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Theorizing from Particularity: Perpetrators and Intersectional Theory on Domestic Violence

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Theorizing from Particularity: Perpetrators and Intersectional Theory on Domestic Violence

*Elizabeth L. MacDowell**

ABSTRACT

The role of identity-based stereotypes about perpetrators in domestic violence cases has not received much attention in legal scholarship, which has instead focused on the identities of victims. However, stereotypes governing who is a recognizable victim (e.g., that victims are white, middle-class, passive, and dependent women in heterosexual relationships) cannot by themselves explain why nonconforming victims are sometimes successful in family court cases and other, more “perfect” victims are not. Drawing on intersectionality theory, which studies the ways experiences are shaped by the interaction of multiple identity categories, I argue that understanding this phenomenon requires a relational analysis that examines the “other side”: the perpetrator, recognition of whom is governed by intersecting identity stereotypes that parallel those affecting victims. Part II introduces two illustrative domestic violence cases and shows the ways in which conventional approaches to intersectional analysis of victims’ experiences cannot explain why unconventional victims sometimes win their cases while others do not. Part III proposes extending intersectionality theory on domestic violence with insights from legal scholarship on the intersectionality of heterosexual men of color and performance theory in order to allow for consideration of how identity is enacted by both victims and perpetrators in court. This Part also considers issues of relative privilege and subordination that arise from an analysis that includes perpetrators as well as victims. Part IV examines the methodological implications of an

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extended intersectional frame, and shows how a more comparative, intercategorical approach to intersectional method supports an analysis that is at once more particularized and more expansive in its explanatory power.

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I. INTRODUCTION

Domestic violence is a serious social problem that is frequently unrecognized, minimized, or ignored because of stereotypes about who is at risk and from whom.¹ The stereotype against which victims² are judged is

1. In the United States, approximately 1.3 million women and 835,000 men are physically assaulted by an intimate partner each year. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY iv (2000), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/183781.htm>. Intimate partners committed fourteen percent of all homicides in the United States in 2007, killing an estimated 1640 women and 700 men. SHANNON M. CATALANO ET AL., BUREAU OF JUSTICE STATISTICS, FEMALE VICTIMS OF VIOLENCE 2 (2009), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2020>. For a compilation of statistics regarding incidents of domestic violence by race/ethnicity, gender, and sexuality, and impacts on employment, children, and other issues, see Am. Bar Ass'n. Comm'n on Domestic & Sexual Violence, *Domestic Violence Statistics: Survey of Recent Statistics*, ABA, http://www.americanbar.org/groups/domestic_violence/resources/statistics.html (last visited Feb. 26, 2013).

There is no uniform or agreed upon terminology for discussing violence between intimates. I use the terms domestic violence, intimate partner violence, and relationship violence in this Article interchangeably to refer to violence between intimate partners, unless a more specific meaning is indicated or appears in quoted text.

2. I use the term “victim” recognizing that victims have agency and often resist violence, and

that of the perfect victim: a fictive construct that floats ghost-like between historical, social, and subjective reality, and is generally identified as passive, dependent, white, middle-class, heterosexual, and female.³ The exclusion of victims who are perceived as not conforming to the perfect victim stereotype from needed services or legal protection—including victims of color, victims in same-sex relationships or who are transgender, and victims who fight back—is well-documented.⁴ However, not all victims who are unlike the perfect victim are excluded from services or otherwise unsuccessful when they seek help. I argue that understanding this phenomenon requires examining not only victims but also what I refer to as the “perceivable perpetrator,” recognition of whom is also shaped by stereotypes about race, ethnicity, class, sexuality, and gender.⁵

In reaching these conclusions, I draw on intersectionality—a method for examining the interaction of identity categories and the theory of what happens when multiple subordinating categories intersect.⁶ Intersectionality theory posits that the interaction of categories creates unique identities and experiences for individuals who are subject to multiple forms of subordination, such as women of color.⁷ Recent scholarship shows that consideration of the sexualization of race and the role of identity performance in race and gender stereotyping warrants extending intersectionality theory to heterosexual men of color, who are typically

that many activists and scholars prefer the term “survivors” in recognition of these attributes. My use of the term is intended include the breadth of individuals subjected to domestic violence, including those who do not survive.

3. See *infra* Part II.B (detailing the origins and attributes of the perfect victim stereotype).

4. See, e.g., Ann Cammett, *Queer Lockdown: Coming to Terms with the Ongoing Criminalization of LGBTQ Communities*, SCHOLAR & FEMINIST ONLINE, Summer 2009, at 1, 4, available at http://sfonline.barnard.edu/sexecon/cammett_04.htm (describing how gender stereotypes result in criminalization of queer victims); Leigh Goodmark, *Transgender Abuse* 33 (unpublished manuscript) (on file with author) (discussing the exclusion of transgender victims from anti-domestic violence services due to lack of conformity with gender stereotypes); Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 96–113 (2008) [hereinafter Goodmark, *When She Fights Back*] (detailing impact of stereotypes on African American and lesbian victims); Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061 (2006) [hereinafter Morrison, *Domestic Violence (Dis)Course*] (describing a domestic violence discourse that defines who is and is not viewed as a victim).

5. See *infra* Part III.A (discussing stereotypes related to perpetrators).

6. See *infra* Part II.B (describing intersectionality theory); *infra* Part IV (describing intersectional method).

7. See Kimberlé 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, 140 [hereinafter Crenshaw, *Demarginalizing the Intersection of Race and Sex*] (describing how single-axis theories of discrimination fail to capture the multi-dimensional experiences of black women).

characterized as singly subordinated.⁸ This scholarship shows that identities associated with privilege can be sources of subordination depending on context and intervening norms and stereotypes.⁹ Using case studies of two domestic violence cases with outcomes that are unanticipated and unexplained by conventional approaches as examples, I argue that the intersectional frame as applied to domestic violence should be extended to include an analysis of the performed intersectional identities of both victims and perpetrators.

Examining the intersectional identity of perpetrators is an intervention with far-reaching implications. Although the racial, ethnic, and gender construction of perpetrators has been explored in legal scholarship,¹⁰ scholarship on domestic violence does not usually factor the identity of perpetrators into the analysis of case outcomes.¹¹ Nor do scholars typically compare the experiences of victims who are unlike the perfect victim stereotype or consider why their experiences in the legal system differ from one another; the identities of white victims also remain unexamined with any specificity.¹² By extending the intersectional frame to include perpetrators, this Article contributes to understandings of how identity shapes responses to domestic violence in ways that cannot be addressed by focusing on victims alone. Ultimately, this requires rethinking the ways in

8. See Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853 (2006) [hereinafter Cooper, *Against Bipolar Black Masculinity*] (laying out the basis for extending intersectionality theory to heterosexual black men); Floyd D. Weatherspoon, *Remedying Employment Discrimination Against African-American Males: Stereotypical Biases Engender a Case of Race Plus Sex Discrimination*, 36 WASHBURN L.J. 23, 26 (1996) (making an earlier iteration of this argument in the employment discrimination context). See also Frank Rudy Cooper, *Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian*, 11 NEV. L.J. 1, 3–5 (2010) [hereinafter Cooper, *Masculinities*] (discussing the importance of analyzing masculinity in a “multidimensional way that acknowledges that gender and race (as well as class and other identities) operate simultaneously, inextricably, and in a context-dependent manner”).

9. See Cooper, *Masculinities*, *supra* note 8 (explaining that heterosexual black men who fail to comply with assimilationist racial norms are being stereotyped as criminal, animalistic, and hypersexual). See also Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 312 (2001) [hereinafter Hutchinson, *Identity Crisis*] (discussing the ways in which “heterosexual status, typically a privileged category, has served as a source of racial subjugation” and describing lynching as an example of “racist, sexualized rhetoric that constructed black males as heterosexual threats to white women”).

10. See, e.g., Cooper, *Against Bipolar Black Masculinity*, *supra* note 8, at 876–79 (discussing the construction of the “Bad Black Man”); Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 20–21 (1998) (describing a “lynch mob ideology” that constructs black men as perpetrators); Abbe Smith, *The “Monster” in All of Us: When Victims Become Perpetrators*, 38 SUFFOLK U. L. REV. 367, 387–91 (2005) (describing the gendered dimensions of responses to Aileen Wuornos).

11. See *infra* Part IV (describing how traditional intersectional method tends to limit categorical complexity).

12. See *supra* note 11.

which the interrelationships of identity categories are construed in domestic violence theory and practice, including the identities of white women who are victims.¹³ In turn, it requires an extension of intersectional method and analysis that shifts the locus of the inquiry from the intersection of subordinating social categories to the interstices—the spaces in between converging categories of power.¹⁴ This shift will permit the analysis of relative privilege and subordination that adding the perpetrator to intersectional analysis requires. It will also create a space more conducive to drawing connections across categories of difference and incorporating the analysis of power more directly into intersectional analysis.¹⁵

While expanding the analysis to include the intersectional identities of all parties in a domestic violence case may raise normative concerns, acknowledging the role of the perceivable perpetrator in case outcomes is not about excusing violence or other abuse.¹⁶ Not attending to the connections between victims and perpetrators allows racist, ethnocentric, and heterosexist stereotypes underlying both the perfect victim and the perceivable perpetrator to flourish. In contrast, addressing these connections holds the potential to advance anti-domestic violence work and further the purpose of intersectional inquiry, which is to describe and resist subordination.¹⁷ Thus, my proposal offers a nonexclusive strategy for extending the intersectional frame in order to accommodate a more nuanced analysis in a field characterized by dynamic and changing understandings and contexts, which will benefit from multiple interventions and methodologies.

Part II of this Article presents the cases of Sandra and Jerome and Madeline and Steve: two couples of color who appear in front of the same family court judge but whose cases result in apparently inconsistent

13. See *infra* Part III (arguing that individual identity should be distinguished from stereotypes like the perfect victim); *infra* Part IV (discussing approaches to studying the intersection of identity categories).

14. See *infra* Part IV (discussing shifts in the analytical structure of intersectional theory about domestic violence required for a more relational analysis that includes perpetrators).

15. See *supra* note 14.

16. See *infra* Part III (describing why analysis of relative subordination should not be confused with relativity).

17. See Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 707 (2001) [hereinafter *The Fifth Black Woman*] (describing the aim of intersectionality as not only making certain identities visible, but centering them in law and politics); Natalie J. Sokoloff & Ida Dupont, *Domestic Violence at the Intersections of Race, Class, and Gender: Challenges and Contributions to Understanding Violence Against Marginalized Women in Diverse Communities*, 11 VIOLENCE AGAINST WOMEN 38, 39 (2005) (describing the latter as two distinct objectives of intersectional domestic violence scholarship). See also Rita Kaur Dhamoon, *Considerations on Mainstreaming Intersectionality*, 64 POL. RES. Q. 230, 234 (2011) (“This attention to power, as the subject of struggle and the subject of transformation, gives an intersectional-type research paradigm its critical edge.”).

outcomes. This Part shows how the apparent inconsistency in their case outcomes is unexplained by routine failures of the family court system to protect victims or by single-axis accounts of race and gender. This Part also presents intersectionality theory and the history and function of the perfect victim stereotype in greater detail. Additionally, Part II discusses the impact of intersecting racial and gender stereotypes on women of color like Sandra and Madeline. This Part shows that, although intersectionality theory is more powerful than single-axis theories, a traditional intersectional approach also fails to account for the difference in their case outcomes.

Part III details the intersectional stereotypes that apply to men of color, like Jerome and Steve, and render them vulnerable to being perceived as perpetrators of crime. This Part also introduces the concept of identity performance to show why—despite the pervasive power of stereotypes—experiences of subordination are not identical even under similar circumstances. Using an expanded analytical framework, this Part shows these case outcomes can only be reconciled when the performed identities of all parties are considered in relation to one another. Additionally, Part III discusses the implications of situational and relative privilege that surface in the analysis, and the need to account for relative privilege within an expanded intersectional frame that includes perpetrators as well as victims. Part III shows the importance of distinguishing between situational and structural privilege, and between the identities of individuals and stereotypes such as the perfect victim. In particular, it shows that deconstructing the relational qualities of intersectional identity requires a more complete analysis of white identity, and argues that white women bringing domestic violence claims should be analyzed with specificity in relation to the perpetrator and not conflated with the perfect victim trope.

Finally, Part IV considers the preceding suggestions for expanding the intersectional framework in terms of methodology. This Part shows that considering the identity of perpetrators in case outcomes moves intersectional method from an *intracategorical* approach (which provides a detailed account of individuals located along *single* dimensions of intersecting social categories—i.e., black women) towards an *intercategorical* approach (which provides a detailed and comparative account of individuals located along *multiple* dimensions of intersecting social categories—i.e., black and white women and men). While intersectional theorists typically juxtapose the primary social group being studied against another (typically more socially-advantaged) group or category (like victims who are white, middle-class, heterosexual women), other groups are seldom examined in detail. This Part shows that the introduction of even a modest, yet more complete, intercategorical element like that suggested here—examining both dimensions of the victim–perpetrator dyad in detail—significantly increases intersectionality’s explanatory power. However, Part IV also shows how tendencies in the analytical structure of theory about domestic violence create challenges for applying intercategorical methods. This Part analyzes the relationship

between more particular and more general understandings of subordination in the context of domestic violence and argues that a more particular approach—one combining intra and intercategorical methods—is nonetheless possible and supports a stronger understanding of the general operation of subordinating social structures. Finally, Part IV discusses implications of a more particularized analysis for practice.

II. THE LIMITS OF AN INTERSECTIONAL ANALYSIS OF DOMESTIC VIOLENCE THAT FOCUSES SOLELY ON THE VICTIM

A. *Two Cases, One Courtroom*

Sandra¹⁸ is an African American woman in her mid-twenties who on several occasions fought back when her ex-boyfriend Jerome, also African American and about the same age, beat her—a fact documented in police reports when Sandra was arrested as the perpetrator, including during an incident in which she was charged with resisting arrest. On these occasions, either a neighbor or Jerome called the police; Sandra never called the police in response to Jerome’s violence against her, which she estimated occurred at least once a month over the five years they were together. On one of the occasions in which Sandra was arrested, the police report states she was injured and bleeding. However, while Jerome spoke to the police at the scene, Sandra refused to tell them her side of the story.¹⁹ Sandra only sought legal protection from Jerome after they had broken up and he was arrested for assaulting and injuring her outside a shopping mall—an incident that resulted in his conviction for domestic violence.²⁰ Despite the potentially significant barrier to relief presented by her own arrest record,²¹ when Sandra subsequently went to family court, she was successful in obtaining a civil restraining order against Jerome that protected her and the son she had with Jerome, as well as orders for sole physical and legal custody, and an order that Jerome’s visitation would be professionally monitored. At the time of the family court hearing, Sandra was a clerk in a professional office and Jerome was unemployed. She testified that he had sold marijuana to earn a living during their relationship, while she always held a legitimate job.

Madeline is an American-born Mexican American whose case against

18. The stories in this Article are drawn from the experiences of my clients. Names and other details have been changed in order to protect their privacy.

19. Sandra testified that she believed Jerome would retaliate if she talked to the police.

20. Jerome pled “not guilty” to intentional infliction of corporal injury, an offense that may be charged as a misdemeanor or felony, and was convicted of simple domestic battery following trial.

21. Women who use force against an abusive intimate partner lose credibility as victims with judges, juries, and attorneys. See Goodmark, *When She Fights Back*, *supra* note 4, at 94–95 (describing how “[o]nce a battered woman uses violence, her status as ‘victim’ is imperiled”).

her mixed race (Latino/white)²² husband Steve appeared some months later in front of the same family court judge. Madeline and Steve were in their early twenties and had been together since their teens. Like Sandra, Madeline supported the family in a semi-professional office job, while Steve was chronically unemployed throughout their relationship. Evidence was presented in family court showing that Steve had been fired from jobs for stealing from his employers, and he was unemployed at the time of the trial. Also like Sandra, Madeline had never called the police about Steve's abuse, which she reported had been ongoing during their seven-year relationship, and only sought help after an incident of post-separation violence that occurred in a public place and resulted in Steve's arrest and conviction for domestic violence.²³ Additionally, there was evidence that Madeline suffered physical injuries from the most recent episode of domestic violence, as well as in past incidents of abuse. Police reports also documented that she did not cooperate with police on one occasion, refusing to answer questions during a domestic violence call initiated by a neighbor. However, instead of Madeline's arrest, this incident resulted in her being transported to the emergency room and put on a psychiatric hold after Steve claimed that she had attempted suicide. Unlike Sandra, Madeline had never been arrested or charged with domestic violence.

But although Sandra and Madeline sought the same orders *from the same judge*, the results of their family court cases were different. While the judge granted Madeline a protective order and an order for custody of the couple's two children, he impatiently rejected her requests that Steve's visitation of the children be supervised. Instead, he minimized her safety concerns regarding the children, and granted Steve extended periods of contact, including overnight visits. In stark contrast to Sandra's case, the judge treated Madeline and Steve as mutually blameworthy and ordered both parties, to attend parenting classes. As Madeline described to me regarding her family court experience after the trial, "There was no question that I was beat [by my husband]. The judge knew I was beat and didn't care. I was less than zero."²⁴

This difference in outcomes is not explained by the facts of these cases. In each case, the perpetrator's criminal court conviction would constitute a

22. I use the terms Latina and Latino throughout this Article to refer to individuals of Latin American, Caribbean, and mixed ethnic origin or ancestry. In addition, because Latinas/os are multi-racial and multi-ethnic, I use the term race/ethnicity to discuss issues related to discrimination against Latinos, and when discussing people of color, including Latinos, rather than trying to distinguish between discrimination based on racism and ethnocentrism. See Katherine Culliton-González, *Time to Revive Puerto Rican Voting Rights*, 19 BERKELEY LA RAZA L.J. 27, 46–47 n.150 (2008) (discussing the basis for this approach given the intersection of race and ethnicity in discrimination against Latinos).

23. Steve pled guilty to the same charge Jerome was convicted of—simple domestic battery—after the prosecutor reduced the charge in a plea deal.

24. See *supra* note 18.

finding that domestic violence occurred, establishing a basis for issuance of civil restraining orders²⁵ and a rebuttable presumption in the victim's favor for child custody.²⁶ Moreover, many of the commonalities in these cases are significant indicators of future lethality.²⁷ But that did not make issuance of the requested orders a sure thing in either case. Studies have shown that judges are reluctant to deny custody even to adjudicated batterers.²⁸ While the existence of a statutory presumption that batterers are unfit for custody makes it more likely that judges will award sole custody to the victim rather than the perpetrator, research shows that high percentages of adjudicated batterers are still awarded custody in states with such a presumption.²⁹ That Sandra obtained an order for supervised visitation is especially remarkable.

25. All fifty states have statutes authorizing issuance of civil orders of protection for domestic abuse based on physical violence and other criminal acts. Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1131–32 (2009). Two-thirds of the states limit protection to those cases. *Id.* at 1112.

26. Twenty-five states have statutory presumptions that an adjudicated perpetrator of domestic violence shall not be awarded custody of minor children. See NAT'L COUNCIL ON JUVENILE & FAMILY COURT JUDGES, REBUTTABLE PRESUMPTION THAT A PERPETRATOR OF DOMESTIC VIOLENCE SHALL NOT HAVE SOLE CUSTODY, JOINT LEGAL CUSTODY, OR JOINT PHYSICAL CUSTODY (Jan. 1, 2009) (on file with author) (compiling state statutes). Sandra and Madeline's cases were tried in a state with such a presumption.

27. See Neil Websdale & Bahney Dedolph, Nat'l Res. Ctr. On Domestic Violence, *Lethality Assessment Tools: A Critical Analysis*, VAWNET.ORG, http://www.vawnet.org/research/print-document.php?doc_id=387&find_type=web_desc_AR (last visited Apr. 21, 2013) (describing lethality research). In particular, nearly every study of lethality in domestic violence cases finds an association between femicide (murder of women by a male partner) and separation or estrangement; risk of nonlethal physical and sexual abuse of both female victims and children increases after separation as well. *Id.* A history of physical violence resulting in injury to the victim is also a sign of heightened risk of lethality in domestic violence cases. *Id.* Risk of a lethal attack also increases if the abuser commits a public act of violence or otherwise puts himself at heightened risk of negative consequences. Hallie Bongar White & James G. White, *Testifying About Lethality Risk Factors*, VAWOR (2005), <https://www.vaw.umn.edu/documents/lethalitytribal/lethalitytribal.html>. When in combination with other lethality factors, unemployment is an increased risk factor as well. *Id.*

28. See, e.g., LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT* 113 (2002) (reporting that perpetrators of domestic violence are as likely to prevail in their efforts to obtain custody of their children as non-perpetrators).

29. See Allison C. Morrill et al., *Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother*, 11 VIOLENCE AGAINST WOMEN 1076, 1101 (2005) (reporting that in states with a statutory presumption against awarding custody to batterers, forty percent of fathers adjudicated as having committed domestic violence against the mother were still awarded joint custody). Victims seeking custody in states with competing statutory provisions regarding custody (e.g., a presumption in favor of joint custody and favoring the parent perceived by the court as more open to shared parenting), as was the case in Sandra and Madeline's state, fared even worse: sole custody was awarded to battering fathers in those states more often than to the mothers who were their victims. *Id.* Mothers also received sole physical custody less frequently when the father was an adjudicated batterer in states with such statutory presumptions (sixty-four percent of the time) than in states with no statutory presumption (sixty-seven percent of the time); if there were competing presumptions, mothers generally received "primary" physical custody, which is tantamount to shared custody (eighty-two percent of the time). *Id.* at 1093, 1102.

Judges are reluctant to restrict visitation for batterers,³⁰ and may in fact be *less likely* to impose restrictions on visitation when there is evidence of domestic violence against the custodial parent by the noncustodial parent.³¹ Poor outcomes for victims have been attributed to the delegialized culture of family courts, wherein issues such as child custody are viewed as emotional rather than legal problems;³² the vagueness of applicable custody standards;³³ and a general reluctance on the part of judges to believe battered women, or to rule against men who batter them, on custody issues.³⁴ But none of these theories explain why these cases had different outcomes.

Traditional theories of race and gender discrimination that examine differing outcomes along a single axis of subordination (e.g., race *or* gender) fail to explain the difference as well. In Madeline's case, it might be argued that the judge—who was a white man—denied her request for supervised visitation because he perceived Steve, a biracial man, as (more) white and favored him for that reason.³⁵ But white supremacy/racism *alone* would not

30. Mary A. Kernic et al., *Children in the Crossfire: Child Custody Determinations Among Couples with a History of Intimate Partner Violence*, 11 VIOLENCE AGAINST WOMEN 991, 1014–15 (2005) (reporting that less than seventeen percent of fathers in cases surveyed where the court was aware of substantiated domestic violence were denied any child visitation; supervised visitation “was no more likely” to be ordered for the abusive parent in cases involving domestic violence than in other cases); Morrill et al., *supra* note 29, at 1102 (reporting that although bench officers in states with a presumption against awarding custody to adjudicated batterers imposed some conditions on visitation more often than in states without such a presumption, “at best, only 64% of orders in these states imposed [any] structure or conditions on visitation orders”).

31. See Nancy E. Johnson et al., *Child Custody Mediation in Cases of Domestic Violence: Empirical Evidence of a Failure to Protect*, 11 VIOLENCE AGAINST WOMEN 1022, 1046–48 (2005) (reporting evidence that judges received recommendations from mediators for joint child custody arrangements more often in cases involving allegations of domestic violence than in cases that did not involve such allegations; supervised child visitation was recommended in a higher percentage of cases where there were no indicators of domestic violence than in cases where there was substantiated abuse; the lowest rate of recommendations for supervised visitation occurred in cases with victim-acknowledged domestic violence that was not reported to the court by the mediator).

32. See Elizabeth L. MacDowell, *When Courts Collide: Integrated Domestic Violence Courts and Court Pluralism*, 20 TEX. J. WOMEN & L. 95, 107–08, 121 n.110 (2011) [hereinafter MacDowell, *When Courts Collide*] (discussing how victims' access to civil court remedies for domestic violence is constrained by court culture); see also Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 731–33 (1988) (describing mediators and social workers as supplanting legal actors in the family courts).

33. See Fineman, *supra* note 32, at 770 (arguing the best interest of the child standard for determining parental custody must be replaced with a standard that is more determinate and less susceptible to moral rather than legal judgments).

34. See Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 675 (2003) (describing the belief of judges in domestic violence cases that it is unfair to consider the perpetrator's violence against the other parent when addressing child custody issues).

35. Studies show trial judges are subject to implicit racial bias in ways similar to the general public. See generally Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (reporting the results of an empirical study showing

explain why he did not also react negatively to a mixed-race relationship and scrutinize the case more closely for that reason, for example by punishing Steve more severely than Jerome because he viewed him as a race traitor.³⁶ Similarly, if white supremacy/racism *alone* explained the different outcomes, the judge might also have reacted negatively to Sandra because she was African American, perhaps by ordering her to attend parenting classes.

More complex theories like intersectionality—which examines the multidimensional and interactive character of race *and* gender norms and stereotypes in domestic violence cases—provide a better framework for understanding the possible dynamics involved in these cases.³⁷ For example, considering race *and* gender highlights the fact that, historically, white men have not been punished for engaging in intimate relationships with, or violence against, women of color.³⁸ Therefore, if the judge had viewed Steve as white, he might have given him a “pass” for abusing his Latina wife.³⁹ However, as typically conceived, intersectional theory about domestic violence also fails to explain why the judge responded differently to Steve’s violence against Madeline than to Jerome’s violence against Sandra, because it focuses on the identity of the victim and not the perpetrator and does not examine the relationship between the identities of the parties in each case.

B. Intersectionality and the Perfect Victim

Intersectionality is the primary framework used by feminist scholars to analyze the significance of co-occurring identities to the issue of domestic violence.⁴⁰ Kimberlé Crenshaw, who originally applied intersectionality to

the impacts of implicit racial bias on judicial decision-making). Thus, white judges are much more likely to draw negative inferences from minority racial status—or favor white status—than are judges of color. *Id.* at 1210–11 (comparing the responses of white and black judges to cues involving white and black racial status). However judges who are racial minorities may draw negative inferences as well. *Id.* at 1210.

36. See Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1261 (1997) (making a similar point about police responses to what they perceived as an interracial (white/Asian) male couple). See also *infra* Part III (discussing “putative whiteness” and racial differentiation among whites by other whites).

37. I share the view expressed by Frank Rudy Cooper that the various theories of “multidimensionality” are consistent with, and a natural extension of, intersectionality theory, and do not distinguish between them. See Cooper, *Against Bipolar Black Masculinity*, *supra* note 8, at 862–63 n.33.

38. See Fenton, *supra* note 10, at 20 (noting that white male prerogative includes access to women of color as well as white women).

39. See *infra* Part III (distinguishing Jerome’s experience from Steve’s in the event that Steve was perceived as white).

40. See, e.g., Morrison, *Domestic Violence (Dis)Course*, *supra* note 4, at 1065 n.6 (providing examples of scholars using an intersectional analysis to study the problem of domestic violence). On the institutionalization of intersectionality as a mode of analysis in the academy more generally, see

analyze experiences of black women in employment discrimination cases, introduced the term into legal scholarship.⁴¹ Using the analogy of traffic at a four-way intersection, Crenshaw argued that the existence of more than one subordinate identity creates distinct vulnerabilities to further disempowerment that cannot be accurately captured or addressed by analyzing a single axis of subordination alone: “If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them.”⁴² Thus, she reasoned, while a black woman may be harmed by practices that are sexist or racist, she may also be uniquely harmed by practices that harm neither men of color nor white women.⁴³ Crenshaw subsequently extended intersectional analysis to other women of color and to the intersection of gender and other categories of identity.⁴⁴ She defined structural intersectionality as “the ways in which the location of women of color at the intersection of race and gender makes [their] actual experience . . . qualitatively different than that of white women.”⁴⁵

Using intersectionality, feminist scholar-activists have shown the ways in which women of color victimized by intimate partner violence are disadvantaged by what Adele Morrison characterizes as a racialized domestic violence legal discourse.⁴⁶ Morrison describes three interrelated parts to the domestic violence discourse: the battered woman identity (that battered women must adopt in order to access services and remedies for

Jennifer C. Nash, ‘Home Truths’ on Intersectionality, 23 *YALE J.L. & FEMINISM* 445, 446–47 (2011). See also Leslie McCall, *The Complexity of Intersectionality*, 30 *SIGNS* 1771, 1771 (2005) (characterizing intersectionality as “the most important theoretical contribution that women’s studies, in conjunction with related fields, has made so far”).

41. See Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 7.

42. *Id.* at 149.

43. See *id.* (explaining, as a result, “Black women sometimes experience discrimination in ways similar to white women’s experiences; sometimes they share very similar experiences with Black men. Yet often they experience double-discrimination—the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination as Black women—not the sum of race and sex discrimination, but as Black women.”).

44. See, e.g., Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1246–50 (1991) [hereinafter Crenshaw, *Mapping the Margins*] (examining intersections of race, gender, and immigration status in relation to domestic violence laws, services and policies). Crenshaw also encouraged extension of intersectionality to additional identity categories, including class and sexual orientation. *Id.* at 1244–45 n.9. For a history of the concept of intersectionality in black feminist thought, see Nash, *supra* note 40. See also PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 17–18 (2000) (discussing the development, after 1980, of works by black women scholar-activists exploring the interconnectedness of oppressions).

45. Crenshaw, *Mapping the Margins*, *supra* note 44, at 1245.

46. Morrison, *Domestic Violence (Dis)Course*, *supra* note 4, at 1068.

abuse);⁴⁷ the empowerment continuum (the process by which a battered woman ends the abuse, including through taking on the battered woman identity and engaging the legal system);⁴⁸ and legal practice (consisting of legal structures, substantive law, and procedural processes, each of which require successful performance of the battered woman identity).⁴⁹ The problem for women of color, as Morrison explains, is that the battered woman identity that threads through each element of domestic violence discourse is typically perceived as white.⁵⁰ More specifically, she is the perfect victim described previously—a white, middle-class, heterosexual woman who is passive and dependent.⁵¹ She does not fight back.⁵² Other than the need for protection, she lacks special needs of any kind.⁵³

The origins of the perfect victim in domestic violence legal discourse lie in the confluence of three factors: social science theories about domestic violence that attribute passivity and helplessness to victims;⁵⁴ political decisions by the feminist and battered women's movements to emphasize the universality of battered women's experiences based on gender rather than other structural factors contributing to women's vulnerability to violence, like race and class;⁵⁵ and deeply-entrenched gender norms that are

47. *Id.* at 1078–86. *See also* Goodmark, *When She Fights Back*, *supra* note 4, at 81–82 (explaining victims must successfully access a preexisting stock narrative about domestic violence in order to get help).

48. Morrison, *Domestic Violence (Dis)Course*, *supra* note 4, at 1086–91 (describing how the domestic violence discourse became more restrictive as anti-domestic violence services became more professionalized and bureaucratic).

49. *Id.* at 1091–97 (detailing the ways in which legal categories are exclusive in character).

50. *Id.* at 1077.

51. *See id.* at 1078 (describing these as the qualities of the “essential battered woman”).

52. *See* Goodmark, *When She Fights Back*, *supra* note 4, at 83–85 (describing the passivity of the paradigmatic victim).

53. *See* JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 133 (1999) (describing the “ideal victim profile” as “a white woman who speaks English and has no material needs or who has the means to hire an attorney to seek financial support through the . . . court”).

54. *See* Goodmark, *When She Fights Back*, *supra* note 4, at 82–85 (describing the influence of psychologist Lenore Walker's theory of learned helplessness on the perception of victims of domestic violence as passive). *See also* Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520 *passim* (1992) [hereinafter Schneider, *Particularity and Generality*] (discussing the unintended consequences of psychological theories like learned helplessness on perceptions of battered women).

55. *See* Crenshaw, *Mapping the Margins*, *supra* note 44, at 1258–61 (discussing the use of universalized gender narratives to raise awareness of domestic violence in the white community that disregard the significance of race and poverty to violence in the lives of women of color). *See also* Goodmark, *When She Fights Back*, *supra* note 4, at 86 (detailing how “[t]he battered women's movement has long struggled with issues of race”).

also associated with white womanhood.⁵⁶ By failing to challenge the racist and sexist norms and stereotypes underlying the characterization of victims, the first two factors allowed the third to thrive.⁵⁷ Historically persistent stereotypes of white women are that they are passive, fragile, and peaceful.⁵⁸ They are also idealized as “the ideal housewife, and the symbol of love and motherhood.”⁵⁹ As Zanita Fenton describes, these are also the qualities of the “good girl” who deserves protection: “[o]nly ‘good girls,’ who are expected to be chaste and truthful, can be victims.”⁶⁰

In contrast, women of color are subject to stereotypes that are directly contrary to the perfect victim based on their race/ethnicity alone. Black women, for example, are viewed as tough, strong, and psychologically dominant,⁶¹ as well as sly and untrustworthy.⁶² Latinas can be stereotyped as hot-blooded and temperamental.⁶³ Although other stereotypes of Latinas are more consistent with the perfect victim, including portrayals of Latinas as virginal and innocent,⁶⁴ Latinas may also be viewed as accepting of patriarchal family structures and violence in their relationships with men,

56. See Fenton, *supra* note 10, at 21 (describing gender and racial norms about womanhood).

57. See Beth E. Richie, *A Black Feminist Reflection on the Antiviolence Movement*, in DOMESTIC VIOLENCE AT THE MARGINS: READINGS ON RACE, CLASS, GENDER, AND CULTURE 50, 52–53 (Natalie J. Sokoloff & Christina Pratt eds., 2005) (arguing a universalized gender approach to domestic violence led to the erasure of women of color and low income women from the dominant view of the problem).

58. Fenton, *supra* note 10, at 21 (citing Mae C. King, *The Politics of Sexual Stereotypes*, 4 BLACK SCHOLAR 12, 15 (1973)).

59. *Id.*

60. *Id.* at 22.

61. Linda L. Ammons, *Mules, Madonna, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1032–33 (1995).

62. Wendy Brown-Scott, *Anita Hill Meets Godzilla: Confessions of a Horror Movie Fan*, 70 TUL. L. REV. 1921, 1932 (1996) (citing GLASS CEILING COMM’N, DEP’T OF LABOR, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION’S HUMAN CAPITAL (1995)). While these attributes predominate, the repertoire of stereotypes associated with black women is complex. See Ammons, *supra* note 61, at 1013 n.44 (detailing stereotypes historically applied to black women). None however are consistent with the perfect victim. See COLLINS, *supra* note 44, at 5 (arguing, “[f]rom the mummies, jezebels, and breeder women of slavery to the smiling Aunt Jemimas on pancake mix boxes, ubiquitous Black prostitutes, and ever-present welfare mothers of contemporary popular culture, negative stereotypes applied to African American women have been fundamental to Black women’s oppression”).

63. Morrison, *Domestic Violence (Dis)Course*, *supra* note 4, at 1082–83; Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 240–41 (1994); *Women: Barriers to Living Violence Free*, ACT, <http://www.actabuse.com/latinas.html> (last visited Feb. 26, 2013).

64. Rivera, *supra* note 63, at 240 n.51 (describing how these stereotypes were memorialized as cultural archetypes in the characters of innocent, sweet, and virginal Maria, and sexy, loud, and promiscuous Anita in *West Side Story*).

and therefore undeserving of protection.⁶⁵ In each case, women of color face the additional hurdle of overcoming negative stereotypes in order to establish themselves as meeting the criteria of another stereotype: that of the perfect victim.

As Morrison points out, those excluded from the domestic violence discourse by virtue of the perfect victim trope include more than heterosexual women of color.⁶⁶ In fact, most victims do not meet the perfect victim criteria. Moreover, as reflected in the family court statistics discussed above, the domestic violence discourse does not necessarily work well for anyone, including white women.⁶⁷ Rather, the qualities associated with the perfect victim are those qualities associated with white women at the level of stereotype—assumptions and responses that operate on a subconscious level.⁶⁸

Madeline and Sandra's stories demonstrate many of the ways in which victims may operate both inside and outside of the perfect victim trope. Although they are both women abused by male partners in heterosexual relationships, Sandra and Madeline show that women sometimes fight back against abusers rather than remaining passive,⁶⁹ do not necessarily cooperate

65. *Id.* at 240–41. Similar stereotypes exist about Asian women. See Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 *BUFF. L. REV.* 1, 96 (1999) (discussing how the sexualization of Asian American women is used to legitimize their subordination by private and legal actors).

66. Morrison, *Domestic Violence (Dis)Course*, *supra* note 4, at 1081–82 (noting that the legal system does not work well for immigrants, poor, lesbian, bisexual, or transgender victims of domestic violence).

67. *But see infra* Part IV (discussing the problem with the lack of demographic data tracking race/ethnicity in family court cases).

68. See Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in *HANDBOOK OF SOCIAL PSYCHOLOGY* 357, 364 (Daniel T. Gilbert, Susan T. Fiske, & Gardner Lindzey eds., 4th ed. 1998) (“Fifty years of research reveals how rooted stereotyping, prejudice, and discrimination are . . . [and how they] operate outside conscious awareness.”).

69. Numerous studies show most women who use physical force against men in heterosexual relationships are victims of ongoing battering and are acting in self-defense or to otherwise resist or stop the violence against them. In one such study, sociologist Susan Miller found that thirty percent of women in court-ordered batterer treatment following arrest on domestic violence charges had acted in response to a male partner's violence. SUSAN L. MILLER, *VICTIMS AS OFFENDERS: THE PARADOX OF WOMEN'S VIOLENCE IN RELATIONSHIPS* 116–20 (2005). See also Megan H. Bair-Merritt et al., *Why Do Women Use Intimate Partner Violence? A Systematic Review of Women's Motivations*, 11 *TRAUMA VIOLENCE ABUSE* 178, 178–89 (2010) (reviewing studies regarding women's motivations for the use of physical violence against intimate partners in heterosexual relationships); Shamita Das Dasgupta, *Just Like Men? A Critical View of Violence by Women*, in *COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE: LESSONS FROM DULUTH AND BEYOND* 195, 202 (Melanie F. Shepard & Ellen L. Pence eds., 1999) (summarizing the results of interviews with women who had used violence against male partners); Shamita Das Dasgupta, *A Framework for Understanding Women's Use of Nonlethal Violence in Intimate Heterosexual Relationships*, 8 *VIOLENCE AGAINST WOMEN* 1364, 1364–89 (2002) (summarizing research findings on women who use nonlethal violence against male partners); L. Kevin Hamberger & Clare E. Guse, *Men's and Women's Use of Intimate Partner Violence in Clinical Samples*, 8 *VIOLENCE AGAINST*

with police,⁷⁰ and may stay with men on whom they do not appear economically dependent.⁷¹ However, their experiences are not fully anticipated by an intersectional analysis either. Sandra was successful although she was neither white, nor dependent, and fought back. In contrast, Madeline was arguably more consistent with the perfect victim trope in that she did not use violence to resist Steve's abuse and thus appeared more passive, but she was less successful than Sandra despite these qualities.

These experiences show that the perfect victim trope and the need for victims to adhere to its criteria is only half the story. The judge in family court did not evaluate Sandra and Madeline's identities as victims in isolation. Rather, both appeared in court opposite their former partners, whom the judge had to see as perpetrators in order for Sandra and Madeline to get the relief they sought. Therefore, understanding the different outcomes in these cases requires examining the identities of each of the parties. The judge may have viewed Jerome and Steve's racial identities as men of color much differently than Sandra and Madeline's racial identities as women.⁷² In other words, their intersectionality could be as much a part of the story as Sandra and Madeline's. In fact, these stories suggest that the existence of a perceptible perpetrator may be, at least in some instances, determinative of whether or not a victim gets relief.

III. EXTENDING THE INTERSECTIONAL FRAME

A. The Perceptible Perpetrator

A victim requires a perpetrator, an identity that is constructed in

WOMEN 1301, 1301–31 (2002) (comparing the experiences of women who had been court-ordered to attend abuse abatement counseling and women in a domestic violence shelter); Susan L. Miller & Michelle L. Meloy, *Women's Use of Force: Voices of Women Arrested for Domestic Violence*, 12 VIOLENCE AGAINST WOMEN 89, 89–115 (2006) (examining data collected from observations at three female domestic violence offender programs).

70. In addition to fear of retaliation as expressed by Sandra, women of color may refuse to cooperate with police investigations and avoid seeking police protection because they distrust the criminal justice system—a system Sandra obviously did not believe would protect her from Jerome. See BETH RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* (1996) (discussing the reluctance of African American women to seek help for abuse from law enforcement); Rivera, *supra* note 63, at 245–48 (describing the internal conflict Latinas may face in using police to prevent domestic violence).

71. Appearances of “financial independence” can also be deceiving, especially given the present economic climate in which most working people are mired in debt. See Deborah M. Weissman, *Law, Social Movements, and the Political Economy of Domestic Violence*, DUKE J. GENDER L. & POL'Y (forthcoming 2013), available at <http://ssrn.com/abstract=2037606> (discussing the relevance of current economic conditions to domestic violence). See also Jody Raphael, *Battering Through the Lens of Class*, 11 AM. U. J. GENDER SOC. POL'Y & L. 367, 369 (2003) (detailing the numerous and complex ways batterers sabotage victims' economic independence).

72. See, e.g., Cooper, *Against Bipolar Black Masculinity*, *supra* note 8, at 881 (showing how intersectional stereotypes about black men and women differ from one another).

opposition to the perfect victim.⁷³ Stereotypes about black men and Latinos render them more likely to be perceived as perpetrators of crime, including domestic violence, than white men.⁷⁴ Just as the stereotypical attributes of white women mirror the attributes of the perfect victim (and femininity more generally), the stereotypical attributes of white men tend to mirror ideals of masculinity, including qualities such as intelligence, self-reliance, leadership, breadwinning ability, competitiveness, competence, and aggression.⁷⁵ Put another way, “white heterosexual male identity is socially construed to be normative.”⁷⁶ Masculinity scholars refer to such ideals as hegemonic masculinity or “masculinity [that] identifies the most empowered, those at the top of the male hierarchy.”⁷⁷ Not only is the masculinity of white men associated with hegemonic masculinity, hegemonic masculinity is associated with whiteness and white privilege.⁷⁸

In contrast, the masculinities attributed to men of color are pathologized, subordinate, and associated with criminality.⁷⁹ Black men, for example, are stereotyped as “animalistic, crime-prone, and sexually unrestrained.”⁸⁰ Similarly, Latinos are stereotyped as unintelligent, untrustworthy, and dangerous.⁸¹ In addition, Latinos are subject to stereotypes relating to actual or perceived nationality and status as

73. See Morrison, *Domestic Violence (Dis)Course*, *supra* note 4, at 1080 (“The construction of the ‘battered woman’ identity needs an ‘other,’ which is an abusive man on the micro level, and patriarchal society on a macro level.”). Cf. Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157 (2007) (discussing how perpetrators are constructed in relation to victims in federal anti-trafficking law).

74. See, e.g., D. Aaron Lacy, *The Most Endangered Title VII Plaintiff?: Exponential Discrimination Against Black Males*, 86 NEB. L. REV. 552, 564–65 (2008) (contrasting stereotypes about white men and black men).

75. *Id.* at 565; Fiske, *supra* note 68, at 357–61.

76. Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN’S L.J. 76, 97, 105 (2000) [hereinafter Carbado, *Straight*] (describing heterosexual white men as “Mankind. The baseline. He is our reference. We are all defined with Him in mind. We are the same as or different from Him.”).

77. NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* 27 (2010).

78. See, e.g., Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497, 1521 (2010) (describing the reference point for whiteness as “the most privileged version of whiteness—a white, non-ethnic, middle-class, heterosexual male”).

79. See DOWD, *supra* note 77, at 27 (explaining masculinity is subject to hierarchies among men, with “subordinate masculinities defined especially by race and class”). See also *id.* at 61 (describing hegemonic masculinity as dominating among multiple, competing masculinities, including those that are subordinate and/or subversive).

80. Cooper, *Against Bipolar Black Masculinity*, *supra* note 8, at 875–76 (citing N. Jeremi Duru, *The Central Park Five, the Scotsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1320 (2004)).

81. Rivera, *supra* note 63, at 240 n.47 (citing Richie Pérez, *From Assimilation to Annihilation: Puerto Rican Images in U.S. Films*, 2 CENTRO BULL. 8, 12 (1990)).

immigrants that associate them with violence, immorality and criminality.⁸² Like Latinas, Latinos are thought to be incapable of assimilation to dominant (white) cultural norms.⁸³ In contrast, black men may be viewed by whites as able to assimilate into white culture if they choose to downplay their race and become what Cooper calls the “Good Black Man.”⁸⁴ However, this perceived potential for compliance with white norms helps justify the suppressed social status and criminalization of other black men, who are labeled “bad.”⁸⁵ To be “good,” black men must also downplay their masculinity.⁸⁶ In sum, for men of color, masculinity itself is problematic, and attributes that tend to be viewed as positive in white men, such as aggression, are more likely to be viewed as menacing when embodied in black and brown male bodies.⁸⁷

As argued by Cooper, this intersection of male gender with heterosexuality and subordinate racial status results in a subordinate status that is different in form and function from the intersectional subordination of women in the same group.⁸⁸ Cooper describes the “bipolar” images of heterosexual black men as compared to stereotypes about black women:

[T]he Bad Black Man image emanates in part from a gender-specific assumption that heterosexual black men are a threat to the sexual security of white women. There are also assumptions about sexual deviance of black women, but they are often designed to make black women seem as though they are available for use by white men. On the flipside, the Good Black Man image seems to be motivated in part by a desire to induce heterosexual black men to desexualize ourselves in order to make whites comfortable. In contrast, the image of the desexualized black woman is often

82. *Id.* at 240. Latinos are also subject to the same negative stereotypes affecting black and dark-skinned men more generally. See also Ian Haney López, *Race and Colorblindness After Hernandez and Brown*, 25 CHICANO-LATINO L. REV. 61, 63 (2005).

83. STEVEN BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION 2, 129 (2003).

84. Cooper, *Against Bipolar Black Masculinity*, *supra* note 8, at 881.

85. *Id.* at 888–95 (arguing the Good Black Man/Bad Black Man dichotomy functions to soothe white anxiety and legitimize racial caste in the post-civil rights era).

86. See, e.g., *id.* at 886 (describing “desexualization” as part of the Good Black Man image). Sexuality, and heterosexuality in particular, is a critical component of masculinity. See DOWD, *supra* note 77, at 62 (characterizing not being a woman and not being gay as the most critical components of the definition of masculinity).

87. See, e.g., Lacy, *supra* note 74, at 566 (detailing the ways in which black men are trapped between being viewed as either not masculine enough (e.g., because they are not viewed as possessing positive masculine traits such as breadwinner, good father, etc.), or too masculine, and therefore threatening).

88. Cooper, *Against Bipolar Black Masculinity*, *supra* note 8, at 879. See also Weatherspoon, *supra* note 8, at 34–36 (making a similar argument).

linked to a criticism of inadequately feminine black women as emasculating black men and thereby bringing down the black community.⁸⁹

In addition, while both men and women of color are subject to negative (and sometimes overlapping) stereotypes, the results are not identical. In the context of domestic violence, while the stereotypes about women of color render them less likely to be viewed as deserving victims regardless of harm, the association of criminality with men of color renders them more vulnerable to being perceived as perpetrators, regardless of guilt.⁹⁰

Guilt was not the issue in Jerome and Steve's family court cases, of course. At that stage, there was no doubt that both men had committed criminal acts of violence against their former partners.⁹¹ Moreover, their criminal convictions were identical and the underlying crimes were very similar.⁹² The only question was whether their prior violence indicated a propensity for future violence.⁹³ In this context, the judge determined that Jerome was enough of a safety risk to justify an order for ongoing, professionally-monitored visitation. In contrast, the judge allowed Steve to see his children without supervision. Thus, Sandra may have been successful in part because Jerome was a perceivable perpetrator—an individual recognized by the judge as accountable for his past acts and capable of future acts of domestic violence—and Madeline may have lost in part because Steve did not conform to stereotypes about Latino perpetrators and therefore was not so perceived. However, viewing Jerome and Steve as intersectional subjects does not, by itself, explain why the judge made this distinction between them. This discrepancy shows the need for another layer of inquiry, into how the parties performed their respective intersectional identities.

B. Identity Performance and Intragroup Distinctions

Intersectionality highlights intragroup distinctions: for example, the category "African American" consists of women as well as men, gays and lesbians as well as heterosexuals, and so on.⁹⁴ Conventional intersectional

89. Cooper, *Against Bipolar Black Masculinity*, *supra* note 8, at 860–61.

90. See Weatherspoon, *supra* note 8, at 34–36 (citations omitted) (arguing, "[n]egative images of African-American men as being 'bogeymen' and 'predators' have become so prevalent that when African-American males are falsely accused of committing a vicious criminal act, law enforcement authorities and the public automatically assume they are guilty").

91. See *supra* Part II.

92. See *supra* Part II.

93. See Meier, *supra* note 34, at 700–03 (discussing the future-oriented nature of judicial determinations about child custody).

94. See *The Fifth Black Woman*, *supra* note 17, at 702 (describing intersectionality as pushing

analysis does not show, however, how individuals within these intragroup categories are heterogeneous in their identities, or the way the experience of identity may be relational, contextual, and change over time.⁹⁵ For this added layer of complexity, scholars incorporate theories of identity performance to add to the insights of intersectionality.⁹⁶ The premise is twofold. First, that individuals have agency even within the constraint of socially constructed status categories like race and gender.⁹⁷ Second, that they may be discriminated against not only for their inter- and intra-group differences (e.g., for their race, or their race plus gender), but also for how they exercise agency with regard to their performance of their identity.⁹⁸ Simply put, the point is that not everyone “does” race, gender, or other aspects of identity in the same way; the results of a performance depend on the expectations of the audience. As illustrated by Devon Carbado and Mitu Gulati in the employment context:

[W]hile it is certainly true that a firm might prefer Asian American women to Asian American men (an intra-racial distinction), it is also true that a firm might prefer quiet and passive Asian American women to Asian American women who do not exhibit those characteristics (an intra-racial performance distinction).⁹⁹

Therefore, Carbado and Gulati argue, it is essential to consider performance as well as identity to understand an individual’s vulnerability to distinctions

for recognition that particular social groups consist of multiple status identities).

95. See *infra* Part IV (discussing contrasting intracategorical and intercategorical approaches to studying intersectionality).

96. In particular, Devon Carbado and Mitu Gulati have developed this field in the context of employment discrimination doctrine. See *The Fifth Black Woman*, *supra* note 17; Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1265 n.11 (2000) [hereinafter Carbado & Gulati, *Working Identity*]. Cf. FRANK RUDY COOPER & ANN C. MCGINLEY, MASCULINITIES AND THE LAW 2 (2012) (applying multidimensionality theory to masculinities theory to arrive at similar conclusions by showing how “masculinities differ depending on the context and the other identities with which they overlap”).

97. See, e.g., *The Fifth Black Woman*, *supra* note 17, at 701–02 (describing choices a man might make about presentation of his male status); Cooper, *Against Bipolar Black Masculinity*, *supra* note 8, at 882–85 (describing the influence of environment on performance of black male identity). See also Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895, 1916–25 (2007) (describing assimilationist strategies adopted by people of color including “accommodating,” “distancing,” and “resigned modeling”); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002) (describing how outsiders deemphasize or “cover” their differences to make insiders feel more comfortable). Identity theory is closely associated with the work of Judith Butler. See, e.g., JUDITH BUTLER, BODIES THAT MATTER (1993); JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990). For a discussion of how the focus of Carbado and Gulati’s work differs from Butler’s, see Carbado & Gulati, *Working Identity*, *supra* note 96, at 1265 n.11.

98. See KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 21–22 (2006) (explaining that possession of the desired social attributes (e.g., whiteness) is less important in the modern era than acting as though one possesses them (e.g., acting white)).

99. *The Fifth Black Woman*, *supra* note 17, at 703.

based on difference.¹⁰⁰

The concept of performance helps operationalize the interaction of structural subordination and stereotype within intersectional theory. Performance helps determine, for example, whether Jerome was a “Good Black Man” or a “Bad Black Man”; whether Madeline was more like a submissive “Maria” or a hotheaded “Anita.”¹⁰¹ Incorporating the concept of performance into an analysis of intersectionality also suggests that other, more expressive facts and dimensions of the parties might affect their perceived satisfaction of victim or perpetrator status and should be considered, such as their dress, hairstyle, and mannerisms.¹⁰² To the extent that witnesses may be seen as an extension of the parties, their performance should be considered as well.¹⁰³ In the family law cases, using this wider lens allows us to consider the possible impact that certain factors may have on the judge’s decision-making, such as Madeline’s white mother-in-law, whose involvement with Steve (he lived with her) and her grandchildren was strategically deployed at trial by Steve’s attorney to seemingly great effect.

As a witness for Steve, Madeline’s mother-in-law’s performance of a competent mother and grandmother (through her dress and demeanor, and articulation of care and concern for Steve and her grandchildren) helped neutralize Steve as a perpetrator of violence by making him appear dependent and immature, rather than manipulative and dangerous. It also bolstered his capacity to care for young children (since she would be there during visitation), while providing a relatable foil for his misconduct (appealing to the bench officer’s sense of family ties and desire for grandchildren). The fact that Madeline and her mother-in-law were similarly positioned with regard to income and occupation (her mother-in-law was a secretary) may have also helped to eliminate any class disadvantage that Steve’s unemployment may have otherwise created for him, while reducing the appearance of Madeline’s vulnerability by emphasizing her relative financial independence.

100. Carbado & Gulati, *Working Identity*, *supra* note 96, at 1262–63 (deeming this type of distinction “‘racial conduct’ discrimination” because it “derives, not simply from the fact that an employee is, for example, phenotypically Asian American (i.e., her racial status) but also from how she performs her Asian-American identity in the workplace (i.e., her racial conduct)”).

101. See Rivera, *supra* note 63, at 240 n.51.

102. See, e.g., *The Fifth Black Woman*, *supra* note 17, at 717–19 (hypothesizing the effect of Afrocentric hair, dress and politics on the promotion opportunities for a black woman in a workplace defined by white norms of behavior).

103. Although outside the scope of this Article, one might also consider the role of attorney identity performance as a mitigating factor in perceived victim or perpetrator status. I am a white female; a white female represented Jerome as well. A white male represented Steve in both his civil and criminal case. Gender bias studies conducted in state (and federal) courts show evidence of pervasive bias on the part of male judges and lawyers toward female attorneys. See Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247, 258–67 (1993).

One might argue that the success of this performance makes a single-axis racial theory like the one disposed of before more credible: Madeline's mother-in-law made Steve, a biracial man, look "more white," and thus less like a perpetrator. Her whiteness, it could be argued, helped her to succeed in this role by enhancing her credibility.¹⁰⁴ Taking into account the concept of performed intersectional identity, however, suggests that, while her race likely played a part in the outcome the hypothesis that it was, in itself, determinative of the outcome, is inaccurate. Just as racial minorities' experiences of racism are not uniform, access by whites to the benefits of white privilege is not guaranteed; an analysis that takes intersectional identity and performance into account is still necessary.¹⁰⁵

Camille Gear Rich describes two factors that determine whether an individual can access benefits associated with a racial identity: racial identification, which is voluntary, and racial ascription, which is involuntary.¹⁰⁶ Racial ascription relates not only to social understandings about race and the interpretation of phenotypical features, but "cultural, historical, or contemporary coalition-specific understandings of race" that are created in particular contexts.¹⁰⁷ Whites with what Rich calls "low-status identity features"—such as those pertaining to gender, class, ethnicity, sexual orientation, and religion—may be denied access to white privilege by higher status whites.¹⁰⁸ As Rich explains, "although a person may claim a 'white' identity, she is merely a putative white person and therefore may not be socially recognized as white in all contexts."¹⁰⁹

104. See Fiske, *supra* note 68 (discussing implicit racial biases affecting assessments of believability that benefit whites); see generally Damian A. Stanley et al., *Implicit Race Attitudes Predict Trustworthiness Judgments and Economic Trust Decisions*, 108 PROC. NAT'L ACAD. SCI. U.S. 7710 (2011) (same). See also Damian A. Stanley et al., *Race and Reputation: Perceived Racial Group Trustworthiness Influences the Neural Correlates of Trust Decisions*, 367 PHIL. TRANSACTIONS ROYAL SOC'Y B 744 (2013), available at http://www.fas.harvard.edu/~mrbworks/articles/2012_PhilTransRoyalSocB.pdf (discussing the neurological aspects of race-based decisions about trustworthiness). It could also help her more than if she had been Latina, specifically, because the attributes of Latino/a stereotypes run counter to the notion that a woman can control male family members. See Rivera, *supra* note 63, at 241 ("Accustomed to a male-centered community, the Latina is constructed [in relation to Latinos] as docile and domestic."). See also Goodmark, *When She Fights Back*, *supra* note 4, at 100 (showing African American women are not perceived as credible by judges and juries).

105. See Rich, *supra* note 78, at 1516 (explaining, "although the basic social privilege of being recognized as white is typically not questioned, . . . access in a given context to the material and dignitary benefits associated with whiteness" may be denied).

106. *Id.* (coining the term "marginal whiteness" to describe "whites who only enjoy white privilege in contingent, context-specific ways").

107. *Id.* at 1517.

108. *Id.* at 1519–20.

109. *Id.* at 1517. But see generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993) (proposing white racial privilege as a form of property owned by whites regardless of other status markers). For recent perspectives and controversies among Whiteness Study and Critical

In other words, Madeline's mother-in-law had to perform her racial identity, and her success in that endeavor depended on the judge's interpretation of multiple structural and expressive factors in addition to her race.¹¹⁰ In turn, even if she helped Steve appear racially white, his was also a putative whiteness, rendering his access to white heterosexual male privilege contingent and contextual. In this regard, Steve's relative youth, physical attributes (he was short and overweight), and especially his mother's involvement in his life, communicated weakness and would be negative factors in his ability to access the benefits afforded to straight white males in many contexts.¹¹¹ But emasculation is also inconsistent with stereotypes about perpetrators.¹¹² In this light, even evidence about Steve's history of stealing from his employers may have made him look more ineffectual as an employee and provider than criminal and a likely perpetrator of future crimes.¹¹³ Thus, whether Steve was perceived as racially white or not, one result of Madeline's mother-in-law's performance was to distance Steve from the stereotype of the Latino perpetrator and perpetrators more generally, by insulating him from the masculinity that would normally be attributed to an adult male. On the other hand, to the extent he was perceived as white, he stood to benefit from the relative impunity that white men have historically enjoyed in perpetrating violence against women of color.¹¹⁴ Additionally, by tipping the scales away from the dependency aspect of the perfect victim trope, Steve's mother-in-law also distinguished Madeline from victim-conforming stereotypes about Latinas and may have allowed less advantageous stereotypes about hot-blooded Latinas to come forward.

Madeline arguably remained more like the perfect victim than Sandra, who had fought back—vulnerable in appearance, she was delicate and petite, and suffered from post-traumatic stress disorder, which manifested as a type

Race Theory scholars about analyzing differential access to power among whites, see Rich, *supra* note 78, at 1510–14 (collecting sources and discussing same).

110. See Rich, *supra* note 78, at 1519–20 (explaining, “low-status identity features work [to exclude some whites from racial privilege] because some whites use these distinctions to judge the ‘belongingness’ or relative status of other white persons”).

111. As described by Dowd, a key to issues of power and hierarchy among men is “[t]he rejection of things female, things associated with mothers, [which] is lifelong. To admit weakness, to admit frailty or fragility, is to be seen as a wimp, a sissy, not a real man. The ultimate fear is to come up short in front of other men.” DOWD, *supra* note 77, at 62; see also John M. Kang, *The Burdens of Manliness*, 33 HARV. J.L. & GENDER 477, 487–88 (2010) (describing the expectation men will distinguish themselves from women by appearing courageous).

112. See Morrison, *Domestic Violence (Dis)Course*, *supra* note 4, at 1080 (citing DEL MARTIN, *BATTERED WIVES* 44 (1976)) (describing the man from whom the white victim must be protected as a “brute”). See also ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 106 (1987) (describing historical efforts by feminists to protect women from male “brutishness” in the home).

113. See *supra* Part II.

114. See Fenton, *supra* note 10, at 20 (discussing the role of racist ideologies in protecting white men's sexual access to both white and black women).

of fugue state and often left her wide-eyed and clearly traumatized as she recounted harrowing episodes of abuse.¹¹⁵ Her vulnerability was underscored by Steve's allegation that she had attempted suicide during their relationship.¹¹⁶ As a United States-born, English-speaking, semi-professional, employed woman, she also appeared more assimilated (white) than anticipated by stereotypes about Latinas.¹¹⁷ Nonetheless, the judge viewed Steve as less of a future danger than Jerome, although he too was guilty of serious domestic abuse, and took evidence similar to that which was provided against Steve more seriously when it was presented against Jerome.

In discussing these cases with others, people have asked me if Jerome's appearance helped explain the difference in the judge's response; specifically, if Jerome appeared in family court like a "thug" in his dress or manner.¹¹⁸ He did not. Nor did he appear like a corporate business executive, in a suit and a tie.¹¹⁹ He was similar to Sandra in manner and appearance: a casually but appropriately dressed individual who handled himself in a confident and straightforward manner; he and Sandra were also physically fit. However, while Sandra's persona did not conform to the perfect victim, Jerome's did not conform to the image of the neutered Good Black Man.¹²⁰ In a narrow repertoire of available images, this left him as the Bad Black Man—the quintessential perceivable perpetrator. With this image unmitigated by factors like those favoring Steve, the judge determined that Jerome posed an ongoing threat to Sandra and their child such that

115. See Meier, *supra* note 34, at 691 (noting many victims are suffering from post-traumatic stress disorder while in court, which can distort their affect).

116. See *supra* Part II.

117. See *supra* Part II.

118. I interpret this question to ask if Jerome wore clothing and accessories associated with hip-hop and African American youth culture. Other authors have considered the racial politics of clothing. See, e.g., Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 49–50 (1994) (“[S]eemingly inconsequential acts like listening to rap and wearing hip hop fashions constitute a means of racial affiliation and identification.”); Onwuachi-Willig, *supra* note 97 (discussing the racial implications of clothing policies for NBA players).

119. See PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* 6 (1999) (describing how the book's subject, Larry Mungin, often dressed in professional business attire rather than casual clothes when out and about in his neighborhood in order to signal he was a “good” black man and put his white neighbors at ease); but see Mary Jo Wiggins, *Race, Class, and Suburbia: The Modern Black Suburb as a ‘Race-Making Situation’*, 35 U. MICH. J.L. REFORM 749, 797–98 (2002) (detailing how professionally dressed blacks are still treated with suspicion by whites).

120. Unlike Jerome, “[the] Good Black Man is ‘passive, nonassertive, and nonaggressive. He has made a virtue of identification with the aggressor, and he has adopted an ingratiating and compliant manner.’” Cooper, *Against Bipolar Black Masculinity*, *supra* note 8, at 881 (citing BELL HOOKS, *WE REAL COOL: BLACK MEN AND MASCULINITY* 42 (2004)).

supervised visitation was required.¹²¹ While we cannot know precisely how the judge reached his decision, the routine operation of stereotype and the difference in outcomes in the two cases suggests that no matter how right the result in Sandra's case in terms of evidence admitted about Jerome's propensity for violence, Sandra received the orders she requested for the wrong reasons.¹²² Similarly, it suggests that Madeline was not awarded supervised visitation and was treated as blameworthy by the judge for reasons unrelated to the substance of her case.¹²³ Only an analysis of the performed intersectional identities of all the actors in these cases—including perpetrators as well as victims—begins to unravel the differences in their outcomes. These results also suggest the importance of keeping in mind a structural analysis of relative privilege as well as subordination within the expanded intersectional approach laid out thus far.

C. Relative Privilege and the Victim–Perpetrator Dichotomy

In extending the intersectional frame to consider the performed intersectional identities of both victim and perpetrator in relation to one another and in relation to outcomes, it is important to distinguish status advantages associated with structural privilege from situational privileges, and to distinguish individuals from the norms and stereotypes to which they are subjected.¹²⁴ For example, because the operation of stereotypes rather than facts of the abuse help explain the difference in outcomes in Sandra and Madeline's cases, the types of stereotypes attaching to Sandra's identity as an African American woman could be understood as privileging her relative to Jerome, whose identity as an African American man is vulnerable to stereotypes of criminality more in keeping with a perpetrator of domestic

121. See *supra* Part II (contrasting the visitation orders received by Sandra to those received by Madeline). Notably, Jerome would not have benefited from Sandra's status as a woman of color in the way that Steve may have benefited if Steve were perceived by the judge as white. See Fenton, *supra* note 10, at 20 (distinguishing the historical function of racist ideology for black and white men; white men control black men's access to black, as well as white, women). In addition, Jerome's criminal history may have been perceived differently than Steve's if the judge saw Steve as white. A study by sociologist Devah Pager in the employment context, for example, suggests that employers take the criminal convictions of white applicants less seriously than those of blacks. See DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 98 (2007) ("Blacks are less than half as likely to receive consideration by employers than equally qualified whites, and black nonoffenders fare no better than even those whites with prior felony convictions.").

122. See Rachlinski et al., *supra* note 35 (discussing the operation of implicit bias in judicial decision-making).

123. See *id.*

124. Melissa McEwan, *Feminism 101: Situational and Relative Privilege*, SHAKESVILLE (Mar. 30, 2011), <http://www.shakesville.com/2011/03/feminism-101-situational-and-relative.html> (explaining situational as opposed to relative privilege).

violence.¹²⁵ However, this analysis also suggests that Sandra's success in the family law case was not based on any immutable characteristic that she possessed. Instead, she possessed, at most, a situational advantage that arose *despite* conduct and intersectional gender and racial stereotypes that might otherwise have distinguished her from a victim deserving of assistance, and *because of* sexual and racial stereotypes applied to Jerome.

In contrast, white women possess, at a minimum, the putative "skin privilege" of whiteness.¹²⁶ This means that advantages that white women experience related to race are not only situational, but also structural.¹²⁷ More specifically, when white women make claims based on domestic violence, they do not have to first overcome racial stereotypes that tend to defeat these claims (as black women do), or appear to fit within racial stereotypes more conducive to being viewed as victims (as Latinas do). Instead, they are likely to be viewed as race-neutral in a way that facilitates their claims.¹²⁸

This is different, however, from possessing the power of the perfect victim trope. Rather, those to whom whiteness is ascribed have the opportunity to benefit.¹²⁹ Accordingly, although white women may be materially as well as putatively advantaged by the perfect victim stereotype, the stereotype is designed to protect hierarchy supporting white male privilege, not white women as individuals.¹³⁰ Like other individuals who bring claims as victims of domestic violence, white women must appear opposite a perceivable perpetrator in order to get relief. Thus, individual white women bringing domestic violence claims can and should be analyzed in relation to other parties and to intersecting identities and stereotypes, and their identities should not be conflated with the perfect victim.¹³¹

125. This is not to suggest that black women are not subject to stereotypes of criminality, but rather that those stereotypes are different than the ones applied to black men. *See, e.g.*, COLLINS, *supra* note 44, at 5 (discussing stereotypical images of black women).

126. *See* Rich, *supra* note 78, at 1517 (discussing putative whiteness).

127. *See* Carbado, *Straight*, *supra* note 76, at 78 (pointing out, "[r]acism requires white privilege").

128. *See* Cooper, *Against Bipolar Black Masculinity*, *supra* note 8, at 871 ("Because the scaling of bodies creates a normative status within each identity category and ranks others against that norm, it renders invisible everyday norms that subordinate people with certain identity statuses.").

129. *See* Rich, *supra* note 78, at 1517 (distinguishing between the appearance of whiteness and ascription of racial privilege). *See also* John O. Calmore, *Whiteness as Audition and Blackness as Performance: Status Protest from the Margin*, 18 WASH. U. J.L. & POL'Y 99, 106 (2005) (distinguishing privilege from identity, and asserting that "dominant whiteness" is not an individual identity).

130. *See* Cooper, *Against Bipolar Black Masculinity*, *supra* note 8, at 871 (contending that western society is founded on the "scaling of bodies"—a hierarchy of identities with white, Christian, heterosexual male identity at the apex).

131. *See generally* Catharine A. MacKinnon, *From Practice to Theory, or What Is a White*

These distinctions between types of privilege are not intended to diminish the importance of situational as well as more stable forms of status privilege. Consideration of the performance of identity shows that analyzing situational privilege is central to illuminating the operation of the perfect victim trope and the victim–perpetrator dichotomy; without it, for example, the basis for Sandra’s success in family court is obscured. Moreover, these forms are interrelated and context-specific.¹³² There is a structural disadvantage created when categories associated with privilege morph into subordinating constructs through stereotype: Jerome was disadvantaged in court *as a black man* if he was judged based on stereotypes rather than legally relevant facts.¹³³ Yet, the same racial identity may have operated to his advantage when he abused Sandra during their relationship because, in addition to her concern that he might retaliate against her for reporting the abuse,¹³⁴ she was undoubtedly aware that he might face discriminatory treatment by law enforcement if she cooperated with police.¹³⁵

Moreover, that Sandra battled the perfect victim trope despite her situational advantage in the family law case was evidenced during Jerome’s criminal trial. There, in light of strong facts in support of a conviction,¹³⁶ the proffered defense was that Sandra was not a deserving victim—whether because she “deserved what she got” or because she did not deserve redress for the harm received—and thus was not a victim at all. The fact that Sandra had fought back on previous occasions was used to bolster this commonplace defense strategy.¹³⁷ The police officer who charged Sandra with resisting arrest testified effectively in support of this theory, seemingly

Woman Anyway?, 4 YALE J.L. & FEMINISM 13, 13 (1991) (advocating for an anti-essentialist approach to analyzing white women). See also Kimberlé W. Crenshaw, *Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality*, 46 TULSA L. REV. 151 (2010) (detailing the synergies between the anti-essentialism of MacKinnon’s radical “dominance” feminism and intersectionality); Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 257 (2002) (proposing white women as an example of “hybrid-intersectionality”). But see Sumi Cho, *Understanding White Women’s Ambivalence Towards Affirmative Action: Theorizing Political Accountability in Coalitions*, 71 UMKC L. REV. 399, 405–06 (2002) (arguing that applying intersectionality to white women risks minimizing their complicity in racism).

132. See, e.g., Rich, *supra* note 78 (exploring the context-specific nature of white privilege).

133. See Cooper, *Against Bipolar Black Masculinity*, *supra* note 8 (establishing the intersectional subordination of heterosexual black men).

134. See *supra* Part II.

135. See Goodmark, *When She Fights Back*, *supra* note 4, at 98 (“African American women may feel particularly pressured to keep their affairs private . . . [because they] may feel that to break the silence is to bring further shame and disapprobation on African American men from the wider society.”).

136. See *supra* Part II. Eyewitnesses saw Jerome assault Sandra and he was arrested at the location immediately afterwards.

137. See, e.g., Fenton, *supra* note 10, at 32–33 (discussing the use of victim-bashing against now-iconic domestic violence victim Nicole Brown Simpson in the O.J. Simpson criminal trial).

in part because of her own feelings about Sandra's behavior. Unlike the officers who testified about Jerome's arrests, she did not have to refer to her police report even though the incident described in her testimony had happened more than a year before, and her irritation at the memory was obvious in her demeanor and inflection. Testimony was also admitted from witnesses who had, on other occasions, overheard Sandra cursing and yelling at Jerome. In this way, Sandra, not Jerome, appeared to be on trial, and her testimony appeared to be offered in her own defense.

The defense's strategy may have been partly successful—as mentioned above, the jury found Jerome guilty of a reduced domestic violence charge.¹³⁸ Thus, part of the dichotomous relationship between victims and perpetrators is that each of the component parts is necessary to the other: if either fails, they both fail. Moreover, both are infused with stereotypes. Nonetheless, analyzing relative privilege should not be confused with relativity. To the extent Jerome was convicted (albeit of a lesser charge), and Sandra was successful in obtaining all the orders she sought in family court, she did not fail to meet the criteria for victimhood completely. What is unclear is the tipping point: at what juncture would Sandra have been too unlike the perfect victim to succeed against Jerome's perpetrator? Similarly, in Madeline and Steve's case, what difference in the identity or performance of any party or witness would have changed the outcome? To explore these questions, we need more data and an approach that facilitates studying both relative and situational privilege without conflating or confusing the two, or their significance to accountability for subordination.¹³⁹ A related question also arises: how to make meaningful connections between forms of interlocking subordination (e.g., racism, sexism, and heterosexism) while continuing to develop a sufficiently nuanced analysis of the performed intersectionality of both victims and perpetrators.

138. See *supra* note 20. Evidence about the “worthiness” of victims such as their criminal history is generally believed to impact jury verdicts, although the exact nature of the impact is unclear. See, e.g., Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343 (2003) (analyzing studies of jury decision-making in capital murder cases). For example, while most jurors report that they were not influenced by evidence of victim characteristics, studies of deliberations in capital murder cases “suggest a fairly strong correlation between a juror’s perception that the victim had a troubled life . . . and an inclination to choose a life sentence rather than a death sentence.” *Id.* at 354.

139. See Cooper, *Against Bipolar Black Masculinity*, *supra* note 8, at 870–71 (“Given that the singly and multiply subordinated share a common enemy in the scaling of bodies, we can address the need for an ethic of action that forges broad antsubordination coalitions.”). See also Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other -isms)*, 1991 DUKE L.J. 397 (1991) (cautioning against comparing “-isms,” which tends to minimize the significance of difference and reinforce racial and other hierarchies).

IV. REMAPPING INTERSECTIONALITY

A. *Categorical Complexity and Intersectional Method*

Because the purpose of intersectionality is to render visible those experiences obscured by examining single categories of subordination alone, the purpose of intersectional method is to show the interrelationship of subordinating categories, thereby exposing the operation of power in everyday life.¹⁴⁰ However, traditional intersectional method is limited in its ability to accomplish this because of the way it minimizes the complexity of categories. Adding perpetrators and performance in the case studies above demonstrates the benefits of adding what sociologist Leslie McCall describes as intercategorical comparisons to conventional intersectional method.¹⁴¹

As McCall explains, the prototypical approach to studying intersectionality is to elaborate, through narrative or case study, the experiences of “a single social group at a neglected point of intersection of multiple master categories or a particular social setting or ideological construction, or both.”¹⁴² McCall refers to this approach as intracategorical because it is centered on the intersections existing *within* a defined social group—in effect, creating a new category located at the intersection of other categories and examining the dynamics of that intersection.¹⁴³ She argues that this approach typically minimizes complexity in two ways. First, only one dimension of each intersectional category is studied.¹⁴⁴ For example, considered individually within the category of victims of domestic violence, Sandra and Madeline exist at the intersection of multiple categories, but each represent only one dimension of the categories of gender, race/ethnicity, class, and sexuality. When considered together, they represent an intergroup comparison on the dimension of race/ethnicity only, as this is the only significant category in which they differ. Second, within the context of any particular intersectional analysis, other social groups are typically studied from the limited vantage point of the primary subject category rather than in terms of their own intersectional complexity; they enter “as background

140. See Crenshaw, *Mapping the Margins*, *supra* note 44, at 1297 (describing intersectionality as “unveil[ing] the processes of subordination and the various ways those processes are experienced by people who are subordinated and people who are privileged by them”).

141. See McCall, *supra* note 40, at 1773–74 (describing inter and intracategorical approaches in terms of “how they understand and use analytical categories to explore the complexity of intersectionality in social life”).

142. See *id.* at 1780.

143. *Id.* at 1781 (noting the groups being studied are often “‘new’ groups in the sense of having been named, defined, or elaborated upon in the process of deconstructing the original dimensions of the master category”).

144. *Id.* at 1781.

contextual or discursive or ideological factors[.]”¹⁴⁵ Thus, in domestic violence scholarship, the problems faced by low-income, heterosexual women of color as victims of domestic violence are typically examined by juxtaposing their experiences with the perfect victim, or with a gesture toward white, middle-class heterosexual women, rather than comparison to white, low-income heterosexual women, heterosexual middle-class women of color, and so on.¹⁴⁶ The intersectional experiences of domestic violence victims in relation to perpetrators are rarely studied at all.¹⁴⁷

In contrast to intracategorical methods, the intercategorical approach is contextual and comparative.¹⁴⁸ Inequality between existing social groups is assumed, without specifying which categories are of consequence at any given time.¹⁴⁹ Therefore, intercategorical method is geared toward discerning which categories or points of intersection are significant in particular contexts, and identifying changes in relationships between social groups over time.¹⁵⁰ The premise is that understanding these relationships requires studying multiple dimensions of any social category subject to analysis. Thus, the inclusion of gender as a category of analysis requires the study of both women and men; inclusion of race requires studying multiple racial/ethnic groups; including both race and gender requires examining the dimensions of each, and their intersections, and so on.¹⁵¹ Following the same logic, studying victims requires studying perpetrators along multiple dimensions of identity as well. In this approach, complexity is managed by strategies for analyzing data,¹⁵² and as a practical matter, by the data

145. *Id.* at 1785–86.

146. *See id.* at 1781 (noting scholars using the intracategorical method “may aspire to situate subjects within the full network of relationships that define their social locations, but usually it is only possible to situate them from the partial perspective of the particular social group under study (i.e., if an Arab woman is the subject of analysis, then issues of race and nationality are more fully examined from the perspective of Arab women than from the perspective of Arab men)”).

147. An exception is an article by Devon Carbado detailing the discursive construction of false dichotomies of race and gender in the O.J. Simpson criminal trial. Devon W. Carbado, *The Construction of O.J. Simpson as a Racial Victim*, 32 HARV. C.R.-C.L. L. REV. 49 (1997). *See also* Fenton, *supra* note 10 (discussing the discursive construction of race and gender).

148. McCall, *supra* note 40, at 1786 (characterizing the approach taken by intercategorical researchers as focused “on the complexity of relationships among multiple social groups within and across analytical categories and not on complexities within single social groups, single categories, or both”).

149. *Id.* at 1785 (describing the intercategorical approach as treating identity categories as provisional, and in some formulations treating the question of “whether there are complex differences and inequalities between groups . . . as a hypothesis”).

150. *Id.*

151. *Id.* at 1786.

152. *Id.* at 1787 (explaining that data is analyzed in “studies of this kind by what at first appears to be a reductionist process—reducing the analysis to one or two between-group relationships at a time—but what in the end is a synthetic and holistic process that brings the various

available.¹⁵³

Both of these methods have strengths and drawbacks. The strength of the intracategorical approach is its depth of field: the centering and detailed elucidation of previously unknown or unacknowledged experiences of subordination.¹⁵⁴ Scholarship on women's acts of agency in the context of domestic violence is an excellent example of the richness of this work. For example, Goodmark's work on victims who fight back examines the issue from the perspective of African American women and lesbians, two groups of women who she argues are more likely to engage in physical resistance to abuse due to structural subordination, and thus more likely to be excluded from domestic violence discourse due to stereotypes about passive victims.¹⁵⁵ This approach is invaluable in identifying the negative impacts of the perfect victim stereotype on victims whom it further marginalizes. However, as demonstrated by the case studies of Sandra and Jerome and Madeline and Steve, studying a single dimension of the primary subject category under scrutiny (here, domestic violence victims) cannot fully capture, explain, or correct for the problems associated with the category (e.g., the perfect victim trope).¹⁵⁶ That requires an intercategorical approach, which is comparative along multiple dimensions of the category under study, and here includes perpetrators as well as victims.

The strengths of the intercategorical approach are twofold. First, it is able to capture relative advantage and disadvantage within and between multiple social groups, and in relation to specific social conditions or systems.¹⁵⁷ For example, in a large-scale intercategorical study of wage inequality in regional United States economies across dimensions of race, gender, and class, McCall found that patterns of inequality differed depending on the type of economy in the region.¹⁵⁸ Post-industrial economies exhibited greater inequality by race and class than by gender, while regions with recent deindustrialization showed greater gender inequality.¹⁵⁹ In addition, when broken down by class, there was more gender inequality among college-educated workers in postindustrial

pieces of the analysis together”).

153. *Id.* at 1787 n.21 (noting the creation of new racial and ethnic categories in the United States census has allowed researchers to incorporate “increasing numbers and combinations of racial, ethnic, and national groups in their analyses”).

154. *See* Dhamoon, *supra* note 17, at 234 (observing the point of this elucidation is not only the representation of identity or categories of difference, but the exposure of “techniques of power”).

155. Goodmark, *When She Fights Back*, *supra* note 4.

156. *See supra* Part II (detailing how conventional intersectional analysis fails to explain the different outcomes in these cases).

157. *See* McCall, *supra* note 40, at 1788–90 (describing studies that employ this approach).

158. *Id.* at 1789–90.

159. *Id.*

economies than in recently deindustrialized economies; in the latter, there was greater gender inequality among non-college educated workers.¹⁶⁰ Thus, not only were working women shown to be disadvantaged in varying degrees relative to working men, some women were shown to be disadvantaged relative to other women in certain economic environments.¹⁶¹

Second, as also illustrated by the example above, the intercategory method is able to distinguish between conditions where categories intersect and where they do not. As intersectionality scholar Jennifer Nash recently observed, identifying “the conditions that permit race and gender (and other categories) to intersect would allow us to better understand the mechanisms by which structures of domination are bolstered and reproduced.”¹⁶² Intercategory research methods can accomplish this task. Moreover, identifying such mechanisms and their effects allows for strategizing more accurately targeted solutions. Using the wage inequality research data discussed previously, for example, McCall proposes that post-industrial economies might benefit from non-gender-specific strategies for reducing wage inequality, like living wage campaigns, while deindustrialized regions would benefit from comparative worth or affirmative action approaches.¹⁶³ In contrast, intracategory approaches may result in recommendations that are only partial solutions. Proposals aimed at making courts more responsive to domestic violence victims without considering the ways in which stereotypes about perpetrators affect outcomes, for example, are unlikely to be completely effective.

On the other hand, complexity grows exponentially as intercategory comparisons are added. Applications of intercategory method may become unmanageable or incoherent; thus, researchers will inevitably look for tradeoffs on the level of complexity in order to make the project more manageable.¹⁶⁴ McCall herself notes that it is difficult to undertake intercategory research or to publish the results due to the size of the project.¹⁶⁵ Thus, the point is not to suggest that studying intersectionality requires fully engaging intercategory methods, but that adding intercategory comparisons leads to a more effective analysis of

160. *Id.* at 1790.

161. *Id.*

162. Nash, *supra* note 40, at 469.

163. *See* McCall, *supra* note 40, at 1790.

164. *Id.* at 1786. Both methods also involve tradeoffs on the level of complexity that may be sought along any dimension. For example, greater differentiation along racial lines might require reducing complexity along class lines. *See id.* at 1786–87 (“In this respect, intercategory researchers face some of the same trade-offs between scale and coherence or difference and sameness that intracategory researchers face in determining the appropriate level of detail for their studies.”).

165. *Id.* at 1787–88.

intersectional subordination.

The case studies of Sandra and Jerome and Madeline and Steve demonstrate the contribution made by even a modest intercategory effort. Examining the intersectional identities of both perpetrators and victims reveals the paradoxically illusory and powerful nature of the perfect victim trope, including the way its constituent parts—although culturally fused with privilege—can be disaggregated and operate independently of one another, or be suspended, in different contexts. Thus, Sandra, neither dependent nor passive nor white, was successful opposite her African American ex-boyfriend, while Madeline was unsuccessful opposite her emasculated ex-husband, although appearing more like the perfect victim than Sandra. However, while the judge may have refused to issue orders for supervised visitation because Steve did not appear like the stereotypical perpetrator, this does not mean that the perfect victim stereotype had no effect on the outcome of Madeline's family law case. A perceived departure from the characteristics of the perfect victim could explain why the judge also treated Madeline as culpable for Steve's past abuse.¹⁶⁶ In this way, the perfect victim stereotype may function like the Good Black Man/Bad Black Man binary to justify hierarchies of inclusion and exclusion, wherein the exclusion of victims that do not conform to the stereotype is justified by the fact that some victims—like Sandra, who also battled the perfect victim trope—are more successful. To the extent that Madeline's exclusion from the category of deserving victims turned on the fact that she worked and was not dependent on Steve financially, the disconnect between gender stereotypes and the economic dimensions of domestic violence is also revealed.¹⁶⁷ Moreover, an intercategory analysis of the outcomes in Sandra and Madeline's cases that includes the perpetrators offers the opportunity for drawing a broader conclusion from the comparison, namely that *there is no ideal regarding victims operating consistently in the law*. Rather, the judge favored neither woman and instead used a complex lens of social identity to "see" a perpetrator in one case, and not so much in the other.

Thus, an intercategory analysis of the perfect victim leads toward a better understanding of the interplay of multiple axes of subordination and privilege, while also bringing into clearer view the workings of single categories like gender on the one hand and race on the other. It also hints at the possibility for a much-needed infusion of economic issues into the

166. See *supra* Part II (explaining that the judge imposed parenting classes on Madeline and treated her as culpable for the abuse).

167. See Angela P. Harris, *Theorizing Class, Gender, and the Law: Three Approaches*, 72 LAW & CONTEMP. PROBS. 37, 42–44 (2009) (discussing the interconnected nature of class, race, and gender). See also Weissman, *supra* note 71 (detailing the failure of domestic violence theories to adequately address the economic dimensions of abuse).

analysis of domestic violence.¹⁶⁸ In addition, an intercategorical approach to examining the outcomes for victims demonstrates the importance of considering the multi-dimensionality of sex, gender, and sexuality.

As detailed by Richard Delgado, racial/ethnic stereotypes like those underlying the victim–perpetrator dichotomy support taboos that protect race and gender privilege.¹⁶⁹ Most relevant here is the taboo of interracial sex, which is supported by stereotypes that pathologize the sexualities of men and women of color.¹⁷⁰ Thus, as Delgado and other Critical Race Scholars have observed, sexuality is a lynchpin in support of heterosexual white male privilege.¹⁷¹ Yet, scholarship about domestic violence rarely considers sexuality as relevant to case outcomes outside the context of LGBTQ¹⁷² relationship violence; similarly, scholarship about heterosexual relationship violence tends to treat gender as sex-conforming.¹⁷³ Examining both sides of the victim–perpetrator dichotomy highlights the importance of deconstructing and analyzing gender in terms of sex (e.g., through the performance of gender identity) and sexuality (e.g., through the sexualization of race and the racialization of sexuality) in the context of heterosexual relationship violence as well. Moreover, the benefits of using an intercategorical approach suggest that studying sexuality in both contexts and across multiple dimensions while including both victims and perpetrators would strengthen understanding of the ways in which heteronormativity, racism, and gender supremacy function both together and separately.

However, while application of an intercategorical approach shows the benefit of building an analysis of the more general workings of power

168. See Weissman, *supra* note 71 (urging scholars to examine the class and economic issues related to domestic violence).

169. See Richard Delgado, *Rodrigo's Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 VAND. L. REV. 1691, 1720 (2007) (describing the taboos applicable to racial/ethnic groups based on what the dominant society needs to extract from the group at any given time).

170. *Id.* at 1720–24 (describing taboos regarding interracial sexual contact that, while varying by race/ethnicity, all characterize men of color as sexually dangerous or undesirable).

171. See, e.g., Fenton, *supra* note 10, at 19 (characterizing stereotypes of race and gender as “unified around the common axis of sexuality”). See also Delgado, *supra* note 169, at 1719 (contending that whites impose taboos to control one another: “If you want people to avoid something, you induce a feeling of disgust. You tell them it’s slimy. Or dirty. Or bad for you. Then, they’ll avoid it. It will be instinctive, something they do without even thinking about it, like recoiling from a snake.”).

172. Lesbian, gay, bisexual, transgender, and questioning. As used in this Article, LGBTQ is also intended to include intersex and other non-heteronormative persons who identify by other terms.

173. Feminists do, of course, analyze domestic violence in heterosexual relationships as gendered violence. See, e.g., ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 5 (2000) [hereinafter SCHNEIDER, *BATTERED WOMEN*] (describing the relationship between heterosexual intimate partner violence and gender inequality); see also Weissman, *supra* note 71 (discussing the economic aspect of hegemonic male gender roles as a potential cause of domestic violence).

through the systematic comparison of multiple dimensions of privilege and subordination, existing approaches to intersectional analysis that limit categorical complexity also tend to inhibit making connections within and between categories. Thus, integrating the benefits of intra- and intercategorical approaches requires rethinking the ways in which categories are organized in relation to one another within the analytical structure of intersectionality. The framework of “particularity” and “generality” is helpful for interpreting the significance of these issues for domestic violence theory and practice.

B. Complexity, Particularity, and Generality

Feminist theorist Elizabeth Schneider coined the terms “particularity” and “generality” to describe the relationship between women’s individualized experiences of domestic violence, including those analyzed by intersectionality (particularity), and larger social problems of violence and subordination (generality).¹⁷⁴ According to Schneider, particularity requires “describing the complexity of women’s experiences non-simplistically, accurately, and in greater detail.” At the same time, Schneider argues, those experiences must be connected to “the more ‘general’ dimensions of the problem.”¹⁷⁵ Schneider identifies two components of the general: “first, the way in which [women’s experience of domestic violence] must be viewed as linked to larger problems of societal violence; and, second, as linked to women’s subordination in general.”¹⁷⁶

The relationship between particularity and generality is dialectical as well as interdependent in nature.¹⁷⁷ The inclusiveness of the particular informs the rigor and utility of an analysis of the general problem; the identification of the general problem helps determine the way particular experiences are identified as relevant and the way they are understood. For example, understandings of domestic violence based on universalized narratives drawn from the experiences of white, middle-class, heterosexual women have limited the explanatory power of theories about why domestic violence happens, and to whom.¹⁷⁸ Paradoxically, stereotypes attributing the

174. See generally Schneider, *Particularity and Generality*, *supra* note 54 (introducing the concepts of particularity and generality). See also SCHNEIDER, *BATTERED WOMEN*, *supra* note 173, at 59–73 (discussing generality and particularity).

175. Schneider, *Particularity and Generality*, *supra* note 54, at 527.

176. *Id.*

177. See *id.* at 528 (relating the dialectic between generality and particularity to a similar dialectic between theory and practice).

178. See *supra* Part II (discussing the origins of the perfect victim trope in domestic violence legal discourse). See also SCHNEIDER, *BATTERED WOMEN*, *supra* note 173, at 62–71 (discussing the need for an expansion of feminist conceptions of battering).

problem of domestic violence to the working and lower-classes also limit understanding of the problem.¹⁷⁹ As explained, intersectionality challenges the first approach and complicates the second with more particularized descriptions of domestic violence based on the experiences of individuals subject to multiple forms of subordination.¹⁸⁰ However, as Schneider explains, the construction of a battered woman identity is in itself “particular,”¹⁸¹ and focusing solely on particularity is problematic for reasons other than inclusivity:

While the development of a distinct legal construct concerning male battering of women has been theoretically important and strategically necessary, moving to the more general level of violence between intimates and women’s subordination can illuminate theoretical and strategic issues that advance our work. Paradoxically, this very emphasis on particularity, on the distinctiveness of battered women’s experiences, has had an unintended effect of compounding the problems of battered women because we have insufficiently connected battered women’s experiences to both the larger and more general problems of women and to those of violence between intimates.¹⁸²

According to Schneider, problems for battered women created by an over-reliance on a particularized battered woman identity include a persistent focus by media and policymakers “on the individual woman and her ‘pathology’ instead of on the batterer and the social structures that support the oppression of women and that glorify or otherwise condone violence.”¹⁸³ Therefore, Schneider argues that feminists should strengthen domestic violence theory and practice by being simultaneously more particular in elucidating the diversity of individual experiences of domestic violence and

179. See PTACEK, *supra* note 53, at 20–21 (noting that feminists promoted universalized narratives partly in response to these stereotypes). See also Elizabeth L. MacDowell, *When Reading Between the Lines Is Not Enough: Lessons from Media Coverage of a Domestic Violence Homicide-Suicide*, 17 AM. U. J. GENDER SOC. POL’Y & L. 269, 285 (2009) [hereinafter MacDowell, *Reading Between the Lines*] (noting that both approaches reinforce hegemonic narratives about domestic violence).

180. See *supra* Part II (discussing the contribution of intersectionality theory to understandings of women’s experiences of domestic violence).

181. See SCHNEIDER, BATTERED WOMEN, *supra* note 173, at 60–62 (detailing problems associated with the battered woman identity, including its reductive, totalizing nature (reducing the entirety of a victim’s identity to the experience of battering), its rhetorical effect of locating the problem in the victim (as opposed to suggesting she has been subjected to an external harm), and its association with negative stereotypes of helplessness rather than resistance).

182. *Id.* at 72.

183. *Id.* at 72. But see MacDowell, *Reading Between the Lines*, *supra* note 179, at 273–76 (detailing how routine production of news, rather than failed feminist accounts, results in hegemonic representations of domestic violence crimes).

more concerted in their effort to connect those experiences to more general issues of subordination.¹⁸⁴

As detailed above, however, the intracategorical approach traditionally used by intersectional theorists limits the analysis of particularity (and thus generality) in at least three interrelated ways. First, the analysis of particularity is limited because intracategorical approaches typically focus on single dimensions of multiple categories (like the victim half of the victim–perpetrator dichotomy) rather than multiple dimensions of each.¹⁸⁵ Second, the analysis of particularity is limited because the focus of intracategorical inquiry is typically on individuals subject to multiple intersecting axes of subordination (like low-income women of color) rather than persons subject to intersections of privilege and subordination (like middle-class, heterosexual men of color).¹⁸⁶ As a result, to the extent that intracategorical analysis includes an analysis of privilege, it is typically a byproduct rather than a focus of the inquiry and—lacking a comparative dimension—is necessarily incomplete.¹⁸⁷ Third, the intracategorical approach limits the development of particularity because, to the extent that it results in newly-analyzed categories of experience (like more detailed accounts of the experiences of particular women of color or sexual minorities, or as recommended herein, the experiences of perpetrators), it lacks a methodological component for making connections between new categories, and between new and other, pre-existing categories. Simply adding additional, more detailed accounts does not solve this problem, or—absent meaningful connections at the level of particularity—result in a coherent, generalized account. Thus, in addition to more detailed accounts, it is necessary to add a systematic, comparative component to intersectional analysis. To cast further light on this problem, it is useful to consider particularity and generality in terms of a spatial analogy in which they have vertical and horizontal aspects. These aspects are evident in feminist theory

184. SCHNEIDER, BATTERED WOMEN, *supra* note 173, at 59.

185. See *supra* Part IV (comparing inter and intracategorical approaches to studying intersectionality).

186. See *supra* Part IV. See also Cooper, *Against Bipolar Black Masculinity*, *supra* note 8, at 856; Ehrenreich, *supra* note 131, at 272–73 (arguing the analyses of most intersectionality theorists “imply that the intersectional effect is relevant only when two *subordinated* statuses are interacting to affect the individual (or subgroup)”); Hutchinson, *Identity Crisis*, *supra* note 9, at 311–12 (observing, “intersectionality usually focuses primarily upon the reality of intersecting subordination”).

187. See Sylvia Walby et al., *Intersectionality: Multiple Inequalities in Social Theory*, 46 *SOC.* 224, 227 (2012) (arguing that by focusing on agency within disadvantaged groups intersectionality loses sight of power and racist structures). One might object that this is not a problem of intracategorical analysis per se, but simply a shortcoming of the literature. In other words, intracategorical research *could* examine intersections of privilege and subordination, but generally does not. Thus, it is unclear how it limits the development of particularity. However, while intracategorical method *might* be used to explore relative privilege, it does not facilitate the type of comparative inquiry from which these intersections are revealed.

and in the dominant domestic violence discourse that feminist theory is responsible in part for shaping.

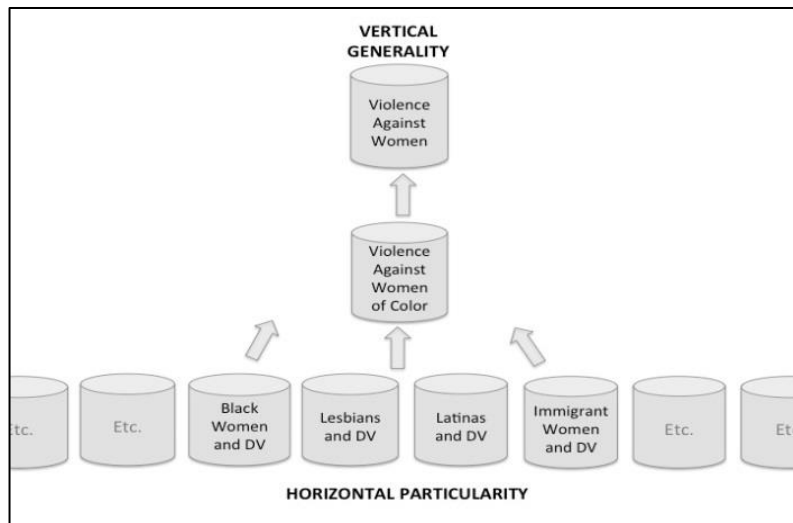
In their vertical aspect, particularity and generality can be viewed as a layered hierarchy of connections between categories, concepts, and issues that build from the most specific (or particular) at the base to the most general at the top. For example, the highest level of the general in a given line of reasoning about domestic violence might be family violence (including children and elders as well as intimate partners), violence against women, or some other more general category, under which are categories of increasing specificity, such as intimate partner violence, battering of women of color, and so on.¹⁸⁸ In contrast, the horizontal aspects of particularity and generality involve the development of categories that appear discrete in relation to one another.¹⁸⁹ This is illustrated by the categories of heterosexual and LGBTQ relationship violence. In feminist theory, law, and popular culture, domestic violence is generally synonymous with the abuse of women by men.¹⁹⁰ In turn, relationship violence involving same-sex or transgender individuals is typically categorized (and as noted above, analyzed) as distinct from heterosexual relationship violence, such that mutually exclusive categories based on sexual orientation and/or gender identity are created. Since they are generally considered distinct, these categories can be viewed as silos, horizontally arranged in relation to one another. Figure 1 illustrates the horizontal and vertical aspects of particularity and generality within a vertically constructed analysis.

188. In their vertical aspect, particularity and generality can also be conceptualized as the relationship between micro and macro level analyses and processes. Patricia Hill Collins, for example, distinguishes between intersectionality (which she defines as the analysis of particular forms of intersecting oppressions) and the organization of interlocking oppressions. COLLINS, *supra* note 44, at 18. Collins defines a matrix of domination as “the overall organization of hierarchical power relations for any society.” *Id.* at 299 (defining matrix in the glossary). Generality would include Collins’s matrix of domination, but also refers to less expansive constructs like violence against women.

189. Cf. Robert Westley, *Reparations and Symbiosis: Reclaiming the Remedial Focus*, 71 UMKC L. REV. 419, 423 (2002) (describing social group identities such as “woman” as multiplying with increasing specificity along a vertical axis, and social groups as proliferating along a horizontal axis as a result of the application of antiessentialist or intersectional theory). See also Ehrenreich, *supra* note 131, at 270 (describing the former as a problem of “infinite regress”).

190. See Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence*, 64 GEO. WASH. L. REV. 582, 614–15 (1996) (describing a “dominant domestic violence discourse” that equates domestic violence with heterosexual relationships); SCHNEIDER, BATTERED WOMEN, *supra* note 173, at 68 (“The mainstream domestic violence movement has long operated from a heterosexist perspective.”).

Figure 1



Absent a comparative method for linking categories, both the vertical and horizontal aspects of generality and particularity present dangers to the rigor and utility of domestic violence theory. The danger of the horizontal aspect lies in the apparent lack of relationship between categories. In their horizontal construction, categories multiply as islands of difference, with little or no basis for communication across differences that might lead to greater understanding, collective knowledge, or action.¹⁹¹ A danger of the vertical aspect lies in relating more particular categories, such as domestic violence against black women or Latinas, to more general categories, such as violence against women, without first relating them to each other. When moving from particularity to generality in this fashion, individuals or groups analyzed with particularity tend to remain mere *examples* of ways in which

191. There is also a problem of collective action in the theoretical collapsing of vertical categories, but (as explained below) as a result of exclusion rather than a lack of shared understanding. Cf. Westley, *supra* note 189, at 423 (describing both the vertical and horizontal aspects of identity theory as having tendencies that threaten collective action).

subordination happens, rather than usable *data* from which general principles regarding the operation of power structures like racism and heteropatriarchy can be extracted. For the same reason, the vertical aspect of particularity and generality also tends to perpetuate dominant narratives about domestic violence. This is one way to understand the tendency in feminist theory to conflate intimate partner violence against women and heterosexual battering: the particularity of categories that do not fit within the dominant narrative (like violence in lesbian relationships) has been left out of the more general analysis.¹⁹² This does not mean that groups outside the dominant narrative like lesbians, are never analyzed with particularity; as discussed above, lesbians have been the subject of careful intracategorical inquiry. However, absent a comparative methodology, the significance of their particular experiences tends to remain unincorporated into general accounts of domestic violence.¹⁹³

In this way, both the horizontal and vertical aspects of generality and particularity can result in the breakdown of domestic violence theory and praxis due to the failure of particularity. Returning to the prior examples, both the subsuming of particular experiences within dominant narratives (by which domestic violence is equated with violence within heterosexual relationships) and the isolation of horizontal categories (by which heterosexual and LGBTQ relationship violence are siloed) tend to omit lesbian women who are battered and not in heterosexual relationships from the dominant discourse about domestic violence. Intracategorical method cannot solve this problem because it lacks a comparative or other methodological element for linking categories. Moreover, the intersectional identities and experiences of perpetrators, including heterosexual men of color (like Steve and Jerome), are subject to even greater erasure from both the dominant discourse and critical theory about domestic violence because they are not typically identified as significant to the analysis of gender violence *as individuals*, and therefore are not analyzed with any particularity.¹⁹⁴ In each instance, the feminist analysis of gender and gender

192. See Goldfarb, *supra* note 190, at 603–04 (discussing the exclusion of gays and lesbians from feminist accounts of domestic violence that also fail to circumscribe the subject of their inquiry).

193. It is also the case that LGBTQ relationship violence tends to be under-analyzed, perhaps in part because it appears more particular than it really is in comparison to heterosexual relationship violence.

194. As described by Dowd:

[M]en have been largely absent from feminist theory as an object of gender analysis, and thus they have tended to be viewed in an essentialist, universal, undifferentiated way. Men have been viewed as a class or group, as a basis for comparison . . . ; as the source of subordination by virtue of gender privilege or abusive power . . . ; as beneficiaries of gender privilege by virtue of norms that presume men as the subject While this placement of men in feminist analysis is not unjustified, it reflects an acceptance of men, in most instances, as undifferentiated and as largely privileged by

violence is necessarily rendered incomplete. Thus, while more particularity is clearly needed, so is an analysis that facilitates comparisons across categories. While Schneider does not provide a method for doing so, or for linking particularity and generality,¹⁹⁵ insights gleaned from the intercategorical approach suggest that mapping the connections between particular intersectional experiences (like heterosexual and LGBTQ relationship violence, as well as victims and perpetrators) will be more successful than linking the particular to the general in the more individualized and unidimensional process typical of intracategorical approaches.

C. Theorizing from Particularity

Crenshaw referred to the project of centering and illuminating the intersectional nature of subordination as “mapping the margins” of dominant discourse about race and gender.¹⁹⁶ A more intercategorical approach to intersectionality involves revisiting the margins between social categories in order to map out the more complete, nuanced, and relational inquiry entailed. This remapping is facilitated by three significant shifts in the analytical structure of intersectional theory about domestic violence.

First, expanding the intersectional frame is best achieved by shifting from the vertical to the horizontal aspect of particularity and generality. Because more particularity is needed for an intercategorical analysis of the performed intersectional experiences of all parties to a domestic violence case, the importance of a horizontal analysis—one that can also grasp the relative nature of privilege and subordination—is increased. Building generality from particularity horizontally, by identifying linkages between and within categories of difference (like victims and perpetrators and the many subcategories that comprise them), rather than vertically by linking more particular categories to more general categories, concepts, or issues, will help theorists avoid inadvertently circumscribing the analysis. As discussed above, generality should be the sum of relevant parts. A horizontal analysis, while not entirely eradicating the danger of siloed categories, will be more likely to result in a robust generality by moving through, and remaining grounded within, particularity.

Second, an expanded intersectional frame is facilitated by a shift away from the *intersections* of subordinating categories to the *relationships between* the co-occurring intersectional identities of both the victim and the perpetrator. The cases of Sandra and Jerome and Madeline and Steve show

the gender system.

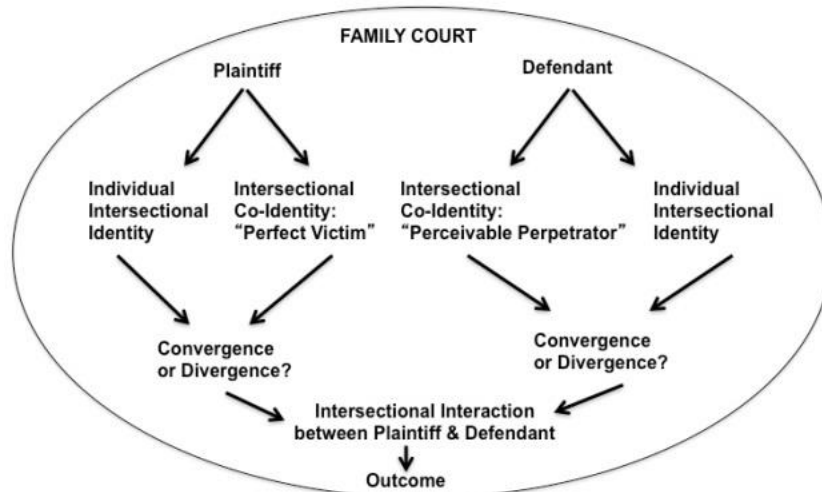
DOWD, *supra* note 77, at 13–14.

195. See *supra* note 174.

196. See Crenshaw, *Mapping the Margins*, *supra* note 44, at 1241.

that each individual party to a domestic violence case is subject to not only one preexisting intersectional identity, but also to the stereotypes and norms applicable to their role in the case. These co-identities demonstrate another dimension of particularity and generality: each intersectional identity exists in relation not only to the *general* master categories giving rise to the intersectional metaphor (e.g., race, gender, sexuality, class, etc.), but the categories *particular* to the given circumstances (e.g., those pertaining to the perfect victim and the perceivable perpetrator), and their performance of those categories. Thus, Sandra and Madeline performed their identities in family court with reference to the intersections of race, gender, sexuality, and class pertaining to both the perfect victim and to them as individual women of color. Similarly, Jerome and Steve performed their identities in relation to the categories and expectations pertaining to perpetrators as well as those applicable to them as men of color more generally. In turn, each party's relative success in the case depends on their performance (or, in the case of perpetrators, avoidance) of co-identity as well as the performance of the other party, significant witnesses, attorneys, and others. Figure 2 illustrates the relational nature of co-identity between plaintiff and defendant in a domestic violence case in family court.

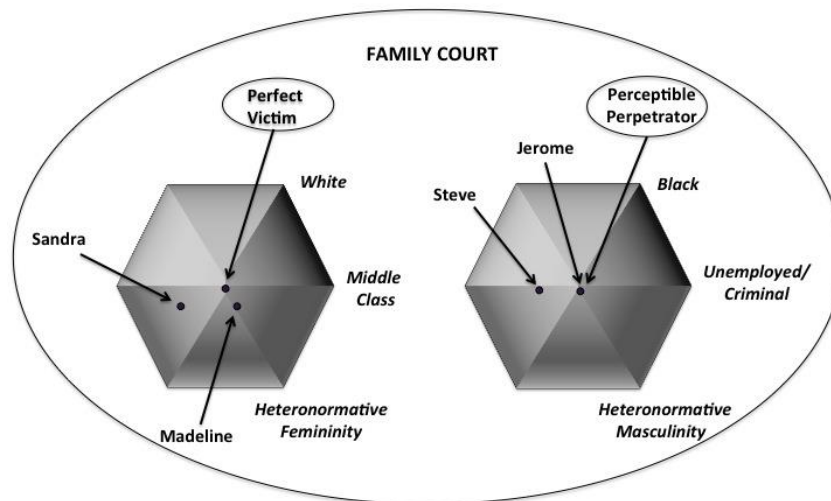
Figure 2



Third, this complexity of analysis requires a shift from the intersections of identity categories to the *interstices* created by the intersecting ideals, stereotypes, and norms constituting specific identities—in other words, to the *relative positions* of the identities of different subjects with respect to

those ideals, stereotypes, and norms. While a precise depiction of these relationships is probably impossible, Figure 3 offers a schematic rendering of the co-occurring and interdependent identities at issue in Sandra and Jerome's and Madeline and Steve's family court cases.

Figure 3



In Figure 3, each line within the two hexagons represents the ideal of a particular dimension of identity; distance from any particular line indicates the degree of removal from the ideal. Thus, the perfect victim is placed at the intersection of the identity structures that constitute her identity: she is white, middle-class, and heteronormative in her femininity. Sandra is close to middle-class and therefore situated fairly close to that line; phenotypically black and so distant from the white line; and does not present herself as a passive, docile woman, so also distant from the line indicating heteronormative femininity. In contrast, while Madeline has the same class position as Sandra, her performance of Latina identity arguably renders her somewhat closer to white, and also closer to heteronormative femininity. As for the men in these cases, Jerome closely matches the characteristics of the perceivable perpetrator, while Steve differs from the stereotype in some respects. The intersectional metaphor does not, by itself, capture these more relational qualities. However, intersectional theory does the work. By attending to the interstices of intersectionality rather than focusing on the intersection alone, we can better account for intercategory and relational complexity.

These shifts fit within trends in critical legal theory toward studying the

interconnectedness of forms of subordination—not only in relationships between structural identity categories, like those considered in intersectional analysis, but in connections between different manifestations of structural subordination, like violence by men against other men, state violence, and violence against women and within communities.¹⁹⁷ For example, consideration of these connections informs a recent proposal by Angela Harris to consider moving from a constituency or issue-based approach to analyzing and addressing violence (e.g., violence against women or violence against LGBTQ communities) to a broader gendered-violence approach.¹⁹⁸ In keeping with the discussion above about the interrelationship of particularity and generality, Harris's recommendation relies on a detailed understanding of various levels of particularity—e.g., men and the production of hegemonic masculinity, the victimization of women in heterosexual relationships, and the experiences of violence within LGBTQ communities.¹⁹⁹ Moreover, her analysis relies on the *relationships* between these particular contexts and categories, which would be obscured by the circumscribing or siloing of categories that occurs absent a comparative, analytically horizontal approach.

In addition to the foregoing, the analysis of the victim–perpetrator dichotomy operating in Sandra and Jerome and Madeline and Steve's cases provides several other indications for what theorizing from particularity might look like. First, the analysis utilizes the insights of prior intracategorical work on intersectional identity from inside and outside the domestic violence literature. Thus, theorizing generality from particularity can proceed from either original research and analysis of a problem, or from the assemblage of the results of prior intra- or intercategorical efforts. Moreover, connections can and should be sought from across the spectrum of critical literatures.²⁰⁰

197. See Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL'Y 13, 35–36 (2011) (describing recent developments in critical legal scholarship). See also DOWD, *supra* note 77, at 23 (noting the pressing challenge to connect fields of theory studying dominance, like feminism and masculinity theory).

198. Harris, *supra* note 197, at 36 (“[Concluding] anti-violence theorizing and advocacy must take an integrated approach, understanding the interplay of race, sexuality, class, and gender and taking account of the places where, and the means by which, gender violence is perpetuated.”). Cf. Schneider, *Particularity and Generality*, *supra* note 54, at 567 (“Although the development of a distinct legal construct concerning male battering of women has been theoretically important, and strategically necessary, moving to the more general level of violence between intimates and women's subordination can illuminate theoretical and strategic issues that advance our work.”).

199. See Harris, *supra* note 197, at 35–36 (drawing connections between violence against men in prison and the production of destructive masculinity, and violence against women and queer communities).

200. See Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of “Sexual Orientation,”* 48 HASTINGS L.J. 1293, 1296–97, 1330 (noting the importance of cross-jurisprudential and interdisciplinary approaches to tracing the interconnectivity of forms of subordination).

Second, while examining every dimension of master categories may be unnecessary (and prohibitive), examining all dimensions of the primary category at issue is usually essential to achieving an analysis that is sufficiently particular. Therefore, correctly identifying the dimensions most directly implicated by a given context for analysis is important. This also means care must still be taken in most cases to minimize the problem of inadvertently eliminating or circumscribing categories of difference. This can be done by making explicit the boundaries of the topic, the categories being considered, and the issues and categories that remain unaddressed.²⁰¹ In addition, the intracategorical approach may remain best suited for its original purpose—analyzing previously unexplored intersectional locations. Even in those cases, however, effort can be made to connect the significance of a newly analyzed category to other preexisting categories.

A more particularized approach also has implications for practice. Based on her examination of the close connections between incarceration and other forms of violence, for example, Harris proposes looking outside the criminal justice system for solutions to gender violence.²⁰² The case studies introduced in this Article show that the civil system may also be a site for the reproduction of racist and heteropatriarchal hierarchies in ways not previously understood. This underscores the need to rethink the function of the civil justice system in facilitating autonomy and safety for victims.²⁰³ These problems cannot be addressed by thinking about victims alone and may in fact be intractable. Thus, the need for alternative approaches to gender violence is indicated by outcomes in the civil as well as the criminal justice system.

Nonetheless, the need for more study is also indicated. Little is known about the role of identity in the civil justice system because demographic data about litigants in family law cases is not routinely tracked. Finding ways to collect data about litigants and outcomes in civil domestic violence cases while protecting the privacy of parties would facilitate quantitative, intercategory research on outcomes and make it easier to learn more about the dimensions of the problem. In addition, qualitative approaches will remain important in order to capture the role of identity performance in case outcomes. To this end, “court watch” programs that train volunteers to observe court proceedings in order to evaluate the treatment of victims by judges and other court personnel should incorporate criteria for evaluating the performed identities of victims and perpetrators into their trainings. This

201. See, e.g., Goldfarb, *supra* note 190, at 619 (“If the [domestic violence] literature described and theorized intimate violence in heterosexual relationships while explicitly stating its focus, far less damage would be done to the visibility and credibility of victims of same-sex intimate violence.”).

202. Harris, *supra* note 197, at 38–39.

203. See MacDowell, *When Courts Collide*, *supra* note 32, at 118–22 (critiquing the characterization of civil courts as providing autonomy for victims).

type of data will be invaluable for determining what sorts of system reforms are needed to make courts more responsive to victims and to evaluate proposed alternatives.

V. CONCLUSION

A lawyer for a non-stereotypical victim like Sandra may assume that her client was successful because she was heard, believed, and taken seriously: the judge *got it*. Conventional intersectional analysis supports this interpretation. Considered together, however, Sandra and Madeline's cases suggest that outcomes turn not only on decision-makers' perceptions of victims, but also—or even primarily—on whether there is a perceivable perpetrator. Therefore, analysis of the victim in relation to the perfect victim trope is not sufficient to interpret outcomes or a reliable predictor of what will happen in future cases. Only examining the performed intersectionality of all the relevant parties to each case explains the structural dimensions of what may at first appear to be incongruously different results.

The relationship of the perfect victim and the perceivable perpetrator demonstrates the importance of addressing manifestations of structural subordination with the interrelationship of subordinating categories, as well as relative privilege. As a method, intersectionality is especially well-suited to explore the relationship between the multi-dimensional aspects of power. Both intra- and intercategory approaches to intersectional analysis locate individuals within a web of social structures that together form the more general manifestations of subordination. Adding perpetrators and the concept of performed intersectionality to the intersectional frame is an additional step toward a more comprehensive analysis of domestic violence that maintains categories as analytical constructs, but also facilitates identifying the connections between them in order to further a more broadly defined anti-subordination agenda.