justice system, especially the police, with communities of color is a major factor contributing to a dynamic that cannot be ignored in understanding the broad picture of domestic violence as it pertains to women of color."<sup>44</sup> In fact, a common view that black battered women hold is that black men only batter because they need a place to release the anger and frustration that comes with dealing with a racist outside world.<sup>45</sup> "[Domestic violence], like substance abuse, crime, and unwanted adolescent pregnancy, are symptoms of living in a systematically deprived society that is designed to dominate and control third world people."<sup>46</sup> Many Black women feel pressure to stay in their relationships to keep their families together, and present a unified front<sup>47</sup> against outside oppressions<sup>48</sup> and stereotypic representations.<sup>49</sup>

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R. Blevins, *Inequalities in Capital Punishment in Tennessee Based on Race: An Analytical Study of Aggravating and Mitigating Factors in Death Penalty Cases*, 31 U. MEM. L. REV. 823 (2001) (reporting that non-white defendants who murder white victims are more likely to receive a death sentence); Katherine R. Kruse, *Race, Angst, and Capital Punishment: The Burger Court's Existential Struggle*, 9 SETON HALL CONST. L.J. 67 (1998) (asserting that the United States Supreme Court disregarded the most detailed and sophisticated type of statistical evidence that death penalty decisions were based partly on race); see also Randall L. Kennedy, *McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1391 (1988) (asserting that, based on empirical research on race and capital sentencing, the state places a higher value on the lives of whites than blacks); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 434 (1995) (noting that "[a]lthough African-Americans are the victims in half of the murders that occur each year in the United States, eighty-five percent of the condemned were sentenced to death for murders of white persons."); Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 522 (1995) (arguing that race "matters greatly in decisions concerning the death penalty"). A disturbing case on this point is the atypical capital sentencing of John William King in the Jasper, Texas, murder of James Byrd, Jr. Dan McGraw, *Justice Delayed for Texas Prosecutor*, U.S. NEWS & WORLD REP., Mar. 1, 1999, at 28. It took the brutal killing of Mr. Byrd by King and friends chaining him by his ankles to the back of their pick-up truck and dragging him three miles for such a sentence to be imposed. *Id.*; see also Christy Lemire, ASSOC. PRESS, Feb. 26, 1999 (reporting that 1854 was the last time a white man was executed for killing a black man in Texas).

44. See Fenton, *Racialized Gender Stereotypes*, *supra* note 33, at 51; see also Beth Richie, *Battered Black Women: A Challenge for the Black Community*, BLACK SCHOLAR, Mar.-Apr. 1985, at 43 ("How can blacks in the domestic violence movement reconcile the reality of police brutality and blatant racism in the criminal justice system with the need for police and court intervention on behalf of battered women?").

45. See Richie, *supra* note 44, at 41.

46. See *id.*

47. See *id.* (noting that the task of calling attention to violence in the African American community is painful because there is already so much negative information about black families).

48. See Christine E. Rasche, *Minority Women and Domestic Violence: The Unique Dilemmas of Battered Women of Color*, 4 J. CONTEMP. CRIM. JUST. 150 (1986) (discussing

In addition to concerns for community, Black women have their own set of stereotypes with which to contend. For Black women the problem is exacerbated by the racialized gender stereotypes of them: "the uncontrollable, promiscuous black woman who is capable of sustaining greater physical abuse than her white counterpart, and who is herself capable of violence."<sup>50</sup>

Second, women of color often have a lack of confidence in the system's ability to serve their needs. There is both a real and perceived lack of interest by the police in the complaints of black women.<sup>51</sup> Even though activism has begun to change the way the police are trained and the protocols by which they are governed, the police are not exempt from the attitudes about race and gender that pervade society.<sup>52</sup>

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mistreatment of communities of color by the justice system); see also Evelyn C. White, *Life is a Song Worth Singing: Ending Violence in the Black Family*, in *THE SPEAKING PROFITS US: VIOLENCE IN THE LIVES OF WOMEN OF COLOR 11* (1986).

49. See Waheema Lubiano, *Black Ladies, Welfare Queens, and State Minstrels: Ideological War by Narrative Means*, in *RACE-ING JUSTICE, EN-GENDERING POWER 337-38* (Toni Morrison ed., 1992) (discussing how the Moynihan Report contributed to the perpetuation of stereotypes like the "welfare queen" and the "culture of poverty" by representing "moral aberration and economic drain"); CARL GINSBURG, *RACE AND MEDIA: THE ENDURING LIFE OF THE MOYNIHAN REPORT* (1989) (discussing media endorsement of the images created by the Moynihan Report); William Ryan, *Mammy Observed: Fixing the Negro Family*, in *BLAMING THE VICTIM 63* (1976) (criticizing the Moynihan Report for creating a new set of group stereotypes which support the idea that black culture produces a weak and disorganized form of family life which results in maintaining black inequality).

50. See Fenton, *Racialized Gender Stereotypes*, *supra* note 33, at 54 (noting that the pattern of not treating complaints of domestic violence very seriously is exacerbated for black women due to stereotypes attached to them); see also Adele Alexander, *She's No Lady, She's a Nigger: Abuses, Stereotypes and Realities from the Middle Passage to Capitol (and Anita) Hill*, in *RACE, GENDER, AND POWER IN AMERICA 5, 18* (Anita Faye Hill & Emma Coleman Jordan eds., 1995) (discussing "the familiar stereotypes of America's black women, be they Mammy or Prissy, Jezebel, Topsy, or Eliza, Sapphires, 'red-hot mama,' 'tragic mulatto,' 'welfare queen,' 'superwoman,' or 'emasculating matriarch'"). See generally Ammons, *supra* note 22, at 1018-19 (noting that in addition to society's refusal to believe battered women, black women must also overcome the presumption that their race predisposes them to engage in and enjoy violence).

51. "After one acknowledges the limitations of statistical correlations, however, there remains the patterns plus anecdotal evidence which adds plausibility, if not probability, to the fear that legal systems continue to regard the victimization of black women with less concern than the victimization of white women." RANDALL KENNEDY, *RACE, CRIME, AND THE LAW 73-74* (1997) (discussing the 1988 commissioned study, reported in *Race Tilts the Scales of Justice Study: Dallas Punishes Attacks on Whites More Harshly*, *DALLAS TIMES HERALD*, Aug. 19, 1990, and the work of GARY D. LAFREE in *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* (1989)).

52. EVELYN C. WHITE, *CHAIN CHAIN CHANGE: FOR BLACK WOMEN DEALING WITH PHYSICAL AND EMOTIONAL ABUSE 37-38* (1994) ("Two of the most common beliefs and the ones most likely to affect your interaction with the police as an abused African-American woman are (1) domestic violence is a private 'family matter' in which the police shouldn't interfere and (2) violence is a 'natural' part of black culture.").

In other words, Black women have to contend with the psychological violence of stereotype; the threat of public violence from social institutions, including the courts and the police; and the possibility of private violence. In this circumstance, making the private public is not guaranteed to eliminate the violence, but only to make it public. In fact, the public forms of violence will most likely be imposed on young Black men. While making the private public also does not guarantee the elimination of violence for white women, the probability of its elimination is much greater than it is for Black women. It is also the case that Black women are not the only ones subject to this dynamic. In fact, I started this essay by explicitly stating that the social location of Black women was to serve as an example of how the dynamic of violence is not so simplistic.

Silence can be protective as well as a perpetuating force. Unfortunately, silence is protective in only a limited sense because it does not buy personal safety and neither does the alternative proposition, especially where the breach of silence is attendant with the triggering of other forms of violence. Silence may give up personal safety while attention (as distinct from voice) may engender violence against a greater community and, in turn, may also diminish the realization of personal safety. Thus, the dynamics of silence/breaking silence is a lose/lose proposition for far too many.

Unfortunately, making the private public is not always the final solution—it may just make the violence public, but not eliminate it. We must be wary that the “public” in this instance not become yet another means of creating the “other.” We must be vigilant that public forms of punishment are not disproportionately levied.<sup>53</sup>

To come full circle, I continue to propose the solutions I advanced in *Mirrored Silence*, but now extended and clarified in two ways—generally and particularly. The general—if we could eliminate from society the differences in treatment of individuals,<sup>54</sup> general solutions would work for everyone. In other words, we must continue to work towards the elimination of the “isms.”<sup>55</sup> The particular aspect of this proposal should help in this process. The particular—while in

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53. *Cf. id.* at 38-39 (noting that domestic violence is much more than a “family matter” and through increased training and community pressure, police departments can better address such violence).

54. Notice I do not propose the elimination of differences between people. Our differences are what make our society so rich, interesting, and innovative.

55. The “isms” refer to the social problems that come from racism, sexism, homophobia, classism, and any other form of discriminatory conduct or animus. Though I am generally cynical about our ability to eliminate the “isms,” I continue to hope that we will work in this direction.

*Mirrored Silence* I made suggestions intended to mimic the solutions created by real women in the context of their own situations, we must go further in finding solutions that comport with the needs of each situation and the individuals in them. In this short piece, I gave further examples of that which confronts some women in the hopes that my suggestions do not become formalistic, but may be applied according to the specifics of each individual's circumstance. Context must always be taken into account. No one solution works in every situation or for all individuals. There must be flexibility in finding solutions from a range of possible ones to achieve the greatest justice.