

COMMENT

Trouble in Paradise: Barriers to Addressing Domestic Violence in Lesbian Relationships

Krisana M. Hodges*

I.	INTRODUCTION	311
II.	STATE DOMESTIC VIOLENCE LAWS OFFER LITTLE OR NO PROTECTION FOR WOMEN VICTIMIZED BY SAME-SEX DOMESTIC VIOLENCE	314
	A. <i>Several State Statutes Exclude Gay and Lesbian Relationships</i>	314
	B. <i>Many Statutes Offer Ambiguous Degrees of Protection to Lesbian Battered Women</i>	316
	C. <i>Few State Statutes Include Lesbian Relationships</i>	318
III.	HOMOPHOBIA DISTINGUISHES LESBIAN BATTERED WOMEN’S EXPERIENCES OF DOMESTIC VIOLENCE.....	320
	A. <i>Homophobia as a Weapon of the Abuser</i>	320
	B. <i>The Legal System’s Revictimization of Lesbian Battered Women</i>	323
IV.	THE HETEROSEXUAL MODEL OF DOMESTIC VIOLENCE OBSCURES LESBIAN BATTERED WOMEN’S EXPERIENCES OF ABUSE.....	325
	A. <i>The Heterosexual Model of Domestic Violence</i>	325
	B. <i>Mutual Restraining Orders as Evidence of Judicial Difficulty Understanding Lesbian Domestic Violence</i>	328
IV.	CONCLUSION	330

I. INTRODUCTION

Lesbian domestic violence exists in the blindside of feminist theorists and gay and lesbian activists.¹ Lesbian battered women fall

* Tulane School of Law, J.D., 2000. I am eminently grateful to Professor Terry O’Neill, Christie Herring and Nicole Mikulas for their invaluable comments and suggestions. I dedicate this article to the woman who first shared her story with me. Your courage is my teacher.

1. The emphasis of this comment is on the unique barriers that lesbian victims of domestic abuse face in accessing legal protection. Many of these problems will overlap the with similar obstacles heterosexual women and gay men face; however, gendered assumptions of patterns of violence erase the reality of women as abusers, uniquely blocking lesbian victims access to legal protection. Men in same-sex relationships also experience many of the obstacles

outside of feminists' theories that explain domestic violence as a form of male oppression of women.² Lesbian and gay activists, seeking to promote a positive image of same-sex relationships may wish to sweep same-sex domestic violence under the political rug.³

Between the cracks, same-sex domestic violence has thrived, as intimate violence infects many lesbian relationships. The National Coalition of Anti-Violence Programs (NCAVP) reports that twenty-five percent to thirty-three percent of same-sex couples experience violence in their relationships.⁴ These numbers are consistent with estimates of abuse in heterosexual relationships.⁵ The NCAVP

discussed in this paper, as well as their own unique challenges in obtaining protection. For a full examination of the issues battered gay men face, see DAVID ISLAND & PATRICK LETELLIER, *MEN WHO BEAT THE MEN WHO LOVE THEM: BATTERED GAY MEN AND DOMESTIC VIOLENCE* (1991). For a guide to social services for abused men in gay relationships, see *Gay Men's Domestic Violence Project* (visited May 9, 2000) <<http://www.gmdvp.org>> (crisis number: 1-800-832-1901).

I am also not including discussion of obstacles that lesbian women encounter in attempting to access battered women's services. Social services designed to help heterosexual women in abusive relationships are often ill equipped, or even unwilling, to assist lesbian victims. See, e.g., Carla M. Da Luz, *A Legal and Social Comparison of Heterosexual and Same-Sex Domestic Violence: Similar Inadequacies in Legal Recognition and Response*, 4 S. CAL. REV. L. & WOMEN'S STUD. 251, 270-71 (1994) (describing the inadequacies in social services available to lesbian and gay victims of domestic violence). Some agencies do serve the particular needs of women abused by their female partners. See *The Network for Battered Lesbians and Bisexual Women* (last updated Aug. 31, 1999) <<http://users.erols.com/nblbw/>> (crisis number: 617-423-SAFE); *Advocates for Abused and Battered Lesbians* (visited May 9, 2000) <<http://www.aabl.org/>>; *Domestic Violence in Lesbian Relationships* (last modified Feb. 2000) <http://www.en.com/users/allison/1_dv.html>.

2. See, e.g., *Editors' Introduction, in VIOLENCE AGAINST WOMEN: PHILOSOPHICAL PERSPECTIVES* 1, 2-4 (Stanley G. French, et al. eds., 1998).

3. See Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere while Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325, 331-32 (1999). See also Da Luz, *supra* note 1, at 267-69 ("Gay men and lesbians consider themselves enlightened and outside of the traditional heterosexual, male-dominated family in which they consider violence to be an accepted norm. This is particularly true of lesbians, many of whom consider violence inherent in the male-dominated structure from which they have removed themselves." (footnotes omitted)). Knauer points out that antigay organizations do in fact use same-sex domestic violence to promote anti-gay propaganda. See Knauer, *supra*, ("[A] weekly publication of the Family Research Council . . . reported the inflated and misleading statistic that 47.5% of lesbians experience some form of domestic abuse compared with only 0.22% of married heterosexual women. This story appears to respond to the assertions that the brutal murder of Matthew Shepard was the result of religious antigay rhetoric by illustrating that, in reality, homosexuals are their own worst enemy." (footnotes omitted)).

Recently, queer media has increasingly covered same-sex domestic abuse. See, e.g., Eric Crites, *When Love Hurts*, OUT, Jan. 2000, at 88.

4. See ANTI-VIOLENCE PROJECT, *REPORT ON LESBIAN, GAY, TRANSGENDERED, AND BISEXUAL (LGTB) DOMESTIC VIOLENCE* 25 (New York City ed. 1998). See also Julie Chao, *National Survey of Gay Domestic Violence Includes Murder Cases. Abuse Rates Same as with Heterosexuals*, S. F. EXAMINER, Oct. 5, 1999, at A4.

5. See ANTI-VIOLENCE PROJECT, *supra* note 4, at 25. See also Knauer, *supra* note 3, at 330.

documented 2,574 cases of same-sex domestic violence in 1998.⁶ Women accounted for forty-eight percent of cases, forty-nine percent were men, three percent were transgendered M-F, and less than one percent transgendered F-M.⁷ Such high numbers demand the attention of feminist theorists and gay and lesbian activists. While recognizing same-sex domestic violence has the potential to disrupt existing theories of abuse, continuing to avoid the complicated issues that are inherent to same-sex domestic violence jeopardizes the safety of countless people in gay and lesbian relationships.

The phrase “domestic violence” generally denotes abuse in a broad range of relationships including intimate partners, children, and extended family. For the purpose of this comment, I will discuss domestic violence among intimate partners in lesbian relationships.⁸ I borrow from the NCAVP definition of domestic violence among intimate partners as “the intentional, nonconsensual pattern of harm by one’s intimate partner for the purpose of gaining and maintaining control over that partner.”⁹

Women in lesbian relationships experience domestic violence differently than women in heterosexual relationships, in part because of the abuser’s unique potential to use homophobia to manipulate and control her partner.¹⁰ All too often, the legal system does not protect these women, as many states constructively or explicitly bar same-sex relationships from the protection of their domestic violence statutes.¹¹ Additionally, lesbian battered women find little sanctuary in feminist theories of domestic violence that are built upon the presupposition that domestic violence is the manifestation of male oppression of women.¹² The purpose of this comment is to draw attention to the unique and particular obstacles lesbian battered women face when they attempt to reach out for legal protection, and to challenge domestic violence activists to expand their theories of domestic violence to include the reality that some women abuse women.

6. See ANTI-VIOLENCE PROJECT, *supra* note 4, at 27.

7. See *id.* at 28.

8. In limiting this comment to battering in lesbian relationships, I do not distinguish between lesbian women, bisexual women, transgendered persons, and women who identify as heterosexual despite their relationships with other women. For the purposes of this comment, I will discuss intimate relationships among women as lesbian relationships, even if the women in those relationships may not necessarily identify themselves as lesbians.

9. ANTI-VIOLENCE PROJECT, *supra* note 4, at 3.

10. See *infra* text accompanying notes 54-70.

11. See *infra* text accompanying notes 13-27.

12. See *infra* text accompanying notes 84-98.

II. STATE DOMESTIC VIOLENCE LAWS OFFER LITTLE OR NO PROTECTION FOR WOMEN VICTIMIZED BY SAME-SEX DOMESTIC VIOLENCE

A. *Several State Statutes Exclude Gay and Lesbian Relationships*

Nine states explicitly exclude gay and lesbian relationships from their domestic violence statutes: Arizona, Delaware, Georgia, Indiana, Louisiana, Michigan, Montana, North Carolina, and South Carolina.¹³ These statutes exclude same-sex relationships in two possible ways. Either the statutes use gendered language to limit coverage to include only male-female relationships,¹⁴ and/or the statutes limit protection to married (or formerly married) couples.¹⁵

Georgia's domestic violence statute only covers married couples or formerly married couples.¹⁶ As Georgia does not allow same-sex couples to marry, the statute effectively denies legal protection to all victims of same-sex domestic violence. Additionally, Indiana extends protection only to spouses and former spouses, persons currently or formerly living together as spouses, or persons with a child in common.¹⁷ Indiana presumably interprets this language narrowly and to the exclusion of same-sex relationships, as evidenced by the statutory requirement that domestic violence prevention and treatment centers "be available to a person who: (1) has been assaulted by the person's *spouse or former spouse*; or (2) fears imminent serious bodily injury from the person's *spouse or former spouse*."¹⁸ By failing to include cohabitants and dating relationships, these states' domestic violence laws severely limit the protection available to heterosexual victims of domestic violence. Lesbian victims are excluded altogether.

Many states exclude same-sex domestic violence from their statutes by explicitly limiting protection to victims of the opposite sex of their abuser. Montana's statute purports to protect "partners;" however, the statute limits "partners" to "spouses, former spouses,

13. See ARIZ. REV. STAT. ANN. §§ 13-3601(A), 36-3001 (West 1993 & Supp. 1999); DEL. CODE ANN. tit. 10 § 1041(2)(b) (1999); GA. CODE ANN. § 19-13-20 (1999); IND. CODE §§ 35-42-2-1.3 (Michie 1997 & Supp. 1999) (domestic battery), 12-7-2-70, 12-18-4-12 (Michie 1997) (domestic violence prevention and treatment centers); LA. REV. STAT. ANN. §§ 46:2121.1, 46:2132 (West 1999); MICH. STAT. ANN. § 16.611(1) (Law. Co-op 1998); MONT. CODE ANN. § 45-5-206 (1999); N.C. GEN. STAT. § 50B-1 (1999); S.C. CODE ANN. § 20-4-20 (Law. Co-op 1985 & Supp. 1997).

14. For example, see South Carolina statute, § 20-4-20.

15. For example, see Georgia statute, § 19-13-20.

16. See *id.*

17. See § 35-42-2-1.3.

18. § 12-18-4-12 (emphasis added).

persons who have a child in common, and persons who have been or are currently in a dating or ongoing intimate relationship with a *person of the opposite sex*.”¹⁹ Delaware limits its statute to protect family and former spouses, heterosexual couples currently living together, and heterosexual couples with a child in common.²⁰ North Carolina’s does have language providing for “current or former household members;”²¹ however, other parts of the statute explicitly limit current or former cohabitants and dating relationships to “persons of the opposite sex.”²² Arizona, Louisiana, Michigan, and South Carolina all similarly limit protection to victims of the opposite sex.²³

Several states have domestic violence statutes that, while not explicitly excluding same-sex relationships, are simply inadequate to protect lesbian victims. For example, Ohio only protects couples who have lived, or are currently living together as spouses.²⁴ Although Ohio courts have interpreted this language to include same-sex couples,²⁵ the “living together” requirement limits the statute’s protection for lesbian victims because many same-sex couples maintain separate residences.²⁶ The “living together” requirement in the Ohio law is far from unique: twenty-four other state statutes include similar restrictions.²⁷

19. MONT. CODE ANN. § 45-5-206 (2)(b) (1999) (emphasis added).

20. See DEL. CODE ANN. tit. 10, § 901(9) (1998).

21. N.C. GEN. STAT. § 50B-1(5) (1999).

22. § 50B-1(2), (6).

23. See ARIZ. REV. STAT. ANN. § 13-3601 (West 1989 & Supp. 1999); LA. REV. STAT. ANN. § 46:2121-1, 46:2132 (West 1999); MICH. STAT. ANN. § 16.611(1) (Law. Co-op 1998); S.C. CODE ANN. § 20-4-20 (Law. Co-op 1985 & Supp. 1997). Recent efforts in Arizona to extend protection of the state’s domestic violence laws to same-sex cohabitants have failed. See *Legislature House Lifts Sodomy, Adultery Prohibition*, TUCSON CITIZEN, Apr. 23, 1999, at 2C. In 1998, the state legislature explicitly excluded gay and lesbian couples from protection. See § 13-3601. See also Thomas Stauffer, *Gay Celebration Outoberfest Draws 7,500*, ARIZ. DAILY STAR, Oct. 17, 1999, at 4B (including discussion of the domestic violence statute).

24. See OHIO REV. CODE ANN. § 3113.33 (West 1995 & Supp. 2000).

25. See *infra* note 39.

26. See Sandra E. Lundy, *Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbians and Gay Domestic Violence in Massachusetts*, 28 NEW ENG. L. REV. 273, 292-93 (Winter 1993) [hereinafter *Assisting Victims*].

27. The following states’ domestic violence laws do not cover current or prior dating relationships when the couple have not lived together: Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Mississippi, Missouri, Nebraska, Ohio, South Carolina, South Dakota, Texas, Utah, Virginia, Wisconsin, and Wyoming. See ALA. CODE § 30-5-2 (1998); ARIZ. REV. STAT. ANN. § 13-3601; ARK. CODE ANN. § 5-26-302 (1997 & Supp. 1999); CON. GEN. STAT. § 46b-38a (1997); DEL. CODE ANN. tit. 10, § 901(9) (1998); FLA. STAT. ANN. § 741.28 (1997 & Supp. 2000); HAW. REV. STAT. ANN. § 586-1 (1999); IDAHO CODE § 39-6303 (1998 & Supp. 1999); IND. CODE § 34-42-2-1.3 (Michie 1997 & Supp. 1999); IOWA CODE ANN. § 236.2 (1994); KAN. STAT. ANN. § 60-3102

B. Many Statutes Offer Ambiguous Degrees of Protection to Lesbian Battered Women

Many states have domestic violence statutes which refer to “partners,” “cohabitants,” or “household members,” and do not explicitly preclude their application to same-sex couples. For example, Alabama recently passed domestic violence legislation that broadened the state’s protection to include violence occurring among family, household, dating, or engagement relationships.²⁸

Ambiguous language in these domestic violence laws does not invite lesbian battered women to utilize their statutory protections. The application of these laws to same-sex domestic violence will vary depending on the attitudes of the prosecutors and judges in the jurisdiction.²⁹ The pervasiveness of prosecutors’ decisions to pursue lesser charges in cases of same-sex battery is difficult to document.³⁰ Similarly, it is hard to account for judges dismissing protective restraining orders for lesbian battered women because they do not fall within the explicit protection of the statute.³¹ Ambiguous language in these statutes allows judges and prosecutors to make facially legal decisions that may, in fact, disguise homophobic attitudes about same-sex relationships.

State appellate courts can clarify that these statutes do in fact protect gay and lesbian relationships to the same extent that the

(1994); KY. REV. STAT. ANN. § 403.720(3) (Banks-Baldwin 1992); ME. REV. STAT. ANN. tit. 19-A, § 4002 (West 1998); MD. CODE ANN., FAM. LAW § 4-501 (1999 & Supp. 1999); MISS. CODE ANN. § 93-21-3 (1994 & Supp. 1999); MO. ANN. STAT. § 455.200 (1997); NEB. REV. STAT. § 42-903 (1993); OHIO REV. CODE ANN. § 3113.33 (West 1995 & Supp. 2000); S.C. CODE ANN. § 20-4-20 (Law. Co-op 1985 & Supp. 1997); S.D. CODIFIED LAWS § 25-10-1 (Michie 1999); TEX. FAM. CODE ANN. § 71.01 (West 1996); UTAH CODE ANN. § 30-6-1 (1998); VA. CODE ANN. § 18.2-57.2 (1996 & Supp. 1999); WIS. STAT. ANN. § 968.075 (West 1998); WYO. STAT. ANN. § 35-21-102 (Michie 1999).

28. See § 30-5-2(a)(4). The National Gay and Lesbian Task Force praised the Alabama legislature, focusing on the term “households” as inclusive of same-sex relationships. See Philip Rawls, *Legislature Draws Praise from National Gay and Lesbian Task Force*, AP ONLINE, July 23, 1999, available in 1999 WL 22026212. However, the legislation’s sponsor, state Representative Yvonne Kennedy of Mobile, rejected the Task Force’s interpretation of the new language. See *id.* The extent to which Alabama courts will interpret the new statute to include same-sex domestic violence remains to be seen. Other ambiguous statutes include: Maine, ME. REV. STAT. ANN. tit. 19-A, § 4002 (West 1998); and Tennessee, TENN. CODE ANN. § 36-3-601 (1996 & Supp. 1999).

29. See Lundy, *Assisting Victims*, *supra* note 26, at 291.

30. See *id.* (“District attorneys may not be interested in pursuing charges in a case of lesbian or gay battering, or may end up prosecuting the victim because they have not thoroughly investigated the case.”).

31. See *id.* (“Judges . . . frequently dismiss cases of same-sex domestic violence on the grounds that such violence is de facto “mutual,” or order inappropriate “relief” such as unwarranted mutual restraining orders[.]”).

statutes protect heterosexual relationships. In *Ireland v. Davis*, a Kentucky appeals court clarified that its facially gender-neutral statute included same-sex intimate relationships.³² In that case, John Ireland and Blake Davis were living together as lovers.³³ Ireland filed a domestic violence petition in district court alleging that Davis abused him.³⁴ Ireland later claimed that Davis violated the terms of the domestic violence order, and an arrest warrant was issued for Davis; however, another district court judge set aside the warrant on the grounds that the court lacked jurisdiction over the case because Ireland and Davis were both men.³⁵ The domestic violence statute at issue protects “member[s] of an unmarried couple [which] means each member of an unmarried couple which allegedly has a child in common, . . . or a member of an unmarried couple who are living together or have formerly lived together.”³⁶ The Kentucky Court of Appeals clarified the scope of the statute, holding that same-sex couples could qualify as “unmarried couples” under the statute.³⁷ The court explained that “domestic violence statutes afford protection to same-sex couples just as they do to the others enumerated therein. The General Assembly has not given preferential treatment to same-sex couples or homosexuals; rather, it has provided for equal treatment under the law for same-sex or homosexual victims of domestic violence.”³⁸

Few other courts have attempted to resolve these ambiguities in their domestic violence statutes. In addition to Kentucky, Ohio courts have also recognized that their state’s domestic violence statutes extend to protect battered partners in gay and lesbian relationships.³⁹

32. 957 S.W.2d 310, 312 (Ky. Ct. App. 1997).

33. *See id.* at 311.

34. *See id.*

35. *See id.*

36. *Id.* (quoting from KY. REV. STAT. ANN. § 403.720(3) (Banks-Baldwin 1992)).

37. *See id.* at 312.

38. *Id.* at 312. The court’s holding received strong criticism from anti-gay rights groups. In 1998, the Kentucky legislature considered and rejected legislation that would have explicitly denied same-sex couples protection under the state’s domestic violence laws. *See* Chris Poynter, *Kentucky’s Gay-Rights Battle*, LOUISVILLE COURIER-J., Oct. 18, 1999, at A1.

39. Ohio courts have three times addressed the inclusion of same-sex partner abuse in the state’s domestic violence laws. In *State v. Hadinger*, a state appellate court held for the first time in Ohio that the state’s domestic violence statute applies to persons of the same sex living together. 573 N.E.2d 1191, 1193 (Ohio Ct. App. 1991). The court stated that excluding same-sex couples from the protection of the statute would “eviscerate the efforts of the legislature to safeguard, regardless of gender, the rights of victims of domestic violence.” *Id.* *See also* *State v. Yaden*, 692 N.E.2d 1097 (Ohio Ct. App. 1997) (holding that persons in same-sex relationships can commit domestic violence on each other, and finding that the two gay men were in fact “cohabiting” under the provisions of the domestic violence statute); *State v. Linner*, 665 N.E.2d

Without these explicit assurances from state appellate courts, the protections that these statutes afford the victims of same-sex abuse are delegated to the precarious discretion of the judges and prosecutors in each case.⁴⁰ This creates a dangerous legal environment where lesbian battered women are unable to predict the responses they may receive if they seek out legal protection. While heterosexual women are not guaranteed a safe and receptive legal environment,⁴¹ lesbian battered women experience the courts as a legal crapshoot in a way that heterosexual battered women do not.

C. Few State Statutes Include Lesbian Relationships

Few states have opened up their legal systems to protect lesbian battered women by including same-sex couples in their domestic violence statutes.⁴² Massachusetts, for example, provides some of the strongest protections for victims of same-sex domestic violence.⁴³ The Massachusetts Abuse Prevention Act extends to protect “family or household members” who are defined as

persons who: (a) are or were married to one another; (b) are or were residing together in the same household; (c) are or were related by blood or marriage; (d) having a child in common regardless or whether they have

1180 (Ohio Mun. Ct. 1996) (holding that the domestic violence statute applied to a lesbian relationship where the women cohabited, and shared household and child rearing expenses).

40. See Knauer, *supra* note 3, at 333-34. Additionally, victims may be so discouraged by a hostile court or an unfavorable ruling that they are unwilling to appeal these decisions. See Sandra E. Lundy, *Equal Protection/Equal Safety: Representing Victims of Same-Sex Partner Abuse in Court*, in SAME-SEX DOMESTIC VIOLENCE: STRATEGIES FOR CHANGE, 43, 47 (Beth Levinthal & Sandra E. Lundy eds., 1999) [hereinafter *Equal Protection*].

41. See Deborah Epstein, *Redefining the State's Response to Domestic Violence: Past Victories and Future Challenges*, 1 GEO. J. GENDER & LAW 127, 132-37 (1999).

42. In addition to California (CAL. PENAL CODE § 273.5 (Deering 1985 & Supp. 2000)) and Massachusetts (MASS. GEN. LAWS ch. 209A, § 1 (Law. Co-op 1994 & Supp. 2000)); Alaska, Colorado, District of Columbia, Illinois, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Vermont, and West Virginia offer statutory protection for same-sex domestic violence. See ALASKA STAT. § 18.66.100 (Michie 1998); COLO. REV. STAT. § 14-4-101(2) (1997); D.C. CODE ANN. § 16-1001(5) (1997 & Supp. 2000); 750 ILL. COMP. STAT. ANN. 60/103 (West 1999); NEV. REV. STAT. ANN. § 217.400 (1995) (presumably protecting lesbian relationships despite the statute's use of male pronouns to refer to the abuser); N.H. REV. STAT. ANN. § 173-B1 (1994 & Supp. 1999); N.J. STAT. ANN. § 2C:2519 (West 1995); N.M. STAT. ANN. § 40-13-2 (Michie 1999); N.D. CENT. CODE § 14-07.1-01 (1997 & Supp. 1999); OKLA. STAT. ANN. tit. 22, § 60.1 (West 1992 & Supp. 2000); 23 PA. CONS. STAT. ANN. § 6102 (West 1991 & Supp. 2000); R.I. GEN. LAWS § 12-29-2 (1994); VT. STAT. ANN. tit. 15, § 1101 (1989 & Supp. 1999); W. VA. CODE ANN. § 48-2A-2 (1999).

43. See Lundy, *Assisting Victims*, *supra* note 26, at 292. Lundy discusses the strengths and limitations of the Massachusetts laws at length.

ever married or lived together; or (e) are or have been in a substantive dating or engagement relationship.⁴⁴

This provision has always included same-sex couples.⁴⁵ Additionally, the Domestic Violence Unit of the Suffolk County District Attorney's Office, the office covering the City of Boston, has explicitly included the special needs of gay and lesbian victims of domestic violence in its continuing legal education reports.⁴⁶

California has also taken legislative steps to include same-sex couples under the protection of its domestic violence statute.⁴⁷ In 1994, California amended its criminal domestic violence law in order to bring gay and lesbian couples under the law's protection, removing the requirement that the abused and the abuser be of the opposite sex.⁴⁸ The amended statute also eliminated the previous criminal distinction between heterosexual and homosexual prosecutions for domestic violence, where effectively perpetrators of heterosexual domestic violence could be charged as felons, but same-sex abuse was a misdemeanor.⁴⁹ The current California statute, however, still does not include current or prior dating relationships.⁵⁰

Inclusive statutes are the gatekeepers of legal protection for lesbian battered women. However, inclusive language is not enough to guarantee that the laws do in fact protect lesbian battered women. These women face unique obstacles in reaching out for legal assistance, and often encounter homophobia and harassment in the courts. Statutory inclusion is only the first step to protecting lesbian battered women.

44. Ch. 209A, § 1.

45. See Lundy, *Assisting Victims*, *supra* note 26, at 292. Lundy also notes that Massachusetts has done away with the "living together" requirement and only requires a "substantive dating or engagement relationship." See *id.* at 293. This change provides greater protection for gay and lesbian couples who are more likely to maintain separate legal residences. See *id.*

46. See generally Andrea J. Cabral, *Obtaining a Restraining Order*, in MAIN HANDBOOK OF MASSACHUSETTS CONTINUING LEGAL EDUCATION, INC. § 2 (1997) (including a section entitled "Representing the Gay or Lesbian Plaintiff") [hereinafter *Restraining Order*]; Andrea J. Cabral, *Statewide Domestic Violence Resource Manual*, in MAIN HANDBOOK OF MASSACHUSETTS CONTINUING LEGAL EDUCATION, INC. § 6 (1997) (including an extensive list of services for gay/lesbian/bisexual victims of domestic violence). Andrea Cabral is the chief of the Domestic Violence Unit of the Suffolk County District Attorney's Office.

47. See § 273.5.

48. See Amanda Steiner, Recent Development, *New Domestic Violence Litigation and Legislation Advance the Rights of Welfare Recipients, Immigrant Women, and Lesbians*, 10 BERKELEY WOMEN'S L.J. 156, 161 (1995).

49. See Evan Fray-Witzer, *Twice Abused: Same-Sex Domestic Violence and the Law*, in SAME-SEX DOMESTIC VIOLENCE: STRATEGIES FOR CHANGE 19, 21 (Beth Levinthal & Sandra E. Lundy eds., 1999).

50. See § 273.5.

III. HOMOPHOBIA DISTINGUISHES LESBIAN BATTERED WOMEN'S EXPERIENCES OF DOMESTIC VIOLENCE

Homophobia is the ever-present weapon of perpetrators of lesbian domestic violence. The abuser mobilizes societal fear and hatred of lesbians as a tool to control her partner.⁵¹ The legal system assumes the reigns of abuse when homophobia infects law enforcement and the courts.⁵² “[B]attered heterosexual women experience violence in the context of misogyny, but battered lesbians . . . experience violence in the context of a world that is both misogynistic *and homophobic*.”⁵³ These experiences with homophobia uniquely distinguish lesbian battered women from their heterosexual counterparts.

A. *Homophobia as a Weapon of the Abuser*

The lesbian abuser often uses societal homophobia and the threat of “outing” her partner as a way to manipulate and control.⁵⁴ An abuser taps into society’s fear and hatred of homosexuality, mobilizing homophobia as a tool to maintain control in her relationship in several ways.

First, an abuser may take advantage of a newly out partner’s internalized homophobia and inexperience with the lesbian community.⁵⁵ A batterer may use homophobia and homophobic rhetoric to assault her partner’s pride and identity.⁵⁶ A batterer may

51. See *infra* text accompanying notes 54-70.

52. See *infra* text accompanying notes 71-83.

53. Claire M. Renzetti, *Violence in Lesbian and Gay Relationships*, in GENDER VIOLENCE 285, 286 (Laura L. O’Toole & Jessica R. Schiffman eds., 1997) (citing Suzanne Pharr, *Two Workshops on Homophobia*, in NAMING THE VIOLENCE (K. Lobel ed., 1986)).

54. See Kathleen Finley Duthu, *Why Doesn’t Anyone Talk About Gay and Lesbian Domestic Violence?*, 18 THOMAS JEFFERSON L. REV. 23, 31-32 (Spring 1996). See also Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence*, 64 GEO. WASH. L. REV. 582, 594-96 (March 1996) (“Another difference in the experience of battering for abused lesbian and gay victims is an even greater relative isolation than that experienced by abused heterosexual women, which intensifies the victim’s vulnerability and the batterer’s power.”).

55. See Duthu, *supra* note 54, at 31.

56. See Charlene Allen & Beth Levinthal, *History, Culture, and Identity: What Makes GLBT Battering Different*, in SAME-SEX DOMESTIC VIOLENCE: STRATEGIES FOR CHANGE 73, 78 (Beth Levinthal & Sandra E. Lundy eds., 1999).

All batterers try to destroy the sense of self and self-worth of their partners; not only will the battered partners be more inclined to accept whatever the batterer does to them, but they also will be less likely to feel they can or deserve to leave the batterer. GLBT batterers have at their disposal the weapons of their own and their partner’s internalized oppression to help erase their partner’s sense of pride in being queer (and therefore, any pride in simply being). . . . Being battered as a GLBT person can lead to

also tell her partner that their relationship is like other lesbian relationships in order to convince her that the abuse is normal.⁵⁷ The batterer may exploit her partner's own internalized homophobia by convincing her that she deserved the abuse because she is a lesbian.⁵⁸ The abuser may also say to her partner that because she is homosexual, no one would believe her (or care) if she complained of the abuse in the relationship.⁵⁹

Second, an abuser may threaten to "out" the victim to her families or friends who may not accept her sexuality.⁶⁰ All forms of domestic violence thrive in isolation and secrecy; however, the lesbian battered woman is uniquely isolated from help and support by her abuser's use of this form of social oppression.⁶¹ Issues of sexual orientation may have cut off the abused from potential sources of support, or fear of estrangement may have inhibited disclosure of her sexual orientation. "Conversely, the fact that the abused may have worked hard to have the relationship accepted by others may inhibit . . . her from reporting the violence."⁶² Whereas a heterosexual woman may find emotional support to leave an abusive relationship from her friends, family, or coworkers, the fact that a battered woman is in a homosexual relationship may further estrange her from these most likely allies.⁶³ The potential for the victim to lose familial and

long-lasting questions of identity and pride. . . . How, particularly if you are battered in your first relationship after coming out, do you separate the experience of being queer from the experience of being battered?

Id. at 78-79.

57. *See id.* at 76-79.

58. *See id.* at 78.

59. *See* Fray-Witzer, *supra* note 49, at 20.

60. Personalized accounts of abuse best illustrate the power of homophobia in lesbian experiences of domestic violence. One victim of domestic violence recounts her lover's threat to disclose her lesbianism to her employer if she did not yield to her lover's demands. "Jennifer" tells her story:

Although we had periods of profound happiness, our arguments increased in frequency as did her drinking and drug use. She was arrested once for possession and driving under the influence. Several months later, she insisted that I submit to drug testing in her place and threatened to tell my employer that I am a lesbian when I resisted.

THE NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS, ANNUAL REPORT ON LESBIAN, GAY, BISEXUAL, TRANSGENDER DOMESTIC VIOLENCE (released October 6, 1998). "Jennifer" also explains that her family now uses the abuse to justify their belief that lesbians are "sick." *See id.*

61. *See* Knauer, *supra* note 3, at 337 ("For the abusers, homophobia becomes 'an extra weapon in their arsenal' as they threaten their partners with 'outing.' This represents a form of abuse that is 'without heterosexual equivalent.'" (citations omitted)).

62. Goldfarb, *supra* note 54, at 595.

63. *See* Allen & Levinthal, *supra* note 56, at 77-78.

social support is especially compelling if the victim is also a member of another marginalized group.⁶⁴

A lesbian battered woman may reasonably fear losing her job with no legal recourse if her sexuality is publicly exposed.⁶⁵ Claire Renzetti found in her research with lesbian battered women that

twenty-one percent of the respondents reported that their partners had threatened to out them. Several respondents stated that they quit their jobs before their partners carried through on the threat to out them at work, explaining that they felt they could find another job more easily than if they were outed, subsequently fired or laid off, and perhaps surreptitiously blacklisted by an employer.⁶⁶

Domestic violence thrives on secrecy. All domestic violence victims, regardless of gender or sexual orientation, “come out” when they reach out for help and protection from the courts. Lesbian victims of same-sex domestic violence must not only “come out” as battered women, they must also “come out” as lesbians in order to access legal protections for victims of intimate partner abuse. By “coming out” as a lesbian in order to seek protection as a battered woman, the victim must first wade through the fears that contributed to her silence and alienation.⁶⁷ A woman who comes forward must reasonably expect that the proceedings will be public or that the court

64. See generally Valli Kanuha, *Compounding the Triple Jeopardy: Battering in Lesbian of Color Relationships*, in *DIVERSITY AND COMPLEXITY IN FEMINIST THERAPY* 142 (1990) (discussing the difficulties lesbians of color in violent relationships face in “coming out” as lesbian and as a battered woman); José Toro-Alfonso, *Domestic Violence Among Same-Sex Partners in the Gay, Lesbian, Bisexual, and Transgender Communities in Puerto Rico: Approaching the Issue*, in *SAME-SEX DOMESTIC VIOLENCE: STRATEGIES FOR CHANGE* 156, 160 (Beth Levinthal & Sandra E. Lundy eds., 1999) (identifying cultural norms of “machismo” and pervasive anti-gay attitudes as barriers victims of same-sex domestic violence face in seeking help); ANTI-VIOLENCE PROJECT, *supra* note 4, at 32 (“For most survivors, leaving an abusive relationship means the possibility of becoming independent. For a survivor with a disability, leaving may mean the possibility of becoming dependent on institutional care, a prospect that might cause additional concern for LGBT individuals because of the knowledge of having to confront institutional heterosexual and homophobic oppression.”).

65. There is no federal protection from employment discrimination on the basis of sexual orientation. See *Employment Non-Discrimination Act of 1994: Hearings S. 2238 Before the Senate Comm. on Labor and Human Resources*, 103d Cong., 2d Sess. 1 (1994) (statement of Sen. Kennedy). The Employment Non-Discrimination Act (ENDA) fell one vote short of Senate passage in September 1996. See Bruce Nolan, *Marriage Defense Bill Passes Easily Job Bias Bill Loses*, *NEW ORLEANS TIMES-PICAYUNE*, Sept. 11, 1996, at A1.

66. Renzetti, *supra* note 53, at 287.

67. See Andrea Cabral & Diane Coffey, *Creating Courtroom Accessibility*, in *SAME-SEX DOMESTIC VIOLENCE: STRATEGIES FOR CHANGE* 57 *passim* (Beth Levinthal & Sandra E. Lundy eds., 1999) (recounting the stories of victims of same-sex domestic violence and their experiences “coming out” to the courts).

may inquire into the details of her relationship.⁶⁸ Being “out” in court may expose her to harassment because of her sexual orientation, or further abuse from her partner.⁶⁹ “In theory, a plaintiff should not have to choose between obtaining legal relief from abuse and disclosing an aspect of . . . her life that could have a negative impact on employment and other personal relationships. However, as a practical matter, that is often the choice that must be made.”⁷⁰

B. The Legal System’s Revictimization of Lesbian Battered Women

When lesbian battered women seek assistance from the legal system they expose themselves to potential victimization and harassment from the police and the courts because of their sexual orientation. A batterer may use the legal system’s poor history of responding to queer issues as tool of isolation, telling her victim that the police and the courts will not help her. This claim is all too often true. At best, the courts have often failed to punish violence against gays and lesbians.⁷¹ At worst,

[t]he legal system has been one of the largest perpetrators and supporters of violence against us. Many of us have lost custody of or visitation rights to our children because of heterosexist courts. Police have routinely raided gay bars and raped and beaten both the men and women found there.⁷²

Lesbian battered women who seek protection from these courts risk being victims of the homophobia that infects the legal system.

68. See Lundy, *Equal Protection*, *supra* note 40, at 47. See also Cabral & Coffey, *supra* note 67, at 58. Cabral and Coffey recount victim’s experiences being “outed” in court:

It was common for such plaintiffs to be questioned at length about the nature of their relationship with the defendant. Although restraining order hearings were usually done at sidebar . . . sometimes, when the parties were the same sex and certain judges were on the bench, plaintiffs were made to stand outside the bar—some 10 to 15 feet away from the judge—and speak into a microphone. References to the place of the abuse (a gay bar or the single bedroom the “roommates” shared); the language of abuse (“faggot” “dyke” “whore”); or the nature of the abuse (sexual abuse or abuse that typically occurs in the context of an intimate relationship, such as the ripping off of clothing) invited further judicial inquiry. Being “outed” was often the price of seeking the court’s protection.

Id.

69. A batterer may use the public forum as an opportunity to further attack and humiliate her victim. See Lundy, *Equal Protection*, *supra* note 40, at 44-47.

70. Cabral, *Restraining Order*, *supra* note 46, § 2-6.

71. See Fray-Witzer, *supra* note 49, at 22-23. Fray-Witzer recounts the story of a Texas judge who sentenced the killer of two gay men to thirty years in jail. The judge explained that he had been lenient in sentencing because the victims were homosexual, stating, “I don’t much care for queers cruising the streets picking up teenage boys. . . . These homosexuals, by running around . . . picking up teenage boys, they’re asking for trouble.” *Id.*

72. Allen & Levinthal, *supra* note 56, at 75.

One of the most dangerous examples of this exists in states with sodomy laws criminalizing homosexual sexual activity.⁷³ In these states, lesbian battered women who come forward are put in the difficult position of first admitting to criminal acts in order to prove that they are in fact victims of domestic violence.⁷⁴ Even when states no longer enforce their sodomy statutes, the laws often remain on the books to validate a hostile environment in the courts, “their very existence sends a clear message to the battered gay man or lesbian: Within this court, *you* are the criminal.”⁷⁵

The legal system has earned the mistrust of lesbian battered women. Too often, homophobia and harassment validate this mistrust when victims seek help from the police and courts. Victims often report of homophobic remarks and sexual harassment from police, attorneys, and judges.⁷⁶

One woman . . . reported . . . that when she told police officers, and later the assistant district attorney, about her partner’s abusive behavior, they “drooled” and “snickered” when they heard that she was a lesbian. Another woman reported that her own attorney seemed more interested in the details of “what two women did in bed” than in knowing and presenting the facts of the abuse.⁷⁷

While there has long been criticism regarding the way the legal system handles heterosexual women’s complaints of domestic violence,⁷⁸ only queer victims face the added humiliation of homophobia.

73. Alabama, Arkansas, Kansas, Massachusetts, Minnesota, Mississippi, Missouri, Utah, Idaho, Arizona, Texas, Florida, North Carolina, South Carolina, Virginia and Oklahoma all criminalize sodomy between consenting adults. See ALA. CODE §§ 13A-6-65(a)(3), 13A-6-60 (1994); ARK. CODE ANN. § 5-14-122 (Michie 1997); KAN. STAT. ANN. §§ 21-3501, 3505 (1995); MASS. ANN. LAWS ch. 272, § 34 (Law. Co-op 1992); MINN. STAT. ANN. § 609.293 (West 1987); MISS. CODE ANN. § 97-29-59 (1994); MO. ANN. STAT. § 566.090 (West 1999); OKLA. STAT. ANN. tit. 21, § 886 (West 1983 & Supp. 1999); IDAHO CODE § 18-6605 (1997); UTAH CODE ANN. § 76-5-403 (1999); ARIZ. REV. STAT. ANN. §§ 13-1411, 13-1412 (West 1989); FLA. STAT. ANN. § 800.02 (West 1992 & Supp. 2000); TEX. PENAL CODE ANN. § 21.06 (West 1994); N.C. GEN. STAT. § 14-177 (1999); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); VA. CODE ANN. § 18.2-361 (Michie 1996). A Louisiana appellate court has recently held that enforcement of the state’s sodomy statute to noncommercial sexual activity between consenting adults violates the state constitution; however, the statute remains on the books. See *State v. Smith*, 729 So.2d 648, 649-50 (La. Ct. App. 1999).

74. See Knauer, *supra* note 3, at 341.

75. Fray-Witzer, *supra* note 49, at 20.

76. See Cabral & Coffey, *supra* note 67, *passim*.

77. Lundy, *Assisting Victims*, *supra* note 26, at 295 (footnotes omitted).

78. See, e.g., *id.* at 291 (“Indeed, the legal system still largely unresponsive to the needs of battered heterosexual women, has been called a ‘nightmare’ for lesbian and gay people.”); Wanda Teays, *Standards of Perfection and Battered Women’s Self-Defense*, in VIOLENCE AGAINST

In *Commonwealth v. Reid*,⁷⁹ the defendant was one of the first women in a lesbian relationship to raise a battered person's defense to the charge of murdering her abuser.⁸⁰ During the course of her defense, Ms. Reid's attorney attempted to keep her lesbianism from the jury out of an apparent fear that such information would be prejudicial.⁸¹ But attempts to conceal Ms. Reid's sexual orientation crippled her defense. "Ms. Reid's killing of her lesbian batterer made little sense outside the context of the batterer's years of abuse of Ms. Reid."⁸² Compounding the humiliating proceedings and the subsequent conviction, the behavior of her attorney contributed to her "legal" abuse. Ms. Reid explains, "[t]hat's what made me feel much more ashamed I had him representing me and he was ashamed to say that we were lovers, and I thought it must really be bad to say that I was gay. If the ground could have opened, I would have gone through it."⁸³

IV. THE HETEROSEXUAL MODEL OF DOMESTIC VIOLENCE OBSCURES LESBIAN BATTERED WOMEN'S EXPERIENCES OF ABUSE

Laws that explicitly protect lesbian battered women do not shield women against the persistent misunderstandings of same-sex domestic violence infecting the legal process. Judges and juries may have difficulty conceptualizing women as batterers, especially given the gendered discourse of domestic violence. Lesbian battered women seeking available legal protection still face the heterosexual model of domestic violence (male abuser/female abused) as an implicit obstacle, even when the domestic violence statutes recognize same-sex battery. Judges and juries may respond to lesbian battery with confusion or denial, effectually blocking protection of lesbian women.

A. *The Heterosexual Model of Domestic Violence*

The paradigm of domestic violence is that men abuse women. That men victimize the women they love fits easily into stereotypical and socially-enforced gender dichotomies where female is passive

WOMEN, 57, 58-61 (Stanley G. French et al. eds., 1998) (discussing the gross inadequacies in the legal systems' treatment of battered women).

79. Crim. Nos. 90-0120-22 (Suffolk Super. Ct. Apr. 26, 1990).

80. See Lundy, *Assisting Victims*, *supra* note 26, at 273. Lundy now represents Ms. Reid in her appeals.

81. See *id.* at 290.

82. *Id.*

83. Fray-Witzer, *supra* note 49, at 24 (quoting from the author's personal communications with Ms. Reid).

and weak and male is aggressive and strong.⁸⁴ The women's movement worked hard to draw attention to domestic violence as a crime.⁸⁵ Feminist theorists and activists posit a new story of domestic violence, where domestic violence is a tool of male power and dominance over women.⁸⁶ In this story, men's abuse of the women they "love" is inextricably bound with a culture of male dominance that endorses violence against women.

Same-sex domestic violence challenges this heterosexual model, forcing us to reexamine the roles of the male batterer and the female victim.⁸⁷ Domestic violence cannot simply be about the enforcement of male power over women when women also abuse women. However, de-sexing the model of domestic violence is not enough to create theoretical space for lesbian battery because the paradigm of domestic violence is a fundamentally gendered story.

The gender story of domestic violence is the template upon which our legal system contextualizes victim's experiences of domestic abuse.⁸⁸ The gendered story of domestic violence allows police officers, attorneys, judges, and juries to hear the story and fill in the gaps of heterosexual women's experiences of abuse. The

84. Cf. Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, in FEMINIST LEGAL THEORY II: POSITIONING FEMINIST THEORY WITHIN THE LAW 155, 160-68 (Frances E. Olsen ed., 1995) (discussing the tension between expert testimony on battered woman syndrome and the overall goal of women's self-defense work to overcome sex-bias in the law of self-defense). The gendered perception of women as weak and passive is troubling for all women who act to stop the pattern of domestic abuse. Schneider's analysis begins, in part, by acknowledging the importance of this perception in the minds of judges and juries who hear and pass judgement on women who kill the abuser. *See id.* Understanding the cultural constructs of gender are key to legal analysis of domestic violence, especially when a woman's acts place her outside of that construction.

85. *See* Epstein, *supra* note 41, at 128-32.

86. *See* Editor's Introduction, *supra* note 2, at 2-3. *See generally* Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, in THE SIGNS READER: WOMEN, GENDER & SCHOLARSHIP 227 (Elizabeth Abel & Emily K. Abel eds., 1983) (comparing Marxist and Feminist theories of power and oppression).

87. *See* Knauer, *supra* note 3, at 328 ("For the domestic violence movement, the existence of domestic violence in the absence of gender differences presents a direct challenge to the feminist construction of domestic violence as a gender-specific development of power and violence.").

88. Cf. Kimberle Crenshaw, *Whose Story Is It Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, EN-GENDER-ING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 402, 404-07, 434-36 (Toni Morrison ed., 1992) (analyzing how the feminist story of sexual harassment and the anti-racist story of lynching played out in the Clarence Thomas hearings and combined to "white out" Anita Hill's experience of sexual harassment). Crenshaw explains that narratives play an important role in the way we as a society, and by consequence the legal system, understand experiences of discrimination. *See id.* These narratives, however, are products of culture, and necessarily confine our understanding of complex individual experiences. These stories are subtext, and their use is often not conscious or explicit.

gendered story of abuse gives credibility to heterosexual women's claims of abuse from their male partners. Additionally, when heterosexual women tell stories which fit into the gendered story of domestic violence, police and judges may use these models as a substitute to fact finding because under this model, heterosexual women's claims of abuse carry a presumption of truth. The story provides that men abuse and that women experience abuse.⁸⁹ Heterosexual women need only fill in the details of their own experience. Lesbian battered women must tell a new story—a story of dominance and control, absent the endorsement of gender norms.

Lesbian battered women often encounter doubts about their credibility when they tell stories of women as abusers. These stories clash with traditional notions of femininity that often infuse domestic violence discourse; and as a result, judges and juries may find it hard to imagine a woman as an *abuser*.⁹⁰ These cultural assumptions about domestic violence severely impair the credibility of the lesbian victim.⁹¹

Insufficient credibility may have severe material consequences. The claims made by one woman to fear the violence of another woman may go unheeded, and she may be denied the help she needs to escape or survive her traumatic circumstances. If she has assaulted her female partner to save herself, her assertion of self-defense may be wrongfully denied, leading to a criminal conviction and the possible loss of liberty through state-imposed sanctions such as incarceration. In short, a lesbian's insufficient credibility in such circumstances predictably contributes to her incapacitation, either through imprisonment, injury, or death.⁹²

The absence of cultural gender markers in cases of same-sex domestic violence often leaves fact finders confused as to who is the aggressor.⁹³ This confusion may manifest itself in two possible ways. Without the gendered tropes of heterosexual domestic violence to inform them, these fact finders may avoid the question of “who is the aggressor?” altogether, or they may rely on heterosexist models of abuse which are dangerously misleading when wrongly applied to lesbian relationships.

89. The gendered story of domestic abuse is not necessarily a model that assumes that domestic violence is criminal. The model of male abuser/female abused was also a part of affirming the husband's right to use physical force to discipline his wife. See Epstein, *supra* note 41, at 128-29. In that case, the same model existed with the presumption of rightness and legality. See *id.*

90. See Goldfarb, *supra* note 54, at 607.

91. See *id.*

92. *Id.*

93. See Knauer, *supra* note 3, at 333-34.

Police avoidance of the question “who is the aggressor?” when responding to an incident of lesbian domestic violence may manifest in the arrest of both women as “mutual combatants.”⁹⁴ Judicial avoidance of the question may lead to mutual restraining orders.⁹⁵ In both cases, police and judges may also respond by ignoring the domestic violence all together.⁹⁶

Fact finders who overlay gendered tropes of domestic violence to lesbian battery risk misidentifying the abuser and the victim. When police or judges seek to understand same-sex domestic violence under the lens of “domestic violence as male dominance of women,” they may answer the question “who is the abuser?” with the heteronormative question “who is the man?”⁹⁷ In this way, lesbians who appear more masculine are especially vulnerable to misidentification as abusers when they seek legal help as battered women.⁹⁸ Lesbian battered women, especially women who appear more masculine, risk misidentification as abuser in a way that heterosexual women do not. Lesbian women are uniquely vulnerable to the risk that the legal system in which they seek shelter from may turn on them and label them as abusive.

B. *Mutual Restraining Orders as Evidence of Judicial Difficulty Understanding Lesbian Domestic Violence*

Massachusetts laws offer some of the strongest protection for lesbian battered women; therefore, that these victims must still routinely overcome judicial confusion and discomfort with same-sex

94. *See id.*

95. *See infra* notes 100-111 and accompanying text.

96. *See supra* notes 29-31.

97. *See* Mary Eaton, *Abuse by Any Other Name: Feminism, Difference, and Intralesbian Violence*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 195, 207 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994), *cited in* Knauer, *supra* note 3, at 335-36.

98. Connie Burk explains how the gendered story of domestic violence endangers masculine battered women:

This is perhaps one of the most common ways that butch dykes are misassessed as abusive—by an advocate’s heterosexist conflation of masculinity with abusiveness. This can result in police arresting or domestic violence programs identifying a butch dyke as the primary aggressor simply because to their heterosexist eyes the butch “looked like the man.” . . . This rigid superimposing of heterosexual gender norms onto femme and butch experience can be used by batterers to minimize or invalidate a survivor’s identity as butch or femme. . . . [I]f masculine people are necessarily expected to . . . physically defend themselves, attacks from a femme partner might be dismissed or mis-assessed as less lethal.

Connie Burk, *Rethinking Femme and Butch*, NETWORK NEWS (Network for Battered Lesbians and Bisexual Women, Boston, Mass.), Spr. 1999, at 9.

domestic violence demonstrates the limits of broad statutory language alone in protecting these victims. Massachusetts law serves as a model of broad legal protection; consequently, the widespread abuse of mutual restraining orders in cases of same-sex domestic violence in Massachusetts courts exemplifies that inclusive statutory language is not enough to protect lesbian battered women. This subtle face of homophobia is among the greatest injustices gay and lesbian victims of domestic violence face in Massachusetts courts.⁹⁹

Courts excessively issue mutual restraining orders in cases of same-sex domestic abuse. For instance, judges often issue mutual restraining orders to both parties in cases of lesbian battery without the required written findings of fact.¹⁰⁰ These judges routinely do not take the time to determine which partner is the abuser and which is the victim.¹⁰¹ Additionally, judges will often require the parties to undergo mutual mediation.¹⁰²

Mutual restraining orders present grave consequences to the *real* victims of abuse. Mutual restraining orders create the perception of shared responsibility between the abuser and abused in the violence.¹⁰³ The abuser may use the mutual order “as a basis to take out a criminal complaint against the victim, thus prolonging abusive contact with the victim.”¹⁰⁴ As a result, the mutual restraining order ultimately undermines the courageous efforts the victim puts into seeking out legal protection in the first place.

For example, if a victim pushes the abuser in an attempt to flee the abuse, he or she may be found to have violated a no-contact restraining order just as much as the batterer who blocks the door [T]he victim may find him—or herself in a domestic violence registry that becomes part of his or her permanent record.¹⁰⁵

The batterer may use the restraining order to perpetrate the abuse.¹⁰⁶ She may threaten to show the order to friends or employers.¹⁰⁷ A

99. See Lundy, *Assisting Victims*, *supra* note 26, at 296-98.

100. See *id.* Lundy explains that this is a central concern of every advocate for battered gays and lesbians which she frequently encounters in her own representation of battered lesbians. See *id.* at 296.

101. See *id.*

102. See *id.*

103. See Fray-Witzer, *supra* note 49, at 25.

104. Lundy, *Equal Protection*, *supra* note 40, at 54.

105. Fray-Witzer, *supra* note 49, at 25.

106. See Lundy, *Assisting Victims*, *supra* note 26, at 296-98. Lundy elaborates by offering examples of specific instances where mutual restraining orders were wrongly applied:

In one case I am aware of, a lesbian batterer had succeeded in obtaining a mutual restraining order against three expartners who sought restraining orders against her, and promptly lodged criminal complaints against at least two of the victims. Moreover,

batterer may also use the restraining order to threaten the custody of her victim's children.¹⁰⁸ Consequently, the wrongful issuance of mutual restraining orders provides the abuser with yet another avenue of control and undermines the protections of the domestic violence laws.

Heterosexual women who come forward in domestic violence cases are *assumed* the victim. Lesbian women do not benefit from this presumption. Judges' difficulties in conceptualizing domestic violence outside of this heterosexual model lead to the over-issuing of mutual restraining orders as a way for judges to sidestep the complexities of lesbian domestic violence.¹⁰⁹ The 1989 Gender Bias Study of Massachusetts courts found that mutual restraining orders are rarely issued in cases of domestic violence, as a whole.¹¹⁰ "If this is so, then the pervasiveness of the practice of issuing mutual restraining orders in cases of same-sex domestic violence can be seen as symptomatic of the mistreatment of abused lesbians and gay men in the Massachusetts courts."¹¹¹ The tendency of Massachusetts judges to issue mutual restraining orders is unique to cases of same-sex domestic violence, and it exemplifies that statutory inclusion alone is not enough to dismantle the legal barriers to protecting victims of same-sex domestic violence.

IV. CONCLUSION

The courage that women who have been abused by other women exhibit when they tell their stories demands the attention of us all. These voices have brought domestic violence in lesbian relationships into the legal and theoretical dialog surrounding intimate partner abuse. Honoring these women requires more than gender-neutral

district attorneys rarely take the time to investigate the lesbian or gay complainant's story because "they don't want to get involved" in gay or lesbian domestic violence cases or because they don't wish to take the time to investigate who is actually the batterer. Often this disinterest leads to the dropping of charges (both those that have merit and those that do not), or to the prosecution of the victim.

Id. (footnotes omitted).

107. *See supra* note 65.

108. *See supra* note 72 and accompanying text.

109. I am not suggesting that lesbian domestic violence is necessarily any more complex than any other form of domestic violence. The complexity stems from the judges' insistence on gendered and heterosexual models of domestic violence. Because lesbian battery challenges many of the gender presumptions grounding this "traditional" model, it is often difficult for judges to resolve the issues of fact.

110. *See* Lundy, *Assisting Victims*, *supra* note 26, at 296-98 (referring to SUPREME JUDICIAL COURT, GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS 93 (1989)).

111. *Id.* at 297.

laws and footnotes to the domestic violence discourse. It requires meaningful discussion of same-sex domestic violence and laws that provide complete protection in fact for the victims of domestic abuse. The obstacles lesbian battered women currently face—homophobia, discrimination, and statutory exclusion—are institutionally entrenched. Including the experiences of victims of same-sex domestic violence in the legal and political efforts to strengthen domestic violence laws is not enough to move mountains of legal oppression; however, statutory changes may combine with increased theoretical awareness to provide real and more complete legal protection for these victims.

Theories of domestic violence must yield to the victims' real experiences of abuse. Advocates of stronger domestic violence legislation do not lose when statutes are broadened to include same-sex relationships. Each of the two primary theoretical groups discussing domestic violence fails victims of lesbian domestic violence. First, there are those that seek to frame the discussion of domestic violence as an issue of family violence, apart from cultural norms and stereotypes.¹¹² The family violence theory includes the potential that women may abuse their husbands; however, lesbian domestic violence does not fit neatly into this camp. These theories have not traditionally recognized same-sex families, nor can they account for the role that homophobia plays in same-sex battery. The other camp attempts to explain domestic violence as part of a larger issue of violence against women, arguing domestic violence, like sexual harassment and rape, is a product of a patriarchal culture.¹¹³ The reality that some women abuse the women they love destabilizes this theory of domestic violence. Ultimately, neither theory is adequate.

Validating the experiences of lesbian battered women does not translate into picking theoretical sides in this debate; however, failing to recognize the reality of domestic violence in lesbian relationships does endanger the safety of the women in those relationships. Justice for the victims of domestic violence is not a zero sum game. When statutes and legal theories broaden to include same-sex domestic violence, all advocates of greater protection for the victims win. More importantly, women who are abused by other women may find sanctuary in the courts and the theories that purport to protect them.

112. See Demie Kurz, *Violence against Women or Family Violence? Current Debates and Future Directions*, in *GENDER VIOLENCE: INTERDISCIPLINARY PERSPECTIVES* 443, 447 (Laura L. O'Toole & Jessica R. Schiffman eds., 1997).

113. See *id.* at 450. Kurz argues for the violence against women perspective; however, she does not mention abuse in lesbian relationships in her discussion.