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Fatal Defense: An Analysis of Battered Woman's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners

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NOTE

FATAL DEFENSE: AN ANALYSIS OF BATTERED WOMAN'S SYNDROME EXPERT TESTIMONY FOR GAY MEN AND LESBIANS WHO KILL ABUSIVE PARTNERS

INTRODUCTION

In 1977, while living in her native Puerto Rico, Annette Green met Yvonne Julio.[1] Green was eighteen-years-old and spoke no English. After developing a sexual relationship, the couple moved to Florida where they set up housekeeping in a trailer. Green cared for Julio's two young twin daughters, got a job in a nursery and began to attend school to learn English.

One night, soon after they had moved to Florida, Green cooked a meal that "did not come out right."[2] Julio responded by punching her until she could no longer breathe. After this initial incident, the relationship deteriorated. Julio forced Green to sleep on a mattress on the floor at the foot of the bed and beat her often, sometimes in the presence of other people. Friends of the couple witnessed Julio strike Green with her fists, her feet and once with a two-by-four wooden board.

The violence escalated further after Julio purchased a handgun. People at the trailer park saw Green fleeing her home on a number of occasions, with Julio in pursuit and the gun drawn. Sometimes Julio held the gun to Green's and the children's heads, one time threatening to "blow [her own daughter's] brains out."[3] When Green intervened, she was beaten.

Both Green and the children sustained numerous injuries

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[1] Brief for Appellant at 14, State v. Green, No. 90-0039 (Fla. Dist. Ct. App. 1990).

[2] *Id.* at 15.

[3] *Id.* (quoting Record on Appeal at 1211, *Green* (No. 90-0039)).

over the eleven years of the relationship. Green's coworkers at the nursery often saw her with black eyes and facial bruises. She suffered, on different occasions, a busted lip, hematomas, concussions, broken ribs, a broken nose and a dislocated jaw. Several times she was beaten unconscious. Once a next-door neighbor noticed that a "hunk of meat was out of [Green's] arm."[4] On the same day, one of the daughters had bite marks and bruises all over her arms and back.

Green's attempts to leave were constantly thwarted by Julio. On one occasion, after a severe beating, Green tried to escape but was captured by Julio and tied to the bed. Even when she was able to break away she soon returned. Initially she returned because she believed or wanted to believe Julio's promises of reform. As Julio's threats of violence increased, however, she returned because she feared that Julio would kill her if she did not return, or harm the children or others.

On October 29, 1988 Green accompanied Julio and the children to a Halloween party. While at the party, Green drank approximately five or six beers and three mixed drinks; Julio drank and also snorted cocaine. Later in the evening Green decided to take the children home. When Julio did not return after a few hours, Green began to worry; when Julio drank and used drugs, a beating usually followed. Green phoned the party several times attempting to convince Julio to come home. When this failed, she drove back to the party at 3:45 a.m. Julio was extremely angry.

The couple and another friend drove back to the trailer. Upon arriving at the home, Julio immediately went into the bedroom where the safe was kept. Green knew that the safe usually contained more cocaine and Julio's guns. Green followed Julio into the bedroom and the two began to argue. Green picked up a knife and told Julio to get away from the safe. Julio reached for the knife and Green stabbed her in the thigh. Julio then looked at Green "like fire was going to come out of her eyes" and said, pointing to the dresser, "That's it. You might as well kill me. There's the gun."[5] Green assumed that Julio now intended to kill her.

Green picked up the gun and Julio lunged at her. Green

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[4] *Id.* at 10-11.

[5] *Id.* at 17 (quoting Record on Appeal at 1248-49, *Green* (No. 90-0039)).

told her not to come any closer and cocked the gun. Julio said, "That is it. I am going to get the gun."[6] Green pulled the trigger and Julio fell to the ground. Green yelled for her friend, who was still in the living room, to call the police. When the police arrived, they found Julio dead with a gunshot wound to the face and a stab wound in her thigh. Green confessed to the murder.[7]

At Green's trial for first degree murder, the defense offered testimony from an expert on intimate violence to support Green's plea of self-defense.[8] The expert was permitted to testify about battered woman's syndrome,[9] and to give an opinion on whether Green suffered from the syndrome and was in fear of bodily harm on the night of the murder.[10]

Despite the defense's efforts, a jury convicted Green of second degree murder on September 7, 1989.

> Jurors questioned after [her] trial said that male jurors refused to believe Green suffered from battered woman syndrome, although all believed that she had been beaten. According to [one member of the defense team], the prosecution played heavily on the fact, admitted by Green in direct examination, that she had once before threatened her lover with a gun. Thus, Green was taken out of the realm of the victim and placed into that of the perpetrator—no longer worthy of the jury's mercy.[11]

The judge sentenced Green to twelve years in prison and five

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[6] *Id.* (quoting Record on Appeal at 1254, *Green* (No. 90-0039)).

[7] Affidavit in Support of Probable Cause at 5, PBSO No. 88-198084 (filed Oct. 30, 1988).

[8] Appellant's Brief at 12, *Green* (No. 90-0039); Trial Transcript at 912, *Green* (No. 90-0039).

[9] Trial Transcript at 938, *Green* (No. 90-0039). "Battered woman's syndrome" is the term used to describe the pattern of violence in abusive households and the effect of such violence on its victims. Many current theorists have difficulty with the term because it has been applied in such a way to connote an illness for which there are definitive symptoms. *See infra* notes 213-17 and accompanying text. When the term "battered woman's syndrome" in used in this Note, it refers to the form of expert testimony that relies on Dr. Lenore Walker's theories on the effects of intimate violence on women. The majority of courtroom experts rely on Dr. Walker's theories to explain why battered women kill their abusive partners. *See infra* note 166 and accompanying text. This Note proposes that expert testimony on the effects of intimate violence for gay and lesbian victims of abuse should be differentiated from expert testimony on battered woman's syndrome and therefore should be distinguished.

[10] Trial Transcript at 948, *Green* (No. 90-0039).

[11] Arlaine Rockey, *To Male Jurors, Battered Lesbian Fought Back Once Too Often*, MIAMI REVIEW, Oct. 24, 1989, at 8.

years probation.[12] In 1991 an appellate court reversed her conviction due to technical errors during the jury *voir dire*.[13] On remand Green accepted a plea bargain in the Spring of 1991 and was sentenced to time served.[14]

Annette Green's case is compelling on a number of different levels. First, it is a part of the growing body of evidence that intimate violence[15] is as prevalent in the gay and lesbian community as it is in the heterosexual community.[16] Second, it is the first case in which an expert on battered woman's syndrome was

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[12] Appellant's Brief at 2, *Green* (No. 90-0039).

[13] Green v. State, 575 So. 2d 796 (Fla. Dist. Ct. App. 1991).

[14] Telephone Conversation with William Lasley, Annette Green's defense attorney (Oct. 9, 1991).

[15] Terms like family violence and domestic violence, widely used by scholars, courts and the media, belittle the problem by linking the violent assault to the safe, reassuring image of the home.

> "Domestic violence" has a tame sound—like a household pet, no longer wild. A "domestic problem" sounds minor and uninteresting; perhaps trouble with bill-paying or disagreements over the division of household chores. Somehow, we devalue incidents that occur in the home. News accounts still report serious assaults and even murders between partners as "the result of a domestic argument," masking the extremity of the acts and the history of threat and brutalization that frequently preceded such events.

ANGELA BROWNE, WHEN BATTERED WOMEN KILL 5 (1987). Additionally, the term "domestic violence" is too strongly linked to violence against women by their male partners. As such, it does not accurately reflect violence that occurs between same-sex couples.

Some scholars have urged adopting the term "intimate violence" to describe violence that occurs among all family members because it more accurately shows that violence infects a broad range of relationships within which violence occurs. *See* JULIE BLACKMAN, INTIMATE VIOLENCE: A STUDY OF INJUSTICE (1989). *But see* BROWNE, *supra*, at 3. Browne argues that violence between romantic partners differs from violence between non-romantic family members. To be understood, violence between romantic partners must be studied within its specific context, with attention given to the "cultural expectations of romance and relating" that may encourage abuse. *Id.*

This Note will use the term "intimate violence" to describe abuse that occurs between adult romantic partners, including both heterosexual and same-sex couples.

[16] Most sources estimate that approximately 21 percent of all heterosexual couples experience intimate violence each year. *See* BROWNE, *supra* note 15, at 5 (estimating that at least 1.5 million women are assaulted each year by their male partners); REPORT OF THE COUNCIL ON SCIENTIFIC AFFAIRS, AMERICAN MEDICAL ASSOCIATION, VIOLENCE AGAINST WOMEN, REPORT I-91, 8 (1991) [hereinafter AMA REPORT] (finding that approximately two million women are severely assaulted each year). Most researchers agree, however, that figures based on national surveys underestimate greatly the frequency of violence in the population because they do not include some groups such as the very poor or non English speaking, nor do they report violence that victims do not acknowledge. As a result, the actual rate of heterosexual partner violence may be more than double current estimates. *Id.*

permitted to testify in a battered lesbian self-defense case.[17] Third, it stands as stark evidence that testimony on battered woman's syndrome fails many defendants who do not fit the stereotype of the "good battered woman."[18]

Although heterosexual women are most likely to experience intimate violence from male partners,[19] there is evidence that gay men and lesbians[20] are as likely, proportionally, to encounter violence in their intimate relationships.[21] Furthermore, typical

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[17] Andrew Blum et al., *Scratch That Defense*, NAT'L L. J., Sept. 25, 1989, at 6.

[18] *See infra* notes 213-17 and accompanying text (discussing the "good battered woman" stereotype).

[19] For example, in 1986 New York State police reported a total of 52,568 incidents of intimate violence, including violations of existing protective orders. Of these, 74% (39,039) involved women assaulted by husbands and common-law husbands; 9% (5042) involved men assaulted by wives or common-law wives; 8% (4592) involved parents assaulted by a child; and 7% (3893) involved children assaulted by a parent. GOVERNOR'S TASK FORCE ON DOMESTIC VIOLENCE, NEW YORK STATE DEPARTMENT OF CRIMINAL JUSTICE, NEW YORK STATE DOMESTIC VIOLENCE (1986). *See also* BROWNE, *supra* note 15, at 8 (citing a number of studies that report between 94 and 95 percent of all partner assaults are women victimized by men). According to the American Medical Association, a woman is more likely to be assaulted and injured or raped by a current or ex-male partner than by any other assailant. AMA REPORT, *supra* note 16, at 1.

Furthermore, when intrafamily assaults are lethal, women are the most frequent victims. In 1987, from a total of 3317 intra-family murders, 31.5 percent (1045) of the victims were female partners and 16.4 percent (543) were male partners. BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, DOMESTIC VIOLENCE STATISTICS 12 (1989) [hereinafter DOMESTIC VIOLENCE STATISTICS]. *See also* FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1983 (1984) [hereinafter UNIFORM CRIME REPORTS 1983] (finding that 17 percent of all homicides are intrafamily). In fact, some studies show that a woman has a greater chance of being killed by a current or former intimate partner than by any other person. DOMESTIC VIOLENCE STATISTICS, *supra*, at 9 (noting that 51 percent of all women killed are killed by current or former intimate partners); *see also* AMA REPORT, *supra* note 16, at 9 (finding that between 1976 and 1987, of the approximately 38,648 people killed by an intimate partner, 61 percent were women killed by either a married, common-law, ex-married or dating male partner). *But see* FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, UNIFORM CRIME REPORTS OF THE UNITED STATES 1989, 12 (1990) [hereinafter UNIFORM CRIME REPORTS 1989] (estimating that only 28 percent of all female homicide victims were killed by husbands or boyfriends).

[20] This Note assumes that intimate violence and its effects are not gender-specific. Thus, unless otherwise indicated, gay men and lesbians are considered one group. This merging is due, in part, to the minimal work that has been done on either gay or lesbian intimate violence. Further research may reveal some differences between both heterosexual women and gay men and lesbians, and between gay men and lesbians. Additionally, most of the theoretical treatises used in this Note focus on lesbian legal theory and intimate violence because less work has been done on gay male intimate violence. Thus, this Note is just a first step for further study into the potential differences between gay and lesbian survivors of intimate violence.

[21] *See infra* notes 37-39 and accompanying text (estimating the rates of intimate

gay and lesbian violence and its patterns and effects appear to be virtually identical to heterosexual intimate violence.[22] The only difference, which is not minor, is the couple's shared gender. Despite this difference, however, the severity of the violence against gay and lesbian partners often yields the same result: victimized partners resort to lethal force. In some of these cases, like those of some heterosexual battered women, the lethal conduct occurs in circumstances that support a viable self-defense claim.[23]

According to many feminist legal scholars, however, self-defense has been historically unsuccessful when used by battered women. Theorists who studied women's self-defense cases in the mid-1970s found that judges and jurors were often unable to separate their preconceived notions of intimate violence and of femininity from the individual woman on trial for killing her abusive spouse.[24] Consequently, feminists urged the admittance of expert testimony on battered woman's syndrome, in large part derived from Dr. Lenore Walker's theories, to convey the woman's experiences to the judge and jurors and to rebut the stereotypes that influenced how the woman's actions were viewed. Recently such testimony has been criticized by feminist commentators for focusing on learned helplessness to explain the woman's failure to flee the relationship[25] and for its part in creating a stereotype of the "good battered woman."[26] Yet, battered

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violence between same-sex partners).

[22] *See infra* notes 42-65 and accompanying text (comparing heterosexual intimate violence and same-sex intimate violence).

[23] Under common law, the defendant is justified in using deadly force against the aggressor if at the time of its use: "(1) [the defendant] is not the aggressor; and (2) [she or] he reasonably believes that such force is necessary to combat imminent, unlawful deadly force by [the victim]." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, at 191 (reprint 1990) (1987). Within this rubric, the use of deadly force is not justified if the force used against the victim is not proportional to the threat; the defendant's perception of the threat is unreasonable; and, in some circumstances, the defendant fails to retreat if she or he can do so safely. *Id.* at 191-98; *see also infra* notes 110-28 and accompanying text (reviewing the difficulties women have had in meeting the requirements of self-defense).

[24] *See infra* notes 93-128 and accompanying text (examining female stereotypes and the bias inherent in traditional self-defense theory).

[25] *See* LENORE E. WALKER, THE BATTERED WOMAN 42-54 (1979); *see also infra* notes 174-80 and accompanying text (discussing Walker's adaptation of the social learning theory of learned helplessness for battered women); *infra* notes 186-97 and accompanying text (criticizing this theory).

[26] In short, the "good battered woman" stereotype is the term used to describe the

woman's syndrome remains the theory most commonly used to explain the cycle and effect of intimate violence on heterosexual women.[27]

Similarly, many judges and jurors subscribe to stereotypes of gay men and lesbians that influence their perception of the battered defendant and his or her actions.[28] Prejudice against gay men and lesbians is particularly deep-rooted and, in some cases, publicly sanctioned by the state.[29] Just as preconceived notions about women have muddied a fact-finder's ability to assess heterosexual intimate violence, so do preconceived notions about gay men and lesbians affect a fact-finder's ability to judge gay and lesbian self-defense cases. For these reasons, gay men and lesbians on trial for killing their abusive partners are in the same position as heterosexual women defendants. Thus, their defense requires a similar type of expert testimony that can rebut the dangerous presumptions held by the judge and jury.

Despite the similarities between heterosexual battered women and battered gay men and lesbians, reliance on traditional battered woman's syndrome expert testimony by gay men and lesbians will likely exacerbate their problems at trial, rather than alleviate them. First, the Walker model of battered woman's syndrome has been largely unsuccessful in non-traditional cases and may expose the defendant to stereotypes and misperceptions to which battered heterosexual women have been exposed.[30] Second, because the testimony on battered woman's syndrome was developed for use with battered women, the theory itself is gender-specific. Its language and many of its basic

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model battered woman who displays each of the "symptoms" described in the typical Walker model. Since many experts offer the Walker model by rote, and because many judges view the testimony as a form of diagnosis, women that do not fit the model have been found by courts not to have "battered woman's syndrome." The *Green* case is a perfect example. *See infra* notes 213-17 and accompanying text (reviewing the problems created by the "good battered woman" stereotype for battered heterosexual women and for battered gay men and lesbians).

[27] *See infra* notes 158-97 and accompanying text (examining the use of expert testimony on battered woman's syndrome in women's self-defense cases).

[28] *See infra* notes 91-92 and accompanying text (discussing stereotypes of gay men and lesbians).

[29] *See infra* notes 136-41 and accompanying text (reviewing sodomy laws and prohibitions against same-sex marriages).

[30] *See infra* notes 186-97 and accompanying text (criticizing battered woman's syndrome expert testimony).

tenets do not translate to same-sex couples.[31]

Although battered woman's syndrome is the term attorneys, judges and the public identify most readily with the causes and effects of intimate violence, expert testimony on intimate violence does not have to be offered under its auspices. In fact, two of the more recent studies on battered women and family violence mention the term "battered woman's syndrome" only when referring either to the kind of expert testimony routinely offered in court,[32] or specifically to Walker.[33] Both empirically-based studies offer compelling explanations for intimate violence and its effects without focusing on helplessness or on gender-role theories. The thoughtful use of these studies instead of battered woman's syndrome may result in less gender-role analysis[34] and sexual stereotyping by the jury.[35]

This Note analyzes expert testimony on battered woman's syndrome in terms of its gender-specificity and argues that, despite the similarities between heterosexual intimate violence and same-sex intimate violence, the terminology and basic assumptions associated with the testimony make it inapplicable to gay and lesbian defendants. Part I explores the similarities and differences between same-sex intimate violence and heterosexual intimate violence, revealing the relative unavailability of emergency and legal services to gay men and lesbians as compared to those available to battered women. Part II explains how stereotypes and biases against women have historically affected their

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[31] *See infra* notes 201-17 and accompanying text (reviewing the difficulties of explaining battered woman's syndrome in gender-neutral terms).

[32] *See, e.g.*, BROWNE, *supra* note 15, at 177 ("Expert witness testimony on the 'battered woman syndrome' . . . although intended to address damaging myths and misperceptions, also contributes in a subtle way to an image of maladjustment or pathology.").

[33] *See, e.g.*, BLACKMAN, *supra* note 15, at 48-53, 190-93.

[34] "Gender-role analysis" refers to the thought process by which individuals are judged to be normal or abnormal based upon their perceived ability to fit within stereotypical gender-role models.

[35] No current theory about intimate violence can be completely disassociated from heterosexual women, however. Virtually all intimate violence studies arise from the work of feminist legal theorists and researchers who study battered women and women who kill their abusive partners. Although this Note advocates a different approach for battered gay men and lesbians, it also presumes that some of the premises upon which feminist legal theorists base their work are still valid and educational. The experiences of battered women in court that evolved from the practical application of the theories inform the way in which these theories can be rethought and reapplied.

use of the traditional defense of justification. This Part argues that stereotypes of and prejudices against gay men and lesbians similarly undermine the fair adjudication of their cases. Part III discusses the creation of expert testimony on battered woman's syndrome, the subsequent criticisms of the way the testimony has been given and heard, and how these criticisms are likely to affect the ability of gay and lesbian defendants to use the testimony successfully. Since this Note concludes that gay and lesbian self-defense cases likely will suffer from the use of expert testimony on battered woman's syndrome, it proposes the use of two alternative theories of intimate violence that may result in less gender-role analysis by the judge and jury.

I. COMPARING THE EXPERIENCES OF INTIMATE VIOLENCE BY GAY MEN AND LESBIANS TO HETEROSEXUALS

Intimate violence between gay men or between lesbians is at once similar to and different from heterosexual intimate violence.[36] The violence itself, its patterns and its results, appears to be virtually identical. However, the difference—the couple's shared gender—so fundamentally alters people's perception of

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[36] *See* CAROL GILLIGAN, IN A DIFFERENT VOICE 14 (1982) (arguing that "it is difficult to say 'different' without saying 'better' or 'worse'. . . ."; because male behavior long has been regarded as the norm, any behavior that differs from male patterns is usually interpreted as deviant or inferior). *See also* Elizabeth Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986). Schneider views the current problems with expert testimony in battered women's cases as a "natural result of the 'differences' approach." *Id.* at 214. The use of specialized expert testimony sets women's self-defense cases apart from other self-defense cases. Courts are thus encouraged to view the battered woman's case as not only different from other cases, but also as inferior. *Id.* For example, many courts interpret battered woman's syndrome as evidence of diminished capacity or mental illness. *See infra* notes 191-97 and accompanying text (explaining the difficulty courts have in understanding expert testimony on battered woman's syndrome).

Schneider's arguments are of particular importance to gay and lesbian defendants. Gay men and lesbians, like heterosexual women, receive unequal treatment in courts because they, too, have difficulty fitting into the male heterosexist-based model of the law. Advocating different treatment for gay men and lesbians sets them apart as different and invites continued stereotyping of them as inferior. This is especially true in the area of intimate violence where gay men and lesbians are arguing that they are the "same" as battered women when, as a group and as separate individuals, they are not. Close and frequent comparisons between battered women and battered gay men and lesbians will detract from the legal arguments in the case because they invite a fact-finder to focus on the differences between the groups. Furthermore, assuming Schneider is right—that different means inferior—gay men's and lesbians' experiences will undoubtedly be found inferior to that of battered women's.

the relationship that the similarities are dwarfed. For this reason, battered gay men and lesbians do not receive the treatment provided to battered heterosexual women. There is virtually no area, from victim emergency services to police and judicial responses to the batterer, where homophobic attitudes do not color the way same-sex intimate violence is treated. The irrationality of the attitude that the gender of the partners should dictate the response to the violence is particularly ironic when accounts by same-sex intimate violence survivors usually make no reference to the gender of the parties.

A. *Typical Patterns of Intimate Violence*

There are no reliable statistics on the prevalence of intimate violence in the gay and lesbian community. Anecdotal evidence from shelter workers, psychologists and anti-violence project personnel, however, indicates that such violence probably occurs at the same rate as it occurs in heterosexual households or in approximately twenty percent of all gay and lesbian relationships.[37] There is some evidence that violence may occur with more frequency between gay men than between lesbians,[38] but

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[37] *See* Elizabeth Rhodes, *Closeted Violence: Authorities, Experts Slowly Start to Offer More Help to Battered—and Battering—Partners of the Same Sex*, SEATTLE TIMES, May 23, 1991, at F1 ("Statistics are scant because domestic violence 'is a denied issue within the gay and lesbian communities. People don't want to admit that it happens. . . . [O]ur best guesstimate, based on the work we've done, is that domestic violence is no less or more prevalent than in the heterosexual community.' ") (quoting Ned Farley, Clinical Director, Seattle Counseling Services for Sexual Minorities). Based on the estimate that approximately 20 percent of all heterosexual couples experience violence, Farley estimates that in his county approximately 30,000 gay men and lesbians were affected in 1990. *Id. See also* Jane Garcia, *The Cost of Escaping Domestic Violence*, L.A. TIMES, May 6, 1991, at E2 ("[D]omestic abuse experts say [intimate violence] is as likely to occur among lesbians as among heterosexual couples."); Joyce Price, *Domestic Violence Between Gays a Hidden Crisis, Counselors Say*, WASH. TIMES, July 20, 1990, at A3 (Dr. David Island, a psychologist and co-author of THE INNER CLOSET: GAY MEN'S DOMESTIC VIOLENCE (1991), estimates that intimate violence occurs among 600,000 gay men and lesbians nationwide).

[38] *See* Price, *supra* note 37, at A3 (Dr. Island estimates that 500,000 gay men are battered by live-in companions, whereas only 50,000 to 100,000 lesbians experience intimate violence); NEW YORK CITY GAY AND LESBIAN ANTI-VIOLENCE PROJECT, INC., 1990 ANNUAL REPORT 3 (1990) [hereinafter AVP REPORT] (of the 143 gay and lesbian domestic violence cases opened in 1990, 45 percent (64 cases) were women, and 55 percent (79 cases) were men). However, the AVP Report notes that "this gender breakdown is particularly noteworthy when compared with the gender make-up of the Project's overall caseload, of whom only 20% were female." *Id.*

here, as elsewhere, too little empirical research has been done.[39] Regardless of the numbers, it is clear from personal accounts that intimate violence exists[40] and that it can be lethal.[41]

Gay and lesbian survivors of intimate violence indicate that the typical abuse they encountered was virtually identical to and followed the same patterns as the violence in abusive heterosexual relationships. Victims report physical assaults and assaults with weapons,[42] rape and sex on demand,[43] property damage,[44]

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[39] The only "empirical" studies of which this author is aware are: Valerie E. Coleman, Violence in Lesbian Relationships: A Between Groups Comparison (1990) (unpublished Ph.D. dissertation, University of California (Santa Monica)) (estimating that approximately 46 percent of all lesbians experience repeated abusive incidents—however, this is based on a study of only 90 couples); DAVID ISLAND & PATRICK LETTELLIER, THE INNER CLOSET: GAY MEN'S DOMESTIC VIOLENCE (1991). Since neither the police, the Federal Bureau of Investigation, nor the United States Justice Department collect statistics on same-sex intimate violence, the likelihood of a reliable estimate is slim. *But see Family and Other Intimate Assaults—Atlanta, 1984*, 39 MORBIDITY AND MORTALITY WKLY. REP. August 10, 1990, at 527 (citing an Atlanta study where statistics on gay and lesbian intimate violence were collected but merged with figures on heterosexual violence).

[40] *See, e.g.*, NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING (Kerry Lobel ed., 1986) [hereinafter NAMING THE VIOLENCE] (containing 15 personal accounts of lesbian survivors of intimate violence and 11 articles by researchers, shelter workers and counselors); Amy Edgington, *Anyone But Me*, GAY COMMUNITY NEWS, July 16, 1989 (providing a personal account of a lesbian survivor of intimate violence); *Two Survivors Speak Out on Lesbian and Gay Domestic Violence*, STOP THE VIOLENCE, Summer 1990, at 6; *see also* Garcia, *supra* note 37, at E2 (containing personal accounts of gay and lesbian survivors and interviews with counselors, psychologists and shelter workers); Price, *supra* note 37, at A3 (same); Rhodes, *supra* note 37, at F1 (same); Phyllis Winfield, *Rare Program Aids Battered Lesbians, Gays: Violence Mirrors Heterosexual Incidents*, SEATTLE TIMES, Sept. 24, 1990, at E3 (same).

[41] There are no government statistics on the lethality of same-sex intimate violence. Since the severity of violence reported by gay men and lesbians is comparable to the severity of the violence reported by heterosexual women whose relationships ended in lethal confrontations, there is reason to assume that the rate of lethality is similar. As additional evidence, there are reported homicide cases where evidence of prior intimate violence by the victim was presented by the gay or lesbian defendant. *See, e.g.*, People v. Spencer, 458 P.2d 43 (Cal. App. Dep't Super. Ct. 1969) (defendant, who killed her lesbian lover, asserted a heat of passion defense and presented evidence of prior violence by the victim against the defendant); State v. Green, 575 So. 2d 796 (Fla. Dist. Ct. App. 1991) (defendant, who killed her lesbian lover, presented evidence of prior acts of intimate violence); Bristow v. State, 338 So. 2d 553 (Fla. Dist. Ct. App. 1976) (defendant, who killed his gay lover, asserted self-defense and presented evidence of being battered by the victim); People v. Huber, 475 N.E.2d 599 (Ill. App. Ct. 1985) (defendant, who killed her lesbian lover, presented evidence of prior violence); Crawford v. State, 404 A.2d 244 (Md. 1979) (defendant, who killed her lesbian lover, presented evidence of prior violence against her by the victim).

[42] Barbara Hart, *Lesbian Battering: An Examination*, *in* NAMING THE VIOLENCE, *supra* note 40, at 188. Lesbians report being bitten, scratched, kicked, punched, stomped, slapped, thrown down stairs, locked in closets and deprived of heat or food.

harassment, death threats against the victim and third parties,[45] economic control,[46] and psychological abuse, including isolation from friends and family.[47] Like heterosexual women, gay or les-

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They also report being assaulted with "guns, knives, whips, tire irons, cars, tent poles, high-heeled shoes, chair legs, broken bottles, pillows, cigarettes and poison." *Id.* Compare BROWNE, *supra* note 15, at 14 (battered women reported being pushed, shoved, slapped, hit, punched, kicked, hit with objects, thrown bodily, choked, smothered, burned, held under water, and assaulted with a knife or gun).

[43] *Compare* Hart, *supra* note 42, at 188 (sexual assaults included "rape; sex on demand . . . weapons utilized or threatened; forced sex with others; involuntary prostitution . . . [and] sexually degrading language") *with* BROWNE, *supra* note 15, at 95-103. Browne reports that approximately 59 percent of the battered women in her study reported incidents of rape; among battered women who killed their partners, the rate was as high as 76 percent. *Id.* at 95-96. According to Browne:

> [S]exual abuse . . . is an 'optimal' kind of violence. It is possible to inflict an intense level of pain over a prolonged period of time without killing the victim; and to cause a wide range of injuries, from superficial bruises and tearing to serious internal injuries and scarring. The psychological impact of sexual assault can also be extreme, especially when the attack is violent and threatening, and the psychological aftereffects may last for years.

Id. at 101. Additionally, partners who are raped are the least likely victims to report the assault. AMA REPORT, *supra* note 16, at 7.

[44] Hart, *supra* note 42, at 188 (Property damage included "arson; slashing of car tires, clothing, and furniture; pet abuse or destruction; stealing and destruction of property; breaking and entering; pulling out telephones; [and] breaking household items.").

[45] *Id.*; *see* BROWNE, *supra* note 15, at 65 (finding that 83 percent of the men in the homicide group, compared with 59 percent of the men in the comparison group, threatened to harm or kill their partner, other people and/or themselves). Browne's study of battered women who killed uses, as a control or comparison group, violent relationships that did not end in a lethal confrontation.

[46] Although many battered spouses maintain independent jobs and incomes, their abusive partners often maintain control over the money. *Compare* Victoria M. Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545, 555-56 (1988) ("Women frequently cite economic deprivation in battering relationships. The husband will not give his wife any money without her 'justifying' it, or he will direct her to pay the bills and run the household without giving her adequate funds to do so.") *with* Breeze, *For Better or Worse*, *in* NAMING THE VIOLENCE, *supra* note 40, at 49 ("While I was more independent than Anna economically, I relied on her to make important decisions regarding the household and our lives in general. . . . Anna demanded freedom to come and go as she pleased while requiring me to ask permission to do anything other than my work.").

[47] Hart, *supra* note 42, at 189; *see* Jeanne Cormier, *Coming Full Circle*, *in* NAMING THE VIOLENCE, *supra* note 40, at 125 ("Slowly, she tried to control my communications with family and friends, and wanted me to sever connections with my past."). Lesbians and gay men may experience a different form of isolation than heterosexual women do due to homophobia in society at large, and the gay and lesbian community's own attitudes about intimate violence:

> [L]esbians are less likely than heterosexual women to turn to family members for emotional support in the aftermath of violence. Those who are not out to family members would have a hard time talking around the issue. Those who

bian victims of intimate violence may encounter one, some or all of these acts of violence.

> During the next six months . . . I was hit and slapped, often till I was black and blue. I was picked up and thrown against walls. . . . I was physically thrown out of the house in the snow with no shoes or coat. I had black eyes and fractured fingers. She destroyed things I loved. She would trap me, not letting me leave the room or the house or the car until the outburst was over.[48]

Gay and lesbian batterers also use threats to expose publicly the victim's sexual orientation, a form of psychological abuse absent from violent heterosexual relationships. Because of the potential consequences of this exposure, these threats may be particularly disabling:

> Once they come out, lesbians and gay men risk personal rejection by others, discrimination, and even violence, all experiences that can have enduring psychological consequences. . . . Suffering antigay assault or other overt victimization can create considerable distress, including feelings of personal loss, rejection, humiliation, and depression; agitation, restlessness and sleep disturbances; somatic symptoms such as headaches and diarrhea; and deterioration in personal relationships.[49]

The pattern of violence and victims' reactions to the violence appear similar to those researchers have noted in heterosexual battering relationships.[50] As in heterosexual relationships, the first incident of violence typically does not occur until the couple has made some sort of commitment, such as living together. One woman noted: "Throughout our courtship, she was tender and loving. From the onset of our co-habitation, however,

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> are out may fear reinforcing stereotypes of the "sickness" of lesbian relationships and lifestyles.

Nancy Hammond, *The Reluctance to Identify Abuse*, *in* NAMING THE VIOLENCE, *supra* note 40, at 196.

[48] Arlene Istar, *The Healing Comes Slowly*, *in* NAMING THE VIOLENCE, *supra* note 40, at 165-66.

[49] Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY 133, 147 (1991).

[50] Since there are no empirical studies on gay or lesbian battering similar to those of Walker, Browne or Blackman, this Note is limited to the personal accounts of abuse victims presented in books and other accounts published in newspapers or magazines. While the personal accounts do appear to substantiate a conclusion that the pattern and effects of lesbian and gay intimate violence are similar to those of heterosexual intimate violence, this hypothesis requires testing in a clinical setting.

physical violence erupted."[51] Another battered lesbian wrote: "Sue and I were living together maybe three days when we were in the bedroom and she became angry and hit me."[52] This is significant because it makes it more difficult for the victim to abandon the relationship.[53]

Once the violence has begun, it appears to follow a progression similar to that noted in violent heterosexual relationships,[54] increasing in frequency and severity as the relationship progresses:

> As time went on, X's explosions increased in frequency and they got closer and closer to being physically abusive. . . . [S]he did, in fact, try to choke me one night. . . .[55]

> The relationship lasted for eleven years. The violence got worse. . . . It became more frequent. Smaller things set it off. . . . The black and blue marks got bigger.[56]

Separation violence—violence that continues after the couple has terminated the relationship—is also present:

> Months later—nearly a year—when she sharply realized that I would not return to her, she turned her violence away from herself, and on to me. . . . When I saw her in person, she physically and verbally threatened me. She punched my face and hit my body. She shoved

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[51] Breeze, *supra* note 46, at 49.

[52] Cory Dziggel, *The Perfect Couple*, *in* NAMING THE VIOLENCE, *supra* note 40, at 63. Compare BROWNE, *supra* note 15, at 47 (estimating that 73 to 85 percent of battered women do not experience violence until after they have made a major life commitment such as marriage or co-habitation).

[53] BROWNE, *supra* note 15, at 42 ("The longer the couple is involved and the more serious their commitment, the more likely they are to remain together after a physical attack.").

[54] Winfield, *supra* note 40, at E3. "The [gay or lesbian] couple goes through what psychologists term a cycle of violence. There's the honeymoon period when everything's wonderful. Then there's the neutral phase when tension builds up, resentments fester and they do little talking. Then the batterer explodes and the abuse begins." *Id.* (interview with Mark Michael, Clinical Psychologist specializing in homosexual batterers and victims); Lydia Walker, *Battered Women's Shelters and Work with Battered Lesbians*, *in* NAMING THE VIOLENCE, *supra* note 40, at 76 ("Lesbian batterers have the classic 'honeymoon phase' of remorse and promises that serve to control the battered woman from leaving or seeking help, and they both use violence/threat and pity/help me behavior to try to keep the woman with them.").

[55] Sarah, *Letting Out the Secret*, *in* NAMING THE VIOLENCE, *supra* note 40, at 117.

[56] Dziggel, *supra* note 52, at 65. Compare BROWNE, *supra* note 15, at 68 (estimating that 80 percent of the women in the homicide group, and 58 percent of the women in the comparison group, reported that the violence worsened during the course of the relationship).

me. She harassed me on the phone. One night I returned home from work to find my apartment destroyed; all of my clothes slashed to ribbons, my piano seriously damaged, precious items destroyed or stolen, plants massacred.[57]

The physical and psychological reactions of gay or lesbian victims are also similar to heterosexual victims. Some victims: leave and return a number of times;[58] blame themselves for the violence;[59] experience a sense of low self-esteem;[60] remain emotionally attached to the batterer despite the violence;[61] or use

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[57] Cormier, *supra* note 47, at 127. Compare BROWNE, *supra* note 15, at 115-16 ("The point of, or even the discussion of, separation is one of the most dangerous times for partners in a violent relationship. Abusive men threatened with the loss of their mates may be severely depressed, angry, agitated, homicidal or suicidal."). Some studies indicate that the level of violence continues to escalate after separation. *Id.* at 114. According to the Department of Justice, a separated or divorced woman is 14 times more likely to be the victim of a violent crime perpetrated by an ex-spouse than is a married woman who remains in the abusive household. BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIMES 5 (1991) [hereinafter FEMALE VICTIMS OF VIOLENT CRIMES].

[58] *See* Istar, *supra* note 48, at 168 ("I left her not once but many times. In a two-year period, I moved back in with her three different times."); Cedar Gentlewind, *Will It Never End?*, *in* NAMING THE VIOLENCE, *supra* note 40, at 45 ("Within a month and a half of being battered I was again going with Amy. I don't remember exactly what she said that brought me back, but I do know that she said she loved me and wanted me to give her another chance.").

[59] *See* Hart, *supra* note 42, at 185. "Batterers always see themselves as the victims of the battered woman. This perceived victimization is repeatedly shared with the battered woman . . . . [B]attered lesbians may continue 'taking care of' the batterer by blaming herself, maximizing her violence and minimizing that of the batterer." *Id.* Compare Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV 267, 289 (1985). "Batterers are also quite remarkable in their ability to externalize and rationalize their acts. The most obvious and frequent target of blame is, of course, his victim. Naturally his blame feeds right into her guilt. Consequently, they *both* blame *her* for the battering." *Id.*

[60] Winfield, *supra* note 40, at E3. " 'For male victims [of same-sex intimate violence], the beating reaffirms that sense of low-self-esteem. If a person is already feeling bad about themselves, when they get beat up, it's like a self-fulfilling prophecy that they aren't worth much.' " *Id.* (quoting Mark Michael, Clinical Psychologist specializing in homosexual batterers and their victims).

[61] *See* Dziggel, *supra* note 52, at 65. "What was crazy about all of this [violence] was that since I wanted the relationship to work, I wanted it to last more than anything else. I thought that as long as we could fight and get back together again and work it out laughing at ourselves for the craziness of what had happened, we would come closer together and that somehow the relationship would improve." *Id.* Compare BROWNE, *supra* note 15, at 80-81. "[E]specially in the early stages of an abusive relationship, women will often try harder and harder to meet their mates' needs, looking to themselves for solutions to the others' distress . . . . Women in the homicide group said they felt like they would be 'deserting' the man in leaving him, or even in thinking about leaving him,

force in self-defense. Again, as in heterosexual relationships, some victims may react in all or a few of these ways.[62]

It should be noted that the issue of victims' retaliatory acts of self-defense, commonly referred to as mutual battering, has received much more attention in the gay and lesbian community than in the heterosexual community.[63] Due to the heterosexual community's relative silence on mutual battering, many gay and lesbian victims of intimate violence do not identify themselves as battered because they fought back.[64] Studies of heterosexual battering have shown, however, that up to forty-nine percent of all battered women fight back on occasion.[65] Thus, being defined as a battered person is not dependent upon total complacency, although experts on battered woman's syndrome often leave this impression.

B. *Social and Legal Treatment of Gay and Lesbian Victims of Intimate Violence*

Despite these similarities, gay and lesbian victims of abuse do not share the same access to services, protection by law enforcement or the judicial system, or support from their community that battered women receive. Counseling services are available in only four cities[66] and, while there are approximately 850

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although the relationship was becoming destructive to them." *Id.*

[62] BLACKMAN, *supra* note 15, at 199-200. "The empirical descriptions of battered women that are currently available are not intended to be wholly applied in each case. That is, a 'diagnosis' of abuse may be concluded if most, but not all, of the traits shown to result from abuse are present in some individual." *Id.*

[63] *See* Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567, 578-79 (1990).

[64] Hart, *supra* note 42, at 184-85.

[65] BROWNE, *supra* note 15, at 6-9 (citing MURRAY ARNOLD STRAUS, ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY (1980)). Browne notes, however, that in the Straus study, all of the couples were living together at the time.

It is important to note, however, that when heterosexual couples engage in mutual battering, the effects of the violence are generally much more severe for one partner—usually the woman. AMA REPORT, *supra* note 16, at 9. "In combination with men's greater average physical strength, these factors [of more aggressive, severe and multiple actions by men as compared to women] lead to quite different physical outcomes for women and men. Women are much more likely to be injured by their male partners than men by their female partners." *Id.* More research needs to be done on whether relatively equal size between same-sex partners makes any difference in the distribution and severity of injuries to the person sought to be defined as battered.

[66] Winfield, *supra* note 40, at E3. Specialized counseling services are available for battered gay men and lesbians in New York City, Minneapolis, Seattle and San

shelters for battered women and their children nationwide, no city has an emergency shelter specifically for gay men or lesbians.[67] While a few lesbians are able to use battered women's services,[68] gay men do not have this option and thus are affected even more by the overall lack of services.[69] Recent studies have linked the availability of services to a decrease in female-perpetrated intimate homicide rates.[70] Since gay men and lesbians lack these services it is likely that violence and lethality levels will remain high.

Police officers and the judicial system have been historically

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Francisco.

[67] Judy Mann, *A Grant in Trouble*, WASH. POST, July 5, 1985, at C3.

[68] While some battered lesbians can take advantage of the current domestic violence network, many apparently face obstacles to both admission and treatment. *See* Nomi Porat, *Support Groups for Battered Lesbians, in* NAMING THE VIOLENCE, *supra* note 40, at 80 ("No single group of battered women has been rejected from services, disbelieved and labelled 'divisive' as battered lesbians."). Some commentators have attributed this problem to homophobia and heterosexism among shelter workers. *See* Linda Geraci, *Making Shelters Safe for Lesbians, in* NAMING THE VIOLENCE, *supra* note 40, at 77 ("[I]t is absolutely vital to work to eliminate homophobia and heterosexism in the shelter environment. . . . As long as the word 'lesbian' has the power to produce fear in people, lesbians in shelter [sic] will not feel totally comfortable.").

Homophobia among government officials also contributes to the lack of available services and to the fear of some shelter workers that the identification of their shelter with lesbians will endanger needed funding. *See* Hammond, *supra* note 47, at 196. This feared loss of funding neared realization in 1985 when a Justice Department grant to the National Coalition Against Domestic Violence ("NCADV") was almost lost after then-Attorney General Edwin Meese delayed the grant because the group was identified as being "pro-abortion, pro-lesbian, anti-Reagan radical feminists." Howard Kurtz, *Meese Delayed Grant When Conservatives Balked*, WASH. POST, Aug. 9, 1985, at C3 (quoting Rep. Mark D. Siljander (R-Mich.)). *See also* Mann, *supra* note 67, at C3. " 'The truth of the matter is that [NCADV] is a questionable recipient. Many leaders and activists of that organization have organized prohomosexual and prolesbian sessions trying to make the case that spousal abuse is somehow inherent in the marriage relationship.' " *Id.* (quoting letter from Pat McGuigan, Director of Institute for Government and Politics, to Edwin Meese). Although the grant was finally approved on August 9, 1985, the NCADV was forced to downplay the role of lesbians in its organization. Howard Kurtz, *Meese Clears Disputed Grant for Aid to Battered Women*, WASH. POST, Aug. 10, 1985, at A2.

[69] AVP REPORT, *supra* note 38, at 3. "[W]e remain thwarted in our efforts to identify satisfactory options for emergency housing and safe shelter for clients seeking to leave their abusive relationships. This problem is particularly severe for gay men, whose only option is often New York's homeless shelter system." *Id. See also* Patricia Nealon, *Domestic Abuse Poses Challenges*, BOSTON GLOBE, Sept. 24, 1989, at 1.

[70] *See* Angela Browne & Kirk R. Williams, *Exploring the Effect of Resource Availability and the Likelihood of Female-Perpetrated Homicides*, 23 LAW & SOC'Y REV. 76, 91 (1989) (showing a high correlation between the 25 percent decrease in female perpetrated intimate-homicides between the years 1979 to 1984 and the presence of emergency shelters and state domestic violence legislation).

unresponsive to gay and lesbian intimate violence, leaving victims without sufficient help from the legal system. Largely as a result of police indifference, gay and lesbian victims of crime are generally less likely than heterosexuals to report incidents of violence to the police.[71] Even if contacted, police downplay the seriousness of assaults between gay men and lesbians and often neglect to arrest the batterer.[72] As one psychologist noted:

> I've heard a lot of horror stories about the police not treating [lesbian victims] seriously, and really being abusive themselves in terms of giving the woman a hard time. . . . That doesn't have so much to do with the violence itself, but how our society reacts, and how hard it is for lesbian women who are being battered to get help.[73]

Fearing such a police response, and often desiring to remain closeted, victims see no escape from the violence, thus trapping

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[71] *Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1542 (1989). *But see* AVP REPORT, *supra* note 38, at 3 (reporting that gay and lesbian victims of crime are no less likely to report a crime to police than the general population—about 50 percent reporting). The history of conflict between the police and the gay and lesbian community, as well as the history of unprovoked violence by the police against gay men and lesbians, contributes to gay men's and lesbians' reluctance to report crime. *Sexual Orientation and the Law*, *supra*, at 1542. According to one survey of gay men and lesbians in eight cities, 13 percent of the lesbians and 23 percent of the gay men reported being victimized by the police due to their sexual orientation. *Id.* at 1542 n.157 (citing Kevin T. Berrill, Anti-Gay Violence: Causes, Consequences, Responses 2 (1986) (unpublished manuscript) (on file at Harvard Law School Library)).

[72] Garcia, *supra* note 37, at E2. Overreliance on the gay and lesbian community by victims, and their desire not to have the police intervene in the relationship, may also cause victims to refrain from calling the police for help. Hammond, *supra* note 47, at 196.

Until recently, battered women also found it difficult to obtain effective police response, including the arrest of the batterer. Often the police only attempted to calm the parties, sometimes separating them for a short period of time, before leaving. Waits, *supra* note 59, at 311. However, after a few successful and well-publicized lawsuits by battered women who were revictimized by their batterers after seeking but failing to receive adequate police protection, many cities instituted pro-arrest policies that encouraged police to arrest batterers. *See, e.g.*, Thurman v. City of Torrington, 595 F. Supp. 1521, 1531 (D. Conn. 1984) (battered woman awarded $2.3 million for injuries sustained after her husband beat her in front of the police); Bruno v. Codd, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979) (New York City Police Department entered into a consent judgment admitting a duty to protect battered women to the same extent as other victims of violent crimes). *See also* MARJORY D. FIELDS, NEW YORK STATE GOVERNOR'S COMMISSION ON DOMESTIC VIOLENCE, MUNICIPAL LIABILITY FOR POLICE FAILURE TO ARREST IN DOMESTIC VIOLENCE CASES (1987) (providing an overview of the federal and state cases in this area). Arrests have been found to be an effective deterrent to further abuse in some cases. Waits, *supra* note 59, at 310.

[73] Garcia, *supra* note 37, at E2 (quoting Valerie Coleman, Psychologist with the Los Angeles Gay and Lesbian Community Services Center).

them more deeply in the relationship.[74]

Even when victims succeed in having their batterers arrested or appear in court to request an order of protection, judges and prosecutors may be unwilling or unable to help the victim. First, their own negative attitudes concerning gay men and lesbians may color their ability to act fairly.[75] Second, because many court personnel are aware of the popular theories that base the perpetuation of intimate violence on male and female gender roles, they may be unable to identify intimate violence in a gay or lesbian relationship.[76] This problem is particularly acute when both parties appear in court and claim to be battered. While a judge would likely dismiss a man's claim that he was also battered by his female spouse, the same judge may assume that both parties in a gay or lesbian relationship are equally to blame or equally capable of inflicting damage.[77]

Finally, even if police and judges were to react decisively to gay and lesbian intimate violence, at least sixteen states have domestic violence laws that do not reach same-sex, non-related cohabitants.[78] Generally, domestic violence laws provide funding

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[74] BROWNE, *supra* note 15, at 126. "A lack of adequate provision for safe shelter, relocation, or protection from further attack contributed to [the battered women's] sense of entrapment; most women in the homicide group concluded that their only alternative was to survive within the relationship." *Id.*

[75] *See infra* notes 131-46 and accompanying text (discussing judicial attitudes concerning gay men and lesbians).

[76] Robson, *supra* note 63, at 567. "Many judges and legal officials have been educated in domestic violence issues in ways which emphasize the dominant/submissive patriarchal arrangement based on objective criteria such as gender." *Id.* at 579.

[77] *Id.* Robson identifies the issue of "mutual battering" as very problematic for judges and posits that judges confronted with two partners who both claim abuse may ignore the possibility that one partner's fighting was in self-defense and simply deny either partner a restraining order or issue a mutual restraining order. For the victim, not only does this response minimize the violence, but it creates later problems if the batterer attempts to use the restraining order against his/her partner. *Id.* at 580 & n.56 (listing the potential consequences for violating a temporary restraining order).

[78] States that have domestic violence statutes that exclude same-sex, unrelated couples are: ARIZ. REV. STAT. ANN. § 12-3601 (1989) ("... opposite sex or ... related ... by consanguity or affinity to the second degree"); DEL. CODE ANN. tit. 10, § 921 (Supp. 1988) (families only); FLA. STAT. ch. 741.30 (Supp. 1990) (related by blood or marriage only); KY. REV. STAT. ANN. § 403.720 (Baldwin Supp. 1990) (family members or unmarried parents of a child); MD. FAM. LAW CODE ANN. § 4-513 (1984) (only spouses currently residing together); MICH. STAT. ANN. § 16.611(1) (Callaghan 1988) (opposite sex only); MISS. CODE ANN. § 93-21-3 (1990 Supp.) ("... persons living as spouses ..."); MO ANN. STAT. § 455.010 (Vernon Supp. 1990) (opposite sex only); MONT. CODE ANN. § 45-5-206 (1989) (opposite sex only); N.C. GEN. STAT. § 50B-1 (1989) (opposite sex only); OHIO REV.

for counseling and shelter space, establish information-gathering systems, and provide for state-sponsored research.[79] In some cities a combination of laws and policies encourage the arrest of batterers, provide for protective orders, mandate arrest for violation of those orders, and define certain acts of intimate violence as felonies.[80] States that define domestic violence so as not to include same-sex, non-related partners effectively bar gay men and lesbians from these protections.

Finally, unlike most battered women today, many victims of abuse report being alienated from the gay and lesbian community once they publicly acknowledge the abusive relationship.[81] One explanation for the community's general unwillingness to help is that many gay men and lesbians do not believe that violence occurs in same-sex relationships or that it could be as serious as it is between a man and a woman.

> Ironically, we may be more tempted as lesbians to hold victims responsible for the physical violence they suffer. . . . It is hard for our friends to see us, strong and tough-minded women that we are, as vic-

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CODE ANN. § 3113.33 (Baldwin 1989) ("... person living as a spouse ..."); PA. STAT. ANN. tit. 35, § 10182 (1991) ("... persons living as spouses ..."); S.C. CODE ANN. § 20-4-20 (Law. Co-op. 1985) ("... spouses, former spouses, parents and children, and persons related by consanguity or affinity within the second degree. . ."); VT. STAT. ANN. tit. 15, § 1101 (1989) (opposite sex, blood or marriage, spouses); VA. CODE ANN. § 16.1-228 (Michie 1988) (spouses only); W. VA. CODE § 48-2A-2 (Supp. 1990) ("... spouses, persons living together as spouses, persons who formerly resided as spouses, parents, children and step-children, or other persons related by consanguity or affinity . . ."). Melanie S. Griffin, Commission on Sex Discrimination in the Statutes (1990) (on file with the National Center on Women and Family Law).

[79] *See, e.g.*, N.Y. SOC. SERV. LAW § 459-a - 459-h (McKinney 1987) (New York State's Domestic Violence Prevention Act provides funding for shelters, services and information gathering services.).

[80] For example, in addition to New York State's domestic violence law, the New York City Police Department has a pro-arrest policy. It mandates arrest in certain situations and discourages police officers from using mediation as a technique. Leonard Buder, *Ward Orders More Arrests in Domestic Violence*, N.Y. TIMES, Apr. 3, 1984, at B20.

[81] The response of the local lesbian community to the arrest of my former lover was demoralizing. Lesbians were upset—even angry—that I had called the police. . . . They suggested setting up a meeting between my former lover and me. They volunteered to mediate so we could reach an "agreement." I can think of few crueler demands on a woman who has been attacked than to insist that she sit down with the attacker and talk things out. I would guess that none of the lesbians who wanted me to do that would consider demanding such a thing from a straight woman who has just been attacked by her boyfriend.

Mary Lou Dietrich, *Nothing Is the Same Anymore*, *in* NAMING THE VIOLENCE, *supra* note 40, at 159-60.

> tims of abuse from partners who may be physically smaller. Paradoxically, even our friends might buy into the old stereotype that somehow, women aren't big enough or strong enough to really do each other damage in a physical fight.[82]

Gay and lesbian victims who experience rejection from their community, especially if the rejection is coupled with support for the batterer, may feel compelled to remain in the relationship and thus suffer continued abuse.

Another explanation for the community's failure to recognize publicly same-sex violence is the fear that acknowledgement will lead to increased derision from the heterosexual community because it will affirm the homophobic attitude that gay men and lesbians are sick.[83] Some theorists believe that this fear is rooted in gay men's and lesbians' own internalized homophobia.[84] Internalized homophobia can cause the individual to be defensive about his or her sexual orientation and thus unwilling to recognize the problem of same-sex violence even in the individual's own relationship.[85]

Additionally, some legal theorists argue that even if the gay and lesbian community were to accept the fact of intimate violence, the issue of same-sex intimate violence should remain isolated from the heterosexual community. Since the heterosexual model of intimate violence is based on stereotypical gender roles not applicable to gay men or lesbians, it cannot be reconciled with violence that occurs between same-sex partners.[86] Any reliance on the heterosexist social or legal system is bound to be unsatisfactory because gay men and lesbians will be unable to present the abuse as consistent with the heterosexual model.

II. Stereotypes and Biases that Affect Fair Adjudication

When feminists first began advocating the rights of battered women who killed in the mid-1970s,[87] they recognized that one

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[82] Hammond, *supra* note 47, at 194-95.

[83] Mindy Benowitz, *How Homophobia Affects Lesbians' Response to Violence in Lesbian Relationships*, *in* Naming the Violence, *supra* note 40, at 200.

[84] *Id.*; Robson, *supra* note 63, at 581.

[85] Robson, *supra* note 63, at 581.

[86] *Id.* at 584-86.

[87] The study of intimate violence in general began in the 1960s and was primarily focused on child abuse. Blackman, *supra* note 15, at 21. However, because violence between intimates was then thought to be quite rare, large scale efforts to understand the

of the most damaging issues for the defense was the way in which women's cases were affected by stereotypes of and bias against women in the criminal justice system.[88]

> We developed the legal argument for women's "equal rights to trial," which challenged sex-bias in the law of self-defense, based upon our knowledge of the particular problems women who killed men in self-defense faced in the criminal justice system: the prevalence of homicides committed by women in circumstances of male physical abuse or sexual assault; the different circumstances in which men and women killed; myths and misconceptions in the criminal justice system concerning women who kill as "crazy;" the problems of domestic violence, physical abuse, and sexual abuse of women and children; the physical and psychological barriers that prevented women from feeling capable of defending themselves; and stereotypes of women as unreasonable.[89]

Stereotypes and anti-woman bias harmed female defendants on two levels. First, societal expectations of women's role in family and society had a strong influence on the fact-finder. Second, the traditional doctrine of self-defense was better suited to men who killed than to women who killed abusive male partners.

Feminist legal theory was premised at least partially on the assumption that women could not receive a fair trial if the negative attitudes of jurors and judges were left unchallenged.[90] Unless jurors and judges were educated, they would be unable to view the female defendant's actions as reasonable because their deliberations and rulings would remain colored by their attitudes. Accepting this premise, feminist scholars worked to develop expert testimony on battered woman's syndrome to convey the experiences of battered women to the judge and jury.

Similarly, anti-gay bias and stereotypes about gay men and lesbians, which consistently depict them as aberrant or sick,[91]

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problem were not made until the late 1970s. BROWNE, *supra* note 15, at 3. *See* SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE (1982) (containing a comprehensive history of the battered woman's movement).

[88] Schneider, *supra* note 36, at 199.

[89] Elizabeth Schneider, *Dialectics of Rights and Politics: Perspectives from the Women's Rights Movement*, 61 N.Y.U. L. REV. 589, 607 (1986).

[90] Schneider, *supra* note 36, at 198.

[91] Popular stereotypes and misperceptions about gay men and lesbians have as a common theme the confusion of gender-roles. A partial list of such beliefs include: gay men want to be, or look and act like, women (hence the derogatory terms queen, fairy, girl, sissy, faggot); lesbians want to be, or look and act like, men (hence the derogatory terms butch, amazon, bulldyke, diesel-dyke, bulldagger); gay men are hysterical when angry; gay men are child molesters; homosexuality is a psychological illness that can be

negatively affect the fairness by which their cases are heard and adjudicated.[92] Judges and jurors often are unable to separate their attitudes about the defendant's sexual orientation from the defendant's actions. Gay men's and lesbians' actions may be unreasonable simply because they are not "like us." Furthermore, contemporary laws aimed at gay men and lesbians give an aura of acceptability to disparate treatment. Like battered women who killed, gay men and lesbians must first find a method to challenge these attitudes to present their cases to fair and impartial fact-finders.

A. *The Female Defendant: Facing Decades of Gender-Bias*

Woman abuse has a long history of acceptance by both the social and legal communities. Early English and American common law condoned wife-beating under the assumption that a woman was the property of her husband.[93] Even after the majority

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cured; gay men (and to a lesser extent lesbians) neither desire nor can attain long-term or permanent relationships; the gay and lesbian lifestyle threatens the family; and gay men and lesbians wish to convert heterosexuals to homosexuality. *See* Herek, *supra* note 49, at 138-72 (providing a detailed list of popular stereotypes affecting gay men and lesbians and offering a sample of the current social science theories tending to refute these stereotypes).

[92] Stereotypes pervade the courts. *See, e.g.*, Wiley v. State, 427 So. 2d 283, 285 (Fla. Dist. Ct. App. 1983) (prosecution was permitted to refer to the defendant as a "bull-dagger" and explain what the term meant); Constant A. v. Paul C. A., 496 A.2d 1, 8 (Pa. Super. Ct. 1985) (custody case) ("[T]he father and mother have sheltered the children from this knowledge [that their mother is a lesbian], and by doing so, insinuated that the mother's behavior is unacceptable. To reverse this will require the children to accept their mother's role, and to some extent, to proselytize the children by indicating that because of this role model now found acceptable, it is a suitable life style for children, particularly Andrea [the daughter]."); Bennett v. State, 677 S.W.2d 121, 125 (Tex. Ct. App. 1984) (during the punishment phase of the gay defendant's trial for sexual abuse, the prosecutor argued that the jury should consider that the defendant's conduct may induce the victim to become gay); *see also* Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 805 (1979); RICHARD MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW 21-45 (1988) (discussing the effects of the legal community's negative views of gay men and lesbians).

[93] Elizabeth Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 627 (1980). *See* Abbott v. Abbott, 67 Me. 304 (1877) (women were not permitted to sue their spouses for any assault committed during marriage); Bradley v. State, 1 Miss. (1 Walker) 156, 158 (1824) (finding that prosecutions for wife-beating were "vexatious . . . resulting in the discredit and shame of all parties involved"); State v. Black, 60 N.C. (Win.) 162, 86 Am. Dec. 436 (1864) (finding that unless there is some permanent injury or the violence is excessive, husbands and wives should be induced to make up and live together); State v. Rhodes, 61 N.C. (Phil.

of states reclassified wife-beating as an assault,[94] prevailing notions of the sanctity and inviolability of the family continued to impede women who sought assistance from the legal system.[95] It was not until the mid-1970s, when feminists moved the previously private act of violence into the public spotlight, that the government began to respond to the needs of battered women.[96]

Not only does a battered woman on trial for killing her abusive spouse face this historic acceptance of wife-beating by the legal system, she also confronts the social stereotypes of womanhood that may be held by judge and jury.[97] Influenced by their notions of an ideal female role model, fact-finders often fail to perceive the individual defendant independent of conclusions about how women are supposed to act. A woman who commits a violent act against her husband threatens jurors' sense of order and security because, by destroying the family unit, she repudiates her natural role as a caring, nurturing mother/wife.[98] Fur-

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Law) 445 (1868) (under the common law Rule of Thumb, the court refused to punish a husband because he had beaten his wife with a stick smaller than the diameter of his thumb and because the court did not want to interfere with the sanctity of the family).

[94] By 1910, 35 out of 46 states had passed reform legislation classifying wife-beating as an assault. MICHAEL DOWD, NEW YORK STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, BATTERED WOMEN: A PERSPECTIVE ON INJUSTICE 5 (1991) (available from the New York State Office for the Prevention of Domestic Violence).

[95] Even today, some states offer certain forms of abuse limited immunity from prosecution because they occur within the family unit. For example, 27 states still have a limited exemption from prosecution for marital rape. In most cases, marriage or cohabitation is a defense to a charge of rape. *See, e.g.* ALASKA STAT. § 11-41.432 (1989); ARIZ. REV. STAT. ANN. § 13-1406.01 (1989); ARK. CODE ANN. § 5-14-103-09 (Michie 1987); CAL. PENAL CODE § 262 (West 1990); COLO. REV. STAT. § 18-3-401-09 (1986); CONN. GEN. STAT. ANN. §§ 53-67(b), 53a-70b (West 1985); DEL. CODE ANN. tit. 11 § 761, 773-75 (1987); HAW. REV. STAT. §§ 707-733, 707-734 (1985); IDAHO CODE § 18-6107 (1989); ILL. ANN. STAT. ch. 38 para. 12-13 to 16, -18(c) (Smith-Hurd 1975); IOWA CODE ANN. § 709.4 (West 1979); KAN. STAT. ANN. § 21-3502 (1981); KY. REV. STAT. ANN. § 510.035 (Michie/Bobbs-Merrill 1990); LA. REV. STAT. ANN. §§ 14:41-:43 (West 1979); MD. CRIM. LAW CODE ANN. § 27-464(D)(c) (1989); MINN. STAT. ANN. § 609.349 (West 1987); MO. ANN. STAT. § 566.030 (Vernon 1990); MONT. CODE ANN. § 45-5-403(1) (1991); NEV. REV. STAT. § 200.373 (1992); N.H. REV. STAT. ANN. §§ 632-A:2, -A:3, -A:6 (1986); OHIO REV. CODE ANN. §§ 2907.02(A)(2), (G), 2907.12(A)(2), (C) (Anderson 1991); 18 PA. CONS. STAT. ANN. § 18.2-61(B) (1991); WASH. REV. CODE ANN. §§ 44.010, 9A.44.040 to 9A.44.060 (West 1984). NATIONAL CENTER ON WOMEN AND FAMILY LAW, MARITAL RAPE EXEMPTION: STATE BY STATE CHART (1991) (available from the National Center on Women and Family Law).

[96] BLACKMAN, *supra* note 15, at 9-13.

[97] Schneider, *supra* note 93, at 624-27.

[98] Mather, *supra* note 46, at 561 (The woman's violence is "antithetical to [the jury's] traditional notions of 'feminine.' . . : [T]he criminal law and society [would] more readily excuse a man for killing his wife's paramour than excuse a woman for killing her

thermore, the jurors' own conceptions of the family as a safe, healthy environment may lead them to deny the existence of violence altogether.[99] Rather than believe the woman, jurors choose to believe their own stereotype.

Stereotypes of women's passivity, submissiveness and unreasonableness skew the jurors' perception of female defendants.[100] Jurors who harbor such stereotypes find it difficult to reconcile their image of the good/healthy/passive woman with the battered woman defendant who is on trial precisely because she was aggressive, and therefore "unfeminine" and "bad."[101] Prosecutors often highlight these stereotypes to discredit the woman and her response to the violence. Defense attorneys in turn respond by playing up more sympathetic stereotypes:

> [P]rosecutors' attacks on the defendants as women included portraying them as evil, discrediting their performances as wives and/or mothers, and reproaching them for inappropriate emotional responses. In one case the prosecutor described the defendant to the jury as a "nefarious, scheming, conniving, rotten, heartless, bloodthirsty, moralist, hardened, murdering rat . . . ." [The defense countered] with a description of the 23-year old defendant as a "little girl," once stating "she's a nice little girl and everything, but she's not a genius."[102]

Finally, like stereotypes of women in general, misperceptions about intimate violence, deeply rooted in our cultural notions of the woman's place in society, make it difficult for jurors

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rapist.").

[99] Schneider, *supra* note 93, at 630 ("[J]uror denial of the problem of woman abuse is common because denial 'allows a person to continue to hold on to the image of the family as an institution of love, nourishment, and protection.' ") (quoting Affidavit of Pat Murphy in support of motion for jury questioning and expert testimony, State v. Brinker No. 30842 (Minn. Dist. Ct., Oct. 3, 1978).

[100] Schneider, *supra* note 93, at 628 (" 'Healthy' women are expected to be dependent, passive and submissive; 'healthy' men are encouraged to be aggressive, competitive and dominant."). These stereotypes also may affect the way battered women react to violence. Mather, *supra* note 46, at 565 ("Most women are socialized to be somewhat passive and nonaggressive, to get along, and to keep peace. These feminine traits are frequently more pronounced in the battered woman."). *But see infra* note 200 and accompanying text (arguing that battered women are active in their effort to survive within the relationship).

[101] Phyllis Crocker, *The Meaning of Equality for Battered Women Who Kill*, 8 HARV. WOMEN'S L.J. 121, 136 (1985).

[102] Pamela Jenkins & Barbara Davidson, *Battered Women in the Criminal Justice System: An Analysis of Gender Stereotypes*, 8 BEHAV. SCI. & L. 161, 164 (1990) (citation omitted).

to appreciate the impact violence has on the individual.[103] Common myths about intimate violence include the belief that women provoke violence and therefore deserve to be beaten;[104] women stay in abusive relationships because they are masochistic and voluntarily participate in the violence;[105] flight from the abusive household ends the violence;[106] husbands or boyfriends have a right to strike their partners; police adequately protect battered women; battered women are in abusive relationships because they are psychologically imbalanced; women who kill their abusers are crazy; and only poor, uneducated women are beaten.[107] A juror who holds any of these beliefs unchallenged is less likely to understand the woman's act of self-defense or perceive it as reasonable.

Added to these gender stereotypes is the bias embodied in the traditional doctrine of self-defense.[108] At common law a de-

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[103] Although these myths are outlined here with respect to heterosexual women, most of the assumptions about intimate violence will also affect gay and lesbian defendants. However, it is important to be aware of the way in which the defendant's sexual orientation may influence the way the jurors think about the myths. For example, jurors who believe the myth that homosexuality itself is a form of mental illness, may assume that gay or lesbian intimate violence is a natural part of the deviant relationship. Herek, *supra* note 49, at 138-43.

[104] *See* State v. Crigler, 598 P.2d 739, 740 (Wash. Ct. App. 1979) ("Their life together was often stormy; and, *when provoked*, he brutally beat on her on several occasions.") (emphasis added).

[105] *See* People v. Powell, 83 A.D.2d 719, 721, 442 N.Y.S.2d 645, 647 (3d Dep't 1981) (prosecutor argued that the defendant was a sexual masochist and that both parties enjoyed participating in the violence).

[106] The question, "Why don't battered women leave?" is based on the assumption that leaving will end the violence. While this may be true for some women who leave after the first or second incident (these women are rarely identified as battered, and still less often studied), even the smoothness of those separations depends on the abuser's sense of desperation or abandonment and his willingness or tendency to do harm when faced with an outcome he does not want or cannot control.

BROWNE, *supra* note 15, at 109-10.

[107] *See generally*, WALKER, *supra* note 25, at 18-31 (discussing and refuting myths about battered women); BROWNE, *supra* note 15. *See also* BLACKMAN, *supra* note 15, at 204-10 (arguing, in response to the myth that most battered women are poor and uneducated, that the focus of most research to date has centered on middle-class battered women and neglected poor, welfare-class women).

[108] Before the mid-1970s, battered women on trial for killing their abusive spouses often pled either insanity, diminished capacity or heat of passion. Schneider, *supra* note 93, at 630. *See* DRESSLER, *supra* note 23, at 299, 319, 473-74 (common law definitions of insanity, diminished capacity and heat of passion). Since these defenses act as theories of excuse, a woman's action was objectively unreasonable but excused because she "did not have a fair opportunity to choose meaningfully whether to inflict the harm." Cathryn Jo

fendant was justified in using deadly force against the victim if, at the time of its use, the defendant was not the aggressor and she reasonably believed that such force was necessary to combat imminent, unlawful deadly force by the victim.[109]

Women traditionally have great difficulty successfully pleading self-defense. In part, this is because it is better suited to its original vision of combat between two male strangers of equal strength and fighting ability than it is to a woman faced with a male partner who has used violence against her in the past.[110] For example, the traditional doctrine required the actor to use only force in proportion to the force being used, or threatened, against her.[111] Many women who are smaller, weaker and/or less skilled in defending themselves than men are unable to ward off a potentially lethal attack by an unarmed assailant without the use of a weapon.[112] Strict enforcement of the proportional force rule leads some courts to find that the defendant could not have acted in self-defense because "a belief that the decedent unarmed might kill or greatly injure the defendant while she had a loaded gun [is] unreasonable."[113]

Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 22 (1986); DRESSLER, *supra* note 23, at 177.

[109] United States v. Peterson, 483 F.2d 1222, 1230-31 (D.C. Cir.), *cert. denied*, 414 U.S. 1007 (1973). *See also* DRESSLER, *supra* note 23, at 191-217.

[110] Crocker, *supra* note 101, at 126-28; Mather, *supra* note 46, at 564-65.

[111] Mather, *supra* note 46, at 656. Prosecutors tend to underemphasize the violence of the abuser to present the battered defendant's use of force as unreasonable. In People v. Bush, 148 Cal. Rptr. 430 (1978), the defendant, a battered heterosexual woman accused of killing her spouse, testified that immediately before the stabbing, her spouse "grabbed her by the back of her collar and threw her across the bed," twisted her arm to take away her keys, choked her "with sufficient force to cut off her breath," beat her "about the face and head," and said, " '[B]itch, you gonna hurt me? I'm going to send you to your grave.' " *Id.* at 434-35. The prosecutor argued during summation that the victim "did not deserve to die 'for slapping a woman.' " *Id.* at 439. The court of appeals found that "the prosecutor was merely drawing the jury's attention to evidence [that the defendant's action] was not commensurate with the force . . . used against her." *Id.* The clear implication is that intimate violence is neither serious nor a real crime; therefore, women who react against it are hysterical and unreasonable.

[112] *Compare* BROWNE, *supra* note 15, at 11 (finding that most battered women who kill their intimate partners use a weapon, usually a gun) *with* FEMALE VICTIMS OF VIOLENT CRIMES, *supra* note 57, at 6 (finding that 76 percent of the spouses, ex-spouses and boyfriends who commit violent crimes against their intimate partners use no weapons).

[113] People v. Davis, 337 N.E.2d 256 (Ill. App. Ct. 1975). Most courts now permit a woman to plead self-defense even if she used a weapon against an unarmed assailant. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR. CRIMINAL LAW 457 (2d. ed. 1986) (asserting that the modern trend is to permit the court to consider the relative size, strength, gen-

Similarly, the requirement that the force or threat of force be imminent disadvantages many women who cannot fight back during an attack.[114] Modern courts have reinterpreted the imminence requirement somewhat more broadly, permitting the jury to take into account the defendant's subjective knowledge of the batterer's past violence and the relative size and strength of the parties.[115] However, many courts continue to find that nontraditional confrontation cases[116] stretch the concept of imminence beyond traditional notions of reasonableness.[117]

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der, the violence of the attack, and the attacker's reputation for violence).

[114] Crocker, *supra* note 101, at 126-27; Mather, *supra* note 46, at 565-58. Although the majority of battered women who strike back at their abusers do so during a physical confrontation, many homicides committed by battered women occur when the spouse is asleep or has his back turned. Schneider, *supra* note 93, at 643; Holly McGuigan, Clinical Professor of Law at New York University School of Law, Lecture on the Defense of Battered Women Who Kill (Nov. 13, 1990).

[115] *See, e.g.*, State v. Wanrow, 559 P.2d 548 (Wash. 1977) (*en banc*). Here, the defendant, who was not a battered woman but who knew of the victim's prior violent behavior, shot the unarmed victim before any violence had commenced. *Id.* at 551. The court found that a jury instruction on imminence which required the jury to consider only "those acts or circumstances occurring 'at or immediately before the killing' " in determining the reasonableness of the defendant's actions was erroneous and unfair. *Id.* at 555 (quoting Jury Instruction No. 10). The court noted:

> The impression created—that a 5'4" woman with a cast on her leg and using a crutch must, under the law, somehow repel an assault by a 6'2" intoxicated man without employing weapons in her defense, unless the jury finds her determination of the degree of danger to be objectively reasonable—constitutes a separate and distinct misstatement of the law and, in the context of this case, violates the respondent's right to equal protection of the law.

Id. at 558.

[116] A non-traditional confrontation case is one in which the defendant acts either before or after a physical confrontation. The most widely used example is a woman who shoots her sleeping partner.

[117] While the definition of imminence varies by jurisdiction, *compare* State v. Norman, 378 S.E.2d 8, 13 (N.C. 1989) (suggesting that the term "imminence" is synonymous with "immediate" or "about to happen") *with* People v. Ariz, 264 Cal. Rptr. 167, 172 (Cal. App. 4 Dist. 1989) (finding that "imminent peril" is "immediate and present and not prospective or even in the near future"), battered women who have nontraditional confrontation cases generally have greater difficulty establishing that their belief of imminent threat was reasonable. Schneider, *supra* note 93, at 634-35. For many of these women, however, the threat of serious bodily injury or death is a continuous threat unlike a "one-time adversarial encounter" that the traditional notion of imminence presupposes. *Id.* at 634. *But see* Kerry A. Shad, Comment, *State v. Norman: Self-Defense Unavailable to Battered Women Who Kill Passive Abusers*, 68 N.C. L. REV. 1159, 1171 (1990) (arguing that any expanded definition of the imminence requirement would " 'categorically legalize the opportune killing of abusive husbands by their wives solely on the basis of the wives' testimony concerning their subjective speculation as to the probability of future felonious assaults by their husbands. . .' ") (quoting *Norman*, 378 S.E.2d at 15).

Despite the greater need for expert testimony in nontraditional cases, judges are more apt to exclude it because they are unable to perceive the defendant's belief of imminent threat as reasonable.[118] In *People v. Aris*[119] the defendant shot her sleeping spouse after he told her that " 'he didn't think he was going to let [her] live till the morning.' "[120] Here, the court concluded that expert testimony on battered woman's syndrome was irrelevant. While the victim may have presented a serious danger to the defendant in the near future, "no 'jury composed of *reasonable men* could have concluded that' a sleeping victim presents an imminent danger of great bodily harm. . . ."[121] The court continued:

> [W]here . . . the defendant's own testimony establishes facts tending to show quite conclusively that there was nothing in the victim's behavior indicating the existence of an imminent danger . . . it is not reasonably probable that [battered woman's syndrome] testimony will convince the jury that, nevertheless, the defendant honestly perceived an imminent danger resulting in a different verdict.[122]

The circle is vicious: the purpose of expert testimony is to acquaint the judge and jury with unusual phenomena, yet the further the defendant's act is from the judge's own experience the less likely he or she is to admit the testimony.

Finally, many commentators criticize the "reasonable man standard" as it is applied to women in general and to battered

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[118] Since expert testimony on battered woman's syndrome is intended to explain how a battered woman could reasonably perceive danger when others might not, one would expect the opposite result. This twist suggests that courts have failed to accept battered women's equal claims of self-defense and have continued to evaluate women's claims according to male standards.

Crocker, *supra* note 101, at 139.

[119] 264 Cal. Rptr. 167 (Cal. App. Dep't Super. Ct. 1989).

[120] *Id.* at 179.

[121] *Id.* at 176 (emphasis added). The court offers a telling analogy to explain its position. "The criminal law would not sentence to death a person such as the victim in this case for a murder he merely threatened to commit, even if he had committed threatened murders many times in the past and had threatened to murder the defendant." *Id.* at 174. If any actor claiming self-defense had to abide by the rules governing the state's authority to execute its citizenry, he or she would be dead by the time no reasonable doubt had been established. Furthermore, the state is hardly in the same position as a battered person: the state and its law is not a person. The "murderer" does not live with the state, does not have visitation rights with the state's children and does not regularly beat and sexually molest the state.

[122] *Id.* at 181.

women in particular. "Widespread adherence to the sex-biased 'reasonable-man' standard compounds women's problems: 'in all that mass of authorities which bears upon this branch of the law . . . there is no single mention of the reasonable woman.' "[123] Since the reasonable man standard envisions male conduct as the norm, any act by a woman that does not conform to the male ideal is unreasonable.[124] Yet if a battered woman defendant highlights the typically male aspects of her action and downplays the typically female aspects, the jury may punish her for being unfeminine. Many commentators have suggested that the only way to avoid this problem is to use another standard for battered women.[125] There is no consensus as to what standard should be used, however. Moreover, there are many theorists who object to the creation of a special standard for women:

> The issue is not the development of a *new* standard of self-defense for women, but the adjustment of existing statutes to account for differences in the experiences of women and men—particularly women faced with a male assailant, and women who are victims of repeated violent assaults by one assailant—so that the same standard can be applied to all victims.[126]

The combination of these factors, the widely held stereotypes of women and gender roles and the bias of the traditional doctrine of self-defense, has led feminist legal theorists to argue that "someone not a battered woman[] is needed to translate the experiences of large numbers of women in this society to the rest of society's representatives."[127] As Professor Elizabeth Schneider

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[123] Schneider, *supra* note 93, at 635 (quoting A. HERBERT, MISLEADING CASES IN THE COMMON LAW 18 (1930)).

[124] Schneider, *supra* note 93, at 636; *see also* GILLIGAN, *supra* note 36, at 17 ("The repeated finding . . . is that the qualities deemed necessary for adulthood—the capacity for autonomous thinking, clear decision-making, and responsible action—are those associated with masculinity and considered undesirable as attributes of the feminine self.").

[125] *See* Schneider, *supra* note 93, at 639-40 (advocating a sex-neutral or individualized standard that would take into account all circumstances and histories of the actors and the perceptions of the defendant); Crocker, *supra* note 101, at 121-51 (advocating a "reasonable woman standard" to account for the differences in a woman's perception of danger, harm and force, but noting that this standard could lead to sexual stereotyping of the kind against which feminist theorists have been arguing); Mather, *supra* note 46, at 545 (reviewing and critiquing "reasonable battered woman standard," the "reasonable woman standard," and the "reasonable sex-neutral standard," and arguing for the adoption of a neutral reasonable woman standard).

[126] BROWNE, *supra* note 15, at 175.

[127] Schneider, *supra* note 36, at 218.

argued:

> [T]he battered woman who killed her husband had nobody in the courtroom who was explaining her actions, who could identify with her and explain her experience and translate it to the jury. . . . They needed somebody else to translate and legitimate it to them because nobody was "female-bonding" or "battered woman-bonding" with her in the courtroom. The jury wasn't likely to do that.[128]

Absent such translation, jurors and judges are unable to view the actions of these women as reasonable because the women's experiences fall beyond their understanding.

B. *Gay Men and Lesbians: The Firmly Entrenched Prejudices of a Heterosexist Legal System*

Although the bias that battered gay men and lesbians face as defendants is somewhat similar to the bias battered women face in court, it is also broader and more difficult to overcome. The sexual identity of the gay or lesbian defendant often becomes an issue during judicial proceedings.[129] Unlike biases concerning women, however, biased attitudes concerning sexual orientation are, at least in part, publicly sanctioned by laws. These laws, which are either aimed at or enforced primarily against gay men and lesbians, reinforce societal attitudes by condoning disparate treatment.[130]

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[128] *Lesbians, Gays and Feminists at the Bar: Translating Personal Experience into Effective Legal Argument—A Symposium*, 10 WOMEN'S RTS L. REP 107, 137 (1988) (quoting Elizabeth Schneider).

[129] *Sexual Orientation and the Law*, *supra* note 71, at 1551-52. Evidence of a defendant's sexual orientation is generally inadmissible unless it is at issue or a defense is raised based upon the victim's or the defendant's sexual orientation. *See, e.g.*, Gabrielson v. State, 510 P.2d 534, 539 (Wyo. 1973) (court reversed defendant's conviction for assault and battery with a dangerous weapon after the prosecution impermissibly referred to the defendant's homosexuality). Even when such evidence is admitted, however, it is often found to be nonprejudicial or nonreversible error. *See, e.g.*, People v. Mullen, 252 P.2d 19, 22 (Cal. App. Dep't Super. Ct. 1953) (while reference to the defendant's homosexuality was beyond the scope of cross-examination, it was not prejudicial because "this evidence was nothing new"); State v. Sias, 416 So. 2d 1213, 1217 (Fla. Dist. Ct. App. 1982) (while testimony regarding the defendant's homosexuality "severely prejudiced the defendant," it was not reversible error because it was introduced to demonstrate the witness's bias); Blount v. State, 630 S.W.2d 856, 861 (Tex. Crim. App. 1982) (evidence of the defendant's homosexuality did not result in enough prejudice to the defendant to warrant a new trial).

[130] *See, e.g.*, *Sexual Orientation and the Law*, *supra* note 71, at 1520-21 (courts use sodomy statutes to justify other types of discrimination because gay men and lesbians are presumed to violate these laws); *id.* at 1542 n.155 (law enforcement policies and the

Judges and other court personnel routinely refer to popular negative attitudes about gay men and lesbians during the course of proceedings that concern gay or lesbian parties or issues.[131] In some cases, the discussion of negative attitudes is used to serve legitimate ends, such as to argue for equal treatment by the public, courts and legislatures, or to strike down an unfair policy or law. For example, in *High Tech Gays v. Defense Industry Security Clearance Office*[132] the court challenged the stereotypes that the Defense Department's manual employed as its basis for requiring gay men and lesbians to endure a more stringent security clearance procedure:

> The Defense Department's unequal treatment of gay people perpetuates the very types of archaic stereotypes that the [Defense Investigative Services] manual implies and that the equal protection clause attempts to extinguish, e.g. that all lesbians and gay men are emotionally unstable, sexually perverted, and particularly prone to blackmail and that homosexuality is deviant sexual behavior parallel to necrophilia, masochism, and pedophilia.[133]

In some cases, however, negative stereotypes clearly influence either the presentation of the case to the court or the judge's own reasoning process. For example, in *Constant A. v. Paul C. A.*[134] the court refused to grant the biological mother expanded custody for her children simply because she was a lesbian. "Here, the father and mother started equal; once the father established the mother's lesbian relationship and his own legitimate and stable heterosexual relationship, a presumption

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legality of anti-gay discrimination may make crimes against gay men and lesbians more violent because such crimes are likely to go unreported and unpunished) (citing Miller & Humphreys, *Lifestyles & Violence: Homosexual Victims of Assault & Murder*, QUALITATIVE SOC'Y 169, 179-80 (1980)); MOHR, *supra* note 92, at 326 (the failure of courts to extend title VII protection to employers and employees of the same gender causes many gay men and lesbians to lose their jobs as a result of sexual harassment).

[131] Judges have referred to homosexuals or homosexuality as immoral, unacceptable and a crime against nature, Bowers v. Hardwick, 478 U.S. 186, 196-97 (1986); as "immoral, indecent, lewd and obscene," Schlegel v. United States, 416 F.2d 1372, 1378 (Ct. Cl. 1969), *cert. denied*, 397 U.S. 1039 (1970); and sodomy as unnatural, "detestible and an abominable crime against nature," Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1075 (5th Cir. 1976) (quoting MISS. CODE ch. 64, art. 12, tit. 7(20) (Hutchinson 1848)), *cert. denied*, 430 U.S. 982 (1977).

[132] 668 F. Supp. 1361 (N.D. Cal. 1987), *rev'd in part, vacated in part*, 895 F.2d 563 (9th Cir. 1990).

[133] *High Tech Gays*, 668 F. Supp. at 1377.

[134] 496 A.2d 1 (Pa. Super. Ct. 1985).

arose favoring the preferability of the traditional relationship."[135] Here, the judge had predetermined the character of the gay or lesbian party based on social stereotypes and was unable to apply the neutral standard for custody or visitation rights—the best interests of the child—fairly. In such courtrooms the gay or lesbian party bears a substantially greater burden in presenting his or her case.

In other cases the laws or rules used by the court are facially biased and form a basis for additional discriminatory treatment by courts. One such example is state sodomy laws.[136] Sodomy laws may specifically prohibit oral-genital and anal-genital contact, or more generally "unnatural lascivious acts" or "crimes against nature."[137] Currently, of the twenty-four states and the District of Columbia that have sodomy statutes in effect,[138] six prohibit such contact only between persons of the

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[135] *Id.* at 7. The court also assumed that the children's mere contact with the mother would expose them to harmful effects. "Here, the children do not know of the lesbian relationship of their mother, and it is inconceivable that they would go into that environment, be exposed to the relationship, and *not* suffer some emotional disturbance, perhaps severe." *Id.* at 8.

[136] *See* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 198-201; *Sexual Orientation and the Law*, *supra* note 71, at 1519-40 (discussing the history and use of sodomy statutes against gay men and lesbians).

[137] *Sexual Orientation and the Law*, *supra* note 71, at 1520 & n.4. Despite the vagueness of the terms "unnatural lascivious acts" and "crimes against nature," courts have upheld these statutes. *See, e.g.*, Rose v. Locke, 423 U.S. 48 (1975) (*per curiam*) (upholding TENN. CODE ANN. § 39-2-612 (1980) which prohibits "crimes against nature"); Wainwright v. Stone, 414 U.S. 21 (1973) (*per curiam*) (upholding FLA. STAT. ANN. § 800.02 (1992) which prohibits "abominable and detestable crimes against nature"). Some courts have construed state sodomy laws to reach only anal-genital contact. *See, e.g.*, State v. Potts, 254 P.2d 1023, 1024 (Ariz. 1953) (an "infamous crime against nature" does not include oral-genital contact).

[138] ALA. CODE § 13A-6-65(a)(3) (1982); ARIZ. REV. STAT. ANN §§ 13-1411 to -1412 (Supp. 1988); D.C. CODE ANN. § 22-3502 (1981); FLA. STAT. ANN § 800.02 (1992); GA. CODE ANN. § 16-6-2 (Harrison, 1989); IDAHO CODE § 18-6605 (1987); KAN STAT. ANN. § 21-3505 (Supp. 1987); LA. REV. STAT. ANN. § 14:89 (West 1986); MD CODE ANN. CRIM. LAW §§ 553-54 (1987); MICH. COMP. LAWS §§ 750.158, .338-.338(b) (1979); MINN. STAT. § 609.293 (1988); MISS. CODE ANN. § 97-29-59 (1972); MO. REV STAT § 201.109 (1987); MONT. CODE ANN. §§ 45-2-101, 45-5-505 (1987); NEV. REV. STAT. § 201.190 (1987); N.C. GEN. STAT. §14.177 (1986); OKLA. STAT. tit. 21, § 886 (1981); R.I GEN. LAWS § 11-10-1 (1986); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); TENN CODE ANN § 39-2-612 (1982); TEX. PENAL CODE ANN. §§ 21.01(I), 21.06 (West 1989); UTAH CODE ANN § 76-5-403 (Supp. 1988); VA. CODE ANN. § 18-2-361 (Michie 1988). *Sexual Orientation and the Law*, *supra* note 71, at 1519 n.2. Massachusetts' sodomy statute, MASS GEN L. ch. 272, § 34 (1986), was arguably invalidated as applied to private consensual conduct. Commonwealth v. Balthazar, 318 N.E.2d 478, 481 (Mass. 1974). Kentucky's sodomy statue, KY. REV. STAT. ANN. § 510-100 (Michie/Bobbs-Merrill 1985), was struck down as anti-

same gender.[139] The constitutionality of these laws was upheld by the Supreme Court in *Bowers v. Hardwick*,[140] where the Court found no fundamental privacy right to engage in same-sex sodomy.[141]

While sodomy statutes are not routinely enforced against consenting adults,[142] they are often used as a justification for other forms of discriminatory treatment based on the assumption that gay men and lesbians violate these laws. For example, in *Mississippi Gay Alliance v. Goudelock*[143] the court used a Mississippi sodomy statute to support its finding that a student newspaper did not have to print advertisements that invited students to an off-campus Gay Center. The fact that Mississippi had a constitutional sodomy statute prohibiting "unnatural intercourse" was a "special reason[] for holding that there was no abuse of discretion by the editor of [the school paper]."[144]

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thetical to the state's interpretation of privacy and equal protection. Kentucky v. Wasson, 61 U.S.L.W. 2180 (1992).

[139] The six states that statutorily prohibit sodomy only between members of the same sex are Arkansas, Kansas, Missouri, Montana, Nevada and Texas. *Sexual Orientation and the Law*, *supra* note 71, at 1520 n.5.

[140] 478 U.S. 186 (1986).

[141] Commentators have almost uniformly criticized the Court's decision in *Hardwick*. *See, e.g.*, *Sexual Orientation and the Law*, *supra* note 71, at 1521-40, 1523 n.30; LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW §15-21, at 1422-35 (2d. ed. 1988). Courts, too, have criticized the Supreme Court's argument in *Hardwick*. *See, e.g.*, Watkins v. United States Army, 847 F.2d 1329, 1358 (9th Cir. 1988) (Reinhardt, J., dissenting) ("[A]s I understand our Constitution, a state simply has no business treating any group of persons as the State of Georgia and other states with sodomy statutes treat homosexuals . . . . I believe that the Supreme Court egregiously misinterpreted the Constitution in *Hardwick*."), *different results reached on reh'g., en banc*, 875 F.2d 699 (9th Cir. 1989); High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1370-71 (N.D. Cal. 1987) (finding that *Hardwick* must be limited to homosexual and heterosexual sodomy, but should not apply to other forms of homosexual activity that are not sodomy); *see also Hardwick*, 478 U.S. at 214 (Blackmun, J., dissenting) ("I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of this right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of non-conformity could ever do.").

[142] *See Sexual Orientation and the Law*, *supra* note 71, at 1520-21.

[143] 536 F.2d 1073 (5th Cir. 1976).

[144] *Id.* at 1075; *see also In re* Appeal in Pima Cty. Juvenile Action, 727 P.2d 830 (Ariz. Ct. App. 1986) (court refused the plaintiff's application for adoption because he was a bisexual and sodomy was against the law); State v. Thornton, 532 S.W.2d 37 (Mo. Ct. App. 1975) (although the court affirmed the defendant's conviction for manslaughter, it found that the defendant could have introduced evidence of the victims' felonious approach under a theory of self-defense because sodomy is a felony and the victim was attempting to engage in sodomy with the defendant); Head v. Newton, 596 S.W.2d 209

Furthermore, as the court in *Baker v. Wade*[145] noted in its opinion invalidating Texas's sodomy statute, sodomy statutes negatively affect gay men and lesbians on virtually every level of daily existence:

> [T]he existence of these criminal laws, even if they are not enforced . . . does result in stigma, emotional stress and other adverse effects. The anxieties caused to homosexuals—fear of arrest, loss of jobs, discovery, etc.—can cause severe mental health problems. Homosexuals, as criminals, are often alienated from society and institutions, particularly law enforcement officials. They do suffer discrimination in housing, employment and other areas.[146]

The state's overt message to the public as well as to judges and jurors is that gay men and lesbians do not conduct their relationships like heterosexuals and therefore do not deserve the same treatment under the law that heterosexuals receive.

Another state-endorsed form of discrimination is the failure of any state to extend the right or privilege of marriage to same-sex couples.[147] While gay men and lesbians may form life-long partnerships, benefits accorded to married couples by governmental and non-governmental institutions (such as workers' compensation or life and health insurance) are unavailable to them.[148] Moreover, unmarried couples are subject to discrimination in areas of housing and zoning regulations, wills, tort claims,

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(Tex. Civ. App. 1980) (plaintiff made a *prima facie* case of slander when two witnesses overheard the defendant refer to the plaintiff as a homosexual which was *per se* slanderous because sodomy is a crime).

[145] 553 F. Supp. 1121 (N.D. Tex. 1982), *appeal dismissed*, 743 F.2d 236 (5th Cir. 1984), *denied*, 769 F.2d 289 (5th Cir. 1985) (en banc), *cert. denied*, 478 U.S. 1022 (1986).

[146] *Baker*, 553 F. Supp. at 1130.

[147] Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9 (1991) (arguing for the recognition of same-sex marriages); Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMP. L. REV. 511, 529 (1990) (discussing options for lesbians who wish to pursue the benefits of marital unions such as durable powers of attorney and cohabitation contracts); *Sexual Orientation and the Law*, *supra* note 71, at 1603-04 (detailing constitutional arguments for same-sex marriages and outlining the legal and social problems that burden unmarried persons).

[148] While marriage forms the basis for a number of social benefits, the legal benefits that accrue from it are equally, if not more, important. In addition to tax benefits, married persons may benefit from life and health insurance policies, workers' compensation benefits or immigration status laws. *See* Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97 (1991); Hunter, *supra* note 147, at 19-27; Robson & Valentine, *supra* note 147, at 514; *Sexual Orientation and the Law*, *supra* note 71, at 1611-23.

and adoption and custody cases.[149]

States claim that the prohibition of same-sex marriage encourages procreation and promotes traditional values.[150] Some commentators argue that the true rationale behind this justification, and perhaps behind many anti-gay and lesbian attitudes, is the fear that recognition of same-sex marriages will further break down the artificial gender roles upon which our society is constructed. As one commentator argued: "Same-sex marriage could create the model in law for an egalitarian kind of interpersonal relation, outside the gendered terms of power, for many marriages. At the least, it would radically strengthen and dramatically illuminate the claim that marriage partners are presumptively equal."[151] Other commentators are less hopeful about the effect of recognition of same-sex marriages. They argue that the gender roles upon which society is constructed can never be broken down. Marriage, as a reflection of these gender roles, will only force gay men and lesbians to "hetero-relationalize" their relationships.[152] In either case, the prohibition against same-sex marriage indicates the power that model gender roles have over society's construction of proper and improper behavior.

Institutionalized discrimination also helps to create an atmosphere that is conducive to anti-gay violence or "queer-bashing":

> Due to the pervasive social disparagement of homosexuality and the continued legality of many forms of anti-gay discrimination, many gay and lesbian victims are reluctant to report acts of violence against them, perhaps out of fear that their sexual orientation will be exposed

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[149] *See Sexual Orientation and the Law*, *supra* note 71, at 1612-18 (housing and zoning discrimination may emanate from "exclusionary zoning laws, restrictive statutory provisions, discriminatory landlord practices, and narrow judicial constructions of the meaning of 'family' "); Robson & Valentine, *supra* note 147, at 514-21 (discussing methods of contract formation that may better enforce a lesbian testator's plans to dispose to her partner).

[150] *Sexual Orientation and the Law*, *supra* note 71, at 1609 & nn.40-41 (citing cases where states have argued both justifications).

[151] Hunter, *supra* note 147, at 17.

[152] The transformation of lesbianism by participation in marriage will not be positive; it will demarcate acceptable lesbian relationships and sexualities from unacceptable ones and it will hetero-relationize lesbianism. Perhaps rather than advocating that marriage be available to lesbians, lesbian legal theory should advance the proposition that marriage should be abolished as a sexist, heterosexist, and narrow institution.

Robson & Valentine, *supra* note 147, at 540.

> . . . . As a result of their reluctance to report crimes, and their distrust of the criminal justice system, gay men and lesbians are more attractive victims for perpetrators of bias crimes.[153]

At least one study has suggested that gay men and lesbians are victimized more often than any other minority group.[154] According to the New York City Gay and Lesbian Anti-Violence Project, there were 507 reported incidents of bias-motivated crimes in New York City in 1990, an increase of sixty-five percent from 1989.[155] Approximately seventy percent of these assaults resulted in injuries serious enough to require medical attention.[156] Such bias crimes are only one indication of the deep-seated animosities that many individuals, including jurors, feel toward gay men and lesbians.[157]

This combination of biased laws, biased attitudes of judges and court personnel, and the overall presence of prejudice and discrimination by society, creates an almost insuperable barrier to same-sex couples seeking equal treatment. When placed against a backdrop of intimate violence, these negative attitudes are magnified even further. Fact-finders are asked to determine the defendant's reasonableness in a situation often alien to them: the defendant is both battered and is gay or lesbian. As feminist theorists surmised in the late 1970s, a determination of reasonableness made from this uneducated vantage point is likely to be fraught with erroneous assumptions created by jurors to fill gaps in their understanding of the defendant's experi-

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[153] *Sexual Orientation and the Law*, *supra* note 71, at 1541-42.

[154] *Id.* at 1541 (citing Peter Finn & Taylor McNeil, The Response of the Criminal Justice System to Bias Crime: An Exploratory Review I (1987) (on file at Harvard Law School Library).

[155] AVP REPORT, *supra* note 38, at 1. There were 308 such reported crimes in 1989. Since the Project relies on self-reporting, these figures represent only crimes reported to the Project. AVP estimates that reports are filed in less than 50 percent of the cases. *Id.* at 3.

[156] *Id.*

[157] The public's reaction against lifting the historic ban against gay men and lesbians in the military, and the close votes in 1992 in several states and cities on the issue of gay and lesbian civil rights are additional evidence of continued animosity toward gay men and lesbians. *See* Adam Clymer, *Hearings Could Sway the Debate on Gay Troops*, N.Y. TIMES, Feb. 1, 1993, at 14 (indicating that 48 percent of the public disfavors lifting the military ban); Jeffery Schmalz, *The 1992 Elections: The States—The Gay Issues; Gay Areas Are Jubilant Over Clinton*, N.Y. TIMES, Nov. 5, 1992, at 8 (reporting the passage of anti-gay legislation in Colorado and Tampa, Florida, and the rejection, by a close vote, of similar legislation in Oregon and Portland, Maine).

ence. Here, too, someone is needed to translate the battered gay or lesbian defendant's experiences to society's representatives.

III. Expert Testimony on Intimate Violence

Since the late 1970s the "someone" to translate the experiences of the battered woman has been an expert in the field of battered woman's syndrome. Although diverse trial strategies are advocated by feminist legal theorists, such as permitting an especially credible defendant to testify without additional aid,[158] the admission of expert testimony has become the focal issue in battered woman's cases for most courts,[159] commentators[160] and the media.[161]

Despite the overall acceptance of such testimony by courts, some commentators have recently begun to criticize the way the testimony is given, heard and used. In particular, the fact that most experts who give testimony rely on one theory, that of Dr. Lenore Walker, has given rise to much debate about whether testimony that is based on a monolithic theory ultimately hurts women's self-defense cases as much as it helps them.

Criticisms of the current use of expert testimony on battered woman's syndrome in women's self-defense cases are important to gay and lesbian defendants for two reasons. First, they are likely to encounter the same problems with certain aspects of the Walker model that heterosexual women have encountered. Battered defendants who fought back on occasion, who were equal economic partners in the relationship or who do not exhibit most of the "symptoms" of battered woman's syn-

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[158] Schneider, *supra* note 93, at 646.

[159] Schneider, *supra* note 36, at 196-97. For cases where courts have admitted and excluded expert testimony, see *infra* note 181.

[160] *See generally* Blackman, *supra* note 15; Crocker, *supra* note 101; David S. Dupps, Note, *Battered Lesbians: Are They Entitled to a Battered Woman Defense?*, 29 J. Fam. L. 879 (1990-91); Schneider, *supra* note 93; Mather, *supra* note 46; Shad, *supra* note 117. For a comprehensive list of law review articles on the battered woman's self-defense work through 1986, see Schneider, *supra* note 36, at 196 n.5.

[161] *See generally* Gerald Caplan & Murray N. Rothbard, *Battered Wives, Battered Justice*, Nat'l Rev., Feb. 25, 1991, at 39; Amy Margolick, *When Battered Wives Kill Does the Law Treat Them Fairly*, N.Y. Times, Dec. 11, 1985, at C8; Susan Paterno, *A Legacy of Violence*, L.A. Times, Apr. 14, 1991, at E1; *Use of Experts in Battering is Upheld on Women's Trials*, N.Y. Times, July 25, 1984, at A1; Nancy Watzman & William Saletan, *Marcus Welby, J.D.: When Doctors Become Judges*, New Republic, Apr. 17, 1989, at 19; Anne Wyman, *Murder Acquittal is Advanced in Battered-Woman Defense*, Boston Globe, Dec. 17, 1989, at 33. *See also* Schneider, *supra* note 36, at 197 n.8.

drome, may find the judge and jury unsympathetic. They may even be excluded from presenting evidence on the prior violence.[162]

Second, gay men and lesbians may find that the traditionally feminist language and images that are an integral part of the history of battered woman's syndrome will be used against them by attorneys, judges and jurors. Basic theories about intimate violence—that it results from the historic position of women as property in a patriarchal structure or that women are battered because they are smaller and weaker—do not translate to same-sex relationships. Yet without some form of expert testimony, gay men and lesbians will find themselves in the same position as battered women in the pre-1970s when firmly held beliefs about women and intimate violence made self-defense an inviable option.[163]

A. *Expert Testimony on Battered Woman's Syndrome*

Feminist legal theorists developed the idea of using an expert on intimate violence "to educate the judge and jury about the common experiences of battered women, to explain the context in which an individual battered woman acted, so as to lend credibility and provide a context to her explanation of her actions."[164] At the time the theories on women's self-defense cases were developed, few researchers in the scientific community

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[162] In self-defense cases, however, evidence of prior violence usually will be admissible, even without expert testimony on intimate violence. *See, e.g.*, State v. MacMillian, 64 So. 2d 856 (La. 1953); State v. Crigler, 593 P.2d 739 (Wash. 1979). In both cases, where expert testimony on battered woman's syndrome was unavailable or not used, the appellate courts reversed the trial courts' exclusion of evidence of prior specific acts of violence by the victim. Without expert testimony, however, the fact-finder is given no explanation of the impact of the violence on the battered victim and is presented with no evidence to challenge the fact-finder's own stereotypes of intimate violence or same-sex relationships.

[163] The decision to present expert testimony in any intimate violence/self-defense case must be made in light of the defendant's circumstances. Some defendants' cases may be better suited to a defense based on insanity, diminished capacity or "heat of passion." As feminist theorists have advised attorneys since the creation of expert testimony on battered woman's syndrome, blind reliance on the expert's testimony may lead to poor results. "[E]xpert testimony not clearly tied to the individual . . . defendant's circumstances and perspective should be used with care. . . . [T]he use of expert witnesses is often prudently foregone, especially where the defendant is credible and articulate." Schneider, *supra* note 93, at 646.

[164] Schneider, *supra* note 36, at 201.

were working with battered women. As a result, much of the early research feminist legal theorists relied upon was the work of Dr. Lenore Walker.[165] Even today, despite the number of researchers who have published in the area of intimate violence and battered women, the great majority of experts who testify in these cases still rely on Walker's model of battered woman's syndrome.[166]

Walker's theory consists of two distinct parts: first, a cycle theory of violence that describes the typical course of violent behavior in a relationship;[167] second, the social learning theory of learned helplessness to explain why battered women often fail to leave abusive relationships.[168] The cycle consists of three phases: (1) the tension building phase, characterized by minor abusive

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[165] *See* WALKER, *supra* note 25. Although a few researchers published before Walker, she was the first to offer an integrated explanation for violence in the home and its effects on victims. The majority of writers at that point were concerned with documenting the existence and extent of intimate violence in America. *See, e.g.*, R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES (1979); R. GELLES, THE VIOLENT HOME (1972); ROGER LANGLEY & RICHARD LEVY, WIFE BEATING (1977); DEL MARTIN, BATTERED WIVES (1976); ERIN PIZZEY, SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR (1974) (Pizzey, who wrote about battered women in England, is credited with having written the first book on intimate spousal violence); SUZANNE STEINMETZ, THE CYCLE OF VIOLENCE (1977); U.S. COMMISSION ON CIVIL RIGHTS, BATTERED WOMEN (1978); VIOLENCE IN THE FAMILY (Suzanne Steinmetz & Murray Arnold Straus eds., 1974).

[166] Schneider, *supra* note 36, at 202; Shad, *supra* note 117, at 1166 n.53. Cases in which courts have recited Walker's model include: Hawthorne v. State, 408 So. 2d 801 (Fla. Dist. Ct. App. 1982); People v. Gindorf, 512 N.E.2d 770 (Ill. App. Ct. 1987) (Walker testified both to battered woman's syndrome and mental illness), *cert. denied sub nom.*, 486 U.S. 1011 (1988); State v. Hodges, 716 P.2d 563 (Kan. 1986), *overruled by* State v. Stewart, 763 P.2d 572 (Kan. 1988); State v. Anaya, 438 A.2d 892 (Me. 1981); State v. Williams, 787 S.W.2d 308 (Mo. Ct. App. 1990); State v. Martin, 666 S.W.2d 895 (Mo. Ct. App. 1984); State v. Kelly, 478 A.2d 364 (N.J. 1984); State v. Leidholm, 334 N.W.2d 811 (N.D. 1983); People v. Torres, 128 Misc. 2d 129, 488 N.Y.S.2d 358 (Sup. Ct. 1985); State v. Moore, 695 P.2d 985 (Or. Ct. App. 1985); Fielder v. State, 683 S.W.2d 565 (Tex. Ct. App. 1985), *rev'd*, 756 S.W.2d 309 (Tex. Crim. App. 1988); State v. Ciskie, 751 P.2d 1165 (Wash. 1988); State v. Allery, 682 P.2d 312 (Wash. 1984) (en banc); Buhrle v. State, 627 P.2d 1374 (Wyo. 1981).

[167] WALKER, *supra* note 25, at xiv.

[168] *Id.* at 42-54; LENORE WALKER, THE BATTERED WOMAN SYNDROME (1984); Schneider, *supra* note 93, at 202; Shad, *supra* note 117, at 1167; Waits, *supra* note 59, at 282. The theory of learned helplessness was first developed in 1975 during research on animal behavior. In laboratory experiments dogs were given random electric shocks. Initially, the dogs attempted to control their environment to stop the shocks. But once they realized the futility of their attempts, the dogs became passive and compliant. Eventually, they made no attempts at escape, even when guided to an escape route. *See* SELIGMAN, HELPLESSNESS: ON DEPRESSION, DEVELOPMENT AND DEATH 21-44 (1975).

incidents;[169] (2) the acute battering phase, characterized by the abuser's severe uncontrollable explosion of violence;[170] and (3) the contrite, loving phase, characterized by the batterer's apologetic and caring behavior.[171] It is during the third phase that a woman is most likely to leave her abuser.[172] However, it is also the point at which she is most vulnerable to his apologies and least able to plan an escape.[173]

Walker applied the theory of learned helplessness in an effort to explain the often-asked question, "Why don't battered women leave?"[174] At first, Walker theorized, a battered woman

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[169] WALKER, *supra* note 25, at 56-59. Women may characterize an incident or a series of incidents as minor abuse, even though serious injury resulted. A person's perception of the violence as minor or extreme depends upon her own history of violence. If she has been a member of an abusive household where fists or objects are routinely thrown, she may consider a slap to be minor. If she has not had a history of violence, however, or the prior violence was relatively noninjurious, she may view a slap as a serious assault. Waits, *supra* note 59, at 292 n.136. Since the frequency and severity of violence tends to escalate over time in abusive relationships, BROWNE, *supra* note 15, at 105-07, and because the victim, especially one with a long history of abuse, tends to minimize both the severity and frequency of violence, a woman may report incidents of extreme violence as minor. BROWNE, *supra* note 15, at 7.

[170] WALKER, *supra* note 25, at 65-70. While the tension-building phase may be very long, lasting weeks, months or even years, the acute battering phase tends to last only 2 to 24 hours. *Id.* at 60 & 69. The effects of the violence, however, can be very serious. *See supra* notes 37-65 and accompanying text on typical violence. Typical injuries include bruises, lacerations, contusions, puncture wounds, broken bones and death. BROWNE, *supra* note 15, at 69.

[171] WALKER, *supra* note 25, at 65-70. The length of the contrite, loving phase may vary from couple to couple, and also may not remain constant in any one relationship. As the relationship progresses and the violence escalates, the time between the contrition phase and the tension-building phase generally decreases. *Id.* at 59. Browne reports in her study of battered women who kill their intimate partners that while nearly all batterers (87 percent) expressed some remorse after the initial violent episode, the percentage of men who did so dropped sharply (to 58 percent after the worst incident) as the relationship progressed. BROWNE, *supra* note 15, at 62-64.

[172] WALKER, *supra* note 25, at 66; Waits, *supra* note 59, at 294.

[173] BROWNE, *supra* note 15, at 111.

> Women in the homicide group showed a marked tendency to withdraw from outside contacts immediately after an abusive incident, rather than attempting to escape or take action against the abuser. . . . They also tended to underestimate the "damage". . . and, at least early in their relationships, entertained the unrealistic hopes for improvement of the abuser's behavior or of the relationship in the future. . . . As the violence escalated in frequency and severity, the women's perceptions of alternatives for escape became increasingly limited, and taking action on any of those alternatives seemed too dangerous to pursue.

Id. at 126.

[174] Browne identifies this question as probably the most frequently asked about battered women. BROWNE, *supra* note 15, at 109. In partial response, Browne notes that the

attempts to control the abusive incidents by identifying the cause of the attack and modifying her behavior accordingly.[175] If the behavior modification results in a desired outcome (the absence of violence), she attempts to replicate the behavior to recreate the outcome.[176] Abuse, however, tends to be both intermittent and unpredictable.[177] When a woman experiences violence despite her modified behavior, she begins to assume that she has no control over her environment.[178] This constant sense of lack of control causes the woman to lose self-esteem and to become docile and passive.[179] Even during periods of relative calm she is unable to act. The resultant psychological state is what is known as "battered woman's syndrome."[180]

Expert testimony on battered woman's syndrome has been ruled admissible by the majority of courts that have addressed the issue.[181] Even when accepted, however, many courts have

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question is based on the erroneous assumption that separation will end the violence. Furthermore, "[a]nother way to look at the issue is to ask, 'Why should the woman leave?' Why should the victim and, possibly, her children hit the road like fugitives, leaving the assailant the home and belongings, when he is the one who broke the law?" *Id.* at 110.

[175] WALKER, *supra* note 25, at 58; *see also* BROWNE, *supra* note 15, at 52 ("A concrete reason for an unexpected attack is comforting; women often attempted to adapt their behavior in light of the reasons given [by their spouses for the abuse], in an effort to prevent further trouble.").

[176] WALKER, *supra* note 25, at 44-45.

[177] Although a batterer will often claim to have been provoked by a particular event or by the victim's failure to perform a task properly, the reason given is often outside the victim's control (he failed to get an expected raise) or out of proportion to the perceived slight (she forgot to buy ham at the store). Attempts to avoid violence in such cases are bound to be futile. BROWNE, *supra* note 15, at 52.

[178] WALKER, *supra* note 25, at 45.

[179] [A] destructive psychological spiral is established; the beatings lead to lowered self-esteem and learned helplessness, which in turn make her unable to escape; her inability to escape makes her feel even more inadequate and helpless and also leaves her in a relationship which will lead to further beatings, which will further decrease her self-esteem.

Waits, *supra* note 59, at 283.

[180] When first used by Walker, however, the word "syndrome" was meant to describe the whole of the abusive relationship, both the cycle of violence and the physical and psychological effects on the victim. WALKER, *supra* note 25, at xiv. Therefore, initially the word "syndrome" focused not just on the woman but on the perpetrator of the violence. However, the way in which the expert testimony on battered women now is used focuses on the woman and her psychological state, rather than the cause of the violence, the batterer. See *infra* notes 186-97 and accompanying text (criticizing expert testimony on the syndrome by feminist legal scholars).

[181] Many courts have found expert testimony to be admissible: Ibn-Tamas v. United States, 455 A.2d 893 (D.C. 1983); People v. Aris, 264 Cal. Rptr. 167 (Cal. Ct. App. 1989);

limited the testimony of the expert or have limited the extent to which the jury can use the evidence in their deliberations. For example, in *State v. Hennum*[182] the court expressly limited the scope of the expert's testimony to a description of the syndrome and its characteristics. It also disallowed any conclusory opinion by the expert on whether the defendant in fact suffered from battered woman's syndrome.[183] Alternatively, in *State v. Williams*[184] the Missouri Court of Appeals specifically requested the expert's opinion on whether the defendant suffered from battered woman's syndrome, finding that without such testimony, the jury would be left without a guidepost.[185]

Terry v. State, 467 So. 2d 761 (Fla. Dist. Ct. App. 1985); Borders v. State, 433 So. 2d 1325 (Fla. Dist. Ct. App. 1983); Hawthorne v. State, 408 So. 2d 801 (Fla. Dist. Ct. App. 1982), *rev'd on other grounds*, 470 So. 2d 770 (Fla. Dist. Ct. App. 1985); Strong v. State, 307 S.E.2d 912 (Ga. 1983); Smith v. State, 277 S.E.2d 678 (Ga. 1981); People v. Gindorf, 512 N.E.2d 770 (Ill. App. Ct. 1987); People v. Minnis, 455 N.E.2d 209 (Ill. App. Ct. 1983); State v. Stewart, 763 P.2d 572 (Kan. 1988); State v. Hodges, 716 P.2d 563 (Kan. 1986); State v. Hundley, 693 P.2d 475 (Kan. 1985); Commonwealth v. Rose, 725 S.W.2d 588 (Ky. 1987); State v. Anaya, 438 A.2d 892 (Me. 1981); State v. Hennum, 441 N.W.2d 161 (Minn. 1983); State v. Williams, 787 S.W.2d 308 (Mo. Ct. App. 1990); State v. Norman, 378 S.E.2d 8 (N.C. 1989); State v. Baker, 424 A.2d 171 (N.H. 1980); State v. Myers, 570 A.2d 1260 (N.J. Super. Ct. App. Div. 1990); State v. Kelly, 478 A.2d 364 (N.J. 1984); State v. Gallegos, 719 P.2d 1268 (N.M. 1986); State v. Branchall, 684 P.2d 1163 (N.M. Ct. App. 1984); People v. Ciervo, 123 A.D.2d 393, 506 N.Y.S.2d 462 (1986); People v. Torres, 128 Misc. 2d 129, 488 N.Y.S.2d 358 (1985); People v. Emick, 103 A.D.2d 643, 481 N.Y.S.2d 552 (4th Dep't 1984); State v. Leidholm, 334 N.W.2d 811 (N.D. 1983); State v. Hill, 339 S.E.2d 121 (S.C. 1986); State v. Ciskie, 751 P.2d 1165 (Wash. 1988); State v. Allery, 682 P.2d 312 (Wash. 1984); State v. Steele, 359 S.E.2d 558 (W. Va. 1987); State v. Felton, 329 N.W.2d 161 (Wis. 1983).

Other courts have refused to admit such expert testimony. Mullis v. State, 282 S.E.2d 334 (Ga. 1981); People v. White, 414 N.E.2d 196 (Ill. 1980); Fultz v. State, 493 N.E.2d 659 (Ind. Ct. App. 1982); State v. Necaise, 466 So. 2d 660 (La. Ct. App. 1985); State v. Edwards, 420 So. 2d 663 (La. Ct. App. 1982); State v. Dannels, 734 P.2d 188 (Mont. 1987); State v. Martin, 666 S.W.2d 895 (Mo. Ct. App. 1984); State v. Thomas, 423 N.E.2d 137 (Ohio 1981), *habeas petition denied sub nom.* Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984), *aff'd*, 474 U.S. 140 (1985); State v. Moore, 695 P.2d 985 (Or. Ct. App. 1985); Commonwealth v. Dillon, 562 A.2d 885 (Pa. Super. 1989), *rev'd*, 598 A.2d 963 (Pa. 1991); Fielder v. State, 683 S.W.2d 565 (Tex. App. Ct. 1985), *rev'd*, 756 S.W.2d 309 (Tex. Crim. App. 1988); Burhle v. State, 627 P.2d 1374 (Wyo. 1981).

[182] 441 N.W.2d 793 (Minn. 1989).

[183] *Id.* at 799.

[184] 787 S.W.2d 308 (Mo. Ct. App. 1990).

[185] *Id.* at 313.

B. *Criticisms of the Admissibility and Use of Expert Testimony on Battered Woman's Syndrome*

Despite its acceptance by the majority of courts, there are numerous criticisms of the admissibility and use of expert testimony on battered woman's syndrome in self-defense cases. The primary objection of its admissibility from critics is that it may lead to an effective "license to kill" for battered women.[186] If jurors are permitted to hear evidence of the victim's violence before the moment at issue, they may conclude that even though the woman's act was not committed in self-defense, she should be acquitted because the victim deserved to die.[187]

A second criticism of the testimony's admissibility is that it may help create a new standard of reasonableness for women's self-defense cases.[188] By permitting an expert to testify that objectively unreasonable behavior was reasonable for one individual, the standard of reasonableness becomes wholly subjectivized in violation of the general principles of self-defense.[189] Battered

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[186] Rittenmyer, *Of Battered Wives, Self-Defense and Double Standards of Justice*, 9 J. CRIM. JUST. 389, 390 (1981).

The effects of the admission of expert testimony do not appear to support this criticism. Since 1979 when battered woman's syndrome expert testimony first began to be admitted regularly, the number of homicides committed by battered women have decreased approximately 25 percent. Male homicide rates have not been similarly affected. Browne & Williams, *supra* note 70, at 80.

[187] Mira Mihajlovich, Comment, *Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense*, 62 IND. L.J. 1253, 1255 (1987) (expert testimony in battered woman's self-defense cases is dangerous because it "encourages juries to decide difficult cases based on sympathy rather than legal requirements"); *see also* Rosen, *supra* note 108, at 50 ("Proponents of the battered woman's defense sympathize so much with the defendant that they have a tendency to focus exclusively on the psychological and physical harm suffered by the woman while forgetting the abuser. His right to life, though, is equally important as the woman's."); Marilyn Hall Mitchell, Note, *Does Wife Abuse Justify Homicide?*, 24 WAYNE L. REV. 1705, 1715, 1725-26 (1978) (acquittals of battered women may appear to sanction retaliation and revenge).

[188] The irony is that this is precisely why feminist legal theorists advocate the use of expert testimony. Feminist theorists argue that the male-based standard of reasonableness under which the critics view these "unreasonable" acts is unfair because it fails to take into account the dynamics of intimate violence that may make these acts reasonable for the battered victim. Expert testimony is needed to explain to the judge and jury how the woman's acts of survival may have been reasonable for her.

[189] Standards for reasonableness vary by jurisdiction. While no state has a purely subjective standard, many states now employ a subjective/objective standard. *See, e.g.*, State v. Leidholm, 334 N.W.2d 811, 818 (N.D. 1983) (the reasonableness of defendant's actions are to be viewed from the standpoint of someone of similar mental and physical

women, therefore, are judged under a more lenient standard than non-battered defendants who commit the same act under similar immediate circumstances.[190]

Alternatively, scholars who do not wish to limit or exorcise expert testimony on intimate violence criticize the manner in which the testimony is given, heard and used. Much of what scholars criticize lies in the failure of some courts, attorneys and expert witnesses to understand the nature of the testimony for self-defense cases.[191] First, the very term "battered woman's defense" to describe expert testimony on battered woman's syndrome is misleading because it erroneously suggests that battered women are offering a completely new, separate or perhaps experimental defense.[192] Instead, women are pleading a traditional case of self-defense, using the expert testimony to help explain why a victim's prior violence toward them makes a perception of imminent threat reasonable.

A second misperception to which courts regularly fall prey is that the testimony is being offered to show an impaired

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characteristics who knows what the defendant knew about the victim); People v. Torres, 128 Misc. 2d 129, 130, 488 N.Y.S.2d 358, 360 (1985) (defendant's subjective belief as to whether the danger was imminent and serious must be reasonable).

[190] Rosen, *supra* note 108, at 43 ("[S]uccessful use of the battered woman's defense theory depends in part on defense counsel's ability to persuade the court and jury that a person who did not suffer from battered woman's syndrome would not be justified under identical objectively identifiable circumstances."). *But see* Crocker, *supra* note 101, at 126-27 ("While the legal system maintains that the reasonable man standard is not biased because the term 'man' or 'men' includes both men and women, legal theorists and practitioners have shown that this claim is legally and experientially false."). *See also* BLACKMAN, *supra* note 15, at 189 (Crocker's explanation of the reasonableness of the battered woman is "an alternative form of reasonableness. . . . Careful attention to the battered woman's past experience with her husband's violence enhances one's capacity to understand her attack against him as reasonable. A true standard of reason is best approximated when all relevant factors that bear on good judgment are considered.").

[191] Schneider, *supra* note 36, at 198-99; Crocker, *supra* note 101, at 137-44.

[192] *See, e.g.*, State v. Scott, 1989 Del. Super. LEXIS 291, 292 (1989) ("Her claim which has been referred to as the 'battered woman's defense,' was and is that she was repeatedly assaulted."); State v. Simons, 731 P.2d 797, 802 (Idaho 1987) ("The 'battered-woman's defense' has not been directly addressed by our appellate courts."); State v. Alston, 515 A.2d 1280, 1281 (N.J. 1986) ("[T]he defense has made no decision regarding the use of applicability of the so-called battered-woman's defense."); Commonwealth v. Dillon, 562 A.2d 885, 889 (Pa. Super. Ct. 1989) ("Even if we were to speculate that the Supreme Court is about to adopt the 'battered-woman' defense in this Commonwealth, the opinion testimony offered by appellant in this case was properly rejected."), *rev'd on other grounds*, 598 A.2d 963 (Pa. 1991).

mental state. For example, in *State v. Hundley*[193] the Kansas Supreme Court interpreted the expert's testimony to mean that "[b]attered women are terror-stricken people whose mental state is distorted and bears a marked resemblance to that of a hostage or a prisoner of war. . . . They become disturbed persons from the torture."[194] The purpose of the testimony, however, is to show why the defendant's act was reasonable for any person with the same history of violence in her position. She is not arguing, as many courts believe, that she was incapable of interpreting her partner's actions at the time of the threat correctly. In essence, the court is reverting to a stereotype that women who kill must be crazy.

Third, courts have also contributed to the confusion by creating a new standard of reasonableness: the reasonable battered woman. In *State v. Williams*[195] the court stated that "the evidence is to be weighed by the jury in light of how the reasonable *battered woman* would have perceived and reacted in view of the prolonged history of abuse."[196] Again, the court's use of this different standard for battered women's cases reinforces the misperception that battered women do not react reasonably to threats of violence. A man in the battered woman's situation, the court implies, would not react similarly.[197]

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[193] 693 P.2d 475 (Kan. 1985).

[194] *Id.* at 479; *see also* Terry v. State, 467 So. 2d 761, 765 (Fla. Dist. Ct. App. 1985) (evidence of battered woman's syndrome should be admitted "to resolve the issue of . . . the appellant's . . . ability to knowingly and willingly waive her rights"); State v. Dannels, 734 P.2d 188, 193 (Mo. 1987) ("[I]n every case cited [in support of defendant's position], the defendant used abused spouse syndrome to prove that she did not have the requisite state of mind to commit the offense."); State v. Martin, 666 S.W.2d 895, 900 (Mont. 1984) (the expert would have testified that "diminished mental capacity is an attribute of the battered woman syndrome"); State v. Williams, 787 S.W.2d 308, 312 (Mo. Ct. App. 1990) ("[I]f the evidence of the syndrome it to have any meaning . . . it must be as a modification of the mental state required of the battered woman."); State v. Alston, 515 A.2d 1280 (N.J. Super. Ct. App. Div. 1986) (court ordered the defendant, who may have chosen to use an expert on battered woman's syndrome, to turn over her psychological and physical medical records as pre-trial discovery because defendants are required to give pre-trial notice of defenses based on insanity or mental defect).

[195] 787 S.W.2d 308 (Mo. 1990).

[196] *Id.* at 312-13; *see also Hundley*, 693 P.2d at 479 ("The objective test is how a reasonably prudent battered wife would perceive [the batterer's] demeanor."); State v. Hodges, 716 P.2d 563, 569 (Kan. 1986) (revises the *Hundley* test to a subjective/objective test of a reasonably prudent battered woman).

[197] Another significant problem with a court's use of a "reasonable battered woman" standard is that it may be unconstitutional under an equal protection argument. Mather, *supra* note 46, at 572 n.220 (citing Michael Buda & Teresa Butler, *The Battered Wife*

C. *Battered Woman's Syndrome and the Gay or Lesbian Defendant*

The primary problem with battered woman's syndrome expert testimony for all defendants is that it often enforces the very stereotypes of women that it seeks to dispel.[198] Courts, mimicking the experts' testimony, continue to describe battered women as helpless, passive and incapacitated victims, stereotypical attributes that have plagued women for centuries.[199] In light of judicial use of battered woman's syndrome, the success of Walker's theory rests more on its emphasis of the stereotypical helplessness of women than on its illumination of the dynamics of intimate violence.[200]

Gay and lesbian defendants, already the victims of stereotypes that portray them as gender-confused,[201] will be forced to

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Syndrome: A Backdoor Assault on Domestic Violence, 23 J. FAM. L. 359, 379 (1984)); *see* Craig v. Boren, 429 U.S. 190, 197 (1976) (a state may not use classifications based on gender if a gender-neutral standard will serve the state's purpose).

[198] *See* Schneider, *supra* note 36, at 198, 208-20.

[199] *See, e.g.*, *Hundley*, 693 P.2d at 479 (referring to battered women as "terror-stricken people whose mental state is distorted"); State v. Anaya, 456 A.2d 1255, 1266 (Me. 1983) (Battered women "typically stay with their men out of economic dependence and . . . frequently . . . react with passivity to the violence of their mates."); State v. Williams, 787 S.W.2d 308, 312 (Mo. Ct. App. 1990) (finding that the woman's failure to leave the relationship is a result of learned helplessness and characterizes the defendant as hysterical and crying after the final beating); State v. Allery, 682 P.2d 312, 315 (Wash. 1984) (describing learned helplessness as a condition that results when a woman is "psychologically locked into her situation due to economic dependence on the man, and an abiding attachment to him").

[200] Furthermore, this description of battered women as helpless has been challenged by more recent studies on victims' reactions to intimate violence:

> The suggestion that battered women are "helpless" is really a misnomer. Battered women are often resourceful and active in their efforts to avoid violence within the context of the relationship. They simply tend not to act in ways that would enable them to leave the relationship. Furthermore, especially for battered women who kill, the suggestion in Walker's language that they must be "helpless" if they have been battered can function to predispose the jury against them. The jurors may believe that a helpless woman could never pull a trigger, that a helpless woman could only endure the abuse, but could not respond in kind.

BLACKMAN, *supra* note 15, at 192. In addition, a dilemma is created for the defense to explain a passive, helpless person's active use of force against his or her partner. Schneider, *supra* note 36, at 220-22. Experts who rely exclusively on Walker's model and emphasize the defendant's passiveness and helplessness confuse the jury. The defendant's actions, for which she is on trial, appear to be inconsistent with her prior inability to leave, defend herself or seek help.

[201] *See supra* note 91 (reviewing prevalent stereotypes of gay men and lesbians).

defend not only their action, but their ability to fit within the stereotyped female gender-role. Experts who explain intimate violence in the terms used for battered woman's syndrome will encourage the jury to try to fit the same-sex relationship into the mold of a heterosexual relationship.[202] This can lead to increased stereotyping and confusion, as the expert and the jury will be forced to ask themselves who played the role of the man and who played the role of the woman.[203] The chance that either

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[202] Gay men and lesbians criticize the use of most feminist theories on intimate violence as it applies to them as an attempt to force same-sex couples into a heterosexist model of human relationships:

> Domestic violence in feminist legal theory is not necessarily applicable to lesbian legal theory because feminist legal theory is often based upon heterosexist assumptions. . . . [I]f lesbian legal theory were to adopt such a view [that domestic violence is caused by gender differences], it would hetero-relationize itself in the same manner in which the legal system often hetero-relationizes lesbian relationships. To sanction [Catherine] MacKinnon's view [that all violence against women is sex-based] would be to make relevant an inquiry into "who is the man" in order to determine the identity of the batterer.

Robson, *supra* note 63, at 584-86. If one views intimate violence as not just a result of gender differences, however, but also a result of differences in power created by disparities in race, economic power, education or physical or psychological strength, then violence between gay men and lesbians does not have to be seen in terms of gender. *See* Hart, *supra* note 42, at 174-75.

[203] The effect of the use of terms and ideas associated with battered woman's syndrome, stereotyped gender-roles and stereotypes of lesbian behavior was evident in the court documents submitted by Green's attorneys. *See* Brief for Appellant at 5, State v. Green, (No. 90-0039) (Fla. App. 4 Dist. 1990) ("Julio [the batterer/victim] was dominant in the relationship."); *id.* at 10 ("Julio was strong for a woman."); Appellant's Response to Motion in Limine at 3, *Green* (Fla. 15 Cir. 1989) (No. 88-14183 CF A02) ("Defendant will testify that she assumed the 'female' role and cared for the children. She was charged with keeping the peace in the household and caring for the minor children."). Defendant's Motion for Jury Selection Expert at County Expense at 2, *Green* (Fla. 15 Cir. 1989) (No. 88-14183 CF A02):

> [C]ounsel should not be expected to assess, without professional assistance, the potential impact on a fair trial of the opinions of individual jurors on such issues as sexism, the battered woman syndrome, homosexual and lesbian relationships, and the assumption by those in such relationships of traditional male-dominant and female-submissive roles. In short, competent defense counsel in a case where an abused party within a lesbian relationship who has assumed the subservient, female, mother role must have their assistance of a professional knowledgeable in these concepts in order to provide the effective assistance of counsel during voir dire.

See also Perez v. State, 491 S.W.2d 672, 673 (Tex. Crim. App. 1973) (although defendant, who was accused of murdering her lesbian ex-lover, testified that she was not a lesbian, the court noted that the defendant "always dressed like a man; kept her hair cut like a man; wore men's clothing . . . and . . . 'always takes a man's place.'") (quoting a witness).

the defendant or the batterer/victim will fit into stereotypical gender roles is minimal.[204]

Furthermore, the harsh reality is that the popular image of the battered woman as small, meek and cowering will not translate to a defendant as large and strong as his or her partner. Although the gay or lesbian defendant may not be equal in size and strength to the abusive partner, generally the discrepancy between the two will not be as extreme as the discrepancy between men and women. This discrepancy between men and women has been, at least in part, the basis courts have used to liberalize the proportional force rule and to subjectivize the standard for the defendant's belief of imminent danger.[205] Judges and jurors will have great difficulty understanding the dynamics of intimate violence when unable to view the defendant as the weaker, helpless victim described in Walker's model.[206]

The description of the battered person as a helpless, passive victim also does not translate to defendants who on prior occasions fought back or attempted to flee. Despite the recognition from experts on heterosexual intimate violence that battered women engage in defensive actions (mutual battering),[207] this aspect of intimate violence is antithetical to Walker's model of the passive victim. While it is not clear whether battered gay or lesbian victims engage in more mutual battering than heterosexual

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[204] Same-sex relationships may be less likely than heterosexual relationships to involve gender-type roles. Available data indicate that most lesbians and gay men do *not* play rigid 'husband/wife' roles in such areas as decision-making, sexual behavior, and the division of household tasks; although task specialization often occurs, it typically is based on individual skills and preferences, with neither partner assuming exclusively 'masculine' or 'feminine' tasks.

Herek, *supra* note 49, at 163.

[205] *See, e.g.*, State v. Wanrow, 559 P.2d 548, 558-59 (Wash. Ct. App. 1977) ("In our society women suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons.").

Commentators have also emphasized the physical differences between men and women to explain women's inability to ward off attacks successfully and for their ultimate use of a weapon against an unarmed man. *See* Crocker, *supra* note 101, at 127; Mather, *supra* note 46, at 565; Rosen, *supra* note 108, at 34, Schneider, *supra* note 93, at 632.

[206] *See* People v. Huber, 475 N.E.2d 599, 601 (Ill. App. Ct. 1985) (court found that the defendant's size was relevant when she was "physically larger than the decedent" in a lesbian self-defense case where there was a history of intimate violence).

[207] *See supra* notes 63-65 and accompanying text discussing mutual battering.

women,[208] the fact that the partners are of the same gender and are likely to be of relatively the same size may suggest to the fact-finder that the defendant did fight back or at least had the capacity to fight back.

If the defendant did engage in mutual battering or any other non-passive behavior, as Annette Green did, the prosecution will be able to argue that the defendant is not a "battered woman" because he or she does not fit the model. In *State v. Anaya*[209] the expert recited the Walker model when she testified that "battered wives typically stay with their men out of economic dependency, and that they 'most frequently . . . react with passivity' to the violence of their mates."[210] In this case, however, the defendant's boyfriend was unemployed throughout the time the couple lived together and the defendant had stabbed the victim on an earlier occasion.[211] The prosecution was permitted to use the expert's characterization of battered woman's syndrome to refute the "battered wife defense."[212]

Finally, both experts and courts have contributed to the creation of a new stereotype, the "good battered woman," that gay and lesbian defendants will have difficulty overcoming. Part of the problem arises from the characterization of the effects of intimate violence as a "syndrome."[213] The word appears to connote an illness for which there are definitive symptoms subject to accurate diagnosis. "Expert testimony on the 'battered woman syndrome' . . . although intended to address damaging myths and misconcreetions, also contributes in a subtle way to an image of maladjustment or pathology. Just the use of the term 'syndrome' connotes impairment to most people, including

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[208] *See supra* notes 63-65 and accompanying text discussing mutual battering.

[209] 456 A.2d 1255, 1266 (Me. 1983); *see also* Mullis v. State, 282 S.E.2d 334 (Ga. 1981) (court refused to admit expert testimony on battered woman's syndrome because the evidence showed that the defendant routinely fought back).

[210] *Anaya*, 456 A.2d at 1266 (quoting the trial transcript).

[211] *Id.*

[212] *Id.*

[213] *See, e.g.*, State v. Hodges, 716 P.2d 563, 566 (Kan. 1986) (discussing "[s]ymptoms manifested by a woman suffering from the syndrome"); State v. Hundley, 693 P.2d 475, 478 (Kan. 1985) (referring to battered woman's syndrome as a malady); Fielder v. State, 683 S.W.2d 565, 587 (Tex. Crim. App. 1985) (finding that battered women "suffer" from common characteristics), *rev'd on other grounds*, 756 S.W.2d 309 (Tex. Crim. App. 1988).

judges and jurors."[214] A battered gay man or lesbian who does not exhibit all or some of the "symptoms" (*e.g.*, passivity, economic or emotional dependence, lack of education or total isolation from family or friends)[215] will be categorized as a "bad battered woman" or not a battered woman at all.[216] Thus, the focus of the cases tends to be on whether the defendant is entitled to call himself or herself a "battered woman," not whether the defendant's action was reasonable or justified.[217]

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[214] BROWNE, *supra* note 15, at 177.

[215] *See, e.g.*, *Hundley*, 693 P.2d at 479 ("Quite likely emotional and financial dependency are the primary reasons for remaining in the household."); State v. Kelly, 478 A.2d 364, 372 (N.J. 1984) ("[T]he stigma that attaches to a woman who leaves the family unit without her children undoubtably acts as a further deterrent to moving out."); People v. Torres, 128 Misc. 2d. 129, 132, 488 N.Y.S.2d 358, 361 (Sup. Ct. 1985) (Battered women's "emotional paralysis is often reinforced by their traditional beliefs about the sanctity of home and family and their false hopes that things will improve. . . ."); *Fielder*, 683 S.W.2d at 587 ("A battered woman displays and suffers from certain common characteristics. . . . For whatever the reasons, these women find themselves in an abusive relationship from which they do not act to escape."); State v. Allery, 682 P.2d 312, 315 (Wash. Ct. App. 1984) (*en banc.*) (A battered women is "locked into her situation due to economic dependency on the man, and an abiding attachment to him. . . ."); State v. Ciskie, 751 P.2d 1165, 1172 (Wash. 1988) (en banc) (A battered woman is " 'very frustrated and accepts the kind of behavior that is going on, and rather than striking out tends to internalize it. . . .' ") (quoting the expert's trial testimony).

[216] Crocker, *supra* note 101, at 144-50. Some courts have refused to allow a woman who did not fit the stereotype of the good battered woman to use expert testimony. *See* Mullis v. State, 282 S.E.2d 334 (Ga. 1981) (court excluded expert testimony where the evidence showed that the defendant routinely fought back); State v. Williams, 787 S.W.2d 308, 310 (Mo. Ct. App. 1990) (trial court excluded expert testimony because the defendant was not married to the batterer).

Prosecutors also rely on these stereotypes in an attempt to refute the defendant's assertion that she is a battered woman. *See* State v. Anaya, 456 A.2d 1255, 1266 (Me. 1988) (state characterized the fact that the defendant worked as tending to refute her status as a battered woman); People v. Powell, 102 Misc. 2d 626, 424 N.Y.S.2d 626 (1980) (State's witness testified to defendant's knowledge and use of guns, implying that the defendant was not a helpless victim; the prosecution also argued that the defendant was a sexual masochist and voluntarily participated in the violence.); State v. Ciervo, 123 A.D.2d 393, 396, 506 N.Y.S.2d 462, 464 (2d Dep't 1986) (state characterized the defendant as a drug user, a neglectful mother, an adulteress, and an inadequate housekeeper to refute her claim that she suffered from battered woman's syndrome and to show how she provoked the violence).

[217] The fundamental problem with the battered woman stereotype is that it allows the legal system to continue considering the defendant's claim based on *who she is*, not on *what she did*. . . . [It] creates a very narrow range of options for a woman when she is judged by the legal system: either she is held to a battered woman's standard requiring strict adherence to judicially-imposed criteria, or she is relegated to meeting an inappropriate and inapplicable reasonable man standard.

Crocker, *supra* note 101, at 149-50.

Gay and lesbian defendants who try to use the battered woman's syndrome testimony are in for a double whammy. First, the theory is already flawed as it applies to heterosexual women. Second, the theory's procrustean bed may break under the tension of applying it to gay and lesbian relationships. In essence, the theory relies on gender stereotypes for its impact. Stereotypes, such as women's socialized passivity, their economic dependence and their lesser size, strength and fighting ability, are central to the explanation of why women are abused by men and why they have difficulty leaving or fighting back. Once battered woman's syndrome expert testimony is drained of these gendered notions, it offers little to no explanation of why intimate violence occurs in same-sex relationships or why battered gay men and lesbians have difficulty in separating themselves from the relationship.

D. *Toward a More Gender-Neutral Theory of Intimate Violence for Gay and Lesbian Defendants*

To avoid these problems, an expert witness in a battered gay man's or lesbian's self-defense case must present a theory of intimate violence that does not depend upon the gender of the batterer and victim. Since most of the current research on intimate violence is based on heterosexual women's experiences, however, there are no "genderless" theories of adult intimate violence available. Thus any expert on intimate violence must depend on theories that have been developed for heterosexual women. This problem is not insurmountable. At least two current theorists, Dr. Angela Browne and Dr. Julie Blackman, have authored studies on intimate violence that avoid many of the pitfalls associated with Walker's model.[218] In particular, neither

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[218] *See* BROWNE, *supra* note 15; BLACKMAN, *supra* note 15. In addition to WHEN BATTERED WOMEN KILL, Browne has also authored or co-authored a number of articles including: Angela Browne, *Assault and Homicide at Home: When Battered Women Kill*, 3 ADVANCES IN APPLIED SOCIAL PSYCHOLOGY (M. J. Sakes & L. Saxe eds., 1986); Angela Browne, *Comparison of Victim's Reactions Across Traumas*, Paper Presented at the Rocky Mountain Psychological Association Annual Meeting, Tucson, Arizona (1980); *Exploring the Effect of Resource Availability*, *supra* note 70; Angela Browne & Kirk R. Williams, *Trends in Partner Homicide: A Comparison of Homicides Between Marital and Non-Marital Partners from 1976-1987* (available from University of Massachusetts Medical School Library).

In addition to INTIMATE VIOLENCE: A STUDY OF INJUSTICE, Julie Blackman has authored or co-authored the following: Julie Blackman, *Emerging Images of Severely Bat-*

theorist's work depends on portraying the battered person as helpless or passive. Both characterize the battered woman's behavior in avoiding the violence and coping in other areas of her life as active.[219] Since battered women have encountered such difficulty when experts used Walker's theory of learned helplessness to explain why the women failed to leave, this difference is significant.

Browne's study is particularly compelling because its focus is specifically on battered women who killed, rather than on battered women generally. When the two groups were compared, Browne found that there were no significant differences between the backgrounds of the women (*i.e.*, education, employment status, violence in childhood),[220] but there were very significant differences in the behavior of the batterer and in the frequency and severity of their violence against their spouses.[221] By explaining

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tered Women and the Criminal Justice System, 8 BEHAV. SCI. & L. 121 (1990); Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RTS. L. REP. 227 (1986); Julie Blackman & E. Brickman, *The Impact of Expert Testimony on Trials of Battered Women Who Kill Their Husbands*, 2 BEHAV. SCI. & L. 413 (1984); Julie Blackman, *Battered Women Who Kill: New Perspectives on the Concept of Self Defense*, Paper Presented at American Psychological Association Meeting, Toronto, Canada (Aug. 1984); Julie Blackman, *Battered Women Who Kill and the Passover Question: Why Is This Night Different from All Other Nights? Or Is It?*, Paper Presented at Association for Women in Psychology, Denver, Colorado (Mar. 1987); Julie Blackman, *Conceptions of Justice and the Use of Expert Testimony on Battered Woman's Syndrome*, Paper Presented at Fourth Annual Adelphi University Applied Experimental Psychology Conference (1985); Julie Blackman, *Expert Testimony for Battered Women Who Kill: Dilemmas of Objectivity and Bias*, Paper Presented at American Psychological Association Meeting, New York, N.Y. (August 1987); Julie Blackman, *A Narrowed Vision: Clarity and Clouds in Victims of Family Violence*, Paper Presented at University of New Hampshire Family Violence Researchers' Conference, Durham, N.H. (July 1987).

[219] BROWNE, *supra* note 15, at 125-27; BLACKMAN, *supra* note 15, at 192-93.

[220] BROWNE, *supra* note 15, at 20-27, 181. Browne notes that the women in the homicide group did tend to be somewhat older at the time of the interview and came from a higher social background than battered women who did not kill. *Id.* at 21. Approximately 71 percent of the women in the homicide group, as opposed to approximately 65 percent of the women in the comparison group, experienced violence at home as children. *Id.* at 23.

[221] *Id.* at 55-74 & 89-97.

> Men in the homicide group used drugs more frequently than did men in the comparison group, and became intoxicated much more often. They were also more frequently given to threats and assaultative behavior: Significantly more men in the homicide group threatened to kill someone other than themselves; more of them abused a child or children, as well as their women partners; and their abuse of their mates was more frequent, more injurious, and more likely to include sexual assault.

these differences to a jury, the expert can lay the groundwork for the jury's interpretation of the defendant's act as reasonable:

> [A] knowledge of the history of the prior violence and the specific context within which the incident occurred is essential for understanding the woman's perceptions at the time of the homicide. . . . [T]he life of a battered woman is "replete with prior provocation, continuing apprehension, and the constant threat of impending danger." . . . As we learn more about battered women . . . those who kill . . . seem to be reacting to the level of violence perpetrated against them.[222]

To explain why some battered women fail to leave the relationship, Browne looks at the battered woman's dim view of her alternatives. Here, she compares battered women with other victims of trauma. Like victims of disasters and wars, battered women focus on self-protection and survival during the impact phase.[223]

> [B]attered women's affective, cognitive, and behavioral responses are likely to become distorted by their intense focus on survival. They may have developed a whole range of responses such as controlling their breathing or not crying out in pain, in an effort to mitigate the severity of the abuse during violent episodes, but have not developed any plans for escaping the abusive situations.[224]

They later "may be extremely suggestible or dependent and, during the period that follows, may minimize the damage or personal loss. This is often followed by a 'euphoric' stage, marked by unrealistic expectations about recovery."[225] Browne finds even a closer parallel between battered women and prisoners of war:

> "Fight or flight" responses are inhibited by a perception of the aggressor's power to inflict damage or death, and depression often results, based on the perceived hopelessness of the situation. The victims' perceptions of their alternatives become increasingly limited the longer they remain in the situation, and those alternatives that do exist often seem to pose too great a threat to survival.[226]

Belief that safe alternatives exist is still more unlikely for gay

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Id. at 181-82.

[222] *Id.* at 175-76 (quoting Nancy Fiora-Gormally, *Battered Wives Who Kill: Double Standard Out of Court, Single Standard In?*, 2 L. & HUMAN BEHAV. 133, 141 (1978)).

[223] *Id.* at 123.

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

[225] *Id.* at 123.

[226] *Id.* at 124.

men and lesbians who in fact have even fewer alternatives than heterosexual battered women.[227]

The victim's behavior and perceptions must be viewed in light of both factors: the level of violence perpetrated against them and their diminished ability to perceive escape opportunities. While the victim may initially remain with the batterer out of love or a sense of commitment or responsibility to the batterer or children, the victim's reasons for remaining change over the course of the relationship. Browne noted that

> as the severity and frequency of abuse increases, three additional factors have a major impact on the women's decision to stay with violent partners: (1) practical problems in effecting a separation [like the lack of access to shelters], (2) the fear of retaliation if they do leave, and (3) the shock reactions of victims to abuse.[228]

Browne's model creates a more stark and frightening portrait of the abusive relationship than the Walker model and, with the focus on the brutality of the abuser, permits a jury to interpret the defendant's reaction as reasonable more easily.

The most significant difference between Blackman's and Browne's study is Blackman's theory of why the battered woman remains in the relationship.[229] One of Blackman's fundamental premises is that "intimate violence does harm to victims' concepts of justice."[230] Without a sense of what is just, a person is less able to perceive injustice and act on this perception. Damage to a person's justice concept "narrows the vision of the victim, diminishing the ability to perceive alternatives and leading to an unusual level of acceptance of cognitive inconsistency as a way of coping."[231] Blackmun argued:

> [T]his tolerance of inconsistency is a reflection of the fundamental inconsistency of their lives: that the man who supposedly loves them

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[227] *See supra* notes 66-80 and accompanying text (discussing the lack of emergency services available for gay men and lesbians).

[228] BROWNE, *supra* note 15, at 110.

[229] Blackman's and Browne's theories are not incongruous and one may be used in conjunction with the other. Since Browne's research was done specifically on battered women who kill, however, the analysis is particularly useful for self-defense cases. As Browne notes, there are significant differences between the relationships of battered women who kill and battered women who do not. While Blackman's theory on why battered women do not leave also is useful, her discussion of the expert's role in the courtroom is especially important. *See* BLACKMAN, *supra* note 15, at 186-211.

[230] *Id.* at 116.

[231] *Id.* at 117.

> also hurts them. This characteristic of battered women is particularly important for jurors to understand, since it may cause her to describe the events of her life in ways that are seemingly contradictory and may be misinterpreted as signs of a generally poor memory or of bungled attempts to be deceptive.[232]

Thus, Blackman's research goes a little further than Browne's to explain the differences in perception that may result from long-term battering. Such an explanation may aid the jury in understanding more fully why many battered victims are able to survive within the context of a relationship without becoming mentally impaired.

Both Browne's and Blackman's works are especially important to gay and lesbian defendants because both include research that can be applied in a gender-neutral manner. Browne's comparison between victims of trauma and battered women is particularly useful because of the connection between non-gender-specific victims and battered victims. In addition, because Browne's study reveals significant differences in the violence of the relationship of battered women who kill, the jury's attention is shifted away from the psychology and gender of the defendant, and toward the batterer and his or her acts of violence.

Although Blackman's work is primarily the result of research on women, her theories are not necessarily gender-specific. While more research needs to be done on same-sex intimate violence, it is likely that any victim of ongoing intimate violence will experience the cognitive reactions that Blackman found in battered women. Finally, it is important to note that neither researcher uses the term "battered woman's syndrome." The absence in their theoretical language of such gender-based terminology makes the adaptation of the theories to gay men and lesbians easier.

Yet, the simple presentation of a gender-neutral theory of intimate violence will not create by itself an environment free from damaging stereotypes, it merely will not add to those which already exist. Jurors who believe that homosexuals routinely sexually molest children[233] or attempt to convert children to ho-

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[232] *Id.* at 194.

[233] *See* Herek, *supra* note 49, at 152-56 (noting that a 1989 Gallup poll found that 58 percent of Americans would not allow gay men or lesbians to teach elementary school).

mosexuality[234] may be predisposed to convicting a gay or lesbian defendant regardless of the case's merits.[235] Jurors who believe that same-sex couples are incapable of sustaining long-term relationships may be unable to understand the impact of intimate violence on a gay or lesbian individual.[236] They may assume that it is easier for a gay man or lesbian to leave the relationship merely because the relationship is not as important to them as relationships are to heterosexuals.[237] Therefore, experts must also be prepared to educate the jury on the nature of same-sex relationships and to refute the stereotypes and prejudices that both the judge and jury bring with them into the courtroom.[238]

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[234] *See id.* at 157-61 (citing studies that show children of gay or lesbian parents are no more likely to be homosexual than children of heterosexual parents).

[235] In *Green* the defense argued on appeal that at least two of the jurors were biased against the defendant because of her sexual orientation. One juror overheard a conversation between two other seated jurors in which one said, "That F'ing [sic] lesbian, they ought to hang that F'ing lesbian." Appellant's Brief at 34, State v. Green, No. 90-0039 (Fla. 4 Dist. 1990). *Green* was ultimately reversed, but not on this point. Green v. State, 575 So. 2d 796 (Fla. App. 1991).

[236] The fact that a significant number of jurors or potential jurors may believe certain myths about gay men or lesbians, or may be deeply prejudiced against them, should indicate to attorneys the need to use an expert during voir dire. In *Green* the defense attorney noted in his motion for a jury selection expert that

> the issue of homosexuality is also subject to a high degree of prejudice. The National Gay and Lesbian Task Force estimates that 80 percent of their population is homophobes [sic] and that lesbian [sic] and gays are the most frequent victims of hate crime in the United States. In this case, the jury will be subjected to detailed [accounts] of the Defendant's emotional and physical relationship with the alleged victim which involves [sic] acts that some may think are unnatural or immoral. Determination of the ability of the juror to be fair to one [who] is involved in a homosexual relationship is essential.

Appellant's Brief at 42, *Green*, No. 90-0039 (Fla. 14 Dist. Nov. 26, 1990). In *Green* the motion for an expert at *voir dire* was denied. The failure of the attorney to discover the jurors' biases may have been fatal to Green's case. *See also* Blackman, *Potential Uses for Expert Testimony*, *supra* note 217 (advocating the use of experts for grand juries, for arguing motions and in the sentencing process).

[237] *See* Herek, *supra* note 49, at 161-64 (citing studies tending to show that not only do gay men and lesbians have long-term intimate relationships, but that these relationships are equally as satisfying and are often as sexually exclusive as heterosexual relationships).

[238] One method the defense can use to expose and refute damaging stereotypes is to prepare carefully the expert beforehand for the questions on direct examination. For example, when asked why the battered defendant did not leave the household, the expert should list the difficulty gay men and lesbians have in finding adequate shelter space; the potential consequences of going to the police or having his or her sexual orientation made public; the history of difficulty gay men and lesbians have had with the police and the criminal justice system; the potential criminal liabilities associated with sodomy laws; and the difficulty in obtaining a temporary restraining order in some states.

In sum, an expert on same-sex intimate violence must be for the battered gay or lesbian defendant what experts on battered woman's syndrome are for battered women: a translator of their lives' experiences. Experts can "educate the judge and jury about the common experiences of battered [persons and] . . . explain the context in which an individual battered [person] acted, so as to lend credibility and provide a context to [his or her] explanation of [the] action."[239] Expert testimony can also refute judges' and jurors' own stereotypes of both intimate violence and the gay and lesbian lifestyle as well as "answer specific questions that are in judges' and jurors' minds of why the battered [defendant] didn't leave home . . . and most importantly, why [he or] she believed that the danger . . . faced on the particular occasion was life-threatening."[240] Gay or lesbian defendants on trial for killing their intimate partners who are not availed of this opportunity lack a fundamental right to be judged fairly without regard to their sexual orientation.

CONCLUSION

Victims of intimate violence endure in their relationships a type of violence and control that is incomprehensible to many people. Those people, who often are the judges and jurors in cases where the victim kills the batterer, have few references in their own lives by which to measure the battered defendant's thoughts or perceptions at the moment when he or she used lethal force in self-defense.

Feminist legal theorists, who were concerned with the fairness of battered women's self-defense cases, moved the judicial system to implement major changes in the way that battered women's cases were being heard and adjudicated. Many of the theories that evolved from the early work on battered women can inform the way that battered gay and lesbian self-defense cases are presented. At the same time, the gender-based assumptions that form a foundation for much of the theories cannot be translated readily to same-sex relationships.

Thus legal theorists, researchers and advocates must work together to create a form of expert testimony that does not de-

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[239] Schneider, *supra* note 36, at 201.

[240] *Id.* at 202.

pend upon the gender of the batterer or the victim. This does not negate what work has gone on before with battered women; it merely expands the horizons of the work to include persons who experience the same violence in their relationships, but who are not traditionally studied. Intimate violence, especially of the kind that is so severe and frequent as to end in the death of one partner, does not appear to discriminate between heterosexual and same-sex partners. Our theories and their application, especially in court, should reflect this reality.

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