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QUEERING DOMESTIC VIOLENCE TO "STRAIGHTEN OUT" CRIMINAL LAW: WHAT MIGHT HAPPEN WHEN QUEER THEORY AND PRACTICE MEET CRIMINAL LAW'S CONVENTIONAL RESPONSES TO DOMESTIC VIOLENCE*

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I. INTRODUCTION

I am uncertain when J.C. crossed the invisible line, but the verbal abuse eventually led to physical abuse and sexual abuse. She punched me, kicked and choked me, pulled my hair, and threw me around the house. She pulled my hair because she knew I loved my hair, which at the time

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was very long and thick. She liked to hit me in the face and choke me until I passed out, and then she would kick me all over.¹

The battered women's movement² came into being because survivors, like the one in the above excerpt, spoke out, and women listened. Women who showed the courage to leave the men abusing them, to speak out about the abuse in their lives and to advocate on behalf of other women being abused were supported by both others who were similarly situated and those who were allied to the cause of ending violence against women. The above account captures well the kinds of abusive behaviors with which victims of domestic violence³ cope at the hands of their intimate partners.⁴ This individual's story is similar to other domestic violence survivors' narratives, except that, in this case, the victim and perpetrator were of the same sex.

Only recently, and primarily in large cities, have victims of same-sex domestic violence begun to find some accessible, appropriate and understanding services.⁵ A coordinated effort to address intimate abuse in lesbian, gay, bisexual and transgender (LGBT) communities has begun to take shape and is organizing itself into a movement.⁶ In many ways, this movement is in the same developmental stages as the battered women's movement was during its first few decades.⁷

The issue of lesbian battering became part of the national scene in the early 1980s, though local communities had occasionally dealt with

1. KJ, *Sharing My Story*, in SAME-SEX DOMESTIC VIOLENCE: STRATEGIES FOR CHANGE 3, 4 (Beth Leventhal & Sandra E. Lundy eds., 1999).

2. See generally SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* (1982) (providing a history of the battered women's movement).

3. In this work, I use the terms "domestic violence," "domestic abuse," "intimate abuse" and "partner violence" interchangeably.

4. See Domestic Abuse Intervention Project, *Power and Control Wheel*, available at <http://www.dvc.org.nz/power.htm> (last visited December 26, 2003) (providing a tool to explain the dynamic of domestic violence, which shows other examples of abusive behavior, including hiding or destroying property, holding one's partner against his or her will, threatening the individual or his or her children or pets and other forms of harassment and isolation).

5. See www.avp.org for a list of National Coalition of Anti-Violence Programs (NCAVP) that provide services as of 2002. As the list shows, though there are an increasing number of programs around the nation in a range of locations, the majority of services and cutting edge work in same-sex domestic violence are in the larger metropolitan areas.

6. Evidence of this includes national LGBT organizations whose conferences have included the issue on their agendas. Scholarship in varied disciplines addresses the issue specifically though there have still been few studies or other empirical works. The National Coalition of Anti Violence Programs has produced an annual report since 1997. Legal scholarship has even begun to recognize the issue, as is exemplified by cites in this work.

7. See generally SCHECHTER, *supra* note 2 (providing a history of the battered women's movement).

violence, particularly in lesbian relationships, prior to that time.⁸ Since then, LGBT issues have been at the margins of the movement for a number of reasons, including political expediency,⁹ territorialism, resource protection, the basic attitude that "it's not my issue," or simply the belief that the battery of females by their male partners is more important than same-sex battery (which, depending on who or what is believed, may or may not be an issue at all). The roots of this marginalization are most commonly homophobia and heterosexism.¹⁰ This marginalization results in a minimization of the prevalence and importance of both same-sex domestic violence and LGBT victims and perpetrators.

The battered women's movement began more than 30 years ago as a grassroots effort to protect from further abuse, and in some cases save the lives of, women living in terror and pain in their own homes. At the beginning of the movement, shelters and safe house networks were created as places to which women could escape. In addition, advocates and activists (many of whom were survivors of domestic violence themselves) began to push for the involvement of the legal system.¹¹ Historically, domestic violence, like marital rape,¹² had not been viewed as a serious social problem, let alone a crime.¹³ Thus advocates and activists worked for laws to protect battered women and to punish and hold accountable men

8. Barbara Hart, *Preface* to NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING 9-16 (Kerry Lobel ed., 1986). See also Pam Elliot, *Shattered Illusions: Same-Sex Domestic Violence* in VIOLENCE IN GAY AND LESBIAN DOMESTIC PARTNERSHIPS 7 (Claire M. Renzetti & Charles Harvey Miley eds., 1996) (commenting on how, in the mid 1980s, the "battered women's movement began to understand that lesbian domestic violence could not ethically be ignored any longer).

9. Same-sex domestic violence is not something with which politicians want to deal. The female victim and her children are sympathetic faces, and politicians often want to court the female vote. Domestic violence allows the politician to be sensitive especially to women and children, get support from women's or feminist organizations and yet be tough on crime. However, LGBT people are not seen as a big enough constituency, in most places, to matter, and bringing up the protection of LGBT issues may be seen as anti-family. Because of this, most battered women's advocates and domestic violence professionals may see the issues of same-sex domestic violence and intimate abuse within LGBT communities as political liabilities.

10. See *infra* Part IV.A.2 for definitions of homophobia and heterosexism.

11. See *infra* Part II.B, Part III.A and Part III.D.1 for a history of the battered women's movement's efforts to involve the legal system to end domestic violence.

12. For a number of years, rape laws featured an exception that made it impossible for a husband to rape his wife. See, e.g., *Warren v. State*, 336 S.E.2d 221, 223 (1985) (providing a history of the common law theory that a husband could not be held criminally liable for raping his wife).

13. SCHECHTER, *supra* note 2, at 157-69 (chronicling how, prior to and in the early days of the domestic violence movement, police would fail to arrest, if they responded at all, and discussing the limited remedies women could seek through the courts). See also EVE S. BUZAWA & CARL G. BUZAWA, *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE* 33 (2d ed. 1996) (noting that "judicial innovations were clearly away from criminalizing such conduct").

who battered.¹⁴ In addition, early research as well as experience suggested that the violence lessened or stopped when the legal system was introduced to a particular situation.¹⁵ While interventions such as arrest, prosecution and treatment were intended primarily to interrupt the "cycle of violence,"¹⁶ they were of symbolic importance as well in that they served as indications that the system was beginning to take violence against women seriously.

There has been a great increase in the number of laws and policies enacted in the last two decades to address domestic violence.¹⁷ All 50 states have some statute specifically criminalizing acts of domestic violence.¹⁸ The interventions authorized by these statutes began with making a crime that which had not previously been criminalized, such as a battery against one's wife. Statutes have since become more specific as to the types of behaviors that are subject to criminal sanctions, such as stalking, harassment and violating a civil restraining order. In addition, law enforcement agencies and prosecutors' offices have developed policies and procedures specific to dealing with domestic violence cases, such as mandatory arrest and no-drop policies.¹⁹ These laws were implemented due to the efforts of battered women's advocates, who did the work necessary to convince the criminal law system of the severity of the

14. *Id.* at 163, 167-69.

15. *See, e.g.*, Barbara K. Finesmith, *Police Response to Battered Women: A Critique and Proposals for Reform*, 14 SETON HALL L. REV. 74, 104 (1983); Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 929-30 (1994).

16. LENORE E. WALKER, *THE BATTERED WOMAN* 55-70 (1979). The cycle theory of violence conceptualizes domestic violence as a three-stage event. The stages are: 1) the tension-building stage, 2) the acute battering incident stage and 3) the honeymoon stage, which is characterized by kindness and contrite loving behavior. It also suggests that there is a repetitiveness to domestic violence and that the abuse will continue and intensify if not interrupted. Another cycle-of-violence theory is the intergenerational theory, which is based on the idea that violence gets passed down from generation to generation. *Id.*

17. *E.g.*, Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (codified in scattered sections of 18 U.S.C.); CAL. PENAL CODE § 13700 (West 2000); WIS. STAT. ANN. § 968.075 (West 2000).

18. *See, e.g.*, BETH LEVENTHAL & SANDRA E. LUNDY, *SAME-SEX DOMESTIC VIOLENCE: STRATEGIES FOR CHANGE* 40-41 (1999); *See also* Joan Zorza, *Woman Battering: High Costs and the State of the Law*, 28 CLEARINGHOUSE REV. 383, 388 (Special Issue 1994) (stating that each state and the District of Columbia has a domestic violence statute).

19. Ganley, Anne L., *Integrating Feminist and Social Learning Analyses of Aggression: Creating Multiple Models for Intervention with Men Who Batter; Treating Men who Batter: Theory, Practice, and Programs*, in *BATTERED WOMEN AND THE LAW* 645, 645-48 (Clare Dalton & Elizabeth M. Schneider eds., 2001) (stating that court-ordered batterer's treatment programs may include mental health programs that focus on psychotherapy, stress management, and anger control for perpetrator's of domestic violence). *See also* NAT'L INST. OF JUST., *SOLICITATION, EVALUATION OF POLICIES, PROCEDURES, AND PROGRAMS ADDRESSING VIOLENCE AGAINST WOMEN* 2 (1999) (describing treatment).

violence perpetrated against women by their husbands and boyfriends. This work included getting those involved with the system — legislators, the police, prosecutors and judges — to buy into the criminalization of domestic abuse. An early goal of the domestic violence movement²⁰ was to bring wife abuse out of the private sphere and into the public awareness.²¹ The criminal law system has become a major tool for protecting victims and holding batterers accountable.

Due to the efforts of the battered women's movement, the criminal law system began to take spouse abuse (later called domestic violence) more seriously. It is my contention that these efforts have led the criminal law system²² to incorporate, to a modest degree, feminist ideas about domestic violence into its standard understanding of violence between males and females. Included in feminist theories of domestic violence are a number of concepts and constructs about sexuality. There are also ideas about sexuality within the criminal law system. At present, the system reflects a particular set of ideas about sexuality in general and sex and gender in particular. This set of ideas, I argue, is one factor dictating how the system responds to domestic violence. This normative construct about sexuality, despite its feminist influences, is both narrow and conventional, thus preventing the criminal law system from accurately assessing and intervening in same-sex domestic violence. Much more broadly, these same limited ideas create under-effective responses to all incidences of domestic violence, thereby defeating the very goals for which the responses

20. I do use the labels "battered women's movement" and "domestic violence movement" interchangeably because, for the most part, they are the same thing; but, on occasion, I am purposely specific in order to distinguish between the earlier days of the battered women's movement (1970s and 1980s) and the later days of the domestic violence movement (1990s to the present). Some individuals and organizations have moved to being more inclusive by referring to the work as an anti-violence movement. Another difference is that the battered woman's movement often connotes a community or grass-roots organization; whereas the domestic violence movement has come to signify professional and mainstream organizations. Though I am fully aware of an international movement working to stop violence against woman, this work is specifically about domestic violence and the movement in the United States.

21. The public-private distinction is "[p]opularly understood to be the separation of work and home in an individual life. In the slogan 'the personal is political' the contemporary women's movement linked public and private. The slogan redefines personal experience as a social process, the product of human activity." MAGGIE HUMM, *THE DICTIONARY OF FEMINIST THEORY* 226 (2d ed. 1995). See also Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 1 (2000) (stating that "American law has long embraced a fundamental distinction between the public and private spheres. As a result, certain issues important to women, including domestic violence and sexual assault, have traditionally been deemed private and therefore exempt from legal scrutiny").

22. By "the criminal law system," I mean to include all actors involved with the development and enforcement of criminal laws. Though my focus is primarily on law enforcement, prosecutors and judges, it is important to note that legislators, attorney generals, the prison industrial complex, correctional officers, others charged with drafting laws and those who monitor and serve individuals who have been charged with and/or convicted of crimes are all part of the larger criminal law system.

were designed. The goals are: to protect victims from being revictimized, to protect others from becoming victims, to hold the perpetrator accountable for "his" actions and, finally, to prevent future abusive behavior.²³

In this work, I argue that the better and more productive responses to same-sex domestic violence, which are primarily the province of social service agencies and community-based organizations, are underpinned by queer theory's concepts of sexuality in general and sex and gender in particular. This underpinning makes these responses more nuanced and effective. I explain that these queer theory-grounded approaches to intervening in same-sex intimate abuse, some of which are utilized today by agencies focused specifically on the issue of domestic violence within LGBT communities, can and should be applied in all situations in which the law, specifically criminal law, responds to intimate violence. Such an application would expand the existing collection of ideas about sex and gender, would be more interactive with communities involved with domestic violence and would improve criminal law responses to all cases of domestic violence, not only those involving LGBT persons. The inclusion of more nuanced approaches to domestic violence, which transcend the now standard feminist response, are grounded in queer theory and incorporate same-sex domestic violence practices in working against *all* intimate abuse, is what I call "queering domestic violence."²⁴

23. Standard criminal law remedies once arrest and conviction have occurred can include incarceration; probation with conditions attached that may incorporate stay-away orders; fines and treatment or counseling programs, such as alcohol or drug treatment, anger management or batterers' treatment. See generally EVELYN C. WHITE, CHAIN, CHAIN, CHANGE: FOR BLACK WOMEN IN ABUSIVE RELATIONSHIPS 52-58 (1994) (giving a general overview of legal options and what to expect in court). See also <http://www.statesattorney.org/aweb/dvqa.htm> (last visited Jan. 19, 2004) (responding, in a list of frequently asked questions, to the question "If convicted, what penalties will the abuser face?" by stating "criminal penalties vary, depending on the specific charges and circumstances. Sentences may include probation, court supervision, community service, counseling, or a jail or prison term").

24. See, e.g., JUDITH BUTLER, BODIES THAT MATTER 167-85, 223-42 (1993). Though Butler is using the term differently, "queering" has come to be used by theorists, who in postmodernist discourse explain sexuality as a social construct. At some point, it seems, in the 1990s, "queer" began to be used as a verb, as in "to queer" or "queering." Authors, such as myself, in search of a provocative and descriptive title took to the term. Examples include: JONATHAN GOLDBERG, QUEERING THE RENAISSANCE (1994); ROBERT GOSS, QUEERING CHRIST: BEYOND JESUS ACTED UP (2002); QUEERING ELEMENTARY EDUCATION: ADVANCING THE DIALOGUE ABOUT SEXUALITIES AND SCHOOLING (William J. Letts IV & James T. Sears eds., 1999); QUEERING THE PITCH: THE NEW GAY AND LESBIAN MUSICOLOGY (Phillip Brett et al. eds., 1994); Larry Catá Backer, *Queering Theory: An Essay on the Conceit of Revolution in Law*, in LEGAL QUEERIES: LESBIAN, GAY AND TRANSGENDER LEGAL STUDIES 185 (Leslie J. Moran et al. eds., 1998); Bruce Carolan, *An Army of Lovers? Queering the Ministry of Defence: Report of the Homosexual Policy Assessment Team*, 34 TLSLJ 555 (1999); Lisa Duggan, *Queering the State*, in SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE 179, 193 (Lisa Duggan & Nan D. Hunter eds., 1995); Symposium, *InterSEXuality: Interdisciplinary*

For this paper, I draw on nearly twenty years of experience doing domestic violence work.²⁵ Over this time, I have had numerous discussions on a range of domestic violence topics; have observed and worked with a myriad of organizations and agencies including law enforcement, victim advocates, and treatment and counseling providers; and have had experience in direct services, administration and programming. I combine my social service and legal experiences with existing legal, feminist and queer scholarship particular to domestic violence. My goals are (1) to explain how issues of sexuality, specifically issues of sex and gender, connect to same-sex and different-sex domestic violence; (2) to understand why criminal law's efforts to intervene in domestic violence have not had the expected positive effects²⁶ and (3) to posit ways of making the criminal law system more effective. I argue that criminal law's responses to both same- and different-sex domestic violence are under-effective²⁷ for a number of reasons. The main reason, and the one I address here, is that current criminal law approaches are too "straight," meaning they subscribe to conventional heteronormative ideas around sexuality, which in turn render interventions into the cycles of abuse weak. In order to rectify the weakness of such interventions, criminal law's approaches to domestic violence must be "queered." In other words, the set of ideas about human sexuality — particularly those about sex, gender and sexual orientation — to which the system currently subscribes, need to be altered and expanded. Finally, those critical ideas need to be applied in practice. I argue that queering criminal law, in theory and practice, will improve its effectiveness in preventing, intervening in and ending domestic violence.

In Part II, I explore domestic violence as a social problem and posit that current criminal law responses are under-effective because they are "straight," meaning they are loaded with conventional attitudes about sexuality. Part III contextualizes the issue of under-effective criminal law responses, which I have characterized as "straight," by showing the grounding theories of those responses, giving practical examples from the domestic violence movement and explaining how sexuality relates to

Perspectives on Queering Legal Theory, 75 *Denv. U. L. Rev.* 1131 (1998); Richard Goldstein, *Queering the Culture*, *THE VILLAGE VOICE* (June 30, 1998), at 38, 44.

25. I have worked in a variety of positions in Indiana, California, Wisconsin and Illinois. These positions range from direct service, as shelter and programming staff; indirect service, as a coordinator of education, outreach and volunteers; and administration. My legal work has been in community education as well as direct representation. Being a survivor as well as working in three states and providing the gamut of services has given me a range of perspectives on the issue of domestic violence.

26. The expectations were that criminalizing domestic violence would have a direct effect on the reduction of intimate abuse.

27. By "under-effective," I mean that criminal law's responses are not as effective as it was expected that, by criminalizing woman battering, they would be.

domestic violence and criminal law. In Part IV, I propose that the solution to the under-effectiveness of current criminal law domestic violence responses is what I call "queering domestic violence," a process designed to alter the law's conventionality. Concluding with Part V, I address praxis and the practicality of queering by exploring whether it would actually work today.

II. THE PROBLEM: CRIMINAL LAW'S UNDER-EFFECTIVE RESPONSES TO DOMESTIC VIOLENCE

When the police are called, they usually are slow to respond and lack sensitivity. Even though police officers are now being trained to respond to domestic violence calls, their attitudes have been slow to change. However, the police are increasingly being called to respond to gay and lesbian domestic violence calls, but they do not appear to be explaining adequately to either victims or batterers the extent of their rights and consequences of specific actions.²⁸

A. DOMESTIC VIOLENCE TODAY

The battered women's movement has historically been a white, middle-class, feminist movement, which focused on white middle- and (sometimes) working-class women victimized by domestic violence.²⁹ Domestic violence theory and practice have recently become much more inclusive as those who have been excluded have written about their experience.³⁰ Because LGBT communities are made up of individuals excluded from other communities, existence inclusivity³¹ and diverse

28. Charlene M. Waldron, *Lesbians of Color and the Domestic Violence Movement*, in *VIOLENCE IN GAY AND LESBIAN DOMESTIC PARTNERSHIPS* 48 (Clare M. Renzetti & Charles Harvey Miley eds., 1996) (citation omitted).

29. See SCHECHTER, *supra* note 2, at 281-86 (discussing race and racism in the battered women's movement); ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 62-65 (2000) (noting that the current image of the battered woman is poor and of color, but that the reality is to the contrary and discussing the intersection of racism and feminism); Lisa M. Martinson, *An Analysis of Racism and Resources for African-American Female Victims of Domestic Violence in Wisconsin*, *WIS. WOMEN'S L.J.* 259 (discussing how African-American are both differently affected by domestic violence and treated differently).

30. See generally BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* (1996); EVELYN C. WHITE, *CHAIN, CHAIN, CHANGE: FOR BLACK WOMEN IN ABUSIVE RELATIONSHIPS* (1994); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L.R.* 1241 (1991); Karin Wang, *Battered Asian American Women: Community Responses from the Battered Women's Movement and the Asian Community*, 3 *ASIAN L.REV.* 151 (specifically addressing issues of race, ethnicity, and domestic violence).

31. "Existence inclusivity" is a term I use to mean the inclusion of people in whatever state they currently exist, whether they are homeless, addicted, in the closet, etc.

approaches have been necessities.³² I contend that both these communities and those who provide services within and to them have concepts of gender that are more expansive than the norm because such expansive concepts, as I see it, are necessary in order to live among and provide services to people who do not fit into rigid gender identities. This expansiveness leads to a more gender-fluid approach to adult intimate violence and more nuanced, and therefore more effective, models of service. This is a "queered" approach.

Those advocating to end lesbian battering have struggled for legitimacy within the battered women's movement. Lesbians have worked tirelessly within the movement and have willingly sublimated the issue of lesbian battering in order to focus on male violence against females.³³ When the issue of lesbian battering has arisen, questions and accusations regarding the seriousness and prevalence of lesbian domestic violence have inevitably followed.³⁴ However, lesbians continue to work within a battered women's movement that, through denial and neglect, diminishes the entire class of LGBT victims. In response, some LGBT anti-violence programs have taken on the issue of same-sex domestic violence.³⁵ Many anti-violence programs were originally founded to focus on issues of violence against LGBT individuals and communities, such as hate crimes and police brutality.³⁶ A number of these programs have since expanded to

32. The mere fact that community organizations have, at least in name, expressed an inclusivity of what are in fact four very different constituencies— lesbians, gay men, bisexuals and transgender people — actually makes inclusivity in practice necessary. It was not always this way. Many groups began as sex-segregated; there were gay men's groups and lesbian groups. See Laura Gowing, *History, in LESBIAN AND GAY STUDIES: A CRITICAL INTRODUCTION* 61-63 (Andy Medhurst & Sally R. Munt eds., 1997).

33. See Hart, *supra* note 8, at 12 (specifically noting that lesbians "pulled a tight lid down on the subject [of lesbian battering]" in order not to "discredit the efforts of the battered women's movement"). See also SCHECHTER, *supra* note 2, at 76 (chronicling how lesbians faced attacks over their sexual orientation from within and outside of the battered women's movement and yet continued to be very involved because of a commitment to ending violence against women). See also SCHNEIDER, *supra* note 29, at 68 (stating that "ironically, although lesbian activists were among the first to work with battered women, the general perception of a battering problem within the lesbian community itself came much later").

34. See Beth Leventhal & Sandra E. Lundy, *Introduction to SAME-SEX DOMESTIC VIOLENCE: STRATEGIES FOR CHANGE* ix (Beth Leventhal & Sandra E. Lundy eds., 1999) (stating that "we often have met with hostility not only in the general public, the mental health professions, and the courts but also within domestic violence organizations and our own queer communities").

35. See Leventhal & Lundy, *supra* note 34, at x.

36. See, e.g., NEW YORK CITY GAY AND LESBIAN ANTI-VIOLENCE PROJECT, at <http://www.avp.org> (stating that the New York City Gay & Lesbian Anti-Violence Project was founded in 1980 in reaction to neighborhood incidents of anti-gay violence and the failure of the criminal justice system to respond). See also COMMUNITY UNITED AGAINST VIOLENCE (CUAV), at www.cuav.org (stating that CUAV began work against hate violence in 1979 and against domestic violence in 1986).

address the issue of violence within LGBT communities, including domestic violence.³⁷

For more than fifteen years, the battered women's movement, when it has chosen to address the issue of same-sex abuse, particularly lesbian battering, at all, has done so by approaching it as a phenomenon that undermines the feminist theory that domestic violence occurs because of a patriarchal, sexism-producing society and the male dominance inherent therein.³⁸ Consequently, the ongoing understanding is that the existence of both same-sex domestic violence and LGBT victims and perpetrators undermines feminist theory, contravenes the battered women's movement's feminist foundations and complicates its woman-centered goals.³⁹ This belief has caused theoretical and practical fractionalization between individuals and organizations working to end intimate abuse.⁴⁰

Intimate partner abuse within LGBT communities has given rise to questions about both the particular strategies for which domestic violence movement workers have advocated and the underlying theory that patriarchy connects to, even causes, domestic violence. These questions include: (1) If women abuse other women and men abuse other men within intimate relationships, what does that do to the theory that domestic violence occurs because of male domination and female subordination?; and (2) if domestic violence is not only about violence against women, can a focus on criminalizing the abuse, which mandates arrest, prosecution and treatment based on the way in which men are gender-socialized, actually be the solution? One would assume that the answer to the first question is that it turns the theory on its head and that the answer to the second question is a simple yes. However, it is more complicated than this, and the bulk of this article seeks to explain both how the answer to the first question is that it actually supports the male domination and female subordination domestic violence theory and why the "yes" answer to the second question is not actually simple. Generally, I argue that the contention, as written by Nancy J. Knauer, that "[s]ame-sex domestic violence forces a re-examination of our image of domestic violence which assumes a male batterer and female victim [and that it] is this gendered understanding of domestic violence that

37. *Id.*

38. See Mary Eaton, *Abuse by Any Other Name: Feminism, Difference, and Intralesbian Violence*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 195, 210-11 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

39. See generally *id.*

40. See generally *id.* Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence*, 64 *GEO. WASH. L. REV.* 582 (1995); Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 *TEMP. POL. & CIV. RTS. L. REV.* 325 (1999).

in turn renders the violence necessarily heterosexual,⁴¹ is only partially true because there is a problem not simply with the understanding of domestic violence, but with the understanding of gender and how both gender and domestic violence interact with sex and sexual orientation. The "gendered understanding of domestic violence" is not "necessarily heterosexual" (because male and female are not genders); rather, it is the conflation⁴² of sex, gender, and sexual orientation, and an essentialized understanding of who is violent to whom that renders this understanding necessarily heterosexual.

Though feminism has managed to separate biological sex from gender, it has not gone far enough because it has not deconstructed gender in order to separate it into the multiple layers that comprise its socially constructed, multi-layered identity. What I mean is that feminism has deconstructed and de-essentialized "woman" and "man" as "sexes," but it has stopped there. This is so particularly since the terms "man" and "woman" indicate gender, in the same way that "male" and "female" indicate sex, and "gay" and "straight" indicate sexual orientation. However, it is not just "woman" or "man" who are/should be de-essentialized, but gender itself.⁴³ In de-essentializing gender, one discovers that the gender paradigm necessary to a feminist understanding of domestic violence is not rendered irrelevant; but neither does that paradigm do what Mary Eaton charges, which is to impose "a heteronormative framework upon lesbian relationships."⁴⁴ I argue that the "continued reliance on gender" is not the problem. Instead, the trouble lies in the reliance on an essentialized gender dichotomy (that of "man" and "woman"), which fails to recognize that sex and sexual orientation are aspects of and often conflated with gender.

Knauer insists that to preserve the gender paradigm "is to define battering as 'male' behavior that can be committed, regardless of the biological sex of the offender."⁴⁵ With this I partially agree. In order to

41. Knauer, *supra* note 40, at 333.

42. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 3 (1995).

43. See generally CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) (exploring the idea of the essentialized woman through a series of essays); ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988) (examining connections between gender and other identities); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 585 (1990) (defining "gender essentialism" as "the notion that a unitary, 'essential' woman's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience).

44. Eaton, *supra* note 38, at 207.

45. Knauer, *supra* note 40, at 335.

preserve the gender paradigm — and I insist that domestic violence is gendered violence and that the paradigm is accurate — one must define "battering" not as "male" (the sex), but as a behavior that is an aspect of the "socially constructed"⁴⁶ (gendered) man's behavior, which can be committed regardless of the biological sex, sexual orientation or sexual community of the offender. Though battering and being abused do maintain the gender paradigm, domestic violence does not maintain gender difference where there is none because the very act of battering is gendered. My argument insists that gender differences are presupposed if there is an abusive act within an intimate couple or family group. It is not the behavior of the biological sex known as "male," as Knauer writes, but the behavior of the socially constructed gender called "man." There is, as I explain, a difference between sex and gender. It is important to note that gender — though socially constructed and conflated with sex, sexual orientation, sexual practices and sexual community — is real.⁴⁷ The problem is *not* a misunderstanding of the dynamic of domestic violence; it is a misunderstanding of gender and its construction.

B. THE CRIMINAL LAW RESPONSE TO DOMESTIC VIOLENCE

I maintain that the criminal law system's conventional/straight ideas about sex and gender contribute to its response to domestic violence. As noted *supra*, these responses have been influenced by feminist domestic violence theory, as a result of the battered women's movement's work with the criminal law system. In much the same way that responses to male violence against female intimates are underpinned by feminist theory, I contend that the most effective responses to same-sex domestic violence are underpinned by queer theory's concepts of sex and gender. I further argue that an application of these approaches to same-sex intimate abuse

46. See WILLIAM ESKRIDGE JR. & NAN D. HUNTER, *SEXUALITY, GENDER AND THE LAW* 262-67 (1997) (introducing a section on post-modern theories by explaining sexuality as a social construction and laying out the origins of social construction theory as it relates to sexual orientation).

Interpreting the Kinsey data, Mary McIntosh asked, Why is it that the study of 'sexual orientation' is considered such an important object of study? She maintained that sexual orientation is a role created by society and indeed created for socially regulatory purposes.

McIntosh said that there is no transhistorical phenomenon that can be called "homosexuality." Much has been made in the last generation of her suggestive point. Michel Foucault's three-volume *History of Sexuality* developed this idea interestingly (without any attribution to McIntosh, however), arguing that 'sexuality' per se was unknown in the ancient world and was the consequence of a confessional dialectic that has grown ever more intense in the modern world.

Id. at 262 (citations omitted).

47. See *infra* Part II.C for an explanation of sexuality issues.

intervention in the criminal law context would alter the existing collection of ideas about sex and gender and would improve the criminal system's effectiveness in all aspects of domestic violence.

Though laws against attempting and/or committing assault, battery, kidnapping, rape and homicide have long been a part of the common and statutory law, such laws have not always automatically applied in the context of marriage and other intimate relationships.⁴⁸ The battered women's movement worked to extend the enforcement of these laws to marriage and other intimate relationships and lobbied for the development of laws specifically prohibiting wife abuse and what has now come to be known as domestic violence.

One goal of the battered women's movement was for domestic violence to be taken as seriously as other assaults, batteries and homicides. Beginning in the early 1970s, advocates have worked to increase the involvement of the criminal law system and have been successful.⁴⁹ In 1978, Minnesota became the first state to allow for probable cause arrest in cases of domestic assault.⁵⁰ Further successes included the adoption of pro-arrest or mandatory arrest policies by law enforcement agencies, the adoption of no-drop policies by prosecutors, the inclusion of expert testimony in trials involving battered women, the use of batterer treatment programs as part of criminal sentencing, and federal domestic violence legislation⁵¹ (namely, the 1994 Violence Against Women Act,⁵² which was recently reauthorized). The fact that all of this happened because of the battered women's movement lends a very slight feminist slant to existing domestic violence law.

Criminal law has moved to the center of efforts to prevent, intervene in and end domestic violence.⁵³ Once efforts to enlist the law in the fight against domestic violence became successful, I argue that the law essentially took over anti-domestic violence efforts. Though influenced by the feminist battered women's movement, the focus is now on "domestic violence...as a problem in isolation, with neither history nor social context. It is viewed as though it can be 'solved' or 'treated' through legal remedies or therapy alone, without considering the issues of women's

48. See, e.g., RICHARD J. GELLES & MURRAY A. STRAUS, *INTIMATE VIOLENCE* 66-67 (1988).

49. See SCHECHTER, *supra* note 2, at 157-83.

50. MINN. STAT. ANN. § 629.341 (1978).

51. See SCHNEIDER, *supra* note 29, at 181-98.

52. Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (codified in scattered sections of 18 U.S.C.). See SCHNEIDER, *supra* note 29, at 188.

53. The legal system has a complex set of responses to domestic violence, the totality of which is beyond the scope of this paper. This is a broad look at the criminal law's overall response.

equality and gender subordination."⁵⁴ This created new challenges for the battered women's movement. One such challenge of the legal system becoming involved in the fight against domestic violence was that movement advocates had to work with and within the system to create the most positive results for victims. This yielded a number of successes by the mid-1980s: "By 1985, under the leadership of women's advocacy groups, legislators in more than 50 percent of the states had passed statutes funding domestic violence shelters, providing training to police departments and prosecutors and removing restrictions on warrantless arrests for misdemeanor domestic assaults."⁵⁵ This legislation also required the development of policies that more clearly indicated an intent to take domestic violence seriously and to prosecute battering and put into place strict guidelines for the nature of the criminal law system's involvement.⁵⁶

As with those who identify as belonging to other subordinated communities, LGBT individuals, even those who have been victimized, are often reluctant to bring the law into their homes.⁵⁷ One reason for this is that police often respond differently when called to a same-sex domestic violence incident than when called to a different-sex domestic violence incident.⁵⁸ In the case of gay male domestic violence, the police arrive and see two men. Frequently, both men will be arrested and sometimes held in the same cell.⁵⁹ Connie Burke, Executive Director of the Northwest Network of Bisexual, Trans and Lesbian Survivors of Abuse, estimated that 75% of the victims in her program had been arrested, sometimes with their abusers.⁶⁰ As evidenced by the comments of one New York City police

54. SCHNEIDER, *supra* note 29, at 27-28.

55. Eve S. Buzawa & Carl G. Buzawa, *Introduction to DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE* vii, x-xi (Eve S. Buzawa & Carl G. Buzawa eds., 1992).

56. *See generally id.* (providing a review of the criminal justice system's responses to domestic violence). *See also* BUZAWA & BUZAWA, *supra* note 13.

57. *See* Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1020-21(1995); 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, 234 (1994); Karin Wang, *Battered Asian American Women: Community Responses From the Battered Women's Movement and the Asian American Community*, 3 ASIAN L.J. 151, 173 (1996).

58. Machaela M. Hctor, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643, 691-92 (1997).

59. Mary Beth D. Collins, Note, *Same-Sex Domestic Violence: Addressing the Issues for the Proper Protection of Victims*, 4 J.L. Soc'y. 99, 104 (2002).

60. John Leland, *Silence Ending About Abuse in Gay Relationships*, N.Y. TIMES, Nov. 6, 2000, at A18

officer, this practice has persisted despite the fact that advocates have complained of it for years.⁶¹

On the other hand, criminal law can prove useful in cases of same-sex domestic violence. "[C]lassifying a crime as domestic may increase the likelihood that the suspect is promptly arrested, that a higher bail is sought and that the victim is referred to domestic violence services. . . [M]any states also have enhanced penalty statutes designed to deter abuse by increasing the batterer's sentence for a second or third domestic violence offense."⁶² Those working to end same-sex domestic violence have turned to the criminal law system for many of the same reasons the battered women's movement did. Compelling the criminal law system to take LGBT communities seriously is symbolic of the society as a whole taking LGBT individuals, communities and issues seriously. The inclusion of LGBT individuals in the criminal law may open up room for them in other areas of the law. An acknowledgment by the criminal law system that LGBT individuals can be victims and perpetrators of domestic violence constitutes a recognition on the part of the law that such intimate relationships among LGBT individuals exist.⁶³ To date, however, the inclusion of same-sex couples and LGBT individuals in domestic violence law has occurred only through the back door of such laws. That is to say, it is only without specificity that queer folk have been included. LGBT individuals have been brought under domestic violence statutes by the use of such gender-neutral language as "living together," "cohabiting" or "dating relationships;" however, the statutes have stopped short of explicitly referring to LGBT individuals in gender-specific language.⁶⁴ Even if the legislative intent was to include LGBT persons under the statutes, in practice, prosecutors and judges can exclude same-sex couples and transgender individuals through statutory interpretation, how and to whom they apply the statutes and whatever judicial and prosecutorial discretion that still does exist.

61. See *id.* (stating that "in such situations, it is common for police to arrest both parties, said Lt. Don Jirak").

62. Patricia G. Barnes, *"It's Just a Quarrel: Some States Offer No Domestic Violence Protection to Gays*, A.B.A.J., Feb. 1998, at 24.

63. However, it can backfire by showing LGBT individuals and relationships as violent and therefore even more deviant. See, e.g., Knauer, *supra* note 40, at 331-32.

64. See NAT'L. COALITION OF ANTI-VIOLENCE PROGRAMS (NCAVP), ANNUAL REPORT ON LESBIAN, GAY, BISEXUAL, TRANSGENDER DOMESTIC VIOLENCE 12 (1997) [hereinafter NCAVP 1997]; NAT'L. COALITION OF ANTI-VIOLENCE PROGRAMS (NCAVP), LESBIAN, GAY, BISEXUAL AND TRANSGENDER DOMESTIC VIOLENCE IN 2000 29 (preliminary ed. 2001) [hereinafter NCAVP 2000] (discussing statutes reflecting this trend).

C. ISSUES OF SEXUALITY AND DOMESTIC VIOLENCE

My argument for a queering of domestic violence and criminal law hinges on a fundamental appreciation of the importance of sexuality to human existence and intimate relationships. I argue that holding onto conventional/straight notions of sex, gender and sexual orientation in the criminalization of domestic violence is both outmoded and detrimental to anti-domestic violence work. If the criminal law system exists to keep people safe in their persons and property⁶⁵ by creating and enforcing a standard of laws by which we are all to live, then it is important to understand how people exist and behave as individuals, in groups and as citizens. Sexuality is part of being human. Domestic violence involves a violation of societal expectations of how we are to behave with those with whom we are most intimate, namely family members, current or former spouses, partners, lovers, roommates, sexual partners, those we are dating and those we have dated in the past.⁶⁶ It is important to understand how terms are used because the legal system uses them to define to whom laws apply. In this section, I will explain what I mean when I use particular terms to refer to aspects of human sexuality.⁶⁷

I use the term "sex" as short for biological sex. It is that which is assigned and recorded at birth. Sex is generally determined by genitalia, chromosomes and hormones and is labeled "male" and "female." When a child is born with ambiguous genitalia or with both a penis and a vagina, most commonly, the child's parents and doctor decide that the child should be one sex or the other. Surgery is generally performed to create genitalia

65. See, e.g., JOHN KAPLAN & ROBERT WEISBERG, *CRIMINAL LAW, CASES AND MATERIALS* (2d ed. 1991).

66. See, e.g., ILL. DOMESTIC VIOLENCE ACT OF 1986, 750 ILL. COMP. STAT. ANN. 60/103(6) (West 1993). The act states that:

"Family or household members" include spouses, former spouses, parents, children, stepchildren and other persons related by blood or by present or prior marriage, persons who share or formerly shared a common dwelling, persons who have or allegedly have a child in common, persons who share or allegedly share a blood relationship through a child, persons who have or have had a dating or engagement relationship, and persons with disabilities and their personal assistants. . .

Id.

67. The point here is, for the purpose of clarity, to be on the same page when discussing issues of sex and sexuality. I understand not everyone will agree with my interpretations, but the effort here is to enable an understanding of the discourse. I acknowledge that there are other interpretations for many of these same words. Part of my argument is necessarily based on how I have chosen to interpret and explain words such as "gender" and "sex."

that have the physical appearance of the chosen sex.⁶⁸ Though babies are often described as "boys" or "girls," it is more accurate to describe infants as "male" or "female." I consider the terms "boy" and "girl" to refer to genders; thus, labeling a baby as either assigns gender to their "male" or "female" sex.

It is widely assumed that there are two genders: (1) the one that goes with the female sex, which is girl or woman, and (2) the one that goes with the male sex, which is boy or man. However, a variety of scholars, activists, scientists and just plain folk living their lives, argue or experience gender differently.⁶⁹ I have settled on using the following as grounding premises: (1) Gender and sex are not the same thing, and they do not have to match; (2) "gender" can mean assigned gender, which is given to the child at birth once the sex is determined; (3) "gender" can also include gender identity, which is how an individual identifies herself or himself.⁷⁰ For the purposes of this paper, I define "gender" as a social construct made up of a set of behaviors, characteristics and traits, which are usually labeled "man" or "woman" (for adults) or "boy" or "girl" (for children). However, individuals can mix and match so as to create, identify as or be any gender. Some of the names that have been included in gender are "man," "boy," "girl," "woman," "transgender,"⁷¹ "MTF" (male-to-female), "FTM" (female-to-male) and "bi-gendered."⁷²

68. GIANNA E. ISRAEL, GENDER ISSUES AFFECT YOU, TOO! INFORMATION ABOUT TRANSGENDER PERSONS, FOR CO-WORKERS, CLIENTS, CUSTOMERS, STUDENTS AND OTHERS INTERESTED IN TRANSGENDER ISSUES (1996) (published brochure on-file with author).

69. See generally, e.g., KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN AND THE REST OF US (1994); JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1999); LESLIE FEINBERG, TRANS LIBERATION, BEYOND PINK AND BLUE (1998); MICHEL FOUCAULT, THE HISTORY OF SEXUALITY (Robert Hurley trans., Vintage Books ed., 1990) (1978).

70. ANN FAUSTO STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY (2000). See also HUMM, *supra* note 21, at 106.

71. Those under the umbrella term "transgender/trans" may include cross dressers, transvestites, drag queens, transsexuals — male to female (MTF) and female to male (FTM). Some choose to have a full range of medical procedures as part of their transitioning, while others limit medical assistance or intervention in sex and gender "matching." Transgender persons can be any sexual orientation — heterosexual, pansexual, bisexual, lesbian or gay. See The Survivor Project, *Definitions Important When Describing, Conversing With, or Advocating For Sex and Gender Minorities* (1998) (on file with author).

72. "MTF" is defined as a male-to-female transgender person (usually transsexual), as in someone who is biologically male and is transitioning or has transitioned to living life as a woman. "FTM" is defined as a female-to-male transgender person, as in someone who is biologically female and is or has moved to living life as a man. "Bi-gendered" refers to one who identifies with and lives as both man and woman. See generally BORNSTEIN, *supra* note 69; BUTLER, *supra* note 69; FEINBERG, *supra* note 69; FOUCAULT, *supra* note 69. Though the terms are what I have defined as sex-based (based in concepts of male and female), the issues are more gender-related. Some MTF and FTM people identify as transsexuals and successfully alter hormone levels, genitalia and secondary sex characteristics. They are transsexual to the extent possible by medical science today, meaning that, at a

Another aspect of sexuality that utilizes terms in need of explanation is sexual orientation. One's sexual orientation indicates, in the broadest strokes, the sameness or difference of the biological sex of those whom an individual seeks for romantic, affiliative, loving and/or sexual pleasure and relationships.⁷³ For the most part, there are two categories or sets of categories that comprise sexual orientation. The first is "straight/heterosexual/sexual majority." These terms describe an orientation toward the sex different from one's own.⁷⁴ In this and other contexts, "straight" is juxtaposed with "queer," and "heterosexual" with "homosexual" or "gay" and "lesbian." Here, I position "sexual majority" as the opposite of "sexual minority," a term describing those non-heterosexuals who make up a given population. To describe intimate abuse that occurs among those whose orientation is toward the sex different from their own, I use the phrase "different-sex domestic violence."⁷⁵

The second category is "queer/homosexual/LGBT/sexual minorities." "LGBT" is the shorthand for lesbian, gay, bisexual and transgender. In addition, "Q" is sometimes added to include "questioning" (as in questioning one's sexuality), particularly when dealing with youth.⁷⁶ "Gay" was an early word used to replace the clinical term "homosexual," which came into use as a term describing a psychological disorder.⁷⁷ As women voiced their displeasure at being rendered invisible in the homosexual or gay movement, "lesbian" was added, both to describe homosexual women and to identify the homosexual community as a whole, as in "gay and lesbian."⁷⁸ "Lesbian" has become more common than the term "gay women," though that particular moniker does seem to be staging a

chromosomal level, they remain male (XY) or female (XX). Transsexuals are those who transform sex as much as transfer sexes or transition from one gender identity to another.

73. See HUMM, *supra* note 21, at 207 (stating that "sexual orientation" "usually means that an individual is naturally inclined towards a particular sexual identity. . . [S]ome argue, following Freud, that orientations are set up in early childhood, while others argue that orientations may be more flexible and relate to the life cycle").

74. *Id.* at 119.

75. Usually, transgender individuals are included under the same-sex domestic violence rubric. However, I use the phrase "different-sex domestic violence" to include both transgender individuals who may be transsexual and couples of different sexes (a male and a female) who gender-identify the same (as both men or both women). Still, as queers, these individuals or couples would likely receive better services by working with LGBT service providers.

76. For example, Questioning Youth Centers (QYC) "began in 1996 as a group of community members meeting to discuss concerns over the lack of available resources for GLBTQ youth. In 1997, the group reorganized into a steering committee for the purpose of forming a non-profit organization operating drop-in centers for GLBTQ youth aged 14 to 18." (Questioning Youth Centers, at <http://qyconline.org/who.html> (last visited May 13, 2003)).

77. See Gowing, *supra* note 32, at 54; JIM KEPNER, BECOMING A PEOPLE: A 4,000 YEAR CHRONOLOGY OF GAY AND LESBIAN HISTORY (1994).

78. See generally Gowing, *supra* note 32, at 55.

comeback currently, due to the association of "lesbian" with feminism.⁷⁹ "Lesbian" and "gay" generally refer to those who are oriented toward and/or attracted to members of their same sex.⁸⁰ "Bisexual," or "Bi," adopted into the movement⁸¹ to a limited extent (some say in name only) in the 1980s and 1990s, refers to individuals attracted to or oriented toward members of either or both sexes.⁸² Though not a sexual orientation, transgender individuals have fought to have their issues adopted by those working on gay, lesbian and bi rights issues, with only moderate success.⁸³ "Sexual minorities" describes LGBTQ individuals and communities, but is a term that has not taken hold. I argue that it has been rejected mostly because it describes a group rather than naming and claiming an identity. Thus, it is akin to an African-American saying "I am a racial minority" rather than "I am Black" or "I am African-American." The desire to name and claim an identity is one of the reasons that "queer" came to be used. I find "queer" to be an identity-based, inclusive term that is less wieldy than LGBT and leaves room for further self-identification. It is an in-group reclamation of a formerly, and, some would argue, still, derogatory term.⁸⁴ For the most part, in this work I use "LGBT" unless I am referring to that which has been specifically identified as "queer," such as "queer theory," or an individual, group or organization that identifies itself as "queer."

79. See Arlene Stein, *Introduction*, to *SISTERS, SXPERTS, QUEERS: BEYOND THE LESBIAN NATION* xi, xii (Arlene Stein ed., 1993) (noting that philosopher Janice Raymond warned "[w]e used to talk a lot about lesbianism as a political movement — back in the old days when lesbianism and feminism went together, and one heard the phrase lesbian feminism"). See also Sidney Abbott & Barbara Love, *Is Women's Liberation a Lesbian Plot?* in *WOMAN IN SEXIST SOCIETY: STUDIES IN POWER AND POWERLESSNESS* 436, 436 (Vivian Gornick & Barbara K. Moran eds., 1971).

80. I purposely use "sex" here and not "gender." Though some would argue that sexual orientation is actually a gender-based attraction, I find it to be more simple and straightforward to connect attractions to sex, which is more permanent, than to gender, which is more fluid.

81. That would be the movement for lesbian, gay, bisexual and transgender rights and freedoms. It is often called the "gay rights movement."

The modern "gay liberation movement" officially began on June 27, 1969 when a bar called the Stonewall Inn in New York's Greenwich Village was raided by police. Rather than passively accept the situation, some 200 gay, lesbian, bisexual and transgender patrons fought back against the police and their nearly nightly raids of gay bars. Riots and rallies ensued and continued for three days straight. A year later, five thousand people marched in New York City to commemorate the Stonewall uprising and to send out a "call for action." In 1994, at Gay Pride Day, a quarter million people marched.

A Brief Background of the Gay Rights Movement, at http://www.dreamworld.org/oystergsa/gsa_history.htm (last visited May 14, 2003).

82. HUMM, *supra* note 21, at 24.

83. See generally, e.g. Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392 (2001) (discussing transgender rights issues).

84. In the same way that it has been argued that African Americans should only use the epithet "nigger" in speech contexts, "queer" has come to be seen as acceptable for use only by those who are LGBT and only in some contexts.

I use the term "queer" to refer to a community or set of communities characterized by particular cultural aspects and certain common, understood and shared sensibilities and stories. The opposite of a "queer community" is a "straight community." Neither designation necessarily excludes nor includes members by virtue of sex, sexual orientation or gender identity. This means that someone can be queer-community-identified, male, gendered man and heterosexual or a straight-community-identified, female, transgender and bisexual man⁸⁵ or any other combination imaginable. I use "queer-" and "straight-identified" as a way to note the ways in which one lives their sexual politics.⁸⁶ I also use "straight" to identify theory, practice, behaviors, attitudes and values that conform to the dominant culture's way of perceiving, thinking about, constructing and experiencing human sexuality.⁸⁷

D. CONVENTIONALITY AND "STRAIGHTNESS"

Webster's New Collegiate Dictionary offers a number of definitions for "straight," including: (1) the obvious, "[h]eterosexual;" (2) "[d]irect, uninterrupted as lying along or holding to a direct or proper course or method;" (3) "[n]ot deviating from the general norm or prescribed pattern" and (4) "[e]xhibiting no deviation from what is established or accepted as usual, normal or proper: conventional, also square."⁸⁸

"Straight" is a common term for heterosexual and is, as noted *supra*, often placed in opposition to "homosexual," "lesbian" or "gay." However, as I argue, "straight" can also be juxtaposed with "queer," as with sexual communities. In this instance, "square," a slang expression for someone who is uptight or too conventional, can also be included in this definition of "straight" when it is used in a way that sets it in opposition to "queer."

When I define much of criminal law practice as "straight," I am using the second definition to describe how law enforcement and others in the criminal law system behave. Policies, procedures, statutes and local court rules are often written and enforced in such a way as to specifically exclude

85. See *supra* notes 65-86 and accompanying text for a discussion of these terms.

86. "Sexual politics" is most commonly used to invoke the classic feminist treatise of the same name and the ideas Kate Millett characterizes as "the proposition that sex has a frequently neglected political aspect." KATE MILLETT, *SEXUAL POLITICS* xi (1970). I use the term in this manner as well, but expand it to include the real positions individuals take on politicized issues that relate to gender and sexuality. These issues range from the obvious, such as abortion or sodomy laws, to the less obvious, such as school board elections, (which control curriculum) and tax laws (which dictate married/single filing status).

87. See *infra* Part II.D.

88. WEBSTER'S NEW COLLEGIATE DICTIONARY 1140 (1981).

both LGBT persons and the issue of same-sex domestic violence. This means that when statutes or policies are adhered to, even if they fail to help LGBT domestic violence victims, they are "holding to a direct or proper course or method." If following the rules as they exist is proper, then what is currently being done is proper. This, too often, is the reason or excuse given for the system's failure to respond to LGBT individuals.

Definitions Three and Four of the term "straight" are the most applicable to this work. Fundamentally, "straight" is about not deviating from, and "queer" is about deviating from, what is deemed normal and thus is normative. I argue that the problem is with the construction of the "norm or prescribed pattern" and the establishment of that which is "accepted as usual, normal or proper." My most basic argument about straightness is that, when it comes to human sexuality, there is no true norm, and nothing is usual. Society may have chosen to make generalizations based on that which appears to occur more often than not. This then becomes the standard, the norm, the prescribed pattern, the usual way of being or doing.⁸⁹ But the fact of something becoming the norm merely assigns dominance, superiority and value to the most often seen, for example heterosexuality. This renders inferior or of lesser value that which appears to happen less, the less visible (e.g., homosexuality).⁹⁰ Other aspects of human sexuality that have been labeled abnormal and deviant include transgenderism, female "promiscuity" or women's "excessive" sexual desire, clitoral orgasms, "May-December" romances, intersexuality, using pornography or sex toys, adultery, etc.⁹¹ If "straight" is the norm and is defined by a list of proper behaviors, to really be straight one has to adhere to the entire list and not deviate one bit. I argue that this means that there are not many "straight" people in the nation. One could argue that "straight" is aspirational. My response is that the "straight" list keeps changing, and for people to have something to aspire to it must be fairly constant; otherwise, no one will know when they get there.

89. HELEN FISHER, *ANATOMY OF LOVE: A NATURAL HISTORY OF MATING, MARRIAGE, AND WHY WE STRAY* (1995).

90. I say "appears to happen less" because there is a certain self-fulfilling prophecy to valuing something in that whatever is devalued becomes less visible.

91. In fact, non-normative sexual identities and behaviors often get lumped together under the label "deviant." Witness Senator Rick Santorum's comments as he discussed a pending Supreme Court case regarding a sodomy law in Texas. Senator Santorum stated, "If the Supreme Court says that you have the right to consensual (gay) sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything." Sean Loughlin, *Santorum Under Fire for Comments on Homoexuality* (April 22, 2003), available at <http://www.cnn.com/2003/ALLPOLITICS/04/22/santorum.gays/index.html>.

In the realm of sexual identity, both queer and straight exist.⁹² The straight identity is the dominant one. Straight is the sexual hegemony. In this context, the enforcement of the criminal law response to domestic violence is essentially straight because the law is inherently conventional. In addition, any influence by feminist theory and practice has not sought to "queer" legal responses. This is because domestic violence feminist theory and practice — which is comprised primarily of liberal feminism⁹³ — itself is straight and conventional when it comes to issues of sexuality, even if its concepts of sex and gender roles are not. "Straight" means conventional and typical attitudes, beliefs and understandings of all aspects of human sexuality. Most fundamentally, "straight" is the understanding that sex conforms to gender, which is conflated with sexual orientation; all of these concepts are presented in an easily recognizable and conforming package.⁹⁴ There is no ambiguity, no atypicality, no question, no doubt, and no confusion as to who is whom and what is what and where everything is and belongs. When law enforcement receives a call about a domestic disturbance or incident of family violence, the expectation is to find a male of a certain type physically assaulting a female of a certain type.

The criminal law relevant to the problems of domestic violence, and all law for that matter, is fundamentally straight. One would imagine that this straightness would be lessened by the feminist influence on domestic violence law. I argue that, to the contrary, it is the feminist influence that has made domestic violence law straight, and that this is because the battered women's movement is fundamentally straight. The feminism that grounds domestic violence theory has its own set of prescriptive conventional norms. For most, domestic violence is rooted in sexism and patriarchy and is fundamentally about male violence against females. Some battered women's advocates do argue that domestic violence law is not based on feminist theory of male domination but on a family violence

92. See generally, e.g., Valdes, *supra* note 42.

93. "Liberal feminism" is:

[t]he theory of individual freedom for women. Liberal feminism is part of the main streams of feminist political and social theory and has the most long-term history. . . . At the heart of liberal beliefs about sexuality is the view that one's private life should not be subject to regulation by society. Liberal feminism therefore accepts the public/private dichotomy which radical feminism attacks. Liberal feminism argues for individual fulfillment free from the strictures of highly defined sex roles. It limits itself to reformism, seeking to improve the status of women within the system but not fundamentally contesting either the system's operation or its legitimacy.

HUMM, *supra* note 21, at 118-19.

94. See generally Valdes, *supra* note 42, at 12.

model that does not specifically gender violence.⁹⁵ However, if one reviews the existing legislation, it becomes apparent that it was all drafted with an assumed image of a certain type of male physically abusing a certain type of female: for the most part, a husband or live-in boyfriend battering his wife/girlfriend.⁹⁶ Though the battered women's movement did not specify the populations with which it was concerned as it developed domestic violence theory and practice, it was clear that it was concerned with women (hence, "the battered women's movement"), specifically, those in spousal relationships.⁹⁷

The "straight" responses to which I refer are grounded in a conventional mind-set about issues of sexuality. One aspect of this conventionality is a belief that sexuality, particularly issues of sex, gender and sexual orientation, has little or nothing to do with either domestic violence itself or when, where, how and why the legal system intervenes or chooses not to intervene. This idea that the law is neutral, unbiased and equally applied regardless of status or identity permeates the legal system.

I argue, as do other critical race theorists, lat crits, feminist theorists, and queer crits,⁹⁸ that the law is anything but neutral, unbiased and equal when it comes to issues of identity or status. In domestic violence cases the identity issues I am addressing are part of the realm of sexuality. Responses to domestic violence are influenced both by attitudes about sexuality in general and by the attitude that sexuality is irrelevant. Scholars

95. *E.g.*, DAVID ISLAND & PATRICK LETELLIER, *MEN WHO BEAT THE MEN WHO LOVE THEM: BATTERED GAY MEN AND DOMESTIC VIOLENCE* (1991).

96. *See* Goldfarb, *supra* note 40, at 596 (citing to MISS. CODE ANN. § 93-21-3 (1993); S.C. CODE ANN. § 20-4-20 (Law. Co-op. 1985)).

97. *See generally* DEL MARTIN, *BATTERED WIVES* (1976); MARIA ROY, *BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE* (1977); SCHECHTER, *supra* note 2; WALKER, *supra* note 16.

98. *See generally* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberle Crenshaw, et al. eds., 1995); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2001) (providing an understanding of critical race theory). *See also* FEMINIST LEGAL THEORY: FOUNDATIONS (D. Kelly Weisberg ed., 1993) (explaining feminist legal theory). *See also* CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997) (explaining critical race feminism). *See also* Francisco Valdes, *LatCrit a Conceptual Overview*, at <http://personal.law.miami.edu/~fvaldes/latcrit/overview.html> (last visited Dec. 2, 2003); THE LATINO CONDITION: A CRITICAL READER (Richard Delgado & Jean Stefancic eds., 1998) (providing an introduction to LatCrit theory and praxis). *See also* Elvia R. Arriola, *Who Owns the Label "Lesbian"?*, 8 HASTINGS LAW JOURNAL 1 (1997); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 9 CONN. L. REV. 561(1997); Laurie Rose Kepros, *Queer Theory: Weed or Seed in the Garden of Legal Theory?* 9 TUL. J. L. & SEXUALITY 279 (1999); RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* (1992); Francisco Valdes, *Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience — RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265 (1999) (providing an explanation of queer legal theory).

and service providers working on same-sex domestic violence reinforce this idea that sexuality (particularly sex and gender) is irrelevant. Insisting that same-sex domestic violence "proves" that domestic violence is not gender violence gives weight to the argument of those who seek to undermine the feminist contention that domestic violence stems from patriarchy.⁹⁹ I characterize the argument as "domestic violence is not about patriarchy; it is about power and control." However, it was feminists who first labeled domestic violence an issue of power and control; they created a space to make domestic violence a crime and social ill by saying that domestic violence was not "merely" a little domestic squabble or one of the rights of men.¹⁰⁰ The power and control explanation and the explanation that domestic violence is gendered violence existing as a result of patriarchy are not mutually exclusive. Patriarchy itself is about power and control.¹⁰¹

The ways in which the criminal justice system views and understands both (1) issues of sexuality, particularly sex, gender and sexual orientation, and (2) how these issues do or do not conform to one another is very conventional. The most conventional, most straight, view is that no separation exists among the three: Sex is gender and gender is sex, and all people are heterosexual. Homosexuality is a choice, sin, phase or rebellion.¹⁰² A less rigid view is that sex and gender are not the same, but that one does indicate or conform to the other. According to this view, there is a match between sex and gender. This version of straight cannot fathom transgender identity. The straight mind-set about sexual orientation is most generally that one can ascertain a person's sexual orientation by identifying first the individual's sex and/or gender and then the sex and/or gender of the individual with whom he or she is paired.¹⁰³ A third view is that issues of sexuality are irrelevant when addressing domestic violence. The straight response is that women are the victims, men the perpetrators, and that that is where sex and gender issues end.

Theories of domestic violence causation, which include family dynamics, individual psychology, external factors, etc.¹⁰⁴ are conventional/straight when they are loaded with gender stereotyping and/or

99. See Eaton, *supra* note 38, at 211; KNAUER, *supra* note 40, at 33.

100. See *supra* Part II.B.; *infra* Part III.A & Part III.D.1.

101. See *supra* note 4 and accompanying text.

102. Though I obviously disagree I am not here placing a value judgment on this conventional mind set. Straight, in and of itself is not bad or good. I am merely arguing that this particular set of ideas has not lead to productive criminal law interventions in domestic violence, particularly same-sex domestic violence.

103. See Valdes, *supra* note 42, at 15.

104. See *infra* Part III.C.

rooted in biological sex. All theories of causation are conventional if they include the notions that perpetrators are men, that victims are women, and that this particular kind of genderedness is necessary for domestic violence to occur. A criminal law domestic violence intervention that is conventional in theory is one that bases its responses on existing theories about domestic violence, on standard theories of punishment and criminal law enforcement as well as on conventional ideas of sexuality. The accompanying mind-set is potentially one that is grounded in the individual psychology theory of causation,¹⁰⁵ the belief that arrest and prosecution serve as a specific deterrence and the fundamental idea that women are victims and men perpetrators. A law enforcement officer who enters a same-sex domestic violence situation possessing these beliefs will more than likely react differently than will an officer who has the same beliefs about individual psychology and deterrence, but whose ideas of sexuality have been queered. The same may be true of the prosecutor who has a multi-disciplinary theory about causation and a belief in rehabilitation, but whose ideas of sexuality are straight; compared with a prosecutor with conventional ideas about causation and the purpose of criminal intervention but a queered idea of sexuality.

Although the thought process and underlying assumptions each player in the criminal law system holds can affect how she or he approaches any given domestic violence case, the existing policies and procedures have a much greater influence on the results of a given situation. A law enforcement agency mandated by law to arrest in a given set of circumstances will arrest when those circumstances exist. Straight/conventional practice is that which is most standard today; the practices that battered women and their advocates lobbied for. Most law enforcement agencies have pro-arrest or mandatory arrest policies or regulations.¹⁰⁶ Most prosecutors' offices have no-drop policies.¹⁰⁷ Many judges sentence to batterers' treatment.¹⁰⁸ These practices have been implemented regardless of the sex or gender of those involved but have resulted in disparate treatment of those in same-sex battering situations. Conventional practices have not produced reductions in domestic violence

105. *Id.*

106. See NAT'L INST. OF JUST., *supra* note 19, at 2-3. See also JUSTICE RESEARCH AND STATISTICS ASS'N, JOINT PUBLICATION OF THE NAT'L. INST. OF JUSTICE AND THE BUREAU OF JUSTICE STATISTICS, DOMESTIC AND SEXUAL VIOLENCE DATA COLLECTION: A REPORT TO CONGRESS UNDER THE VIOLENCE AGAINST WOMEN ACT (1996) (providing a discussion of state-to-state reporting practices).

107. *Id.*

108. *Id.*

in general, let alone in same-sex domestic violence.¹⁰⁹ In addition, the number of women who are being arrested has risen.¹¹⁰ Many of these women are identified as victims who commit retaliatory or defensive (though not legally self-defensive) violence.¹¹¹ Still, this violence violates domestic violence statutes.¹¹² Advocates working with communities of color, the poor and immigrants have spoken out and written about the disproportionate effect that domestic violence statutes in general, and mandatory arrest statutes in particular, have had on these communities.¹¹³ Essentially, the policies have given police another reason to enter already over-policed communities and to arrest and prosecute those who are already most arrested and prosecuted.

As applied to LGBT communities, the straight response, combined with conventional theories about both causation and the purposes of criminal law, has proven to be particularly ineffective. Though there are individual cases in which particular communities have been well served by existing responses — for example, certain gay white males in San Francisco — the majority of those involved in LGBT communities have reported an over-abundance of either dual arrests or no arrests.¹¹⁴ In addition, transgender communities report much police abuse of both victims and perpetrators.¹¹⁵

The legal system's prevention efforts have been focused on the idea that domestic violence is a crime. These efforts have proved to be less than effective within subordinated communities, including LGBT communities, because communities that already have negative interactions with law enforcement and the court system are reluctant to voluntarily invoke state power, even if an individual is being victimized. In such situations, one is more likely to identify with one's community than as a victim.¹¹⁶

109. NCAVP 2000, *supra* note 64, at 11 (providing the most recent comparative numbers).

110. Reports indicate a 18.4% increase from 1999 to 2000. *Id.*

111. See generally Mary Ann Dutton, *Validity of "Battered Woman Syndrome" in Criminal Cases Involving Battered Women*, in DOMESTIC VIOLENCE LAW 666 (Nancy K. D. Lemon ed., 2001) (discussing cases in which battered women are charged with assaulting their perpetrators).

112. See generally FREDRICA L. LEHRMAN, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE 6-1 to 20 (1997); Isabelle Scott, *Domestic Violence Practice and Procedure, 2003 Cumulative Supplement* 213-22 (2003) (providing an annotated listing of, and comments on, state criminal domestic violence statutes).

113. E.g., RICHIE, *supra* note 30; Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281 (1997); Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in domestic Violence Policy*, 2 AM. U. J. GENDER SOC. POL'Y & L. 171 (1994).

114. Leland, *supra* note 60, at A18.

115. See *infra* Part III.D.3.

116. See Ammons, *supra* note 57, at 1020-21; Rivera, *supra* note 57, at 234; Wang, *supra* note 57, at 173.

The impact of straightness is multifaceted. As noted above, there are a number of applicable definitions of "straight."¹¹⁷ When it comes to domestic violence interventions, "straight" is implicated in assumptions about victims and perpetrators in general, as they pertain to responses to same-sex domestic violence and as they pertain to responses to different-sex domestic violence. Even with the very slight feminist slant of modern domestic violence law, the legal system still possesses a hostility towards the issue of domestic violence. The legal system's hostility toward domestic violence indicates that the system features particular assumptions about victims and perpetrators. Work by feminist researchers and theorists that emphasized the seriousness of physical violence and that introduced such concepts as learned helplessness¹¹⁸ and battered women's syndrome,¹¹⁹ helped to create a particular image (or stereotype) of a victim as helpless and hospitalized, and of a perpetrator as deviant and always physically violent. The image created by battered women's advocates and acknowledged by the criminal law system, which already assumes women's vulnerability and victimization because of the fundamentally gendered nature of the law itself,¹²⁰ is that domestic violence is about the serious physical harm that perpetrator (bad man) does to victim (good woman). This is the image of domestic violence.

The battered women's movement has influenced the criminal justice system to formulate domestic violence interventions that conform to its definitions of gender. Even though domestic violence exists because of the way gender has been constructed by and within a heterosexist patriarchal society, a straight/conventional approach to ending domestic violence has yet to work. It is possible that more nuanced non-gendered or queered approaches will help. This is what some queer organizations are doing. Their approaches are rooted, not in the battered women's movement's

117. See *supra* note 88 and accompanying text.

118. The psychosocial theory of learned helplessness is a "psychological rationale. . . developed to explain why the battered woman becomes a victim in the first place and how the process of victimization is perpetuated to the point of psychological paralysis." WALKER, *supra* note 16, at 43.

119. See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Women's Syndrome*, 21 HOFSTRA L.R. 1191, 1194-96 (1993) (explaining that the battered women's syndrome is more than "their psychological reactions to domestic violence" and that the syndrome is most commonly used by experts testifying at the trials of battered women who have killed their abusers to explain why they could not or did not leave. The "battered women's syndrome" language has occasionally been replaced by "battered person's syndrome" or other gender-neutral language).

120. See Goldfarb, *supra* note 40, at 596-601 (explaining how gender is embedded and institutionalized in the common law system, citing to common law doctrines of unity and merger, property rights, and physical rights of men over women).

feminist theory but in queer theory.¹²¹ Thus, the criminal justice system should ground its approaches in queer theory's more fluid notions of gender and sexuality. This should render the system's responses more uniformly effective for all those victimized by domestic violence.

E. WHO IS HARMED WHEN THE SYSTEM FAILS?

The straight response has been less effective than it could be, primarily because it fails to incorporate individual as well as community identities and needs into its repertoire. When the actors within the criminal law system respond from a straight mind set, queer victims and perpetrators and any others falling outside the conventional images of victim and perpetrator are not treated equally. For example, once a police officer identifies a person as transgendered, the officer's attitude and behavior towards that individual often change.¹²² Transgender victims are often gender-misidentified and treated as if they are violating the law by simply being trans.¹²³ In the case of lesbian and gay male domestic violence, law enforcement officers have regularly determined victim and perpetrator based on size, which is a reflection of straight notions of male/female and butch/femme stereotypes: The bigger person is the perpetrator, the smaller person the victim.

Prosecutors, even those whose offices have no-drop policies, may choose not to prosecute because, rightly or wrongly, a perception exists that it is difficult to obtain a conviction in same-sex domestic violence cases. This difficulty is attributed to, among other reasons, a belief on the part of judges and juries that domestic violence between two men or two women is either nothing more than a fair fight or just what gay people do.¹²⁴ Hardcore batterers¹²⁵ in particular know that the system would just as soon not deal with the number of cases of domestic violence that go through the

121. Queer theory both incorporates and expands on feminist theory. See Elizabeth Weed, *Introduction to FEMINISM MEETS QUEER THEORY* vii, vii (Elizabeth Weed & Naomi Schor eds., 1997).

122. Interview with Shawna Virago, Domestic Violence Director, Community United Against Violence, in San Francisco, Cal. (Aug. 1, 2000).

123. See generally Diana Courvant & Loree Cook-Daniels, *Trans and Intersex Survivors of Domestic Violence* (1998) (handout from The Survivor Project, on file with author); BORNSTEIN, *supra* note 69; FEINBERG, *supra* note 69. "Trans" is a shortened form of "transgendered" and also includes transsexual and others who are gender transgressive). *Id.*

124. See NCAVP 2000, *supra* note 64, at 7 (explaining that many police officers view violence between LGBT couples as mutual or consensual abuse).

125. I use this term to refer to those who show the most lethality and whose repeated violence and abuse seem to be the most entrenched (as opposed to those who are violent or abusive but do not show signs of being on-going batterers). There are different types and severities of domestic violence and, though all may violate the law, not all incidences or perpetrators are the same. See Donald G. Dutton & Susan K. Golant, *The Batterer: A Psychological Profile* 22-23 (1995).

system and would especially prefer to avoid the combination of gay, lesbian, bisexual or transgendered people with domestic violence.

The problem is that when these failures of the system occur, victims are not protected, and batterers are not provided the intervention necessary to stop them from being violent or abusive again, be that counseling or punishment. This is a major flaw with the straight response. Another problem with conventional responses is that distrust of the legal system by LGBT individuals and communities continues and, in some cases, escalates because of LGBT individuals' interactions with the system. If a case is handled poorly at any stage, a victim will be less likely to seek assistance again and will advise others not to involve the police or the court system.¹²⁶ Good or bad, the criminal law system is the point of entry to assistance in an emergency; 9-1-1 is the number called. If no assistance is given or if the victim is treated like a criminal by being arrested along with the perpetrator, the message that help is not available is transmitted to the victim and the perpetrator.

When it comes to different-sex domestic violence, the most obvious problem with the straight response is that male victims of female violence are ignored.¹²⁷ Though not found in the same epidemic proportions as male violence against females is found, there are some male victims of female batterers.¹²⁸ It has been a fundamental tenet of both the battered women's movement and the movement against same-sex domestic violence and domestic violence within LGBT communities that numbers should not be the main focus: One victim is one victim too many. A queered approach may allow the male victim of the female batterer to be more readily identified and provided with the needed assistance.¹²⁹ In addition, a queer

126. In Columbus, Ohio, the total number of incidents reported increased slightly in 2000 but were from "a narrowing segment of the LGBT community". In addition, the number of reports continued to be low. This may be attributable to a "lack of cooperation and support from mainstream service providers". NCAVP 2000, *supra* note 64.

127. See Nancy L. Guerin, Comment, *People v. Walker: The Battered Husband Defense*, 7 CRIM. JUST. J. 153, 157 (1983). See generally Alexander Detschelt, *Recognizing Domestic Violence Directed Towards Men: Overcoming Societal Perceptions, Conducting Accurate Studies, and Enacting Responsible Legislation*, 12 KAN. J. L. & PUB. POL'Y 249, 250 (2003).

128. U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 1 (1995) (stating that women were about 6 times more likely than men to experience violence committed by an intimate).

129. There has been what I can only call "whining" from any number of men's rights groups complaining that battered men have nowhere to turn. They insist that there are many such men, pointing to the Murray A. Straus and Richard J. Gelles studies, among others, to substantiate their claims. MURRAY A. STRAUS, RICHARD J. GELLES & SUZANNE K. STEINMETZ, *BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY* (1980); RICHARD J. GELLES & MURRAY A. STRAUS, *INTIMATE VIOLENCE* (1988). These studies used conflict tactics methodology to arrive at numbers that indicate a nearly equal number of men and women victims of violence at the hands of their intimates, and a higher

approach may make it possible to design much-needed programs for heterosexually identified females or women who may be victims acting in self defense or out of retaliation.¹³⁰

A number of female victims of different-sex domestic violence are also harmed by the straight response. As a result of the existence of gender-based expectations of who a victim is and how she responds in any given situation, women who do not conform to these expectations may fail to receive protection and may be treated like criminals, in much the way that LGBT victims are. Lack of the standard female passivity, being angry rather than afraid, appearing to be uncooperative and fighting back are all examples of the "wrong" type of victim response.¹³¹ To the other extreme, excessive passivity, an apathetic affect, failing to "cooperate" as a complaining witness or not prosecuting also make for the wrong type of victim: a difficult victim.¹³²

The battered women's movement has successfully brought the issue of domestic violence into the public consciousness. Still, straight/conventional responses to domestic violence are simply not effectively serving the myriad interests and needs of both victim and perpetrator. People are falling through the cracks and intimate-partner

number of male victims of what the studies refer to as "severe violence." See *Rates of Severe Spousal Violence by Gender*, at <http://www.menweb.org/throop/battery/gelles/rateKY.html> (last visited Dec. 2, 2003). But see Trish Wilson, *The Myth of Battered Men: Men and Women are not Equally Abusive*, at <http://members.aol.com/asherah/cts.html> (last visited Dec. 2, 2003) (challenging the claims that women are equally or more abusive). However, even if we assume that the critics are correct and that there are hundreds of thousands of battered men seeking services, my response is that the men's rights movement needs to do what the feminist and battered women's movements and LGBT communities have done: that is, to step up to the plate and fill that need. The battered women's movement and those working against domestic violence in LGBT communities began their work with little or no money. Most organizations still rely heavily on donations, though governmental grants have increased. Reporting is a key part of continued funding. My call is for the men's groups to step up and open their homes to battered men and their children; to start shelters and service agencies on donated furniture and food; to apply for federal grants where statistics must be documented; to provide 24-hour crisis lines and advocacy; to deal with issues of gay and transgender men in shelters and groups, as battered women's shelters have addressed (or not) the issues facing lesbian, bi and transgender women; to address dual arrests and develop tools by which one determines who is the batterer and who is the victim. Subordinated groups have had to take care of their own for years. It is time for dominant groups to do the same thing and not simply expect someone else, in this case women, to do it yet again.

130. Batterer treatment programs for women are often populated with victims who did violate the law but are not batterers. In these cases, the act of physical violence was indeed an isolated event and neither part of a pattern nor done with the requisite intent of gaining power and control which is necessary to label the individual a batterer.

131. This "wrong" type of victim response has been noted in women of color. See generally Crenshaw, *supra* note 30; RICHIE, *supra* note 30; WHITE, *supra* note 30.

132. Examples might include Asian and Asian-American women. See generally, e.g., Wang, *supra* note 57. See also Interview with Joy Canada, Queer Women's Services Program Coordinator, Asian Women's Shelter, in San Francisco, Cal. (April 25, 2002).

abuse continues to be a serious, dangerous and time- and resource-consuming problem.

III. THE CONTEXT: THE DOMESTIC VIOLENCE MOVEMENT AND THE DEVELOPMENT OF A CRIMINAL LAW RESPONSE

[The criminal justice system provides] a certain level of gratification. [It] feeds the [victim's] revenge fantasy. It indicates a seriousness. [It makes] clear that something's wrong. Your partner's in jail! What are you going to do?¹³³

A. THE DOMESTIC VIOLENCE MOVEMENT AND ANTI SAME-SEX DOMESTIC VIOLENCE WORK

In January 1978, a group of women was called to testify at the U.S. Commission of Civil Rights Hearings on Woman Abuse. This was the beginning of an organizing effort that led to the National Coalition Against Domestic Violence (NCADV).¹³⁴ Approximately 40 of these women, who identified as lesbians, met separately to discuss issues specific to lesbians working to combat domestic violence. Though they faced accusations of being separatist and divisive and of trying to discredit the movement, they held their discussion. Two issues repeatedly surfaced: (1) homophobia within the battered women's movement, its programs and service agencies and (2) lesbian battering.¹³⁵

In contrast, the movement to stop gay men's battering has been more of a loose coalition of individuals and programs providing services. In 1981, the Seattle Counseling Service for Sexual Minorities began providing services to gay male domestic violence victims and batterers. In 1986, three other programs were founded, one in New York and two in San Francisco, all of which are still in operation.¹³⁶ Recently, anti-LGBT violence programs have taken on the issue.¹³⁷ These organizations have provided services for both lesbians and gay men. Many groups also serve transgender persons, bisexuals, questioning individuals and those who do

133. Interview with Maggie Paul, Advocate, San Francisco Network for Battered Lesbian and Bisexual Women; Volunteer, W.O.M.A.N. Inc., in San Francisco, Cal. (April 21, 2000).

134. See, SCHECHTER *supra* note 2, at 136-50 (providing a detailed history of the development of the National Coalition Against Domestic Violence).

135. Hart, *supra* note 8, at 9, 12.

136. ISLAND & LETELLIER, *supra* note 95, at 35.

137. The organizations were originally founded to address anti-LGBT violence, such as gay bashing, and AIDS/HIV issues. Some were or still are community centers. Organizations include agencies such as Community United Against Violence (San Francisco, Cal.) and The Gay and Lesbian Community Center (New York, NY). See National Coalition of Anti-Violence Programs (NCAVP), at <http://www.avp.org> (last visited Jan. 19, 2003).

not claim any particular identity but have experienced same-sex abuse and/or relate to the issue of intimate abuse from a non-heterosexual standpoint.¹³⁸

Naming the Violence: Speaking Out About Lesbian Battering was the first, and still one of few, compilations of narratives and information about same-sex domestic violence, specifically lesbian battering.

This book grew out of a meeting, held in September 1983, sponsored by the Lesbian Task Force of the [NCADV]. Attended by over one hundred participants, the meeting was the first opportunity for many. . .to discuss lesbian battering outside of the context of. . .local communities. This meeting set the tone for the work — and the controversies — that have since surfaced throughout the country.¹³⁹

This meeting and the resulting book have been touchstones for those working against same-sex domestic violence, particularly lesbian battering. Much of the work that has sprung up since the mid to late 1990s has been in response, though not necessarily conscious response, to the personal narratives and informative articles contained in this initial compilation.

In many ways, those who are currently working to end same-sex domestic violence are where battered women's advocates were in the early stages of the domestic violence movement: They are searching for basic answers. There are those serving LGBT persons, most of whom work within existing systems (whether the criminal justice or domestic violence system), who are simply using the battered women's movement's strategies and services. There are others, most coming from within LGBT organizations, who are attempting to do things differently.

There are signs that things are slowly changing. In recent years thanks to the tireless efforts of queer activists and survivors who simply would not shut up and go away, many state domestic violence laws have been amended to include victims of same-sex partner abuse. Mental health and community organizations (both queer and straight) are beginning to take the problem of same-sex domestic violence seriously. Most hearteningly, grassroots activists have done an impressive amount of creative work to address issues of queer domestic violence.¹⁴⁰

138. There is a difference between same-sex domestic violence and abuse experienced by LGBT persons. Same-sex domestic violence can and does occur between individuals who are heterosexually identified and/or gender-fixed (as opposed to being transgender). The relationship could be siblings, parent-child, etc., but could also be an adult intimate relationship in which the parties are transgendered.

139. Kerry Lobel, *Introduction* to *NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING I* (Kerry Lobel ed., 1986).

140. Leventhal & Lundy, *supra* note 34, at x.

What I have found is that LGBT-identified individuals, activists and service providers who work in LGBT communities, as opposed to those who are outside the communities, are trying to create different models. These new, more nuanced approaches to preventing, intervening in and ending domestic violence have arisen out of the need to consider a number of issues relating to age, gender, sexual orientation, race, class and language.

B. DOMESTIC VIOLENCE STATISTICS

When Del Martin wrote *Battered Wives* in 1976, she noted, Accurately determining the incidence of wife-beating per se is impossible at this time. Obvious sources of information are police reports, court rosters, and emergency hospital admittance files, but wife-abuse is not an official category on such records. Information on the subject gets buried in other, more general categories.¹⁴¹

Today, local law enforcement, county and state agencies and federal government offices keep specific domestic violence statistics.¹⁴² In addition, district attorneys' offices regularly keep prosecution and conviction counts, while battered women's service agencies and state and national domestic violence coalitions keep track of calls and services provided.¹⁴³ Hospitals, especially those in states with mandatory reporting laws,¹⁴⁴ also keep records of the number of patients seen who were identified as victims of domestic violence. Researchers have conducted short- and long-range studies to determine numbers of victims and perpetrators.¹⁴⁵ Still, at least one aspect of what Martin wrote almost 25 years ago has not changed: Accuracy continues to be an issue. This is not necessarily because of a lack of numbers, but possibly because of too many numbers that are in conflict with one another.

141. MARTIN, *supra* note 97, at 10-11.

142. See, e.g., BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIM REPORT, VIOLENCE AGAINST WOMEN OFFICE (2001); U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE & THE CENTERS FOR DISEASE CONTROL AND PREVENTION, CRIMINAL VICTIMIZATION REPORTS: EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (2000) [*hereinafter* U.S. DEP'T OF JUSTICE].

143. These statistics are often kept for purposes of reporting back to granting agencies. See, e.g., Office of Justice Programs, Grants to Encourage Arrest Policies and Enforcement of Protection Orders Program, Enhancement Grant Award Program: FY 2001, Wis., at <http://www.ojp.usdoj.gov/vawol/map/arrest/2001/wigtea.htm> (last visited Dec. 3, 2003).

144. See generally Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 562-63 (1999) (providing a review of mandatory reporting).

145. See generally BUREAU OF JUSTICE STATISTICS, *supra* note 142; GELLES, *supra* note 129; JUSTICE RESEARCH AND STATISTICS ASS'N, *supra* note 106; STRAUS, *supra* note 129.

Another reason for the accuracy problems might be that different definitions of domestic violence exist. In addition, statistics have become a political tool for groups on both sides of the issue.¹⁴⁶ I, like most other battered women's advocates and those working against LGBT domestic violence, do not deny that men are victims of abuse at the hands of women. However, I take issue with two assertions: (1) that domestic violence is not gendered/gender violence, and (2) that the issue of battered men is identical in scope and seriousness to the issue of battered women. Yes, one victim is one victim too many, and, as I argue here, queering domestic violence is designed to respond to all victims while acknowledging that domestic violence is gender-based violence and that the majority of victims are women and perpetrators, men.¹⁴⁷

Another reason why accuracy can legitimately be questioned is that, for many, domestic violence is still something about which one remains silent. This is especially true for those victims who are members of a subordinated group (other than women), such as immigrants, non-English speakers, youth, the disabled and LGBT persons.¹⁴⁸ The accuracy of numbers is also called into question because males who are battered by females are often unwilling to discuss the abuse.¹⁴⁹

The prevalence studies most agreed upon are those kept by law enforcement agencies, national battered women's agencies, such as the Family Violence Prevention Fund,¹⁵⁰ and the federal government, such as the National Crime Victim's Survey.¹⁵¹ Most government statistics focus on arrests or the numbers of those reporting abuse. The focus is on physical violence rather than a range of abusive behaviors.¹⁵² "Nearly 1.9 million women are physically battered in the United States each year. The Federal Bureau of Investigation estimates that almost fourteen hundred

146. The two "sides" of the issue are: (1) battered women's advocates and long-time domestic violence movement activists and organizations, and (2) individuals and groups who used to argue that domestic violence against women was not a major issue and now argue that men are equally or more victimized by their intimate female partners. See generally *Battered Men — The Hidden Side of Domestic Violence*, at <http://www.batteredmen.com/> (last visited May 15, 2003).

147. See Wilson, *supra* note 129 (providing a synopsis of studies about men's and women's violence).

148. Some studies suggest that domestic violence in communities of color may be even greater than what is actually reported, ". . . especially if the victims have additional reason to fear or mistrust the police." See NCAVP 2000, *supra* note 64, at 17.

149. See Ami Chen Mills, *Battery Row*, at <http://www.copss.org/media/metroDV.htm> (last visited July 1, 2003).

150. Family Violence Prevention Fund Web Site, at <http://endabuse.org/resources/facts> (last visited Nov. 18, 2000).

151. BUREAU OF JUSTICE STATISTICS, *supra* note 142.

152. See Domestic Abuse Intervention Project, *supra* note 4 (featuring the "Power and Control Wheel," which provides a look at the range of behaviors).

women, about 9 percent of all murders, were killed by their spouses or partners in 1996 alone."¹⁵³ "Nearly one-third of American women (31 %) report being physically abused by a husband or boyfriend at some point in their lives, according to a 1998 Commonwealth Fund survey."¹⁵⁴ In contrast, an estimated 8% of males in heterosexual relationships suffer violence at the hands of their female partners.¹⁵⁵ Some studies show a higher percentage of males physically abused by females; the discrepancy lying in how abuse is defined and in male reluctance to give voice to their victimization.¹⁵⁶

Studies show that men are willing to report physical violence toward them at the hands of women even if they do not identify such violence as battering or themselves as "battered men" or abused husbands/spouses.¹⁵⁷ This means that males do report that females hit back or even that females initiate the violence, but they do not identify with the full dynamic that makes up domestic violence.¹⁵⁸ It is important to note that females are generally victims of the entire cycle/structure of abuse that makes up domestic violence, not just of the physical violence which constitutes domestic abuse as the law defines it.¹⁵⁹ Males may report domestic battery, but they generally do not identify as battered men or as abused, possibly because they do not fit the definition of a battered person. It is also important to note that "much of female violence is committed in self-defense, and inflicts less injury than male violence."¹⁶⁰ The physical violence that males do to female intimates is a major concern to those working to stop domestic violence. "Battered women spend at least twice as much time in bed due to illness as women who have never been battered."¹⁶¹ In addition, "[53%] of female chronic pain sufferers were previously abused by their partners before the onset of the chronic pain condition."¹⁶²

153. SCHNEIDER, *supra* note 29, at 12 (quoting findings from a Federal Bureau of Investigations survey).

154. Family Violence Prevention Fund, *supra* note 150.

155. Leland, *supra* note 60, at A18.

156. MURRAY A. STRAUS & RICHARD J. GELLES, PHYSICAL VIOLENCE IN AMERICAN FAMILIES, (1990), available at <http://www.endabuse.org/resources/facts>.

157. See U.S. DEP'T OF JUSTICE, *supra* note 142, at 17.

158. See generally WALKER, *supra* note 16, at 55-70 (providing a discussion of dynamics of domestic violence).

159. See NAT'L INST. OF JUST., *supra* note 19; JUSTICE RESEARCH AND STATISTICS ASS'N, *supra* note 106.

160. Violence in Families: Assessing Prevention and Treatment Programs 42 (Rosemary Chalk & Patricia A. King, eds., 1998), available at <http://abanet.org/domviol/stats.html>.

161. *Id.*

162. *Id.*

Though few studies have been conducted, evidence indicates that the dynamic within same-sex domestic violence, both female-on-female and male-on-male, is highly similar to male-on-female violence in both level of injury and pattern of abuse. Lesbian, bi and trans women as well as gay, bi and trans men, who are victimized by a member of the same sex and/or someone who is LGBT, are more likely to behave like men who are battered by women in different-sex relationships than like women who are battered by men. Thus, they are less likely to seek help.¹⁶³

In relation to same-sex domestic violence, a fundamental question exists as to how to conduct an accurate prevalence study. David Island and Patrick Letellier answered the question "Why is it so hard to find out how many gay men are battered by their mates?"¹⁶⁴ by noting a number of reasons that can also apply to other queer individuals. These reasons include: (1) domestic violence is a taboo topic; (2) there is inadequate reporting; (3) LGBT communities avoid facing the problem; (4) there has been no systemic scientific study conducted; (5) the few victims who do report become an under-representative sample of the larger picture because most victims do not tell anyone at all and (6) authorities fail to ask, and nearly 100% of batterers do not tell anyone and do not seek help voluntarily.¹⁶⁵

As Claire Renzetti noted in a 1999 speech, homophobia renders it difficult to do an incidence study that is statistically accurate.¹⁶⁶ When society criminalizes, discriminates against, misunderstands, hates and acts violently toward a particular group of people because of who they are, how they were born or the life they choose to live, individuals who are part of those groups often choose to, are forced to or are coerced to remain closeted. Victims of domestic violence are often reluctant to seek services for a number of reasons, including fear of additional abuse, lack of economic resources and lack of available services in their area. When homophobia and transphobia are added to these factors, LGBT victims are even less likely to report abuse or seek services. In a homophobic and transphobic society, we are still unsure of the number of people who identify as lesbian, gay, bisexual and/or transgender; those who are being victimized are even more hidden.

163. See generally CLAIRE M. RENZETTI, *VIOLENT BETRAYAL: PARTNER ABUSE IN LESBIAN RELATIONSHIPS*, at 75 (stating that though many in her study sought help, they did not receive it); ISLAND & LETELLIER, *supra* note 95, at 11 (noting that the largest group of gay male victims is comprised of those who tell no one).

164. See ISLAND & LETELLIER, *supra* note 95, at 9.

165. *Id.* at 9-12.

166. Claire M. Renzetti, Address at the Same-Sex Domestic Violence Conference (Dec. 6, 1999).

Since Island and Letellier's book was first published in 1991, a few more studies have been conducted on the prevalence, nature and causes of same-sex domestic violence.¹⁶⁷ It has been determined that "domestic violence occurs within same-sex relationships with the same statistical frequency as in heterosexual relationships."¹⁶⁸ All existing studies put the prevalence of domestic violence among gay and lesbian couples at approximately 25-33% of the total number of same-sex relationships.¹⁶⁹

C. THEORIES OF DOMESTIC VIOLENCE

The questions of what causes domestic violence and why it continues have been addressed by a number of disciplines, resulting in a variety of theories. The criminal law system has incorporated the variety of social theories about domestic violence causation into its responses to domestic violence. One very common theory is that domestic violence is caused by environmental or external factors, such as: alcohol and the stress that can accompany work pressures, unemployment, racism and parenthood.¹⁷⁰

A second theory "seek[s] to explain domestic violence in terms of the psychological or personality characteristics of either the men who perpetrate violence, or the women who are victims of domestic violence."¹⁷¹ The psychological theorists who espouse this theory posit male batterers as different from males who do not batter in their psychological profiles. These theorists also argue that female victims also have a particular psychological profile, termed "codependent," that can compel them to seek (male) partners who are or will be abusive.¹⁷²

A third theory is the family dynamics or family violence theory, which features as its unit of analysis the family, rather than the individual, society or community. Family theorists focus on relationships between and among family members.¹⁷³ "The family violence perspective suggests that women and men learn from childhood experiences and from media portrayals and societal norms that violence is an acceptable way to resolve disputes."¹⁷⁴

167. See Gregory S. Merrill, *Battered Gay Men: An Exploration of Abuse, Help-Seeking and Why They Stay* 6-9 (1996) (unpublished M.S.W. thesis, San Francisco State University, School of Social Work) (on file with author) (summarizing existing studies).

168. American Bar Association Commission on Domestic Violence, at <http://www.abanet.org/domviol/stats.html> (last visited Nov. 1, 2000).

169. *Id.*

170. Domestic Violence and Incest Resource Centre, *Are You Happy at Home? Information on Abuse in Relationships*, at <http://www.dvirc.org.au/publications/dv.htm> (last visited July 11, 2003).

171. *See id.*

172. *See id.*

173. *Id.* at 389.

174. *Id.* at 390.

"[While] [t]he family violence perspective maintains that women and men are equally likely to engage in violence, . . . [f]eminists [counter] that many of women's acts of physical aggression are actually attempts to defend themselves from men's attacks."¹⁷⁵

A fourth set of theories, comprised of feminist theories, is focused on social context and concentrates on issues of sex, gender and power. For feminist theorists, patriarchy, not only in the classic sense of a male-dominated society, but also as the name for the fundamental hegemonic force in today's western culture, is what allows domestic violence to exist and continue.

This examination of the existing theories of domestic violence causation leads one to ask what theories exist regarding the causes of same-sex domestic violence. No one theory, separate and apart from the above theories, exists. However, the above theories as to the causes of domestic violence in general have been adapted to discuss same-sex domestic violence specifically. In 1991, Island and Letellier noted:

[O]nly when research has been conducted for many years will light be shed on [the] big questions. But a clear and useful theory of gay men's domestic violence is needed, a theory that will tentatively explain the phenomenon and guide the thinking needed for research to be planned and conducted. By postulating this first theory, we challenge the members of the academic, scientific and psychological communities in America to get to work on the problem of gay men's domestic violence.¹⁷⁶

Island and Letellier went on to develop a theory that did not define batterers as "crazy," though it did state that "gay male batterers are not mentally healthy."¹⁷⁷ Though Island and Letellier did note that gay male batterers have a distorted view of masculinity, they went on to write,

We do not suggest that any existing treatment or theoretical approach should be eliminated. Rather, we want to increase and improve the availability of psychological help for batterers that can only come from proper use of psychodiagnostic categories by treatment providers. We want to stop the violence now, and if labeling the batterer as mentally disturbed will help to stop the violence, as we believe it will, then it should be done now.¹⁷⁸

175. *Id.* at 389-90.

176. ISLAND & LETELLIER, *supra* note 95, at 38.

177. *Id.* at 58.

178. *Id.* at 60.

Similarly, theorists have adapted domestic violence theories to specifically discuss lesbian victims and perpetrators. Claire Renzetti, a leading researcher on lesbian battering, summarized the findings of her study of 100 women who identified as battered lesbians in *Violent Betrayal*.¹⁷⁹ She determined that a number of factors were frequently associated with abuse. The one with the strongest association was the partners' dependency on one another:¹⁸⁰ "Batterers appeared to be intensely dependent on the partners whom they victimized."¹⁸¹ These findings are a variation on the psychological theory of domestic violence causation. In addition, Renzetti pointed to issues of substance abuse and family violence history. This diversity of findings indicates that no one theory exists as to why lesbian battering occurs.

My approach to domestic violence causation theory, for both different- and same-sex domestic violence, is multi-dimensional.¹⁸² This approach does not search for one universal reason for domestic violence, instead realizing that, for any given victim or perpetrator, the explanation can come from a combination of factors unique to that individual. Denise Kindschi Gosselin warns that multi-dimensional theories make the determination of what works and what does not work to end domestic violence much more difficult and create conflicting responses by communities and law enforcement agencies across jurisdictions.¹⁸³ Often, application and enforcement of domestic violence laws can be different from county to county and even courtroom to courtroom, based on what a judge or prosecutor believes is the reason domestic violence exists and what needs to and can be done about it.¹⁸⁴ However, complexity and difficulty are not reasons to reduce all those involved in violent relationships to a single essentialized victim or perpetrator: A queered approach demands multidimensional theorizing about domestic violence.

D. DOMESTIC VIOLENCE AS A CRIME

"Violence against wives was a right [husbands] exercised with impunity for centuries."¹⁸⁵ This right was articulated and supported in

179. RENZETTI, *supra* note 163.

180. *Id.* at 116.

181. *Id.*

182. DENISE KINDSCHI GOSSELIN, HEAVY HANDS: AN INTRODUCTION TO THE CRIMES OF DOMESTIC VIOLENCE 80 (2000).

183. *See generally id.* at 80-81.

184. *See generally* WAYNE R. LAFAYE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965).

185. BARBARA J. HART, THE LEGAL ROAD TO FREEDOM 1 (1991) (distributed by the Pennsylvania Coalition Against Domestic Violence) (on file with author).

philosophy, religion and law. In the late 15th century a Christian scholar propagated the *Rules of Marriage*, which specified: "When you see your wife commit an offense . . . scold her sharply, bully and terrify her. And if this doesn't work . . . take up a stick and beat her soundly."¹⁸⁶ British common law continued to allow husbands to beat their wives but limited it by adopting the "rule of thumb," which permitted a man to beat his wife with a rod not thicker than his thumb.¹⁸⁷

Not until 1871, in *Fulgham v. State*, did any court revoke a husband's legal right to beat his wife.¹⁸⁸ However, in 1874 the highest court in North Carolina disagreed with the Alabama court and continued to provide legal protection for husbands who beat their wives, stating, "If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze and leave the parties to forget and forgive."¹⁸⁹ In 1882, Maryland became the first state to make wife beating a crime, deeming it punishable by 40 lashes or a year in jail.¹⁹⁰

Even when laws were passed that made wife battering illegal, the fact that such laws were rarely enforced meant that the abuse did not stop. Though some states had laws that were designed to punish husbands who assaulted or committed battery against their wives, other major institutions, including religious institutions, and society as a whole continued to support a husband's right to be violent toward his wife.¹⁹¹ Thus, the legal system effectively ignored the few laws that did exist when it came to the privacy of the home. As other intimate relationships short of marriage became more common, dating became freer, engagements became longer and living together became more frequent, the rights of males to be violent towards females extended beyond the marital relationship. Thus, spouse abuse or wife beating became known as woman battering or domestic violence. The few laws that existed to punish violent husbands did not extend to males involved with women in other types of intimate relationships. In addition, the existing laws designed to protect individuals from strangers frequently were not extended to non-married couples in different-sex relationships. The existence of same-sex relationships was not even acknowledged.

186. *Id.* at 1.

187. Cheryl Ward Smith, "The Rule of Thumb," a Historic Perspective?, FOCUS, VOL. 1, NO. 7 (LOS ANGELES DOMESTIC VIOLENCE COUNCIL) (April 1998) [reprinted in NANCY K.D. LEMON, DOMESTIC VIOLENCE LAW 1, 2 (2001)].

188. 46 Ala. 143, 146-47 (1871).

189. North Carolina v. Oliver, 70 N.C. 60, 61-62 (1874).

190. HART, *supra* note 185, at 2.

191. See, e.g., Reva B. Siegel, "The Rule of Love:" Wife Beating as Prerogative and Privacy, 105 YALE L. J. 2117 (1996).

As determined by the National Coalition of Anti-Violence Programs' nation-wide study, compiled into the *1997 Report on Lesbian, Gay, Bisexual and Transgender Domestic Violence*,

State statutes on domestic violence may not include same gender relationships in their definition of 'domestic.' In fact, seven (7) states explicitly exclude same-gender relationships from qualifying. The remaining states may or may not include same-gender relationships in their definition of 'domestic,' depending upon how they define it, case law interpretation, the state Attorney General's opinion . . .¹⁹²

In general, no law addressing domestic violence is specific to same-sex domestic intimate abuse. Thus, there are no existing statutes specifically including lesbians, gay men, bisexuals, transgender individuals or homosexuals in their scope or coverage.¹⁹³ Therefore, LGBT issues and concerns are, at worst, deemed not to exist or, at best, must be implied because the words referring to them do not appear. LGBT individuals are only included in existing domestic violence laws by virtue of not being specifically excluded. Some states do "intentionally and specifically exclude battered lesbians and gay men from protection by defining domestic violence only as violence between members of the opposite sex."¹⁹⁴ This reflects a blatant intent to discriminate and to reinforce a heteronormative/straight view of both domestic violence and its remedies. In addition, some states define domestic violence "only as violence occurring between spouses, former spouses, or family members who are related by blood or consanguinity."¹⁹⁵ There are others that require that relationships covered by domestic violence statutes include a sexual element. The catch-22 is that some of the states with these statutes criminalize sodomy or any homosexual sexual relations, effectively forcing a victim of same-sex domestic violence seeking assistance from the legal system to admit to a crime.¹⁹⁶

1. Legislation

Existing law generally defines domestic violence according to two elements: 1) a particular relationship and 2) an assault and/or battery. The definition of the first element, the particular relationship, varies from state to state. For example, in California,

192. *Id.* at 14.

193. NCAVP 2000, *supra* note 64.

194. Evan Fray-Witzer, *Same-Sex Domestic Violence and the Law*, in SAME-SEX DOMESTIC VIOLENCE: STRATEGIES FOR CHANGE 19, 20 (Beth Leventhal & Sandra E. Lundy eds., 1999).

195. *Id.*

196. *Id.* (discussing statutes in Michigan and Maryland).

"[d]omestic violence" means abuse committed against an adult or fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. For purposes of this subdivision, "cohabitant" means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to: (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as husband and wife, (5) the continuity of the relationship and (6) the length of the relationship.¹⁹⁷

Another example is Wisconsin, where "[d]omestic abuse means [abuse]. . . engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common."¹⁹⁸ The second element, the assault or battery, is also defined in these statutes to encompass actual bodily injury or the threat of bodily injury.¹⁹⁹

At the federal level, domestic violence has primarily been addressed through the Violence Against Women Act (VAWA).²⁰⁰ VAWA primarily focuses on the civil side of domestic violence law, with some criminal penalties attached to such things as restraining order violations and crossing state lines to violate a restraining order or to commit domestic violence. VAWA also provides for a Violence Against Women Office that provides funding to track domestic violence issues, keep statistics, provide services, etc. As with state laws, the VAWA contains no specific mention of LGBT individuals. VAWA specifically envisions a traditional husband-wife relationship or, at best, a non-marital relationship of the nature described in the above state law. It states that domestic violence can be committed "by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, [or] by a

197. CAL. PENAL CODE § 13700 (West 2000).

198. See WIS. STAT. ANN. § 968.075 (West 2000).

199. CAL. PENAL CODE § 13700 (West 2000) (defining "abuse" as "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another"). WIS. STAT. ANN. § 968.075 (West 2000) (defining the assault as "[i]ntentional infliction of physical pain, physical injury or illness," "[i]ntentional impairment of physical condition," "[a] violation of s. 940.225 (1), (2) or (3) [referring to a sexual assault statute]," or "[a] physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3").

200. Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (codified in scattered sections of 18 U.S.C.).

person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction. . ."²⁰¹ VAWA is the result of years of work by domestic violence advocates and lobbyists.

2. *Criminal Law's Concepts of Domestic Violence*

Fundamental to criminal law's involvement in domestic violence is the belief that a violent or abusive act perpetrated by a person against his/her partner, spouse or intimate is a crime. This belief has not always been reflected in the law. As the battered women's movement and anti-violence advocates began to press for the legal system to take woman battering seriously, criminal law began to move away from its previous stance of standing on the sidelines of domestic disturbances. This original stance was described by Wayne LaFave in 1965:

The police are sometimes advised to avoid arrest in domestic disputes where possible. . .The police dislike becoming involved in family disputes, and calls for service may be refused when it does not appear that arrest is essential to maintain order, or when demands upon police services are particularly heavy.

In any event, an officer is unlikely to make an arrest in cases of intrafamily disturbances involving minor offenses such as unaggravated assaults if the offended spouse does not insist upon prosecution. Even if the victim-spouse asserts a desire to prosecute, the officers may still refrain from arresting if it appears likely that the victim will later change his or her mind.²⁰²

Since LaFave wrote this, mandatory arrest policies have been implemented in part to correct this traditional attitude.²⁰³

In addition to the police being reluctant to intervene, prosecutors often did not want to prosecute domestic violence cases either because the victim would sometimes become "uncooperative" or because of the belief that a "man's home is his castle."²⁰⁴ The law has addressed this reluctance to prosecute on the part of prosecutors in two ways. First, no-drop policies have been utilized to address the reluctance of victims to press charges.²⁰⁵ Second, batterer treatment programs have been introduced to give judges,

201. *Id.*

202. LAFAVE, *supra* note 184, at 121-22 (citations omitted).

203. Not arresting a batterer has resulted in some victims suing municipalities for failure to protect. *See, e.g., Thurman v. City of Torrington*, 595 F. Supp. 1521 (U.S.D. Conn., 1984) (holding that plaintiff could recover from the City for not protecting her from her estranged husband who seriously injured her after she repeatedly reported his threats).

204. LEHRMAN, *supra* note 112, at 7-15.

205. A prosecutor's "no drop" policy is designed to take the pressure off a victim by pursuing prosecution regardless of the victim's wishes. *See Mills, supra* note 144, at 561-62.

who were often reluctant to jail or imprison a man for "minor acts of battery against a woman" because of the belief that most men at some time "need" to use force to control their wives or girlfriends,²⁰⁶ a different intervention option.²⁰⁷ The criminal law system has mostly addressed same-sex domestic violence in the extremes, with an all-or-nothing attitude. The "nothing" attitude is enacted by barely responding at all or simply giving the abuser a "good talking to;" while the "all" is represented by the "mandatory arrest" standard.

As criminal law has developed a complicated and problematic history in regard to domestic violence, it has developed a similarly problematic history in its dealing with LGBT persons. The criminal law system, like other social institutions, has either rendered the identities of LGBT persons invisible or has spotlighted those identities by deeming LGBT persons immoral, criminal and/or pathological. This has occurred through a long history of sodomy laws, the criminalization of homosexual behavior and laws barring members of the same sex from marrying.²⁰⁸ These factors have combined with the law's traditional responses to domestic violence to create two principal views about same-sex domestic violence. The first view is that same-sex domestic violence does not constitute a crime at all. The second view is that LGBT people deserve what they get (e.g., to be assaulted, abused and victimized) because they are abnormal, criminal and/or immoral.

I have found that the attitude of law enforcement, lawyers and the judiciary toward domestic violence has not significantly changed, even as policies and practices such as mandatory arrest policies, no-drop policies and treatment program options have come into existence and even been enforced. The modern criminal law system approaches domestic violence as a crime only because statutes specifically state that it is a crime. In other words, even as the numbers of arrests and prosecutions for domestic

206. See HART, *supra* note 185, at 1.

207. See Joan Zegree & Meg Crager, *Eastside Domestic Violence Program About Domestic Violence: Treatment for Abusers*, at <http://www.edvp.org/AboutDV/forabusers.htm> (last visited Oct. 7, 2003). See also STAND!'S DOMESTIC VIOLENCE TREATMENT PROGRAM, at <http://www.standagainstdv.org/dvtp.html> (last visited Oct. 7, 2003). See also ELLEN PENCE & MICHAEL PAYMAR, EDUCATION GROUPS FOR MEN WHO BATTER: THE DULUTH MODEL xii-iv (1993) (explaining the reasons for developing "Education Groups for Men who Batter: The Duluth Model" and noting that "unless there were aggravating circumstances, the courts refused to impose jail sentences on first offenders without first giving them an opportunity to rehabilitate themselves").

208. Things may be changing even though in *Lawrence v. Texas*, the Supreme Court wrote specifically that the ruling does not allow members of the same sex to marry. In *Goodridge v. Dep't. of Public Health*, 440 Mass. 309 (2003), the Massachusetts Supreme Court ordered that laws barring same-sex couples from obtaining marriage licenses be struck down.

violence continue to rise,²⁰⁹ the attitude that intimate violence is less serious than stranger violence still permeates the criminal law system. This attitude is coupled with the belief that all couples fight, sometimes physically, and that domestic violence is only a criminal law problem because of politicians who seek either to appease a female constituency or to look tough on crime by passing legislation that criminalizes historically "normal" behavior. The latter argument can be formulated as follows: The primary purposes of the criminal law system are to promote public safety and to punish.²¹⁰ Thus, if the fundamental belief that all relationships have some level of violence in them does ring true,²¹¹ then what domestic violence statutes are doing is criminalizing "normal" behavior.

The history of criminal law's conceptions of both domestic violence and LGBT individuals and relationships gives rise to several still unresolved questions. The first question is whether society is willing to accept that relationships in general have a certain level of violence. Another question is if society even wants to allow certain kinds of relationships to exist.²¹² Yet another question is whether or not the criminal law system should be the institution addressing the issue. This question is based on the argument that domestic violence would be better addressed by the social service, educational, mental health or public health system.²¹³ The argument is premised on the idea that punishment, a primary function of the criminal law system, may be an inappropriate way of handling domestic violence. While jailing or imprisoning a person who chooses to batter does, at least temporarily, incapacitate her or him, it may not lead to a permanent cessation of the behavior, which is both an outcome desired by victims and the overarching goal of punishment. Though incapacitation may temporarily or even permanently halt the abuse

209. See generally STATE OF CAL., OFFICE OF THE ATT'Y GEN., BUREAU OF CRIMINAL INFORMATION & ANALYSIS, REPORT ON ARRESTS FOR DOMESTIC VIOLENCE IN CALIFORNIA, 1998, 4, 1 CRIM. JUST. STATISTICS CENTER REPORT SERIES 3 (1999). See also NCAVP 2000, *supra* note 64.

210. See *supra* note 23 and accompanying text; KAPLAN & WEISBERG, *supra* note 65, 5-45 (1991).

211. Those who believe this to be true point to the work of researchers such as Murray Straus and others, whose studies indicate that women are as violent to intimate partners as are men. See generally Murray A. Straus & Richard J. Gelles, *How Violent are American Families? Estimates from the National Family Violence Research Survey and Other Studies*, in PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES 95, 95-112 (Murray A. Straus & Richard J. Gelles eds., 1990). It is Straus's Conflict Tactics Scale that is generally differently interpreted. See Wilson, *supra* note 129.

212. The response to this statement may seem obvious, but I submit that it is not. Society discusses the issue of proper, adequate or permitted levels of violence regularly. Examples are discussions of spanking, the death penalty, just versus unjust wars, self defense and police use of force. Modern, especially U.S., society tolerates, condones even, certain violent acts.

213. These institutions are becoming increasingly involved in working against domestic violence.

of a particular victim, it does not guarantee that the perpetrator's behaviors will cease entirely, either while incarcerated or upon release.²¹⁴ A perpetrator may resume abusive behaviors upon returning to an existing relationship or starting another.

Though the criminal law system may not be the most effective tool for preventing, intervening in and ending domestic violence, it has become the dominant one. Thus, although actors within the system may have questions as to its usefulness and thus may be reluctant participants, domestic violence cases constitute the majority of police calls in many jurisdictions and a large part of any state's criminal court docket.²¹⁵ Criminal law's primary goal is to protect the public, but when it comes to domestic violence, the criminal law system has become involved in issues of violence prevention, treatment and services that may be better left to other institutions and systems.

3. *Domestic Violence Practice: Under-Effective Responses*

Attitudes do influence practice, but practice can also influence attitudes. What law enforcement officers, lawyers, judges and community members are trained to do, if regularly and properly implemented, can affect how they think and feel about domestic violence. VAWA funds have gone to training police and judges as well as to having specially trained attorneys, advocates and other legal professionals in prosecutors' offices.²¹⁶ An understanding attitude can have a positive effect on practice, and suitable training as to the proper implementation of well-designed practices can have a positive effect on one's attitudes about complicated issues and communities different from one's own.

Law enforcement officers are often not anxious to respond to domestic disturbance calls because, among other reasons, they are considered to be very volatile situations.²¹⁷ Prosecutors are not necessarily anxious to prosecute domestic violence cases because of the possibility of an uncooperative complaining witness, the possibility that the couple will reconcile or the possibility that perpetrators may act out violently toward the lawyer. The opposite response is a drastic commitment to prosecute all cases that qualify as domestic battery because of a fear that there will be

214. Intimate relationships of various kinds do form in prison, and patterns of domestic violence can appear.

215. See Zorza, *supra* note 18, at 385.

216. See, e.g., Office of Justice Programs, *supra* note 143 (providing examples of the type of funding administered through the Office On Violence Against Women established by the Violence Against Women Act).

217. See BUZAWA & BUZAWA, *supra* note 13, at 27.

one that ends up as a domestic homicide. Judges also often perceive victims as uncooperative in relation to the process. To remedy these failures of the system, all parties need more education about domestic violence dynamics and the realities of the lives and experiences of victims and perpetrators.²¹⁸

"For an offense that affects peoples' most intimate lives, and has deep ramifications for childhood, parenting and society as a whole, it is remarkable that the solution to the problem has been vested in the criminal justice system, a system that is restricted both in its goals and the means by which it can achieve them."²¹⁹ Criminal law's domestic violence interventions primarily consist of responding, arresting, prosecuting, trying and sentencing. Even those parts of law enforcement and prosecutors' offices charged with prevention and/or advocacy efforts, such as community police officers or victim/witness and domestic violence advocate offices, are mainly there to make the existing system of arrest, prosecution and conviction operate as smoothly as possible for all involved.²²⁰

There is little disagreement from those active in domestic violence work that the legal system, especially law enforcement, has some place in working to intervene in and end intimate abuse. Most see the role of the police as serving as protectors, the ones who come into a dangerous situation to make it safer. The purpose of prosecution is seen as making the violence permanently stop. This serves the goals of victims, which are to end the current abuse and to keep the perpetrator from repeating the behavior.²²¹

The goal for those working against any form of domestic violence is to prevent *anyone* from being victimized or being a victimizer. "Although criminalization is an important symbol of public contempt for violence between intimates, any anticipated deterrent effect has been undermined by insufficient attention to the wider social context in which this kind of violence occurs."²²² This is especially true for LGBT communities. "The criminalization of domestic abuse has been designed to deter offenders and to protect victims, the latter objective representing a radical departure from

218. See Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 38-44 (1999).

219. CAROLINE G. NICHOLL, FROM BATTERING TO BETTERING: CHANGING THE LIVES OF VICTIMS OF DOMESTIC VIOLENCE AND THEIR ABUSERS 3 (Campaign for an Effective Public Policy, Perspectives on Crime and Justice: A Series of Papers Reconsidering Current Approaches, 1998).

220. *Id.*

221. *Id.*

222. *Id.* at 1.

the traditional goals of the criminal 'processing system.'"²²³ A problem is that, on the large scale, it seems to have done neither: Even if there was a reduction in domestic violence during the 1990s,²²⁴ no one has yet uncovered evidence that specific victims have been protected or that specific batterers have been prevented from battering.²²⁵

Although arrests have increased, in many cases the arrest constitutes the only sanction without any follow-up. Low rates of prosecution (as low as 1% in many areas, according to Ford, 1993) often neutralize the actions of the police and undermine the deterrent effect intended. The system, focusing on the enforcement and prosecution in order to reduce recidivism, fails in rigorously pursuing these tactics to ensure that either offender accountability or victim safety is guaranteed. Too many court injunctions and restraining orders are unenforced, arrest warrants against batterers remain unexecuted and victims' fears of repeat assault remain high.²²⁶

The lack of follow-up and a reliance on punishment are two main problems with the criminal legal system in general that also apply to its domestic violence interventions. "The criminal justice system has responded to the clamor for intervention, albeit slowly and hesitantly, but the response has been framed within its usual practices."²²⁷ These usual practices have included: ending the involvement of the system either at sentencing or once a sentence is completed (as in after the probationary or parole period); relying on punishment; treating those in the criminal justice system as experts, which means "paying attention to 'due process' and the niceties of the rules of evidence, rather than to the needs of victims and their abusers;"²²⁸ and valuing victim interests over victim wishes,²²⁹ which means that what the victim has actually stated that she or he wants is

223. *Id.* at 3.

224. See Joan Zegree & Meg Crager, *Eastside Domestic Violence Program About Domestic Violence: Treatment for Abusers*, at <http://www.edvp.org/AboutDV/forabusers.htm> (last visited Oct. 7, 2003); See also STAND's Domestic Violence Treatment Program, at <http://www.standagainstdv.org/dvtp.html> (last visited Oct. 7, 2003).

225. To date, the studies conducted to determine recidivism of both those convicted of felony or misdemeanor domestic battery and those who have been repeatedly victimized by the same or a different partner have been limited. See, e.g., Gwat-Yong Lie et al., *Lesbians in Currently Aggressive Relationships: How Frequently do they Report Aggressive Past Relationships?*, 6 VIOLENCE & VICTIMS 121 (1991), (showing that there is an increased likelihood that lesbians who witnessed or experienced aggression in previous intimate relationships would experience aggression in another relationship).

226. NICHOLL, *supra* note 219, at 3-4.

227. *Id.* at 5.

228. *Id.*

229. *Id.*

subordinated to the victim's wants as "interpreted by the criminal justice professionals."²³⁰

Though some empirical evidence indicates that domestic violence has not actually decreased²³¹ since heightened involvement of the criminal law system began, evidence has shown that some individuals, whose abusive behaviors, assaults and batteries have been interrupted early on, have been prevented from continuing to be physically assaultive.²³² This evidence supports the widely-held belief that interrupting the cycle of violence, through either the arrest of the abuser or the victim's leaving the abuser, has a positive effect on ending the violence.

American society seems to possess a certain reliance on the importance of the law. Though faith in the system is regularly tested, especially through high profile cases,²³³ and is decidedly less prominent in subordinated communities, the fundamental idea still exists that if there is a law for or against something, that particular something is important. Thus, the fact that domestic violence has been criminalized by all 50 states and the federal government²³⁴ serves both to indicate to society that there is something serious about intimate violence and to give citizens something to point to if the laws are not enforced.

To find potentially more productive approaches, the criminal justice system can look to: the early work of the battered women's movement, the current activities of those working against same-sex domestic violence; and other subordinated communities doing work to end intimate abuse, such as those working on Indian reservations, with migrant farm workers, with

230. *Id.*

231. See U.S. DEPT OF JUSTICE, *supra* note 142 (stating that although some studies have shown slight declines in the prevalence of domestic violence, many analysts argue that a lack of self-reporting and a failure by helping professionals to recognize occurrences of battering make estimates under-inclusive). See Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAM. & CONCILIATION CTS REV. 335, 339 (1999). But see BUREAU OF JUSTICE STATISTICS, BUREAU OF JUSTICE STATISTICS CRIME DATA BRIEF: INTIMATE PARTNER VIOLENCE 1993-2001. NCJ-197838 (2003) (providing a graph and text indicating a drop in "nonfatal violence against females age 12 or older").

232. See Christopher D. Maxwell et al., *The Effects of Arrest on Intimate Partner Violence: New Evidence From the Spouse Assault Replication Program*, NAT'L INST. OF JUSTICE: RESEARCH IN BRIEF, July 2001, at 1, 2.

233. Cases that have been seen as challenging the fairness of the judicial system include the O.J. Simpson case (seen as an indication of either (1) the rich getting acquittals while the poor get convictions, (2) African American jury nullification, or (3) the sexism in the system which renders it impossible for battered women to get justice); the Amadou Diallo case, in which an unarmed African-American man was shot to death by New York Police Officers; and the 13 men freed from death row in Illinois.

234. See Zorza, *supra* note 18, at 388 (citing to a complete list of state domestic violence statutes).

immigrant populations, in the inner cities and with non-English speakers.²³⁵ Caroline Nicholl demonstrates that these sources may provide potentially more productive approaches when she makes a call for "harm reduction and peacemaking [to be] the primary aims." She goes on to say "domestic abuse demands a substantial shift from a narrow legal counteraction to a broad social response engaging the community." She calls for paying more attention to "shame as a root cause of violent behavior, to shift from the enforcement model . . . to a more communitarian regulation of domestic violence [and] to acknowledge [and include] certain restorative justice processes."²³⁶ I agree with these as specific suggestions, but there need to be more fundamental changes in theory and practice. These changes include altering the mind set of the criminal law system and thus affecting its practices, which are based on stereotyped attitudes toward what domestic violence is and who is victimized by it.

IV. THE SOLUTION: QUEERING DOMESTIC VIOLENCE

There is a difference in heterosexual domestic violence and same-sex [domestic violence] mainly that the D.V.[sic] movement is based on a gender-based model and so are the responses [and] support systems. VAWA for one! Granted, a person chooses to batter, regardless of gender. But I do believe that socialization and oppression challenges are a factor faced more so [by] diverse groups.²³⁷

Feminist domestic violence theory and practice have become the norm for addressing domestic violence today. Feminist approaches have remained unchallenged and remain fully integrated into the training of the next generation of battered women's shelters, advocates and services volunteers.

[M]uch current theory (such as the battered woman syndrome) developed because pre-existing law did not fully account for battered women's experiences in particular cases. Application of these theories to practice has both helped overcome preexisting problems and created new problems, inspiring the development of more sophisticated theories in response.²³⁸

235. See generally NANCY K.D. LEMON, DOMESTIC VIOLENCE LAW 132-89 (2001) (offering an overview of domestic violence issues in subordinated communities in a chapter entitled *Cross-Cultural Issues: Survivors of Heterosexual Domestic Violence who Face Multiple Oppressions*).

236. NICHOLL, *supra* note 219.

237. E-mail from Robin Nickel, Director, Lesbian Domestic Violence Program, W.O.M.A.N. Inc., (Aug. 25, 2000) (on file with author).

238. Naomi Cahn & Joan Meier, *Domestic Violence and Feminist Jurisprudence: Towards a New Agenda*, 4 B.U. PUB. INT. L.J. 339, 359 (1995).

While battered women's advocates, domestic violence movement activists and academics have developed, and continue to develop, sophisticated theories of domestic violence, the practical application of these theories began to slow in the 1990s, especially in regards to same-sex domestic violence. Consequently, existing domestic violence practice has remained largely "straight" or conventionally feminist. This straight feminist theory and praxis has helped to render under-effective an already conventional criminal law system. It is because of this that queer theory and practice can be helpful. They can move feminism further as well as influence the criminal law system to move down a path to more productive domestic violence interventions.

A. QUEERING IN THEORY

The postmodernist theorizing of Michel Foucault, Mary McIntosh and others on the issue of sexuality gave rise to the development of queer theory.²³⁹ LGBT individuals and communities reclaimed "queer" as an identifying term in the 1980s. The term allows for a positive redefinition of a formerly derogatory term for odd or strange individuals relegated to second-class status. The term is inclusive of the myriad of sexualities without being essentialist. Laurie Rose Kepros summarizes queer theory as "adopt[ing] a social model, which treats sexuality as the product of intersecting cultural and historical events."²⁴⁰ As Kepros further explains, "queer theory views sexuality as a widespread social condition and, thus, a matter of importance to all individuals whether they are sexual minority or majority."²⁴¹ Like some of the more radical feminist theory upon which it expands, queer theory allows for seeing sexuality, especially gender, as socially constructed and therefore capable of being "deconstructed" and "reconstructed." The resulting social construction theories have been included as part of postmodernism.

1. *Queering Feminist Theory*

Lesbian feminist theorists have helped to distinguish between sex and gender.²⁴² Sex, as previously explained, is that which is determined by one's biology (chromosomes, hormones and genitalia) and which is labeled "male" or "female." Gender, as defined by the feminist theory I apply here, is the "culturally-shaped group of attributes and behaviors given to the

239. See ESKRIDGE & HUNTER, *supra* note 46, at 262.

240. Kepros, *supra* note 98, at 282.

241. *Id.*

242. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 162 (1999).

female or to the male"²⁴³ and is labeled "boy" or "man" or "girl" or "woman." Fundamental to this theory is that the behavioral differences that do exist between males and females are not biologically based, but rather, socially constructed. While behaviors may have biological bases, what is important, according to this theory, is that society chooses to assign labels and meanings to certain actions based on the biological sex of the individual whose behavior is observed. Gender therefore is made up of those behaviors and attributes labeled "boy" and "girl" or "man" and "woman." Man's attributes are generally valued. Woman's are less so.

Feminism has been instrumental in exposing constructions of gender and in revealing how deeply rooted those constructions are. Modern science has shown that there are biologically based differences between the female sex and the male sex. However, sex is not gender, though it has been a primary component of the construction of gender. Feminism decoupled sex and gender and helped bring value to those traits that have been attributed or assigned to the gender "woman" or "girl" and to the female sex. What feminism did for domestic violence is to sex it. For most domestic violence and battered women's advocates, intimate abuse is about male violence against females. Though gender and sex may be separated, the battered women's movement conflated them again by defining the battered woman as, in many ways, a stereotypical, heterosexual, gender-static, female woman.

The law has more or less accepted the feminist contention that domestic violence has not been taken seriously because women are the victims and men, the perpetrators. Though feminists decoupled sex and gender (meaning that they made sex and gender neither identical nor determinative of one another), I argue that, when theorizing in the context of domestic violence, the two are re-linked. They are brought back together within each binary category ("man" and "woman" for gender and "male" and "female" for sex) as well as across categories. This re-linking does not occur in the previously mentioned determinative sense, but in an indicative and even essentialized way. I contend that though biology is not the same as, nor does it determine, behavior, each indicates, and is inextricably linked to, the other. In the context of abuse, males are men and females, women, and the two are paired. The idea that males are men and females, women is the concept of gender conformity. Gender conformity and the static way gender is defined combine to limit feminist theory and practice.

243. HUMM, *supra* note 21, at 84.

Using Frank Valdes' conflation theory²⁴⁴ as a foundation, I argue that rigidity, conformity and stasis constitute a triangle of ideas, which, when conflated, ground criminal law's straightness. Rigidity is the unbendingness of gender. Conformity is the assumption that gender, sex and sexual orientation match. Stasis stands for the proposition that gender does not change over time. This triangle of ideas helps to maintain straight sexual theory and serves as the foundation of the attitudes about sexuality that are embedded in the criminal law. Queer legal theory seeks to shake up that conventional foundation.

Queer legal theory²⁴⁵ has roots in cultural theory,²⁴⁶ in feminist legal theory,²⁴⁷ and in critical race theory.²⁴⁸ An increasing number of voices

244. In explaining his conflation theory, Valdes states:

The conflation comprises three constructs; sex, gender, and sexual orientation. . . [T]he first leg of this triangle is the conflation of sex and gender. The second leg is the conflation of gender and sexual orientation. The third is the conflation of sex and sexual orientation. . .

The first leg, conflating sex and gender, holds that every person's sex is also that person's gender. The second leg, conflating sex-derived gender and sexual orientation, is less familiar, at least initially. . . [This leg is] the generally recognizable linkage between "queers" and "dykes" on the one hand, and "sissies" and "tomboys" on the other, suggest[ing] that some correlation between sex-determined gender and sexual orientation is at work.

The conflation's third leg may be the least familiar, but is discernible and demonstrable nonetheless. The conflation of sex and sexual orientation is shown by the way in which sexual orientation is directly surmised by the sameness or difference of sex(es) within a coupling: a sameness of sex within a coupling results directly in conclusions of homosexual orientation for each participant whereas a difference of sexes within a coupling produces conclusions of heterosexual orientation.

Valdes, *supra* note 42, at 12-15. In this conflationary scheme, "sex" refers to external genitalia, usually as observed at birth. *Id.* at 21. "Gender" signifies the composite of personal appearance and social behaviors, characteristics and roles imputed to all persons at birth on the basis of sex. *Id.* at 21 In other words, the conflationary manifestation or performance of sex-determined gender, is expected and demanded in both social ("public") settings as well as in sexual ("private") relations. *Id.* at 54. In this scheme, "sexual orientation" effectively represents the sexual dimension or performance of gender. *Id.* at 22.

245. See generally Arriola, *supra* note 98; Teresa de Laurentis, *Queer Theory: Lesbian and Gay Sexualities, An Introduction*, DIFFERENCES, Summer 1991, at iii; Valdes, *supra* note 98.

246. See generally BORNSTEIN, *supra* note 69; BUTLER, *supra* note 69; FEINBERG, *supra* note 69; FOUCAULT, *supra* note 69.

247. See generally FEMINISM MEETS QUEER THEORY (Elizabeth Weed & Naomi Schor, eds., 1997) (discussing the connections between feminism and queer theory).

248. DELGADO & STEFANCIC, *supra* note 98, at 7-9 (describing the tenets of critical race theory: First, that racism is ordinary, not aberrational . . . Second, most would agree that our system of white-over-color ascendancy serves important purposes, both psychic and material. . . A third theme of critical race theory, the "social construction" thesis, holds that race and races are products of social thought and relations. Not objective, inherent, or fixed, they correspond to no biological or genetic reality; rather, races are categories that society invents, manipulates, or retires when convenient. . . Another, somewhat more recent, development concerns differential racialization and its many consequences. . . Closely related to differential racialization. . . is the notion of intersectionality and anti-essentialism. . . A final element concerns the notion of a unique voice of color. Coexisting in somewhat uneasy tension with anti-essentialism, the voice-of-color thesis holds that because of their different histories and experiences with oppression, black, Indian, Asian, and Latino/a writers and thinkers may be able to communicate to their white counterparts matters that the whites are unlikely to know).

have introduced queer theory to legal analysis and scholarship, creating a queer legal theory.²⁴⁹ "Scholars often describe queer theory as postmodern and as such theor[izing] from fragmentation."²⁵⁰ I maintain that queer theory operates from the feminist theory that splits up biological sex and gender, but goes much further by exploding the binary man-woman construction to create what I call "gender fragmentation." Directly disrupting the straight sexual theory described *supra*, the concept of gender fragmentation is composed of several elements, two of which I label "gender neutrality" and "gender fluidity." What I do is apply this queer theory in the context of the crime of domestic violence and suggest how it might impact and improve criminal law's domestic violence interventions.

Most states' domestic violence criminal laws are not gendered on their faces.²⁵¹ This means that the laws are not specifically restricted to males or females, to men or women or to the roles each plays, such as husband or wife.²⁵² However, the fact that a statute is not facially gendered does not mean that it is gender-neutral. This is because the relationship definitions are gendered. The relationship is a major element of the legal construction of domestic violence as a crime. The way in which the term "relationship" is defined (for example, as marriage, cohabitation or dating)²⁵³ genders a given domestic violence situation because the roles discussed in definitions of relationships are attributed to one gender or the other. Not only are these roles gendered, they are also binary: for example, "father" and "mother" or "husband" and "wife." The narrow relationship definitions included in domestic violence statutes thus limit their applicability to spouses or to adults with "a minor child in common," as in California law. These roles infer gender. They "give" a gender to that which appears to be neutral.

What gender neutrality means, among other things, is that gender is approached neutrally on the face of the law and in the interpretation of the law. Part of creating gender-neutral laws is beginning from the position that an individual of either sex or any gender can be perpetrator or victim. Gender neutrality is most relevant when drafting new legislation or

249. *E.g.*, Arriola, *supra* note 98; de Laurentis, *supra* note 245; Valdes, *supra* note 98.

250. Kepros, *supra* note 98, at 282-83. *See also* RUTHANN ROBSON, SAPPHO GOES TO LAW SCHOOL: FRAGMENTS IN LESBIAN LEGAL THEORY 43-44 (1998).

251. All states have enacted different forms of domestic violence statutes. However, only Vermont automatically classifies violence in same-sex relationships as domestic violence. Vermont does so because of the equal benefits extended to same-sex couples through civil union laws. *See* Pamela M. Jablow, Note, *Victims of Abuse and Discrimination: Protecting Battered Homosexuals Under Domestic Violence Legislation*, 28 HOFSTRA L. REV. 1095, 1110 (2000).

252. *See, e.g.*, CAL. PENAL CODE § 13700 (West 2000); WIS. STAT. ANN. § 968.075 (West 2000).

253. *See supra* section II. C. 1.

proposing changes to domestic violence statutes and in interpreting and applying existing laws.

Gender fluidity goes further. It stands for the proposition that gender is not static but relational. The doing, being or, as Judith Butler might contend, "performing" of gender²⁵⁴ is about process.²⁵⁵ Laws are neutral only if, in their creation or interpretation, gender is not assumed or assigned. If those who are implementing the laws do not presume to assign gender to an individual or to assume gender because of certain traits, behaviors or context, they understand gender fluidity.

Imagine the following scenario: The police receive a 9-1-1 call about a domestic disturbance. They respond quickly, finding a female who is dressed up for an evening out with her boyfriend. The boyfriend is fairly small, younger than the woman and not similarly dressed up. The woman shows the police some minor injuries, and her boyfriend is arrested. Later, on her way home from her job at a construction site, she goes to the district attorney's office to discuss her case. Rather than having a discussion with the assistant district attorney assigned to her case, she gets into a confrontation with her/him. It seems that her boyfriend has accused her of being the violent one, as batterers often do. He has told the prosecutor that he was just defending himself. Now, with her short hair, jeans, leather jacket and work boots and with her injuries no longer visible, she "looks the part" of a batterer, meaning she "looks like a man." She has become suspect of being at least as violent as her boyfriend. The attorney suggests that perhaps the incident was just a fight, since she looks like she can "hold her own" and since her boyfriend, who is transgender, is "really a woman anyway."²⁵⁶ This response by the legal system, based on how the individual looked on two different occasions, shows a lack of understanding of gender fluidity. In this case, the fluidity is about gender presentation;²⁵⁷ other times, it is about gender identity.²⁵⁸ Learning to understand gender fluidity should be an aspect of the training of law enforcement, lawyers and the judiciary.

254. See generally, e.g., BUTLER, *supra* note 69, at 24-25.

255. Gender, here, means the set of attributes that comprise man, boy, girl, woman etc.

256. This kind of incident was a common occurrence while I was directing the LIABLE (Legal Intervention and Advocacy for Battered LBT Empowerment) program in San Francisco, California.

257. I define "gender presentation" as the combination of gender identity and gender expression. The Survivor Project, *Definitions Important When Describing, Conversing With, or Advocating For Sex and Gender Minorities* (1998) (on file with author) (defining "gender identity" as "personal view of one's own gender" and "gender expression" as "an act undertaken which influences or is intended to influence another's perception of one's gender").

258. *Id.*

2. *Homophobia and Heterosexism*

Some commentators on same-sex domestic violence view legal responses to abuse in LGBT communities as a result of the entrenched homophobia and/or heterosexism of the criminal law system.²⁵⁹ While this is true, it is merely one part of the story. The homophobia and heterosexism that exist are only a few aspects of the straight response. Thus, eliminating or reducing only these two aspects, as they are embodied in the beliefs, feelings and reactions of the actors in the system, will not substantially alter the straight response and therefore will not result in more effective interventions.

Homophobia, defined as a fear of homosexuality in oneself or others,²⁶⁰ is an individualized reaction. Though the criminal law system as a whole could be described as homophobic, homophobia would be best addressed within the system by training and sensitizing individuals within the system. It is the individual officer's, prosecutor's or judge's fears that must be addressed.²⁶¹

Heterosexism, which is the "unconscious or explicit assumption that heterosexuality is the only 'normal' mode of sexual and social relations,"²⁶² works in conjunction with homophobia to deprive LGBT communities of appropriate and equal services from, and treatment by, the criminal law system. If it is believed that individuals are abnormal, treating them poorly, not assisting them at all or being brutal is at least understandable, if not justifiable. If that belief is coupled with the fear that those individuals will make others question their sexual orientation, then maltreatment may be more exaggerated. Homophobia and heterosexism do need to be actively undermined.

However, attempting to effect change by focusing on any one person's homophobia and heterosexism is insufficient. A more effective approach would be to focus on broad institutional changes by implementing new

259. See generally Pamela D. Bridgewater & Brenda V. Smith, *Introduction to Symposium, Homophobia in the Halls of Justice: Sexual Orientation Bias and its Implications Within the Legal System*, 11 AM. U. J. GENDER, SOC. POL'Y & L. 1, 2; Knauer, *supra* note 40.

260. HUMM, *supra* note 21, at 123. However, homophobia also includes somewhat less extreme reactions, such as discomfort with, worrying about and apprehension of homosexuals and/or homosexuality. It can manifest itself as a full-blown phobia and can create what has been known as homosexual panic, which has been used as a defense in some assault and murder cases.

261. Fears are usually of being "hit on" (and not disliking it), of being "turned gay," of "catching AIDS," which is still associated with homosexuality (particularly gay men), of catching homosexuality by contact or of homosexuality being taught to children. These attitudes can cause an overreaction or other inappropriate responses to homosexuality, transgenderism and LGBT people.

262. HUMM, *supra* note 21, at 94.

policies that are LGBT-sensitive and inclusive and by holding accountable those who violate them. This approach would go farther than would trying to change the feelings of each individual. For example, a regulation barring officers from using derogatory language about LGBT individuals, accompanied by training on what that language is and what proper language would be, with sanctions for any officer who uses such language at any time while on duty, would go farther than would sensitivity trainings on the way in which being called a "faggot" hurts a gay man's feelings. The cultural mind-set, within both the criminal law system and society as a whole, that holds on to gender rigidity needs to be replaced with one that values gender neutrality and fluidity.

3. Sexism

I argue that homophobia and heterosexism are types of sexism and that sexism is important to theorizing about domestic violence. What battered women's movement activists did was to listen to what individual battered women were telling them and to look in their stories for explanations that might be generalizable to the overall question, why do men batter? This became the question feminist researchers and theorists sought to answer. In attempting to answer this, feminist theorists explained the subordinated nature of woman's experience by exposing the patriarchal society in which we live. I define "patriarchy" as a society dominated by men, which rewards men for their behaviors and which punishes and deems of lesser value the behaviors of women. The oppressive attitudes about and treatment of women, on individual occasions by individual men and endlessly by society as a whole, are what feminists labeled sexism. Feminist legal theorists have brought feminist theories to bear in the legal realm, providing analyses of how sexism works within the law and offering other woman-centered and gender-focused thought, research and criticism.²⁶³

Feminists explain that the answer to the question, "why do men abuse women," is that society allows men to abuse women and encourages, supports and rewards the behavior.²⁶⁴ I argue that in a patriarchal society, abusive behavior is an element of the construct "man." Patriarchal society values the norms of that construction (e.g., aggressiveness and competitiveness) so highly that any behavior that is included therein becomes something to which all people aspire, regardless of sex or gender.

263. See, e.g., FEMINIST LEGAL THEORY: FOUNDATIONS, *supra* note 98.

264. See generally MARTIN, *supra* note 97, at 25, 65 (discussing socialization and sex roles); SCHECHTER, *supra* note 2, at 209; SCHNEIDER, *supra* note 29, at 67-68; WALKER, *supra* note 16, at xi.

By way of analogy, let us look at athletes. This society generally idolizes its professional athletes. Most people cannot be famous, but can and do aspire to have the characteristics of celebrities. Individuals can aspire to be as talented as they are, to dress like them, to drink what they drink, to refuse to be a parent to our children like some of them do, to work hard and improve with every game like others do, to come back from injuries that seem to be career ending, to carry a gun, to abuse our partners or to give back to our communities. In the same vein, in a patriarchal society, women cannot be males but they can aspire to express the traits attributed to men (e.g., to be more assertive, less emotional or more competitive) if they want to succeed in a male-dominated world. This is to perform maleness, essentially, to be men. Am I insulting lesbians by imposing a heteronormativity on their relationships? Mary Eaton might argue that I am.²⁶⁵ I think not. My argument is that in the case of domestic violence and the criminal justice system, it is the system and society that impose heteronormative sexist demands on lesbians, viewing lesbians (and all queer people) through a heteronormative and gender-static lens. This is the problem: Heteronormativity exists.²⁶⁶ The above is simply my explanation for it. I am being descriptive, not prescriptive.

Susan Schechter included sexism as a key element in her work, *Women and Male Violence*.²⁶⁷ "Feminist theory defines [domestic violence] as the historical expression of male domination which is manifested in the family and currently reinforced by the institutions, economic arrangements and sexist division of labour within capitalist society."²⁶⁸ "[F]eminists locate violence against women within the broader context of women's subordinate position relative to men"²⁶⁹ and insist that "only by analyzing this total context of battering will women and men be able to devise a long-range plan to eliminate it."²⁷⁰ Feminist theory asserts that a sexist society dictates that men can and should control what is theirs, including their women and children, and maintain power individually and collectively through a range of behaviors, some of which are violent and may include murder if necessary.²⁷¹

265. See Eaton, *supra* note 38, at 207.

266. See *infra* Part V.

267. See generally SCHECHTER, *supra* note 2.

268. HUMM, *supra* note 21, at 16.

269. *Id.*

270. SCHECHTER, *supra* note 2, at 209.

271. In 1998 about 876,340 women and 157,330 men were victims of violent crimes committed by an intimate partner. Women were victims of intimate-partner violence at a rate 5 times that of males. Intimate-partner homicide accounted for about 11% of all murders nationwide; 72% of the persons murdered by intimates were women. BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: INTIMATE PARTNER VIOLENCE 2 (May 2000).

I believe that sexism is based less on sex than on gender; that it is prejudice or discrimination against, or denigration or subordination of the construct "woman," all that is associated with stereotyped notions of "woman" or "female," and those behaviors and attributes that define "normative" (e.g., heterosexual and static views of gender in relation to biological sex). Sexism, therefore, is a learned and socially constructed behavior pattern that is based on one person's perceptions of the behaviors and attributes of another person's sex and gender. Sexism can be attributed to the narrow and rigid view that there are two and only two genders. Sexism has been defined by bell hooks as being "of primary importance not because it is the basis of all other oppression but because it is the practice of domination that all people experience."²⁷²

Same-sex intimate abuse supports the notion that domestic violence is rooted in sexism because all adult intimate abuse is rooted in sexism, fully grounded in the subordination of and discrimination against woman by man and by society as a whole.²⁷³ My argument hinges on the understanding that "women" and "men" are gender constructs, that is, a social construction of behaviors, attributes and traits applied to one sex or another (either male or female). On one side, sexism is about how society devalues the gender construct "woman" and about how we choose to subordinate and discriminate against those who demonstrate those attributes that we despise or devalue, such as those who are emotional, weak, passive, small or high-voiced or those who work cooperatively.²⁷⁴ On the other side, sexism is about how individuals aspire to the attributes that construct the gender "man" and how society rewards and supports those who demonstrate attributes that we all value and aspire to, such as leadership, assertiveness, aggressiveness, violence, power, independence and speaking with a deep voice. Choosing to act out abusively toward an intimate partner is coded as an aspect of being a man. Being a victim of that abuse is coded as an aspect of being a woman. The individual's biological sex (or actual self-identified gender) is irrelevant. Thus same-sex domestic violence — all domestic violence — is rooted in sexism.

One school of thought argues that domestic violence is fundamentally about power and control and is not a result of sexism. This argument has particularly been made by those who see, or want to see, same-sex domestic violence as fundamentally different from different-sex partner

272. BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 35 (1984).

273. See Arriola, *supra* note 98, at 18.

274. See Sandra L. Bem, *The Measurement of Psychological Androgyny*, 42 J. OF CONSULTING AND CLINICAL PSYCH. 156 (1974) (including these characteristics in lists of masculine and feminine traits).

abuse and who seek an explanation for that difference.²⁷⁵ Included in this group are LGBT community advocates and the feminist theorists who perceive same-sex domestic violence as contradicting feminist theory. I argue that power and control are the building blocks of domestic violence. The theory is that an individual who wants to assert power and gain control over some aspect of her or his life and/or over an intimate partner seeks to obtain that control by acting out abusively towards that partner. However, I do not believe that explanation fully explains the social structure that supports intimate abuse and continues to allow it to happen.²⁷⁶ I believe that sexism does fully explain that social structure, even in cases where the intimates are of the same sex, because society seeks to regulate behavior by tolerating certain types of violence. One type of violence society tolerates is that against women and those who present the attributes and behaviors ascribed to the social construct "woman." One of the major behaviors that constructs woman is being sexual with men and/or sexually available to men.²⁷⁷

B. QUEERING IN PRACTICE ²⁷⁸

Organizations and individuals responding to same-sex domestic violence and to LGBT victims and perpetrators are putting into practice some of queer theory's concepts of sex and gender. Though they may not identify their practices as informed by queer theory, these agencies and individuals have discovered that in responding to situations of intimate abuse, it is necessary to adapt quickly to changing gender presentation or identity. In other words, these organizations and individuals have utilized a practical understanding of gender fluidity and fragmentation.

275. See, e.g., Merrill, *supra* note 167, at 6-9. See also ISLAND & LETELLIER, *supra* note 95, at 2; Hart, *supra* note 8, at 174.

276. However, power and control effectuated through physical and sexual violence are indeed the tools used to maintain all oppression. Fundamental social ills that create a desire and need for the power and control in the first place are deeply rooted in oppressive attitudes and behaviors, such as sexism.

277. Gay men are often constructed as women because, among other reasons, they are sexual with men. Lesbians are constructed as women, even without being perceived as being sexual with men because there is still a belief of sexual availability to men, in addition to the myriad of other "womanly" attributes which lesbians are seen as still possessing.

278. I have observed and participated with organizations and agencies that work with LGBT communities and address same-sex domestic violence, primarily in San Francisco, California and Madison/Dane County, Wisconsin. This part of the text has come about through this work and through conversations with a number of individuals involved with the issue of same-sex domestic violence. A number of individuals who have worked against domestic violence have posed the following questions: "How do you hold accountability and empathy/compassion together?" Finding a way to do this is a fundamental aspect of queering in practice because LGBT individuals who choose to be abusive are still LGBT and are still part of LGBT communities.

I am arguing for more gender neutrality and fluidity and for a consciousness that acknowledges those who are gender-transgressive.²⁷⁹ Those who draft, make and enforce criminal law need to incorporate gender neutrality and include an understanding of gender fluidity into the implementation of those laws. The criminal law system also needs to find a way to intervene in domestic violence in such a way that the focus is truly on patterns of behaviors and on the facts of the situation, rather than on the identities of the parties as determined by preconceived ideas of the typical abusive relationship, the typical victim and the typical perpetrator.

The criminal system needs to incorporate tools that are not fundamentally gendered. However, the criminal law system should not be seen as the central or only place for preventing, intervening in and ending domestic violence. Those with whom I have spoken agree that, when it comes to intimate violence in LGBT communities, there needs to be a range of nuanced approaches. I argue that all domestic violence interventions need to be queered.

1. *Queering the Positive Law*

Queering the law includes all aspects of it, from statutory drafting through implementation. It includes all the players in the system. One approach to changing domestic violence practice is to ensure that the laws are applied to all persons regardless of sexual orientation or gender identity. A law may not seem to specifically protect LGBT victims on its face, but the absence of gendered language may have been the negotiated result of lobbying efforts. So an exploration into legislative intent may be necessary. There are times when neutrality is not exclusionary but rather an example of inclusivity. Arguably, a first step in queering practice may be to guide, entice or lead the law and its supporting/enforcing systems into ignoring differences from the gendered norms. In other words, individuals may need to learn how not to call attention to differences before they are able to rise to a level of understanding, accepting and embracing those who differ from the stereotype but still need the aid of the law. This is not a call for individuals to be closeted. It is a call for system actors to at least be willing to ignore gender and sexual orientation, if they are unable to instead be sensitive to and aware of those differences. Sexual differences should *not* be the reason individuals are treated in any particular manner.

Queering positive law most fundamentally requires that domestic violence statutes explicitly include lesbian, gay, bisexual and transgender

279. I use "transgressive" to describe the act of transforming, transgressing, or transitioning of gender. (I use "transing" as shorthand for all of the above.) Transgender people do this most visibly.

persons. All statutes must apply regardless of the gender, sex, sexual orientation, gender identity or gender presentation of the individual. Arguably, gender-neutral statutes (i.e., statutes that no longer refer to the crime as "wife abuse" and include cohabiting or dating couples in the relationship element) actually have the same effect as statutes that specifically include LGBT victims and perpetrators. This may be true in theory. In practice, however, the lack of explicit inclusion has given those in the system a way out. Issues of interpretation and application become powerful outlets for discriminatory views and personal prejudice. In addition, unless a law explicitly states that it is LGBT-inclusive, LGBT persons may not believe they are actually included. When a system has been openly hostile to one's existence to the extent to which, as in a number of states today, one's sexuality is criminalized or deemed immoral²⁸⁰ and relationships are excluded from legal recognition, laws that are designed to help end violence in one's life often need to specifically communicate to an individual that she or he is meant to be included. This is one of the reasons for the inclusion of sexual orientation in hate crimes legislation²⁸¹ and the proposed Employment Nondiscrimination Act itself.²⁸² Anti-discrimination ordinances list specific groups for a reason. When it comes to crimes that have been historically gendered and/or sexed, the specific acknowledgment that they can occur in same-sex or same-gender situations is important.

The reality of life in LGBT communities and as an LGBT person needs to permeate all facets of the law. The common law, statutory law, rules, regulations, policies and procedures are currently understood from a straight-subject positioning. This can be seen from the historical concept

280. Sodomy laws criminalize oral and/or anal sex between consenting adults. The laws are often invoked to deny LGBT people basic civil rights, such as employment, privacy and child custody. States that prohibit consensual sex between same-sex partners include Kansas, Missouri, Oklahoma and Texas. States prohibiting different-sex and same-sex sodomy include Alabama, Florida, Idaho, Louisiana, Mississippi, North Carolina, South Carolina, Utah and Virginia. LAMBDA Legal Defense and Education Fund, at [http:// www.lambdalegal.org/cgi-bin/iowa/documents/record?record+275](http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record+275) (last visited Nov. 1, 2002). *But see* *Lawrence v. Texas*, 123 S. Ct. 2472 (striking down a Texas law criminalizing same-sex sodomy and rendering all sodomy statutes unconstitutional). *Lawrence* will serve victims of same-sex domestic violence well because they will no longer need to admit to having committed a criminal act in order to be covered by state domestic violence/abuse statutes. However, those states specifically excluding LGBT individuals, and all states that do not specifically include LGBT persons in their domestic violence statutes, are still failing to provide services to victims and perpetrators of same-sex abuse.

281. *See* Hate Crimes Prevention Act of 1999, H.R. 1082, 106th Cong. (1999) (amending 18 U.S.C. § 245 to include hate crime offenders who committed their crime because of perceived sexual orientation).

282. The Employment Nondiscrimination Act of 2001, H.R. 2692, 107th Cong. (2001) is designed to "prohibit employment discrimination on the basis of sexual orientation." *Id.* Transgender individuals are not explicitly included in the Act. *See id.*

of spousal privilege²⁸³ to the (in)decision as to whether transgender inmates are sent to a men's or women's facility.²⁸⁴ Gianna E. Israel writes of the latter: "Of all the hardships to befall transsexual persons, few compare to imprisonment. Male-to-female transsexuals are in a unique situation. Born with male genitalia, they have a female[/woman] gender identity, and many have lived as women for years yet they are routinely incarcerated in men's prisons."²⁸⁵

The law and its enforcement view situations through a straight lens. For example, family law is greatly impacted by the bar against the marriages of same-sex couples.²⁸⁶ If a gay or lesbian couple is not "married" under the law, there is no spousal relationship for the purposes of how the law treats domestic violence, how it may criminalize the violation of a restraining order or even if it can or will address the couple's need for custody and visitation orders. The inability to categorize one's partner as one's spouse also impacts one's experience of tort law, inheritances, pensions, tax law, etc.²⁸⁷

Much of the legal literature that addresses the issue of same-sex domestic violence focuses on the need for LGBT individuals to be included in legislation and for LGBT victims to be as protected as heterosexual victims are. The argument is often based on equal protection.²⁸⁸ While I support the view that LGBT victims and perpetrators should be treated equally with their heterosexual counterparts, my argument does not revolve around constitutional status. Even if there was full constitutional inclusion, there still would not be significant positive results in the area of intimate abuse because of the straight nature of criminal law's domestic violence interventions. Though it is necessary to make sweeping changes to the law

283. "Spousal privilege" is defined as the privilege allowing a spouse not to testify about communications or statements with the other spouse made during the marriage or to testify as an adverse witness in a criminal case against the other spouse (also termed "marital privilege" or "husband-wife privilege"). BLACK'S LAW DICTIONARY 741 (6th ed. 1991).

284. See generally Oliver Libaw, *Gender Dilemma: Inmates Who Look Like Women, Housed With Men*, at <http://abcnews.go.com/sections/us/DailyNews/transgender3122.html> (last visited May 15, 2003) (Though I refer to this source, I believe that the title shows a lack of understanding. The individual inmates do not just "look like women;" they *are* women).

285. Transsexual Inmate Treatment Issues, at <http://www.firelily.com/gender/gianna/inmates.htm> (last visited May 16, 2003).

286. See also Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. 7, 28 U.S.C. 1738C_2000) (reinforcing a heteronormative view of marriage).

287. Marriage offers a number of rights and benefits, along with the responsibilities. See, e.g., *If Same-Sex Marriage Were Legal*, at www.nolo.com/lawcenter/ency/article.cfm/objectID/E8EE3592-48AE-463A-9A09C37986417BBC/catID/64C2C325-5DAF-4BC8-B4761409BA0187C3 (last visited Dec. 3, 2003).

288. See, e.g., Jablow, *supra* note 251, at 1111.

as we know it and learn it, it is also necessary to make sweeping changes to the theory underlying it and to the way it is practiced.²⁸⁹

2. *Queering the Police*

The main change law enforcement needs to make is actually not a change at all: It is simply to treat same-sex domestic violence cases, and intimate abuse cases in general, like any other crime. Though there are substantial differences between domestic abuse and other crimes, including other assaults, not the least of which is the intimate relationship itself, there are policing skills available to an officer that are often under-employed or not employed at all when the parties involved are related to each other or in an intimate relationship. Assumptions that do not seem to come into play in a bar fight, such as that the bigger person is the perpetrator, for example, come into play when the case is one of domestic violence.

The problem is the automatic invocation of the straight response. Communities of color make similar complaints about police response in regards to race. Racial profiling on highways in the name of the "war on drugs" is an example of a conventional response to crime prevention. When it comes to a particular kind of racial profiling, one aspect of the convention is that certain people, in this case black males in "fancy cars," are drug dealers. Similarly, in the case of same-sex domestic violence, the conventional view of the woman as victim, combined with a misunderstanding and gendered stereotyping of gay and lesbian relationships that assumes that the person who "plays the woman's role" must be the smaller party, leads to the assumption that the bigger person is necessarily the perpetrator. If both individuals are men, another possible outcome of the straight response is to assume that they must both be violent because men in general are violent, which leads either to dual arrest or to no arrest. If both are women, the abuse is seen as not serious, which leads to no arrest or no response at all.

A queered police response to a same-sex domestic violence situation would be one that is devoid of assumptions. The response would not attempt to simply layer whatever understanding officers have about domestic violence in general on top of the particular situation in which they find themselves. Instead, law enforcement would have specific training about LGBT communities and would be expected to treat LGBT persons with the same high standards with which they are expected to treat all

289. An important tool in making the changes is to employ different language on the issues of power and control in abusive relationships that emerge for LGBT people. See Domestic Abuse Intervention Project, *supra* note 4.

persons. Gender is relatively unimportant at the scene. Having absolute clarity about an individual's sexuality, be it sex, gender, sexual orientation or sexual practices is not necessary for effective policing, at least not at the time of crisis or emergency.²⁹⁰ Police can eliminate the need to identify someone by gender by asking individuals their names and referring to each by name.

In a domestic dispute, what is important is diffusing the situation, keeping all parties calm and restoring order, so that all involved, including law enforcement officers themselves, are not in any danger. It is important to quickly assess the situation, to offer the victim support and assistance and to begin to immediately demonstrate that the behavior has negative consequences for the perpetrator. Gendering the situation more often than not leads to getting it wrong. Getting it wrong is inexcusable.²⁹¹

3. *Queering Lawyers and Judges*

When it comes to lawyers, the issue may be that the adversarial nature of the system prevents prosecutors and defenders from working to find a solution to a given domestic violence case that meets the needs of the victim, perpetrator and society as a whole. But without an overhaul of the rules of professional conduct or the code of ethics, which call for zealous advocacy,²⁹² as well as changes in other rules and laws that address contact between certain lawyers and certain clients, we must work with the existing system.

A general question is: What is the point of prosecution? If it is all about conviction, LGBT victims of domestic violence are unlikely to receive the assistance they deserve. This is because, according to this view, even those prosecutors' offices with domestic violence advocates are not really focused on victim advocacy but are instead focused on convicting the person charged with the domestic assault or battery. This may not be in the victim's best interest or in the family's best interest. Though a prosecutor is not a victim's lawyer, she/he represents the state and therefore the public and thus has a responsibility to seek justice for the public as a whole and

290. I am not saying that an understanding of an individual's sexuality has no place in police work. In fact, a sensitive understanding may be of great help. I argue though that this understanding will not necessarily help determine who is victim and who is perpetrator at the time. Granted it may prove to be a useful short cut to assume big equals batterer, but there is too much danger for victims, perpetrators and law enforcement in getting it wrong.

291. See COMMUNITY UNITED AGAINST VIOLENCE ("CUAV") AND THE D.A.'S FAMILY VIOLENCE PROJECT ("FVP") PRESENT SAN FRANCISCO POLICE ACADEMY. TRANSGENDER, LESBIAN, GAY AND BISEXUAL DOMESTIC VIOLENCE (a training outline, internal to the Family Violence Project, unpublished, not for general release, on file with author).

292. MODEL RULES OF PROFESSIONAL CONDUCT R. 1.3 (2002).

the victim as an individual.²⁹³ When public safety is one of a system's purposes, prosecutors must take into account the safety of the victim as well as that of other potential victims. LGBT individuals are in the best position to assess their safety and thus must be heard. Victims of domestic violence do not often "cry wolf."²⁹⁴ If a victim says that the perpetrator will hurt or kill her/him if she/he testifies, it just might happen. It is important that the prosecutor takes the LGBT victim and her/his case as seriously as the heterosexual and gender-conforming victim, even if the likelihood of a conviction is lower because of the possibility of a homophobic judge or an ignorant jury. For the lawyers involved, it is less about gender or the straight response than it is about how victims are dealt with in general; battered women's advocates have complained for years that the victim is not empowered in the legal process.²⁹⁵

Unlike prosecutors, criminal defense attorneys are often seen as the enemy of battered women and other victims of domestic violence because they defend the criminal batterers. Defense attorneys often do not receive the same level of training about domestic violence that prosecutors do because it is seen as not important to a defense to know or understand the dynamics of abuse. As was noted previously, victims often verbalize that what they want is for the abuse to end. Defense attorneys are in a good position to emphasize to their clients the importance of finding assistance to end abuse. If they understand the repetitive nature of intimate abuse, they can let their clients know that if they do not want to be back in the criminal system, they need to stop the violence. A criminal defense lawyer has access to an alleged perpetrator that no one else does. Defense attorneys who have an understanding of the fluid and fragmented nature of gender can prove to be better advocates, to be more able to differentiate victim from perpetrator and to provide better defenses if the "wrong" person is on trial.

Some criminal defense attorneys have begun to garner favor with the battered women's movement as they have started to be necessary in the defense of victims who kill their abusers, the defense of victims who have been accused of criminal violations of restraining orders as well as in cases

293. See George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 Sw. U. L. REV. 98, 107, 110 (1975).

294. Contrary to some beliefs, women are not necessarily given to false claims of domestic violence particularly when custody and visitation issues are at stake. For example, it is widely believed that women in contested custody cases are inclined to make false claims that children are being sexually abused. However, such allegations are raised in only 2% of all child custody disputes. See Joan Zorza, *Protecting the Children in Custody Disputes when One Parent Abuses the Other*, 30 CLEARINGHOUSE REV. 1113, 1121 (1996).

295. See, e.g., Mills, *supra* note 144, at 554.

of applications for clemency for convicted victims of domestic violence.²⁹⁶ It is in the defense of victims who have killed or attempted to kill batterers that the battered women's syndrome has been most utilized.²⁹⁷ This has helped to create the archetypal battered woman, which has done a disservice to both many females who are battered by males but who fail to fit the stereotype and to those who are being battered by a same-sex partner or by someone who identifies as lesbian, gay, bisexual or transgender.²⁹⁸ A broader understanding of victimization and how it manifests itself may prove to serve victims who defend themselves or retaliate, even if it does not meet the definition of self defense.²⁹⁹ This may prevent victims from being convicted, jailed, imprisoned or even arrested in the first place.

Judges need to be trained on issues of domestic violence as well. Part of queering domestic violence would be to train judges on issues of sexuality, specifically on same-sex domestic violence. Even if the police and prosecutors handle a case well, and a conviction or plea is secured, a judge can undermine that work at sentencing, not only by the sentence she/he issues, but also by the speech she/he gives from the bench. One San Francisco judge told two women, a victim and perpetrator, "now ladies, that's no way to have a relationship."³⁰⁰

4. *Queering Others*

Communities must be queered too. The majority of LGBT communities address domestic violence from a straight mind-set. The first big obstacle to the queering of LGBT communities is the denial that the

296. See, e.g., Goldfarb, *supra* note 40, at 586-88. The "Framingham Eight" was the name given to a group of women who had killed their batterers and were imprisoned in the women's prison in Framingham, Massachusetts. *Id.* at 586-87. "In 1991, Governor William Weld amended the guidelines for commutation of sentences, a form of executive clemency, to include a 'history of abuse [that] significantly contributed to...the offense.'" *Id.* at 586. The eight women filed petitions for commutation of their sentences. It has been stated that "...the difficulties that each petitioner encountered in receiving a fair hearing of her claims seemed proportional to the degree to which she varied from an idealized image of a woman." *Id.* at 587-88.

297. Dutton, *supra*, note 119, at 1193.

298. See generally EDWARD W. GONDOLF & ELLEN R. FISHER, *BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS* (1988). Gondolf & Fisher posit, using an empirical study of battered women in Austin, Texas, an alternative theory to learned helplessness and finding that many battered women actually seek help. *Id.* I suggest that if this is true for women battered by men, the same would be true of others. This counters the image of the archetypal battered woman.

299. Self-defense is defined as "justified use of force against an aggressor when and to the extent it appears to him [sic] and he [sic] reasonably believes that such conduct is necessary to defend himself [sic] or another against such aggressor's imminent use of unlawful force." Model Penal Code § 3.04 (1985).

300. This became a well-known story within the community of advocates working against same-sex domestic violence in the San Francisco, California area during the mid to late 1990s.

problem even exists. There is still a strong belief that same-sex relationships and relationships that include bi and/or transgender identified persons are devoid of intimate violence.³⁰¹ Lesbians, bisexual and transgender women simply believe that women are not violent or abusive. Gay, bi and trans men, like their heterosexual and gender-conforming counterparts are likely to see any violence or abusiveness as a normal aspect of being a man.³⁰² For LGBT communities, queering domestic violence means bringing it into the open, acknowledging it and addressing it. In many ways, LGBT communities are at the "head in the sand" stage of this movement.

C. OTHER ASPECTS OF QUEERING

Queering domestic violence is not limited to finding non-conventional ways to address issues of sexuality. What LGBT and other subordinated communities are doing to address domestic violence includes limiting the involvement of the criminal system and, as a result, or out of necessity, creating and incorporating more nuanced approaches to the problem.

1. *Limiting the Criminal System's Role*

LGBT domestic violence organizations, particularly in cities where services are more available, such as San Francisco, increasingly discourage their clients from involving the police in their problems.³⁰³ When a victim goes first to a social service agency, that agency may suggest police involvement or pressing charges as only one of several options, even when the agency has a relatively good relationship with law enforcement and the prosecutor's office. Though having a police report on file can be advantageous down the road as the violence increases or continues, some advocates understand that victims may be more afraid of the system than they are of the abuse and abuser. There is general agreement that if a person is in an emergency situation, in danger of loss of life or of bodily

301. See, e.g., Liz Nadoff, *Lesbian Violence: No Longer a Secret*, BAY AREA CAREER WOMEN, April-May, 1987, at 1 (on file with author); Pat Califia, *Battered Lovers: The Hidden Problem of Gay Domestic Violence*, THE ADVOCATE, March 4, 1986, at 42, 43; ROBSON, *supra* note 98, at 157-67; Mubarak Dahir, *Hidden Bruises*, THE ADVOCATE, Nov. 23, 1999, at 25.

302. See Interview with Patrick Letellier, freelance writer, advocate on behalf of battered gay men, anti-same-sex domestic violence activist and survivors' counselor, in San Francisco, California (May 2, 2000); Interview with Greg Merrill, clinical social worker, former Domestic Violence Project Coordinator, in San Francisco, California (April 21, 2000).

303. When I directed the Legal Intervention and Advocacy for Battered LBT Empowerment in San Francisco, California, we regularly advised clients of the downsides of involving the police. (See *Legal Intervention and Advocacy for Battered Lesbian Empowerment — LIABLE Program, Volunteer Training Materials* (April 1997) (on file with the author).

injury, then the police should be called to intervene. Though it is true that in the case of LGBT individuals, particularly those who are people of color and/or poor, police involvement may result in their being victimized by those charged with protecting them, saving one's life is usually agreed to be worth police intervention.³⁰⁴ If the person is not in an emergency situation but is in crisis, the service provider may offer the option of police involvement and heed the victim's wishes if she/he chooses not to involve law enforcement. A problem arises when the police are utilized for protection and the victim chooses not to follow up by cooperating in prosecution. Often, this is interpreted as wasting the police and prosecutor's time. Advocates have taken it upon themselves to ensure that police and prosecutors are aware that a victim is choosing not to follow up for whatever reasons she/he has, which may be that she/he doesn't trust the system. Victims are still entitled to protection even if they choose not to "cooperate" in prosecuting their partner. Safety, not conviction and incarceration, is often the domestic violence victim's main concern.

While some LGBT communities and agencies are beginning to limit police involvement at the intervention stage, others are reclaiming a community-based model for prevention and are spending less time collaborating with law enforcement and other legal agencies. In their prevention efforts, law enforcement and prosecutors tend to focus on the message that domestic violence is a crime. Some community-based agencies have gone directly to community members in attempts to educate friends and family members about domestic violence.³⁰⁵ Many victims, long before they seek services from an agency or help from law enforcement, turn to family and friends for assistance to end the violence or to escape the abuse.³⁰⁶ This help-seeking often comes earlier in the relationship than the point at which it becomes necessary to involve the criminal law system. Lesbians are more likely to turn to friends than to the mental health system.³⁰⁷ Asian Women's Shelter's Queer Women's Services³⁰⁸ designed a program where it held a series of gatherings in people's homes to discuss the issue of domestic violence among queer Asian and Asian-American women. The goal was two-fold: first, to help create a community more knowledgeable about how to help friends who may be in abusive relationships, and, second, to help individuals identify

304. See, e.g., Crenshaw, *supra* note 30, at 1257.

305. See, e.g., Asian Women's Shelter Collaborative web site, at <http://www.apilegaloutreach.org/projects/awsc.html> (last visited May 13, 2003).

306. P.B. Poorman & Luan Gilbert, *Guidelines for Mental Health Systems' Response to Lesbian Battering*, in CONFRONTING LESBIAN BATTERING 105-18 (P. Elliot ed., 1990).

307. *Id.*

308. See The Asian Women's Shelter Collaborative website, *supra* note 305.

potential abuse in their own lives. Programs run by other agencies include healthy relationship education in high schools and middle schools and community outreach and awareness campaigns that include literature drops and tabling at major community events, such as dyke marches, pride parades and street fairs as well as in bars, restaurants and community centers. Community agencies have begun to focus on creating alternatives to aggression such as anger management treatment programs, for those who have yet to be physically violent with a partner, rather than attempting to counsel after the battery has occurred. These programs can be sessions offered to coming-out groups at queer youth centers or can be specific to those who identify that they have a problem and want to avoid becoming more violent than they already are.

2. *Creating More Nuanced Approaches*

More nuanced approaches include utilizing naturally occurring forces within communities to assist victims and, at least, restrain batterers from being physically violent and, hopefully, prevent and end their abusive behavior. These approaches include sometimes using the legal system to get both the perpetrator's and the victim's attention: "A night in jail definitely indicates something serious is going on."³⁰⁹ It can get the attention of friends and family too.

The question is, what happens once "we have everyone's attention?" Different individuals who have been victimized have different needs, and perpetrators respond to different forces. Agencies are beginning to discover that what may work for a homeless teenage transgender hustler who is being abused by the older alcoholic gay man with whom he occasionally stays, may be to find the teenager a more permanent living situation. The older man may be in need of alcohol or drug counseling and a therapy group. The "A List" lesbian professional who is abusive to her long-term partner may need to be confronted by her peers in an intervention-like situation, which a service agency can help them design. At the same time, those same friends assist and protect her partner by providing shelter and support. Nuanced approaches are designed to fit the needs and desires of the victim, both as to what they want and need for themselves and as to what they want and need to have happen to the person who is being abusive. Efforts are under way to ensure that protective orders restrain perpetrators from committing violence, rather than serving as "stay-away orders," which kick out abusers and keep them from being within a certain number of feet of their victims. Often, it is economic

309. Interview with Greg Merrill, *supra* note 302.

dependency that keeps victims in place. Keeping a perpetrator employed, living at home and participating in family life, but not abusing, is often what a victim truly wants. The nature of the nuanced approach is to marshal all possible resources to stop or prevent the abuse. In these cases, punishment is not the primary goal.

D. FUNDAMENTALS OF QUEERING THEORY AND PRAXIS

What I am arguing about domestic violence is this: Regardless of the actual sex or gender of the parties involved in intimate abuse, the abuse occurs because sexism devalues women and anyone who exhibits any womanly traits. Such womanly traits include being a victim, especially of domestic violence. This is why, in different-sex domestic violence, females are the victims 90-95% of the time.³¹⁰ Gender rigidity is the belief that only females are women or have womanly traits; therefore females are the only ones who can be victims of intimate abuse. A binary structure to gender and constructed sex/gender conformity allows for only males and men or masculinized individuals, according to gendered stereotypes, which are imposed by society and sometimes accepted by the individual, to be the perpetrators.

In applying this theoretical limitation to domestic violence, it is the male sex and therefore the gender "man" that is the perpetrator, and the female or the gender "woman" that is the victim, whatever their actual physical sex or gender identity. I believe queer theory's gender fragmentation alters that gender conformity and stasis. It changes the idea of who can be a victim or a perpetrator because it allows for male women, female men and all the combinations that can happen with sex and gender. Gender-rigidity and victim-perpetrator gender presumptions can explain why there are dual arrests or no arrests in same-sex domestic violence cases. It is because gender clues as to victim and perpetrator are not there. For example, in the case of two men, the police arrive and see no woman, therefore no victim, and two men, therefore two perpetrators. Thus, the police arrest both victim and perpetrator. In the case of two females, there is no man and thus no perpetrator. Police describe the situation as "just a cat-fight," and state that if you leave two women alone, they will work things out. The problem is that victims call the police for protection, and in neither of these cases do they receive it.

I am not saying that same-sex relationships feature a more masculine partner, who is the abuser, and a more feminine partner, who is the

310. BUREAU OF JUSTICE STATISTICS, BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS: VIOLENCE BETWEEN INTIMATES, NCJ-149259 (1994), cited at <http://abanet.org/domviol/stats.html>.

victim.³¹¹ Not all relationships, same- or different-sex, have binary gender roles. Thus, same-sex relationships are not about one partner playing the man's role and the other playing the woman's.³¹² An aspect of queer identity, which many LGBT individuals embrace, is at least marginal gender transgressiveness, even if only in gender roles. Thus, same-sex relationships are not always a "more masculine" versus "more feminine" issue.

What I present is the idea that at the very instant an individual chooses to act out abusively toward an intimate partner, he or she is doing at least two things: 1) exerting a desire for power and control over another and 2) exhibiting the attribute of being the "gendered man" and seeking the social rewards that go with exhibiting a behavior that is assigned to man whether the perpetrator is male, female or intersexed. These rewards exist because of sexism. In behaving this way, the individual is forcing his or her partner to assume what has been constructed as the weak, submissive or "victim" role, which, because of the socially constructed gender duality, is an attribute of the woman gender. In a sexist society, there must be two and only two genders, and one cannot exist without the other; this is true regardless of actual behavior or actual identity.

Fundamentally, woman is seen as the victim and the victim as woman-like (i.e., feminized) and perpetrator as man-like (i.e., masculinized) and man as perpetrator. Criminal law assigns a status — victim or perpetrator — to perceived gender roles and responds to the situation based on that gender perception. This perception can be wrong if in fact the sex and gender of the individuals do not conform to those stereotypes. I am arguing that neither biological sex nor gender itself tells us who the victim and perpetrator are. Victim and perpetrator are socially assigned according to perceived gender (either "I see you as a man, therefore you are the perpetrator" or "I see you as the perpetrator, therefore you are acting like a man"). The same can be said for the victim/woman. However, what you see, or think you see, is not necessarily what you get and definitely should not be the major factor that determines how the law responds to domestic violence.

311. See *Myths and Stereotypes of Lesbians*, in LEGAL INTERVENTION AND ADVOCACY FOR BATTERED LESBIAN EMPOWERMENT — LIABLE PROGRAM, VOLUNTEER TRAINING MATERIALS (1997) (on file with author).

312. Increasingly in different-sex relationships, the roles are not as clearly defined as they once were. See Peg Tyre & Daniel McGinn, *She Works, He Doesn't*, NEWSWEEK, May 12, 2003, at 44.

V. THE PRAXIS: QUEERING IN THE REAL WORLD

We can change the name from battered wife to battered woman to battered person, and we can have professorial experts discuss the nature of lesbianism and violence, but . . . [t]o successfully use a defense based on being battered, a woman must be the stereotypically good wife. Given that many heterosexual women are insufficiently wifely to sustain the defense, it is perhaps not surprising that [a lesbian can] not do so. . . [T]he forces of domestication require that [a lesbian] continue[s] to force herself to fit into the legal category wife if she hopes to win . . .³¹³

The truth is that this is a straight society. It is dominated by the conventional. It is also true that this conventionality has existed in one form or another for millennia. It is, for many, a difficult process to see sex and gender as different from each other, as unbundled from sexual orientation and separate from morality and religion. For some people, it is impossible to separate morality, religion and sexuality from law. The law is connected to other systems: It both permeates society and is influenced by its conventions. Thus, changing the conventionality of the law may not be possible.

The law, like the society in which it exists, is essentially gendered: For the most part, what I describe as a sex- and gender-conformity exists. The most obviously non-conforming are transgendered persons.³¹⁴ Though there are an increasing number of gender nonconformists and a wider diversity of transgender people, most of whom are "queer," the reality is that the majority of people present/perform³¹⁵ the gender that society has assigned to their sex. Males are readily perceived as men and females as women. This means that if you or I were to try to guess the sex on someone's birth certificate by looking at or listening to her or him, much of the time we would be right.

Another reality is that the majority of domestic violence is perpetrated by heterosexually identified males, who also identify as men, against heterosexually identified females, who know themselves and identify as women. According to an American Psychological Association 1996 report, "nearly one in three adult women experience[s] at least one physical assault by a partner during adulthood."³¹⁶ In addition, according to a Bureau of Justice Statistics' 1994 report, 90-95% of domestic violence victims (in

313. ROBSON, *supra* note 98, at 159-60.

314. *See generally* BORNSTEIN, *supra* note 69; FEINBERG, *supra* note 69.

315. *See* BUTLER, *supra* note 69, at 24-25.

316. American Bar Association Commission on Domestic Violence, *supra* note 168.

heterosexual relationships) are women.³¹⁷ Domestic violence is overwhelmingly a crime perpetrated by males against females. My argument is in no way intended to diminish this fact.

In fact, I believe that, along with supporting the theory that sexism is at the root of domestic violence,³¹⁸ same-sex intimate abuse also facilitates a better understanding of why the majority of domestic violence is perpetrated by heterosexually identified males. A reason is that they make the "best" men. What this means is that since gender, in this case man, is constructed of a number of behaviors and traits, many of which are learned, heterosexual males are going to have learned those masculine, "manly" traits from the beginning and are going to be socially rewarded for performing them well. Some of the traits coded as aspects of being a man include muscles, aggressiveness, abusiveness, violence and a desire for and exhibiting of power and control. Heterosexual males from a very early age learn how to be men and have the biological make-up to do a good job at it.³¹⁹ Females, gay men and transgender individuals can aspire to and learn these and other traits coded as masculine, but heterosexual, gender-conforming males have a head-start. On the flip side, heterosexually identified, gender conforming females "make the best women." In addition, on the whole, this society values men and devalues women. Thus those archetypal men — the heterosexually identified males — if not being rewarded for being violent towards women (though in many ways this is exactly what happens), are at least performing true to type by being violent and are not sanctioned because of that. In contrast, females and non-gender conforming males face sanctions for not gender presenting as women or as men, for not performing to type, for actually being violent or for any combination of these.

A. WHY INVOLVE CRIMINAL LAW AT ALL?

Maybe the criminal law system should not be utilized at all in anti-same-sex domestic violence work, or any anti-abuse work. If the system is too straight and ineffective, what case is there for involving police, lawyers and judges? The problem with the criminal law system is not the system itself per se: I see it as a good idea poorly executed. If the idea is that law enforcement is a paramilitary force, prosecutors are presenters of the evidence of those we already know are guilty, juries sit only for the

317. *Id.*

318. *See supra* Part IV.A.2.

319. FISHER, *supra* note 89, at 188-208 (discussing the biological differences between men and women).

purpose of giving a public face to prosecutorial decision making, and judges exist to make sure those people who get caught get what is coming to them, then the system should not be part of anti-domestic violence efforts because it exacerbates the problem by emphasizing force, violence, power and control in the same way domestic violence does. A paramilitary-type law enforcement system and a legal system based on punishing the presumed guilty is, like those who choose to be abusive, based in the model that "might makes right." However, if the system exists to serve and protect and to uncover and mete out justice, then the system needs to be able to do just that and do it fairly. Patrick Letellier noted that if the system worked, it would be a good thing.³²⁰ The state stepping in to protect those who are being harmed and the system stopping that from happening again and preventing it in the first place are what victims want. The problem seems to be that the system picks and chooses who is worthy of protection and from whom those people need to be protected.

Another reality is that the criminal justice system's involvement in domestic violence is here to stay. The system does need to be scaled back to become one of many tools, not the only tool, in the box. It has been through much hard work that advocates secured some recognition by the legal system, and this was an important victory: If the law takes an issue seriously, it must be a serious issue. The next step is to get the law to take same-sex domestic violence as seriously as it does different-sex intimate abuse and to deem LGBT people worthy of protection. If the criminal law system does what it does best and does it fairly, that will be a system that works. My argument is that to do what it does best and to do it fairly, the criminal law system must adopt a queered approach to domestic violence.

Some may argue that the criminal law system is about equal treatment of all individuals and communities. The argument is that the law is not about nuanced approaches and that the system must have and does have objective standards for arrest, prosecution, trying and sentencing. If this is so, there is no place for the type of subjectivity that aspects of queering call for. It is true that, particularly in practice, queering does call for an understanding of and acceptance of addressing the person as she or he presents and/or chooses. For example, if a victim is a woman, be she biologically female or gendered woman, the pronoun used should be "she."³²¹ In addition, a victim's wishes as far as issues of prosecution and even sentencing should be taken into account. This may seem to be about creating individual standards for individual victims and offenders, but each

320. Interview with Patrick Letellier, *supra* note 302.

321. The Survivor Project, *supra* note 71.

actually is an individual. The person is the individual, not the standard. This particular argument about the objectivity of the law has been made in situations other than domestic violence. In many ways, I am agreeing that the law needs to be more objective and less subjective when it comes to issues of human sexuality, particularly sex, gender and sexual orientation; In some ways this is a corner-stone of gender neutrality.

Nuanced approaches are another issue. Nuanced approaches to intervention mean addressing victims', perpetrators' and communities' needs and recognizing that to have a positive effect is to understand what may or may not work based upon the differences in the needs of all the actors in any given situation. The actors include the systems involved as well. "Nuanced approaches" basically means trying to use different approaches within the available and appropriate range that may work with different situations. The law can be both objective and nuanced. Equality is not identical to sameness. Two sentences can be equal and just but different, for example thirty dollars or thirty days.³²² The point of having nuanced approaches is to try for that which might work.

A point that follows along the same lines as the argument that the law should be objective, is that the law, or at least justice, is blind and that queering domestic violence actually shows a bias against straight society and towards LGBT individuals and communities. It is similar to the argument that LGBT anti-discrimination ordinances are promoting "special rights." My rebuttal is that the law continues to show a bias against LGBT people based on their sexual orientation, gender identity or perceived sexual practices and that the concept of queering is to reduce that bias and create more equality, not more inequality.

B. LAW AS AN INSTRUMENT OF SOCIAL CHANGE

There are arguments against the whole concept of queering domestic violence. Some of these arguments are based on religious or moral objections to homosexuality, transgenderism and any and all things generally defined as "queer." Often, the idea of sexuality at all is seen as a controversial subject and treated as taboo.³²³ To those who have a religious or moral opposition to the criminal law treating LGBT victims and perpetrators of domestic violence fairly and equally, I have little counter

322. However, one might argue that issues of poverty may make these sentences unequal and even unjust, because without access to money, there really is no choice but to take jail time.

323. Queer issues are not the only "taboo" subjects. Other such topics include other issues of sexuality, such as sex education, condom distribution, gay marriage, gays in the military, age of consent and adoption by lesbians and gay men.

argument. Suffice it to say that law and religion are and should be separate. This discussion is not about religious differences or morality but about ideas of how to address what does and continues to be a phenomenon, and that is domestic violence.

Other points against queering are based on the nature and purpose of the criminal law itself. Some may contend that queering domestic violence is basically about using the law to create individual change, to fundamentally alter the way individuals and communities interact with each other. What follows that statement is usually that the law is not capable of being effective as an instrument of either social or individual change.

In the case of social change, the law, particularly criminal law, is reactive. In the case of domestic violence, even the area of law that can be proactive, namely legislation, is already behind the times and is reacting to battered women's movement lobbying efforts and tragic cases of domestic homicide or serious injury based on a government failure to protect.³²⁴ Social change happens because people organize into movements, such as the battered women's movement. The law is merely a tool that works either to inhibit that change or to assist that change. Often, the assistance comes or does not come in the form of case law, law reform and/or law enforcement's or the legislature's resistance to change. Either way, attempting to use the law as an impetus for social change in the area of domestic violence cannot work. I argue that queering domestic violence is not about social change, but about altering how the law itself operates. If all the law and parts of the criminal law system that touch domestic violence were queered, it would be on a grand scale and, if successful, could assist the social change known as the domestic violence movement. However, this is neither the point nor necessary to successfully create positive criminal and civil interventions into domestic violence.

Creating individual change is another issue. This is a question much beyond the scope of this article because it is about the efficacy of law in altering human behavior. It calls into question both laws themselves and punishment. Do existing laws against domestic violence prevent individuals from acting abusively towards intimates? Apparently not, given that thousands are arrested in any given year for domestic assault and/or battery.³²⁵ So how or why would having laws that are gender-

324. See, e.g., *Thurman v. City of Torrington*, 595 F. Supp. 1521 (U.S.D. Conn. 1984).

325. Wisconsin reported approximately 25,000 arrests for domestic violence during 2000. Approximately 17,000 of the arrests were categorized as domestic assault or battery. A substantial portion of the offenses were reduced to disorderly conduct misdemeanors. See Office of Crime Victim Services, State of Wis. Dep't of Justice, 2000 Wis. Domestic Abuse Incidence Report, at <http://www.doj.state.wi.us/cvs/dar/> (last visited Nov. 3, 2003).

neutral, that specifically include LGBT individuals or that are sensitive to queer communities have any greater impact on the individuals who are perpetrating or victimized by same-sex or different-sex domestic violence? The answer is that they may not. However, I do argue that though the impact of such laws may not be greater, they may begin to equalize LGBT persons in the eyes of the law, society and LGBT communities themselves. They may also begin to provide the proper balance in different-sex domestic violence cases in which the victim and perpetrator do not follow gender-stereotypical, conforming or static norms. The creation of inclusive laws and approaches can open up room for more positive practices and greater fairness, which may have an effect on decreasing domestic violence.

Issues of the efficacy of punishments are topics for another article. In cases of domestic violence, does arrest, jail time or prison time, specifically or generally deter others from acting out abusively toward intimates? Does rehabilitation, such as batterer's treatment, work? Is the state's, the people's or society's retribution appropriate in cases of domestic violence? Finally, does rehabilitation work to change behavior? Incapacitation can halt the physical violence an individual perpetrates on one particular victim, but, particularly in the case of same-sex abuse, does jail or prison time only allow access to more victims while inside, making no change to the individual's behavior, so that the finding of a new relationship once released means a new victim on the outside? Though these are questions that need much further research, I argue that having an understanding of same-sex domestic violence and a queered approach may help to make the punishment phase more useful in achieving the goal of public safety by being able to focus on domestic violence itself and not pay so much attention to the sex or gender of perpetrator or victim.

C. CAN QUEERING WORK?

Though it might seem that the opposite would be true, queering might work in practice but not in theory. In this case, the theory is more about changing how people think about, understand, and perceive gender, sex, sexual orientation and sexuality in general which is very difficult to do. However, queering in practice is about altering the policies, procedures and laws that actually exist. It is about changing terminology, words and training. I have seen San Francisco police and prosecutors become more aware of and sensitive to the issue of same-sex domestic violence because it has become a specific part of their training.³²⁶ They have learned how to

326. See COMMUNITY UNITED AGAINST VIOLENCE, *supra* note 291.

assess the primary aggressor³²⁷ and to not use offensive language. There is still a long way to go, but it is better today than it was when I was first trained on lesbian battering issues in 1987.³²⁸ Education, training, and implementation of policies, procedures, rules, regulations and laws can make the difference in being able to queer domestic violence practice.

It is important to note that there have been advances in the areas of domestic violence, LGBT rights and the inclusion of LGBT individuals in law and policy. For example, the year 2000 census altered its questionnaire and is now more able to accurately track the number of same-sex couples living together.³²⁹ State laws have changed to include non-married victims of domestic violence under the protection of the family and criminal courts.³³⁰ Queer culture is seeping into the collective consciousness of the dominant culture of the United States.³³¹ As goes popular culture, so goes the law? Maybe so. Queering in theory is about altering the collective consciousness. If by offering professional training and community education, the lobbying and education efforts of those working against

327. A number of states passed "primary aggressor" legislation in the late 1990s. New York's legislation "requires the police to arrest only the primary physical aggressor in response to a domestic violence complaint." See Press Release, N.Y. Dep't. of the Governor, Governor Pataki Signs Landmark Domestic Violence Legislation (Oct. 14, 1997), available at http://www.state.ny.us/governor/press/oct_14_97.html (last visited May 14, 2003). The Feminist Majority Foundation summarizes the primary aggressor legislation as follows:

[S]ome departmental or statewide policies now provide guidelines for an officer to determine who is the "primary aggressor" in a violent incident. For example, the California Commission on Peace Officer Standards and Training publishes a guidebook for officers responding to domestic violence, discouraging "dual arrests" and outlining several factors to consider when determining who is the primary aggressor in a domestic violence situation. The primary aggressor is defined as "the person determined to be the most significant, rather than the first, aggressor." Factors to consider include the history of domestic violence between the people involved, the threats and fear level of each person, and whether either person acted in self-defense. These are appropriate considerations when determining who is the primary aggressor, and therefore which of the two parties should be arrested.

Feminist Majority Foundation, *Domestic Violence Facts*, at <http://www.feminist.org/other/dv/dvfact.html> (last visited May 14, 2003).

328. Women Organized to Make Abuse Nonexistent (W.O.M.A.N.), Inc., in San Francisco offered my training. This organization, still in operation, was one of the first to address the issue of lesbian battering.

329. According to the U.S. Census Bureau, an unmarried couple is defined as being composed of two unrelated adults of the opposite sex who share a housing unit with or without the presence of children under 15 years old. U.S. Census, Bureau, *Current Population Survey: Definitions and Explanations*, at <http://www.census.gov/population/www/cps/cpsdef.html> (last visited Nov. 29, 2002).

330. See generally NCAVP 1997, *supra* note 64.

331. See, e.g., Jess Cagle, *America Sees Shades of Gay*, ENT. WKLY., Sep. 8, 1995, at 20; A.J. Jacobs, *Gay TV: Should Ellen Join the Gay Characters Appearing on Prime Time? An EW Poll & Special Report About The Controversy*, ENT. WKLY., Oct. 4, 1996, at 19; A.J. Jacobs, *When Gay Men Happen to Straight Women*, Oct. 23, 1998, at 20. See also Deborah Blum, *The Gender Blur*, UTNE READER, Oct. 1998; *Who's Gay & Who's Not On TV*, THE GLOBE, March 16, 1999, at 23-25; *Hollywood's Gay Underground Exposed: Who's In . . . Who's Out!*, THE NAT'L ENQUIRER, Nov. 5, 2002, at 42-63.

same-sex domestic violence are having a positive effect on queering in practice, and if queer culture is moving into the mainstream, then maybe this is a prediction of what is to come. It is definitely a comment on what needs to happen.

VI. CONCLUSION

Often, the attitude of the judge (and, in criminal cases, the prosecutor as well) sets the tone for the court. Concerned, committed, thoughtful judges can inspire concerned, committed, thoughtful juries. Practitioners can help by educating the courts about the causes and dynamics of same-sex domestic violence, just as they have done with heterosexual domestic violence.³³²

If criminal law were to be queered in the way I am suggesting, LGBT individuals would feel as though the criminal law system were as accessible to them as battered women have started to feel that it is. When law enforcement arrived at the home, they would gather evidence and assess the situation based on a variety of indicators, none of which would include sex, gender or sexual orientation, whether the case included two males, two females or a male and a female. This is the key recommendation: that none of these — sex, gender or sexual orientation — should be determinative in how the law responds to domestic violence. I am arguing that broader, more fluid notions of gender can be useful in all domestic violence interventions, regardless of the sex of the one who chooses to abuse or the one who chooses to survive. These broader, more fluid notions of gender, when combined with less rigid ideas about all aspects of sexuality and applied to criminal law's responses to intimate abuse, may result in more positive domestic violence interventions. Thus, queering domestic violence may be a way to straighten out criminal law.

332. Fray-Witzer, *supra* note 194, at 25.

ESSAYS

