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Leigh S. Goodmark

University of Maryland Francis King Carey School of Law, lgoodmark@law.umaryland.edu

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Transgender People, Intimate Partner Abuse, and the Legal System

Leigh Goodmark*

The unique experiences of transgender persons subjected to abuse have not been the focus of legal scholarship; instead, the experiences of transgender people are often subsumed in the broader discourse around domestic violence in the lesbian, gay, bisexual, and transgender (LGBT) community. This dearth of legal scholarship is not surprising given how little research of any kind exists on how transgender people experience intimate partner abuse. This is the first law review article to concentrate specifically on intimate partner abuse and the transgender community. The Article begins by discussing the difficulties of engaging in scholarship around this topic, noting the lack of a shared language and knowledge base for discussing intimate partner abuse in the transgender community. The Article then documents the barriers confronting transgender people seeking relief from intimate partner abuse, situates those barriers in the broader context of the structural and institutional violence and discrimination that are so prevalent in the lives of transgender people, and examines closely the inadequacy of the legal system to address the needs of transgender people subjected to abuse. This part of the Article is informed by the observations and insights of legal professionals working with transgender people subjected to intimate partner abuse, as well as the narratives of transgender people who have engaged the legal system. The Article then examines the gendered nature of intimate partner abuse against transgender people, arguing that such abuse can be understood not only through the lens of the patriarchal narrative of the battered women's movement, but also as a means of policing gender norms and affirming gender identity. The Article questions whether the legal system, which is the most developed and best funded response to domestic violence in the United States, can ever function as the cornerstone of an effective response to intimate partner abuse for transgender people. The Article concludes that we cannot create effective systemic responses to intimate partner abuse without understanding the particular needs of discrete groups of individuals subjected to abuse — like transgender people.

INTRODUCTION

On August 28, 2009, Paulina Ibarra, a twenty-four-year-old transgender¹ woman, was stabbed to death in her apartment in Hollywood.² Al-

* Professor of Law, Director of Clinical Education, and Co-Director, Center on Applied Feminism, University of Baltimore School of Law. Thanks to Dean Spade, Shannon Minter, Erez Aloni, Clare Huntington, Courtney Joslin, and the participants in the Feminist Legal Theory Collaborative Research Network for their guidance and suggestions. Thanks also to the many advocates who shared their time and insights with me: Linnet Caban, Ursula Campos-Gatjens, Victoria Cruz, Catherine Shugrue Dos Santos, Pooja Gehi, Virginia Goggins, Chanel Lopez, Morgan Lynn, Jarad Ringer, Marie Romeo, Terra Slavin, Andrew Sta. Ana, Wayne Thomas, and Kristin Tucker. Enormous thanks to Peggy Chu for her insight and research support, and to the staff of the *Harvard Civil Rights-Civil Liberties Law Review*, particularly Mollie Bracewell, Josh Freiman, Elizabeth Graber, Jason Lee, and William O'Neil, for their editorial assistance and enthusiasm for this Article.

¹ See discussion of the term “transgender” *infra* Part I.B.

though her death was originally investigated as a hate crime, police later dismissed that theory because the victim knew her attacker, according to Lieutenant Wes Buhrmester of the Los Angeles Police Department.³ Neighbors heard fighting and a woman screaming; police arrived seven minutes after a resident called 911 and found Ibarra lying on the floor.⁴ Jesus Catalan was arrested in July 2010, and in April 2011, he pled guilty to involuntary manslaughter in Ibarra's death.⁵ According to Buhrmester, prosecutors likely took the plea instead of trying Catalan for murder because "Catalan had apparently been injured during a struggle with Ibarra . . . Ibarra and Catalan knew each other and she was not killed during the course of a felony (like robbery)."⁶ Catalan was sentenced to twelve years' imprisonment and is eligible for parole in 2021.⁷

On March 30, 2010, Amanda Gonzalez-Andujar, a twenty-nine-year-old transgender woman, was found strangled to death and soaked with bleach in her apartment in New York City.⁸ Gonzalez-Andujar was lying naked on her bed; her apartment had been ransacked, her belongings destroyed, and her laptop missing.⁹ Detectives quickly came to suspect that Gonzalez-Andujar had been killed by a man she had been dating, and sources said that the damage in the apartment was likely attributable to a struggle between Gonzalez-Andujar and her killer.¹⁰ Security videos from the apartment building showed Gonzalez-Andujar's alleged killer, Rasheen Everett, entering the building at approximately 9:00 a.m. on March 27. Shortly thereafter, neighbors heard screaming and loud noises coming from Gonzalez-Andujar's apartment. Everett left the building seventeen hours later, carrying two bags.¹¹ Gonzalez-Andujar and Everett may have met in

² Karen Ocamb, *Suspect Sought in Transgender Murder in Hollywood*, LGBT/POV.COM (Nov. 13, 2009, 5:55 PM), <http://www.lgbtpov.com/2009/11/suspect-sought-in-transgender-murder-in-hollywood/> (page no longer available; original on file with author).

³ *Id.*; see also *Suspect Arrested in Hollywood Transgender Murder*, KTLA.COM (July 9, 2010, 9:08 AM), <http://www.ktla.com/news/landing/ktla-transgender-murder-arrest,0,2590940.story> (citing LAPD officer Sarah Faden's assertion that "the slaying was investigated as a hate crime").

⁴ Ocamb, *supra* note 2.

⁵ Karen Ocamb, *Jesus Catalan Pleads Guilty to Involuntary Manslaughter in Killing of Transgender Paulina Ibarra*, LGBT/POV.COM (Apr. 26, 2011), <http://lgbtpov.frontiersla.com/2011/04/26/jesus-catalan-pleads-guilty-to-involuntary-manslaughter-in-killing-of-transgender-paulina-ibarra/>.

⁶ *Id.*

⁷ *Id.*

⁸ Al Baker, *In Woman's Death, an Arrest but No Motive*, N.Y. TIMES, Apr. 15, 2010, at A22.

⁹ Michael J. Feeney & John Lauinger, *Transgender Woman Amanda González-Andujar Found Dead, Naked in Ransacked Apartment*, N.Y. DAILY NEWS (Mar. 31, 2010), http://articles.nydailynews.com/2010-03-31/news/27060521_1_1_queens-apartment-transgender-woman-medical-examiner.

¹⁰ Rocco Parascandola, *Transgender Woman Amanda Gonzalez-Andujar Was Strangled by Man She Was Dating, Cops Suspect*, N.Y. DAILY NEWS (Apr. 1, 2010), http://articles.nydailynews.com/2010-04-01/news/27060540_1_queens-apartment-transgender-woman-victim.

¹¹ Baker, *supra* note 8.

an Internet chat room;¹² sources speculated that Everett stole Gonzalez-Andujar's laptop to prevent police from finding email correspondence between them.¹³ Everett has been charged with murder, burglary, tampering with physical evidence, and possession of stolen property.¹⁴ If convicted, Everett could be sentenced to twenty-five years imprisonment.¹⁵

Paulina Ibarra was killed by a man she knew. Amanda Gonzalez-Andujar may have been killed by a man she was dating. Yet articles about their deaths do not mention the possibility that what Ibarra and Gonzalez-Andujar experienced was intimate partner abuse.¹⁶ Intimate partner abuse does not appear as part of the official narratives of what happened to these women¹⁷ — not in the news accounts, not in police statements, and not in the crimes with which Catalan and Everett were charged. Had these not been transgender women, however, the stories would certainly have been different; when women are killed, intimate partner abuse is often immediately

¹² *Id.*

¹³ Parascandola, *supra* note 10.

¹⁴ *Case Details — Charges, Queens Supreme Court — Criminal Term, Case # 01592-2010, Defendant Rasheen Everett*, N.Y. STATE UNIFIED COURT SYSTEM, http://iapps.courts.state.ny.us/webcrim_attorney/AttorneyWelcome (enter security-check characters and select “I agree”; then select “Case Identifier”; then enter case number “01592-2010” in case number field; then follow “01592-2010” hyperlink).

¹⁵ Michelle Garcia, *Arrest in Transgender Murder Case in Queens*, ADVOCATE.COM (Apr. 15, 2010, 2:15 PM), <http://www.advocate.com/news/daily-news/2010/04/15/arrest-transgender-murder-case-queens>.

¹⁶ I have chosen to use the term “intimate partner abuse,” as opposed to “intimate partner violence” or “domestic violence,” in order to capture the broad range of behaviors — beyond physical violence and extending outside the boundaries of the home — that serve to limit the autonomy of transgender people subjected to abuse in their relationships.

¹⁷ Intimate partner murder involving transgender victims is often described instead as a hate crime. *See, e.g.,* Dan Frosch, *Death of a Transgender Woman is Called a Hate Crime*, N.Y. TIMES (Aug. 2, 2008), <http://www.nytimes.com/2008/08/02/us/02murder.html>. Attorney Pooja Gehi suggests that much intimate partner abuse in the transgender community may be cast as hate crimes. Gehi posits that the failure to recognize these murders as intimate partner abuse stems both from the shame that perpetrators have in admitting that they are in relationships with transgender people and the assumption that when a transgender person is killed by an intimate partner, there must have been some financial relationship between the two (as indeed was suggested in the case of Amanda Gonzalez-Andujar, *see, e.g.,* Baker, *supra* note 8 (describing how Gonzalez-Andujar advertised her services as a “she-male” prostitute)). Interview with Pooja Gehi, Staff Attorney, Sylvia Rivera Law Project (Aug. 18, 2011) (notes on file with author); *see also* EMI KOYAMA, *THE TRANSFEMINIST MANIFESTO AND OTHER ESSAYS ON TRANSFEMINISM* 11–12 (2000), available at <http://zine.library.info/files/transfeminist%20manifesto.pdf> (“Murders of trans women, like that of prostitutes, are seldom taken seriously or sympathetically by the media and the authorities — especially if the victim is a trans woman engaged in prostitution.”). Attorney Terra Slavin pointed out the Ibarra case to me as an example of this phenomenon. Interview with Terra Slavin, Lead Domestic Violence Staff Attorney, L.A. Gay & Lesbian Ctr. (July 22, 2011) (notes on file with author). For a discussion of the ways in which media depictions of domestic violence render women subjected to abuse less visible, see generally Elizabeth McDowell, *When Reading Between the Lines Is Not Enough: Lessons from Media Coverage of a Domestic Violence Homicide-Suicide*, 17 J. GENDER, SOC. POL'Y & L. 269 (2009); Eliza Gray, *Transitions: What Will it Take for America to Accept Transgender People for Who They Really Are?*, NEW REPUBLIC, June 23, 2011, at 10.

considered by the police.¹⁸ Did the gender identities of Ibarra and Gonzalez-Andujar preclude the media and the police from seeing their deaths as possibly resulting from intimate partner abuse?¹⁹

If so, that oversight would not be terribly surprising. There is little information about intimate partner abuse in the transgender community in either the legal or social science literature.²⁰ Where information about violence against transgender individuals does exist, that violence is often characterized as generalized violence or as a hate crime rather than as intimate partner abuse.²¹

But transgender people do experience intimate partner abuse. The few studies that do exist confirm that significant numbers of transgender people are subjected to intimate partner abuse.²² Needs assessments of transgender

¹⁸ VERNON J. GEBERTH, *PRACTICAL HOMICIDE INVESTIGATION: TACTICS, PROCEDURES, AND FORENSIC TECHNIQUES* 459–62 (4th ed. 2006). That police look to intimate partners first is not surprising given that in a 1995–1996 national survey, “64% of the women who reported being raped, physically assaulted, and/or stalked since age 18 were victimized by a current or former husband, cohabiting partner, boyfriend, or date.” PATRICIA TJADEN & NANCY THOENNES, *FULL REPORT OF THE PREVALENCE, INCIDENCE AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY iv* (2000).

¹⁹ In a 2011 murder in Harlem, friends and family of transgender woman Camila Guzman immediately suspected that her boyfriend, Equan Southall, had killed her. Interview with Sharon Stapel, Exec. Dir., N.Y.C. Anti-Violence Project (Aug. 31, 2011) (notes on file with author). Police initially investigated the murder as a hate crime, but pushed by advocates and Guzman’s family and friends, they soon turned their investigation to Southall, who had dated Guzman for four months prior to the murder. *Id.* Southall reportedly turned himself in to police and confessed to committing the murder not long thereafter. *Id.*; see also Julie Bolcer, *Boyfriend Arrested in Murder of Transgender Woman in New York*, *ADVOCATE.COM* (Aug. 23, 2011), <http://www.advocate.com/news/daily-news/2011/08/23/boyfriend-arrested-murder-transgender-woman-new-york>. What never appeared in the media, but what Guzman’s “chosen family” shared with Jarad Ringer of the New York City Anti-Violence Project, was that on several occasions prior to her murder, Guzman had sought police assistance after being beaten by Southall, at least once appearing at the precinct with visible injuries, and yet police refused to investigate her claims. Telephone Interview with Jarad Ringer, Coordinator, Hate Violence and Police Relations Program, and Marie Romeo, Domestic Violence Program Coordinator, N.Y.C. Anti-Violence Project (Oct. 19, 2011) (notes on file with author).

²⁰ See, e.g., JANICE RISTOCK & NORMA TIMBANG, *RELATIONSHIP VIOLENCE IN LESBIAN/GAY/BISEXUAL/TRANSGENDER/QUEER [LGBTQ] COMMUNITIES: MOVING BEYOND A GENDER-BASED FRAMEWORK* 5–6 (2005).

²¹ The 2011 National Transgender Discrimination Survey reported that 19% of transgender people surveyed had experienced violence at the hands of a “family member,” with the rates higher for people of color, undocumented people, and the low-income and unemployed. Because the survey does not distinguish intimate partner abuse from abuse by a parent or child, however, it is impossible to tell what percentage of those surveyed experienced the kind of abuse at issue in this Article. JAIME M. GRANT ET AL., *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY* 100 (2011).

²² But, as Caroline White and Joshua Goldberg have noted:

It is impossible to discuss the extent of violence against [transgender] people with any certainty, as current tracking mechanisms are problematic Even the usual sources of reporting of interpersonal violence are largely unavailable to [transgender] survivors: police and emergency medical services are compromised options because of their histories of violence against [transgender] people, particularly sex trade workers and prisoners . . . [, and] gendered anti-violence organizations —

people in Chicago and Philadelphia reveal high rates of intimate partner abuse among respondents: 56.3% of respondents in Philadelphia and 66% in Chicago reported violence in their homes.²³ Transgender people made up at least 4.7% of the survivors accessing services through the member programs of the National Coalition of Anti-Violence Programs (NCAVP) in 2009.²⁴

If intimate partner abuse is in large part about controlling and enforcing gender norms within relationships,²⁵ transgender people, by virtue of their failure to conform to such norms, are particularly vulnerable to abuse. Moreover, they experience that abuse in a specific context that makes accessing resources challenging at best. Given that the domestic violence legal system operates imperfectly even for those people around whose goals and needs it was designed (white, straight, middle-class women),²⁶ transgender people subjected to abuse are highly unlikely to find relief by turning to the legal system for assistance.

This Article examines the phenomenon of intimate partner abuse in the transgender community, focusing on the structural and institutional barriers that make transgender people unlikely to access the best funded and most often suggested resource for addressing domestic violence: the justice sys-

often the first line of contact for survivors — are often inaccessible because of general public uncertainty whether they provide services to [transgender] survivors.

Caroline White & Joshua Goldberg, *Expanding Our Understanding of Gendered Violence: Violence Against Trans People and Their Loved Ones*, 25 CANADIAN WOMEN'S STUD. 124, 125 (2006). While White and Goldberg's observations are based on their work in Canada, similar problems exist in the United States and are discussed *infra* sections II.B.2, II.C.1.

²³ Gretchen P. Kenagy, *Transgender Health: Findings from Two Needs Assessment Studies in Philadelphia*, 30 HEALTH & SOC. WORK 19, 23 (2005); Gretchen P. Kenagy & Wendy B. Bostwick, *Health and Social Service Needs of Transgender People in Chicago*, 8 INT'L J. TRANSGENDERISM 57, 62 (2005). These studies suggest, but fail to specify, that abuse experienced "in the home" is committed by intimate partners. See Kenagy, *supra*, at 23; Kenagy & Bostwick, *supra*, at 62. In an older study from San Francisco, 37% of transgender women reported physical abuse within the last year; 44% of those recently abused were abused by an intimate partner. S.F. DEPT OF PUB. HEALTH, THE TRANSGENDER COMMUNITY HEALTH PROJECT 5, 9 (1999), available at <http://hivinsite.ucsf.edu/InSite?page=cftg-02-02>. Among transgender men, 27% reported physical abuse within the past year; 30% of those transgender men who were recently abused were abused by an intimate partner. *Id.* Other studies show similar rates of victimization. See, e.g., DIANA COURVANT & LOREE COOK-DANIELS, TRANS AND INTERSEX SURVIVORS OF DOMESTIC VIOLENCE: DEFINING TERMS, BARRIERS AND RESPONSIBILITIES 3 (1998), available at <http://www.survivorproject.org/defbarresp.html> (finding that 50% of respondents to the Gender, Violence, and Resource Access Survey of transgender and intersex individuals reported having been raped or assaulted by an intimate partner).

²⁴ NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER DOMESTIC/INTIMATE PARTNER VIOLENCE IN THE UNITED STATES IN 2009 14 (2010) [hereinafter NCAVP 2009]. I write "at least" because it is possible that, rather than identifying themselves as transgender men or women, respondents identified themselves simply as men or women. Valerie Jenness, *From Policy to Prisoners to People: A "Soft Mixed Methods" Approach to Studying Transgender Prisoners*, 39 J. CONTEMP. ETHNOGRAPHY 517, 542-43 (2010) (noting that the vast majority of male-to-female transgender inmates surveyed labeled themselves as female when asked about their gender identity, while considerably fewer identified as transgender).

²⁵ See *infra* Part III.

²⁶ See LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 23-25 (2012).

tem.²⁷ The Article will suggest the need to rethink the use of the justice system to meet the needs of transgender people subjected to abuse.

This Article proceeds in four parts. Part I outlines the challenges of writing about intimate partner abuse of transgender people. Part II examines the experiences of intimate partner abuse in the transgender community, situating those experiences in the wider context of the lives of transgender people and drawing heavily on the experiences of advocates working with transgender people subjected to abuse. Part III considers the ways in which the abuse of transgender people is a gendered experience. Part IV asks whether and how the current system for responding to intimate partner abuse could be responsive to the needs of transgender people subjected to abuse. The Article concludes that we cannot make domestic violence law and policy without really understanding the needs of those who are using the system.

I. THE CHALLENGES OF WRITING ABOUT INTIMATE PARTNER ABUSE IN THE TRANSGENDER COMMUNITY

A. *Writing as a Cisgender Person*

I am mindful of the responsibilities attendant to the task I have taken on as a cisgender²⁸ person writing about the transgender community. Julia Serano cautions:

If cissexual academics truly believe that transsexual and intersex people can add new perspectives to existing dialogues about gender, then they should stop reinterpreting our experiences and instead support transsexual and intersex intellectual endeavors And they should finally acknowledge the fact that they have no legitimate claim to use transsexual and intersex identities, struggles, and histories for their own purposes [N]on-intersex, cissexual artists and academics should put their pens down, open up their minds, and simply listen to what we have to say about our own lives.²⁹

²⁷ See *infra* section II.C.

²⁸ The term “cisgender” refers to people whose gender identity is consistent with their birth-assigned sex. See Dean Spade, *Be Professional!*, 33 HARV. J.L. & GENDER 71, 76 n.6 (2010) (explaining that “cisgender” is a term “commonly used in trans and allied communities and in trans scholarship for people who are not transgender”).

²⁹ JULIA SERANO, WHIPPING GIRL: A TRANSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY 212 (2007). I have taken Jacob Hale’s *Suggested Rules for Non-Transsexuals Writing about Transsexuals, Transsexuality, Transsexualism, or Trans_____*, SANDY STONE, <http://sandystone.com/hale.rules.html> (last updated Nov. 18, 2009), to heart in writing this piece. Those rules include starting from a place of humility and recognizing that I am not a transgender person; remembering my subject position and power as a writer; paying close attention to and incorporating the writings of transgender people; and working to avoid

Appreciating Serano's caution, I have nonetheless chosen to write this Article because of the dearth of legal scholarship on the intimate partner abuse of transgender people. As Paisley Currah, Richard M. Juang, and Shannon Price Minter state in their introduction to the seminal collection *Transgender Rights*, my goal is to create scholarship that "does *not* situate [transgender] people as a means to an end or an intellectual curiosity but considers the well-being of [transgender] people as an end in itself."³⁰

B. Writing About Transgender Issues

A major challenge of writing this Article was that of language. We do not yet have a common language accepted by all interested parties for talking about the experiences of transgender people. "Transgender" itself is seen by some as a contested term. Ethnographer David Valentine, for example, argues that the definition of transgender is "tentative and shifting, precisely because the meanings of the term are still being negotiated."³¹ Transgender is often defined as an "umbrella term used to refer to all individuals who live outside of normative sex/gender relations — that is, individuals whose gendered self-presentation (evidenced through dress, mannerisms, and even physiology) does not correspond to the behaviors habitually associated with the members of their biological sex."³² Two dangers of using the term "transgender" in this broad way are the possibilities of including those who do not themselves identify as transgender and of elevating a single commonality over other differences in identity — race, class,

essentialization of the experiences of transgender people. *Id.* I hope that I have been successful in hewing to them.

³⁰ Paisley Currah et al., *Introduction to TRANSGENDER RIGHTS* xxii (Paisley Currah et al. eds., 2006) (emphasis in original; alterations added).

³¹ DAVID VALENTINE, *IMAGINING TRANSGENDER: AN ETHNOGRAPHY OF A CATEGORY* 38 (2007). Law professor Libby Adler has suggested that defining "transgender" broadly is a political choice

designed to maximize the size of the constituency, suggest alliances among people who are not exactly alike, create a home for as many people in need as possible, and to hint to onlookers that they or someone they care about might be implicated. As transgender advocates in the legal domain articulate rights claims on behalf of transgender people, however, this definition will (and has already begun to) taper.

Libby Adler, *T: Appending Transgender Equal Rights to Gay, Lesbian and Bisexual Equal Rights*, 19 COLUM. J. GENDER & L. 595, 606–07 (2010); see also SERANO, *supra* note 29, at 26 (describing "transgender" as a strategic, essentialist political term).

³² VIVIANE K. NAMASTE, *INVISIBLE LIVES: THE ERASURE OF TRANSEXUAL AND TRANSGENDERED PEOPLE* 1 (2000); see also JOEY L. MOGUL ET AL., *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* xix (2011); BRIAN MOULTON & LIZ SEATON, *TRANSGENDER AMERICANS: A HANDBOOK FOR UNDERSTANDING* 5 (Human Rights Campaign 2005); Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 392 (2001); Sonja Shield, *The Doctor Won't See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment*, 31 N.Y.U. REV. L. & SOC. CHANGE 361, 365 (2007).

disability, sexual orientation — that shape an individual transgender person's experiences.³³

Sociologist Val Jenness learned this lesson in her study of transgender inmates in California. A consultant on the research team who Jenness believed to be transgender

encouraged me to avoid using the term “transgender” with transgender inmates. Odd, I thought. Later, I discovered she offered this advice at least in part because she does not identify as transgender; despite the fact that I hired her precisely because I assumed she is transgender only to find out she identifies, simply as “a woman” (who underwent “anatomical corrections” to reflect that identity).

In contrast, other experts encouraged me to use the term transgender because it is, they argued, well equipped to capture a range of identities.³⁴

Understanding that the choice to use the umbrella term “transgender” may be contested, there is some general agreement around the usage; as Currah, Juang, and Minter note, “[s]ince about 1995, the meaning of *transgender* has begun to settle, and the term is now generally used to refer to individuals whose identity or expression does not conform to the social expectations for their assigned sex at birth.”³⁵ For that reason, I have chosen to use the term “transgender” to talk about a range of people whose lives are admittedly quite dissimilar and who may experience abuse in very different ways.

Other language choices raise similar issues. While some use the term “cisgender” to refer to people whose gender identity is consistent with their birth-assigned sex,³⁶ others have not adopted the term. Similarly, the thoughtful use of pronouns is essential in discussing the lives of transgender people. While some transgender people have adopted the terms “hir” and “ze” as generic pronouns for both genders, others choose not to use those terms because they identify solely and strongly as a particular gender — as him or her rather than hir, she or he rather than ze. Per Dean Spade's example in his article, *Resisting Medicine, Re/modeling Gender*, I have chosen to

³³ See, e.g., Christoph Hanssmann, *Counting Us In: Problems and Opportunities in Health Research on Transgender and Gender-Nonconforming Communities*, 8 SEATTLE J. FOR SOC. JUST. 541, 554 (2010) (explaining that “‘transgender’ is a category that has varying degrees of resonance among those incorporated within the term, and identification with the term may vary along racial and class lines”); see also NAMASTE, *supra* note 32, at 266–67 (“[T]his umbrella term may erase the specificity of different [transgender], and especially transsexual, individuals.”).

³⁴ Jenness, *supra* note 24, at 527–28.

³⁵ Currah et al., *supra* note 30, at xiv (emphasis in original).

³⁶ See Spade, *supra* note 28, at 76 n.6.

use gender-nonspecific terms when discussing hypothetical people, and gender-specific terms for people who identify as a particular gender.³⁷

The decision about whether to use the term “passing” — a term that is quite contested among transgender people — was equally difficult. “Passing” is frequently used as shorthand to describe the experience of having one’s gender identity accepted unquestioningly by those around hir. Transgender activist Kate Bornstein defines passing as “the act of appearing in the world as a gender to which one does not belong, or as a gender to which one did not formerly belong.”³⁸ Passing is a complicated concept; it can be a derogatory term to the extent that it signifies deception by the transgender person or represents images imposed upon transgender people by a society with expectations about how men and women should look and act.³⁹ I have chosen to use the term sparingly and largely limited to the context of discussing the desire to be perceived by others as one’s authentic gender. I recognize, however, that even with this limited use, the presence of that term in this Article may be perceived as offensive.

C. *Writing About Transgender People and Intimate Partner Abuse*

The lack of hard data on transgender people’s experiences with intimate partner abuse is another factor that makes this a difficult article to write. This lack of data — this “informational erasure”⁴⁰ — is not confined to the context of intimate partner abuse, but rather is an issue across a number of fields of study. To the extent that scholarship exists, it sometimes uses the

³⁷ Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 17 n.7 (2003). My thanks to Professor Erez Aloni for suggesting this solution.

³⁸ KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN AND THE REST OF US* 125 (1994). One transgender man, though, used the term “passing” to refer to his life as a woman. *Id.* Another man explains,

Now it no longer feels like passing. Before transitioning I was living in a pretend place. Passing is about putting out the façade. I passed to the world for decades, now I’m not passing. I’m being . . . [N]ow I never think, am I being perceived as a man? I mean that was a moment-to-moment conversation when I was trying to live as a woman.

CHRISTOPHER A. SHELLEY, *TRANSPeOPLE: REPUDIATION, TRAUMA, HEALING* 49 (2008).

³⁹ Interview with Sharon Stapel, *supra* note 19. “Passing” is also a racially charged term, denoting everything from “the antebellum practice of slaves passing as white to the recent phenomenon of ‘cyber-race,’ or racial passing on the Internet,” which could make use of the term doubly problematic for transgender people of color. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 72 (2006); *see also* RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 68 (2012) (describing passing as “the effort to deracinate oneself”).

⁴⁰ Hansmann, *supra* note 33, at 567–68 (drawing the term from Greta R. Bauer et al., “*I Don’t Think This Is Theoretical; This Is Our Lives*”: *How Erasure Impacts Health Care for Transgender People*, 20 J. ASS’N NURSES AIDS CARE 335, 348 (2009)). One participant in a study on research and the transgender community explained, “I’m one of the dead ones. Remember . . . just because you’re [transgender], you’re one of the dead ones. All of this time that I’ve survived, I’m one of the walking dead because we’re not counted; we’re not represented anywhere.” *Id.* at 568 (quoting the study by Trans PULSE).

term “LGBT” as a proxy for “same-sex” and focuses on same-sex domestic violence. It frequently fails, however, to discuss specifically transgender people subjected to abuse;⁴¹ the “T” is appended to the “LGB” without any meaningful consideration of the issues particular to the “T” community.⁴²

Kristin Tucker, Program Manager at the Northwest Network, suggests that the lack of data stems from the failure of those seeking to study transgender people to do so with the goal of improving the lives of the community.⁴³ Because institutions and system actors have shown no inclination to use their scholarship in this way, transgender people have not been willing to make themselves available for studies.⁴⁴

Tucker notes that much of the work that does exist on abuse in transgender communities comes from institutions dedicated to LGBT issues, like the NCAVP.⁴⁵ To supplement that survey data and the few existing studies on abuse of transgender people, I interviewed a number of legal advocates and lawyers who work regularly with transgender people subjected to abuse. Those interviews gave me a richer and more nuanced understanding of the experiences of transgender people subjected to abuse and of the context within which that abuse occurs. The advocates’ interactions with the legal system on behalf of their transgender clients were instrumental in helping me understand the legal landscape that confronts transgender people subjected to abuse.

A final challenge involves teasing out intimate partner abuse from the other forms of violence that transgender people regularly confront. As is clear from the stories of Paulina Ibarra and Amanda Gonzalez-Andujar, it is often difficult to determine whether the violence transgender people experience should be characterized as hate crimes, bullying, intimate partner abuse, random acts of violence, or ordinary assaults. Regardless of the label attached to such actions, however, violence against transgender people is

⁴¹ See, e.g., Shannon Little, *Challenging Changing Legal Definitions of Family in Same-Sex Domestic Violence*, 19 HASTINGS WOMEN’S L.J. 259, 260 (2008) (explaining that studies suggest that domestic violence occurs in the LGBT and the heterosexual communities with equal frequency, but citing only to studies of same-sex domestic violence).

⁴² Adler, *supra* note 31, at 598–600; see also Nancy J. Knauer, *Gender Matters: Making the Case for Trans Inclusion*, 6 PIERCE L. REV. 1 (2007). There are some who question whether transgender people should have ever been included under the LGB umbrella, given that being transgender is not a sexual orientation but a gender identity. See Ellen A. Jenkins, *Taking the Square Peg Out of the Round Hole: Addressing the Misclassification of Transgender Asylum Seekers*, 40 GOLDEN GATE U. L. REV. 67, 68 (2009); Dylan Wade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 270 (2005) (“Gender identity is who one is. Sexual orientation is to whom one is attracted. Transgender people have all sexual orientations: some transgender people are straight, some are gay, some are bisexual, and some are queer.” (citation omitted)).

⁴³ Interview with Kristin Tucker, Program Manager, Nw. Network (July 25, 2011) (notes on file with author).

⁴⁴ *Id.*

⁴⁵ *Id.* Note, also, that most of the available research focuses on the abuse of transgender women; for that reason, the experiences of transgender men are not as well documented in this Article.

disturbingly common. Surveys of transgender people document the disproportionately high rates of violence they experience. One survey featuring data collected from 1996 to 1997 found that over their lifetimes, almost 60% of transgender people experienced either violence or harassment: over half experienced verbal abuse, 23% were stalked or followed, almost 20% were assaulted without a weapon, 10% were assaulted with a weapon, and almost 14% experienced rape or sexual abuse.⁴⁶ Other surveys have found similarly high rates of violence against transgender people.⁴⁷ In its 2010 survey of hate violence in the lesbian, gay, bisexual, transgender, queer, and HIV-affected communities in the United States, the NCAVP found that transgender people were twice as likely to be assaulted or discriminated against and 1.5 times more likely to experience intimidation than cisgender white individuals.⁴⁸ In 2011, NCAVP found that transgender people of color were 1.85 times more likely to experience discrimination, 1.28 times more likely to experience physical violence, and 2.38 times more likely to experience police violence than other survey respondents.⁴⁹ The survey also found that transgender people were more likely than other survey respondents to experience severe violence, and less likely to receive law enforcement assistance.⁵⁰

Transgender women are particularly likely to be marked for violence. The 2011 NCAVP survey found that transgender women made up 40% of murder victims in the survey, but constituted only 10% of the overall sample;⁵¹ the 2010 survey reported similar findings.⁵² Surveys of the trans-

⁴⁶ Emilia L. Lombardi et al., *Gender Violence: Transgender Experiences with Violence and Discrimination*, 42 J. HOMOSEXUALITY 89, 95–96 (2001); see also SHELLEY, *supra* note 38, at 91 (finding that 50% of transgender people surveyed had been physically assaulted); Lori Sexton et al., *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men's Prisons*, 27 JUST. Q. 835, 858 (2010) (summarizing studies on rape in the transgender population).

⁴⁷ Sexton et al., *supra* note 46, at 858 (summarizing surveys finding that 37% of transgender people “experienced physical abuse because of their gender identity or presentation”; between 43% and 59% experienced some form of violence).

⁴⁸ NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, HATE VIOLENCE AGAINST THE LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER AND HIV-AFFECTED COMMUNITIES IN THE UNITED STATES IN 2010 7 (2011), available at <http://www.avp.org/publications/reports/reports.htm> (click “2010 National Hate Violence Report (full report)” hyperlink) [hereinafter NCAVP 2010]. To compile this report, NCAVP collected and analyzed aggregate program-level data from seventeen programs serving lesbian, gay, bisexual, transgender, queer, and HIV-affected communities in fifteen states, as well as 850 individual surveys submitted by twelve of the organizations. *Id.* at 12.

⁴⁹ NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, HATE VIOLENCE AGAINST THE LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER AND HIV-AFFECTED COMMUNITIES IN THE UNITED STATES IN 2011 30 (2012), available at <http://www.avp.org/publications.htm> (click “NCVAP releases National Report on anti-LGBTQH Hate Violence in 2011”) [hereinafter NCAVP 2011].

⁵⁰ *Id.* at 20, 36.

⁵¹ *Id.* at 9.

⁵² NCAVP 2010, *supra* 48, at 7 (noting that 44% of the murder victims in the 2010 study were transgender women, though transgender women constituted only 11% of the 2010 sample).

gender community have found that 98% of violence in the transgender community was targeted at transgender women, and that transgender women of color accounted for 70% of all murders of transgender people reported internationally in 2003.⁵³

II. INTIMATE PARTNER ABUSE AND THE TRANSGENDER COMMUNITY

How transgender people experience abuse within their intimate relationships and how gender identity affects access to public systems (like the legal system) are shaped by the context in which transgender people live. That context makes the experience of abuse quite different from that of the prototypical victim around whom domestic violence law and policy were constructed. Situating the specific experience of abuse within that broader societal context is essential to understanding and developing an accessible response for transgender people subjected to abuse.⁵⁴

A. *The Transgender Experience of Intimate Partner Abuse*

Intimate partner abuse is frequently defined as physical, sexual, economic, and/or emotional abuse perpetrated against an intimate partner in order to assert power and control over that partner.⁵⁵ Transgender people experience all of those forms of abuse in their intimate relationships. But because, as Nicola Brown notes, “[e]ffective abuse tactics often exploit identity-based vulnerabilities,”⁵⁶ physical, sexual, and emotional (as well as other forms of) abuse may manifest quite differently when a transgender person is the subject of that abuse.

⁵³ Caroline White Holman & Joshua M. Goldberg, *Social and Medical Transgender Case Advocacy*, 9 INT’L J. TRANSGENDERISM 197, 206 (2006).

⁵⁴ I am conscious of Libby Adler’s warning that to succeed in winning protections for transgender people under the law, advocates have constructed a victimization narrative for transgender people.

One might respond, “well trans people are despised and powerless.” Of course, there is far too much truth to that depiction. Still, trans advocates ought to ask themselves whether they want to participate in inscribing that painful reality in law and legal argument and whether their repeated assertions that trans people are despised and powerless might contribute to the ongoing production of that reality.

Adler, *supra* note 31, at 612. I have raised similar concerns in the context of domestic violence law and policy. See GOODMARK, *supra* note 26, at 61 (arguing that inscribing battered women syndrome in the law perpetuates problematic stereotypes about women subjected to abuse).

⁵⁵ See, e.g., *Domestic Violence*, U.S. DEP’T OF JUSTICE, <http://www.ovw.usdoj.gov/domviolence.htm> (last updated Aug. 2012). It may be difficult to find a common vocabulary to describe transgender abuse; as Janice Ristock and Norma Timbang explain, “finding the most accurate language to describe intimate partner violence can be difficult because language itself is not neutral and reflects many assumptions that are embedded within dominant culture.” RISTOCK & TIMBANG, *supra* note 20, at 3.

⁵⁶ Nicola Brown, *Holding Tensions of Victimization and Perpetration: Partner Abuse in Trans Communities*, in INTIMATE PARTNER VIOLENCE IN LGBTQ LIVES 153, 156 (Janice L. Ristock ed., 2011).

Transgender advocacy groups have identified forms of abuse unique to relationships involving transgender people. Physical abuse tactics include “assault, mutilation or denigration of body parts such as chest, genitals, and hair that signify specific cultural notions of gender.”⁵⁷ Other forms of physical abuse may entail touching one’s body in ways or places one has asked not to be touched,⁵⁸ or insisting that rough sex is the way that “real” men or women enjoy intercourse.⁵⁹ Transgender-specific forms of emotional abuse include calling someone by the wrong pronoun or referring to hir as “it,”⁶⁰ threatening to reveal the transgender person’s gender identity or birth-assigned sex to employers, landlords, immigration officials, friends, or family members,⁶¹ and making threats related to the transgender person’s custody of or relationship with hir children.⁶² Some transgender people experience low self-esteem and anxiety around body issues.⁶³ Abusers play on these emotions by telling the transgender person that ze isn’t a “real” man or woman,⁶⁴ ridiculing hir body,⁶⁵ and dictating how hir gender identity is expressed (through selection of clothes, hairstyles, and such).⁶⁶ Abusers also destroy or hide clothing, wigs, binders,⁶⁷ and other accessories used to reinforce the transgender person’s authentic gender identity.⁶⁸

The medical needs of transgender people also provide opportunities for abuse. Abusers deny access to transgender people’s medical treatments or hormones, destroy needed medical supplies, and coerce their partners into

⁵⁷ White & Goldberg, *supra* note 22, at 126.

⁵⁸ FAMILY SERV. TORONTO, *LOVES ME, LOVES ME NOT: A RESOURCE FOR TRANS PEOPLE WHO MAY BE WONDERING ABOUT THEIR RELATIONSHIP 2*, available at <http://www.family.servicetoronto.org/programs/dks/AboutAbuseTrans.pdf> (last visited Oct. 23, 2012); FORGE, *TRANSGENDER & SOFFA DOMESTIC VIOLENCE/SEXUAL ASSAULT RESOURCE SHEET 4*, available at http://forge-forward.org/wp-content/docs/TransDV-SA_2011-02.pdf (last updated 2011). FORGE is a Wisconsin organization dedicated to providing peer support for members of the transgender community and their significant others since 1994. FORGE provides national training and technical assistance on transgender issues. See *About Us*, FORGE, <http://forge-forward.org/about/> (last visited Oct. 16, 2012).

⁵⁹ FORGE, *supra* note 58, at 4.

⁶⁰ FAMILY SERV. TORONTO, *supra* note 58, at 2; FORGE, *supra* note 58, at 4.

⁶¹ White & Goldberg, *supra* note 22, at 126; FAMILY SERV. TORONTO, *supra* note 58, at 2; FORGE, *supra* note 58, at 4.

⁶² White & Goldberg, *supra* note 22, at 126; FORGE, *supra* note 58, at 4.

⁶³ See KOYAMA, *supra* note 17, at 12 (“It is easy for an abuser to make a trans woman feel ugly, ashamed, worthless and crazy Abusers get away with domestic violence by taking away women’s ability to define their own identity and experiences — the areas where trans women are likely to be vulnerable to begin with.”); see also COURVANT & COOK-DANIELS, *supra* note 23, at 5.

⁶⁴ FAMILY SERV. TORONTO, *supra* note 58, at 2; FORGE, *supra* note 58, at 4; Interview with Chanel Lopez, Community-Based Counselor/Advocate, N.Y.C. Anti-Violence Project (Feb. 22, 2012) (notes on file with author).

⁶⁵ FAMILY SERV. TORONTO, *supra* note 58, at 2; FORGE, *supra* note 58, at 4.

⁶⁶ FAMILY SERV. TORONTO, *supra* note 58, at 2; FORGE, *supra* note 58, at 4.

⁶⁷ Binders are used by some transgender men to camouflage their breasts. See generally *Binding Methods: An Expensive Process for Trans Folks and Butch Women*, QUEERCENTS, <http://queercents.com/2008/12/31/binding-methods-an-expensive-process-for-trans-folks-and-butch-women/> (last visited Oct. 16, 2012).

⁶⁸ FAMILY SERV. TORONTO, *supra* note 58, at 2; FORGE, *supra* note 58, at 4.

refraining from pursuit of medical treatment.⁶⁹ Abusers may also withdraw or withhold support for transgender-specific medical care or services (surgery, hormones, or electrolysis, for example).⁷⁰ Economic abuse may include exploitation of the transgender person's financial dependence by demanding that ze reimburse hir partner for any financial assistance provided — even requiring hir partner to work illegally to pay hir back.⁷¹

Transgender people are uniquely vulnerable to abuse due to their marginalization within mainstream culture. “Non-trans[gender] perpetrators are acutely aware of the individual and institutional vulnerabilities faced by trans[gender] people and these vulnerabilities feature explicitly in the abuse tactics and harm done.”⁷² Accessing supportive services could deprive abusers of many of the tactics they use to isolate and disempower their transgender partners. But transgender people subjected to abuse confront a number of barriers when seeking assistance. Those barriers include lack of economic and social support, unavailability of safe shelter, and gender segregation of domestic violence services.

B. Barriers to Seeking Assistance

The domestic violence service system operates on the assumption that people subjected to abuse should separate from, and should want to separate from, their abusers.⁷³ As a consequence, services and supports are largely dedicated to achieving separation.⁷⁴ This reliance on separation-based remedies is problematic for many people subjected to abuse, who may be unwilling or unable to end their relationships for a variety of reasons, including love, economics, safety, immigration, children, and religion, to name only a few.⁷⁵ While transgender people subjected to abuse almost certainly have the same hesitancy about ending their relationships, and face many of the same barriers as cisgender people, those concerns and obstacles play out differently in the context of transgender people's lives.

⁶⁹ FORGE, *supra* note 58, at 4. Medical care may be difficult for transgender people to secure in any event; 19% of transgender people report being denied medical care because of their gender identity. GRANT ET AL., *supra* note 21, at 6. Transgender people also face difficulties in qualifying for and keeping insurance coverage, and might be reluctant to terminate relationships with partners whose insurance plans cover crucial medical services and medications. See Kari E. Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination Against Transsexuals*, 11 COLUM. J. GENDER & L. 88, 96–97 (2002).

⁷⁰ White & Goldberg, *supra* note 22, at 126; FORGE, *supra* note 58, at 4.

⁷¹ White & Goldberg, *supra* note 22, at 126.

⁷² Brown, *supra* note 56, at 162.

⁷³ GOODMARK, *supra* note 26, at 82; see generally Sally Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487 (2008); Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

⁷⁴ GOODMARK, *supra* note 26, at 80–96.

⁷⁵ *Id.* at 96–101.

1. *Social and Economic Support.*

The relationship a transgender person has with hir abusive partner may be that person's only source of support, in any number of ways. Transgender people receive less emotional support from their families than cisgender people,⁷⁶ which may make them more reliant upon their partners for love and stability. The support needed to acknowledge publicly one's abuse may be hard to find in the broader transgender community. The same type of "gag order" that keeps some members of marginalized communities from reporting abuse, due to fear of bringing unwanted negative scrutiny to their communities, operates within the transgender community as well.⁷⁷ As advocate Kristin Tucker explains, in a political and social climate in which strangers regularly subject transgender people to vicious abuse, and where earning social recognition and acceptability is so difficult, it seems unwise to talk about the ways in which transgender people are abused in intimate relationships.⁷⁸ Indeed, some transgender people subjected to abuse opt to suffer silently rather than to perpetuate negative stereotypes of transgender people and their relationships.

Transgender people may rely on their partners for other forms of support as well. Transgender people are among the most economically vulnerable populations in America.⁷⁹ "Transgender people," writes attorney Pooja Gehi, "are more likely than non-trans people to be poor From an early age, transgender people are more likely to be kicked out of their homes, forced out of school, shut out of jobs, and denied healthcare, which makes them more likely to be homeless, poor, and/or eventually incarcerated."⁸⁰ Transgender people are over ten times more likely to be homeless than the

⁷⁶ Rhonda J. Factor & Esther D. Rothblum, *A Study of Transgender Adults and Their Non-Transgender Siblings on Demographic Characteristics, Social Support, and Experiences of Violence*, 3 J. LGBT HEALTH RES. 11, 13 (2007).

⁷⁷ Brown, *supra* note 56, at 153; FORGE, *supra* note 58, at 1.

⁷⁸ Interview with Kristin Tucker, *supra* note 43.

⁷⁹ The indicia of economic discrimination in the lives of transgender people must be understood against a backdrop of wider systemic and structural inequality that disproportionately affects them. David Valentine points to a range of policies responsible for the economic marginalization of transgender people, including "neoliberal policies which further disenfranchise the poor and entrench poverty, associated 'quality of life' urban policing, the corporatization of public space, and the diminution of the public sphere." VALENTINE, *supra* note 31, at 227.

⁸⁰ Pooja Gehi, *Struggles from the Margins: Anti-Immigrant Legislation and the Impact on Low-Income Transgender People of Color*, 30 WOMEN'S RTS. L. REP. 315, 324 (2009); see also SHANNON MINTER & CHRISTOPHER DALEY, TRANS REALITIES: A LEGAL NEEDS ASSESSMENT OF SAN FRANCISCO'S TRANSGENDER COMMUNITIES Part II(A)(4) (2003) (finding that 40% of transgender people lacked health insurance); Gabriel Arkles, *Safety and Solidarity across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 525 (2009) (explaining that poverty and homelessness remain common among transgender people); Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207, 211 (2008) (noting increased risk of homelessness for transgender women).

general population of the United States; studies have found that between 6.4% and 25.5% of transgender survey respondents were homeless at the times of the studies.⁸¹ The 2011 National Transgender Discrimination Survey found that transgender people experienced twice the rate of unemployment as cisgender individuals.⁸² A 2001 study found that transsexuals⁸³ were almost three times more likely to experience economic discrimination (defined as being fired, not being hired, being demoted, losing a promotion, or being unfairly disciplined at work) than cisgender people.⁸⁴ Studies estimate that between 23% and 51% of transgender people in the United States are unemployed.⁸⁵ Half of the transgender respondents to one survey reported having experienced employment discrimination;⁸⁶ a 2011 survey found that 90% of transgender people had been harassed, mistreated, or discriminated against on the job, and that 47% had experienced an adverse job outcome related to their gender identity.⁸⁷

State assistance for transgender people having difficulty finding work may not be available, and accessing that assistance may expose transgender people to harm. The 2011 National Transgender Discrimination Survey found that 22% of transgender respondents had been denied equal treatment in public accommodations, including government agencies.⁸⁸ In a survey of the transgender population in San Francisco, 20% of respondents reported experiencing discrimination at the hands of social service agencies.⁸⁹ Transgender people who are eligible for welfare benefits, like others seeking federal aid, sometimes must engage in a work activity to receive benefits.⁹⁰

⁸¹ MINTER & DALEY, *supra* note 80, at 27, 32; Sexton et al., *supra* note 46, at 857; *see also* GRANT ET AL., *supra* note 21, at 4 (finding that 19% of transgender people surveyed had been refused a home or apartment because of their gender identity, 11% had been evicted, and 55% had been homeless).

⁸² GRANT ET AL., *supra* note 21, at 3.

⁸³ This study focused particularly on transsexuals — transgender people who have undergone sex reassignment surgery — as opposed to transgender people generally. *See* Lombardi et al., *supra* note 46.

⁸⁴ *Id.* at 96. The study also found that experiencing economic discrimination as a result of one's transgender status correlated strongly with experiencing a violent incident because one was transgender. *Id.* at 98.

⁸⁵ Sexton et al., *supra* note 46, at 847.

⁸⁶ MINTER & DALEY, *supra* note 80, at Part II(A)(4).

⁸⁷ GRANT ET AL., *supra* note 21, at 3.

⁸⁸ *Id.* at 5.

⁸⁹ MINTER & DALEY, *supra* note 80, at Part II(A)(4).

⁹⁰ In order to receive federal welfare monies, states are required to ensure that a certain percentage of welfare recipients are engaged in work activities, which can include job training and community service. Benjamin F. Burry, *Testing Economic Reality: FLSA and Title VII Protection for Workfare Participants*, 1 U. CHI. LEGAL F. 561, 561 (2009) ("States are required to ensure that a certain percentage of welfare recipients work or meet other federal mandates."). States are free to use state-only money to subsidize programs without requiring that recipients work or meet other federal mandates, but such programs are scarce. Rebecca E. Zietlow, *Two Wrongs Don't Add Up To Rights: The Importance of Preserving Due Process in Light of Recent Welfare Reform Measures*, 45 AM. U. L. REV. 1111, 1128 (1996).

Seeking financial assistance from the state can be a jarring experience. As Kristin Bumiller observes in the context of women subjected to abuse:

During a symposium on welfare reform as a queer issue, Roz Blumenstein, the director of the Gender Identity Project, was quoted as saying: “Transgender people are not safe at workfare sites The majority of my clients were harassed verbally and physically at their workfare sites. Many of them felt so unsafe at their sites that they chose to drop out of the program and forego aid.”⁹¹ Indeed, Blumenstein explained, many transgender people who felt unsafe at their workfare sites in New York gave up state assistance and “returned to working as prostitutes on the streets, where they felt safer.”⁹²

Given the lack of social and economic support that many transgender people experience, separating from an abusive partner who provides one or both of those forms of support may not be a transgender person’s best option. Leaving is an even less viable option for transgender people who lack housing.

2. *Access to Shelter.*

Access to safe shelter is particularly problematic for transgender people. Housing insecurity is a tremendous issue for transgender people, who are often homeless or at risk of homelessness and who may only find temporary shelter by moving from friend to friend.⁹³ The 2011 National Transgender Discrimination Survey found that of those transgender people surveyed who sought shelter, 55% were harassed by shelter staff, 29% were

Thrust into new relationships with the public sphere, women often find that they experience brutalities that mimic the violence they hoped to leave behind. When women turn to the state for welfare, social services, support, and/or redress, they encounter the dilemma of avoiding either the “Scylla of private patriarchy” or the “Charybdis of public patriarchy.” In both the public and private spheres, forging autonomy and equality requires “dependent subjects” to go up against the masculine norms of the family and state. These women are always at risk of trading one form of dependency for another; by seeking protection outside the family they are risking the imposition of new forms of control by a multiplicity of laws and agents of the state.

KRISTIN BUMILLER, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE 97 (2008).

⁹¹ Richard E. Blum et al., *Why Welfare Is a Queer Issue*, 26 N.Y.U. REV. L. & SOC. CHANGE 201, 205–06 (2000–2001). Joseph DeFilippis further explained that work sites required transgender people to wear

“proper” business clothing [I]f you are a transgender person, the job center’s definition of what is appropriate business attire may very well be different from how you may define it, what you are comfortable in as a transgender person, and this is one way of weeding people out right there and then. Transgender persons are either faced with doing something that feels completely unnatural, to be part of a system that does not make room for individuals, or they are unfairly rejected by that system.

Id. at 212.

⁹² *Id.* at 206.

⁹³ Brown, *supra* note 56, at 156; see also Daniella Lichtman Esses, *Afraid to Be Myself, Even at Home: A Transgender Cause of Action Under the Fair Housing Act*, 42 COLUM. J.L. & SOC. PROBS. 465, 483 (2009); Sexton et al., *supra* note 46, at 857.

turned away because of their gender presentation, and “22% were sexually assaulted by residents or staff.”⁹⁴

Attorney Wayne Thomas contends that the inability to secure safe shelter is the single most important issue facing transgender people subjected to abuse. Thomas argues that safe housing is the priority for most transgender people subjected to abuse; other issues, including seeking legal protection from abuse, are secondary and will never be addressed if stable housing is not established.⁹⁵ Giving up secure housing with an abusive partner might be feasible if safe, welcoming options for shelter existed, but in most communities, the gender-based orientation of services for women subjected to abuse makes finding alternate shelter extremely challenging, if not completely impossible.

Domestic violence services are, for the most part, gender-segregated.⁹⁶ Shelters for women subjected to abuse approach the question of admitting transgender women in three ways: by flatly refusing to admit transgender women, by accepting only post-operative transgender women, or by having a policy of accepting clients who can document that they are undergoing a gender transition.⁹⁷

Those shelters that refuse to admit transgender women do so largely because they do not see transgender women as women;⁹⁸ instead, transgender women are usually defined “as men, regardless of how the individual battered [transgender] person identifies him- or herself or lives his or her life”⁹⁹ These shelters often admit residents based on their sex at birth rather than their gender identity,¹⁰⁰ and in some cases without regard to whether the individual has undergone sex reassignment surgery. Underlying the refusal to admit transgender women to shelters is fear; transgender women are seen as “invaders” if they attempt to access gender-segregated services.¹⁰¹

Other shelters and domestic violence services providers open their doors to transgender women on the condition that they look to others like

⁹⁴ GRANT ET AL., *supra* note 21, at 4.

⁹⁵ Interview with Wayne Thomas, Managing Attorney, Gay Men’s Domestic Violence Project (Aug. 29, 2011) (notes on file with author).

⁹⁶ SHELLEY, *supra* note 38, at 105; *see also* COURVANT & COOK-DANIELS, *supra* note 23, at 6; Dean Spade, *Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, in TRANS GENDER RIGHTS, *supra* note 30, at 217, 227.

⁹⁷ NAMASTE, *supra* note 32, at 177–78.

⁹⁸ ALLISON COPE & JULIE DARKE, TRANS ACCESSIBILITY PROJECT: MAKING WOMEN’S SHELTERS ACCESSIBLE TO TRANSGENDERED WOMEN ch. 5 (Oct. 1999), available at <http://www.queensu.ca/humanrights/tap/toc.htm>.

⁹⁹ Charlene Allen & Beth Leventhal, *History, Culture, and Identity: What Makes GLBT Battering Different*, in SAME-SEX DOMESTIC VIOLENCE: STRATEGIES FOR CHANGE 73, 77 (Beth Leventhal & Sandra E. Lundy eds., 1999).

¹⁰⁰ Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 753 (2008). Spade notes that other institutions that serve low-income people, including homeless shelters, drug treatment facilities, and group homes for youth, employ similar policies. *Id.*

¹⁰¹ COURVANT & COOK-DANIELS, *supra* note 23, at 6.

women — that they “pass.” The safety and comfort of other residents were the rationales given for these policies.¹⁰² According to Vivian Namaste:

I was informed that [a transsexual woman] would be accepted into some shelters “if the person doesn’t come across as too terribly masculine.” Staff people claimed that the physical appearance of transsexual women was related to their ability to “fit in” Other people decide if a transsexual woman is “feminine” enough, if she is “really” a woman, if her presence will be “disruptive,” and if she has the right to the services offered to women.¹⁰³

Such shelters often make case-by-case decisions about whether transgender women are eligible for their services. This process can entail ad hoc decisions regarding whether the transgender woman is “appropriate” as a client,¹⁰⁴ requirements that the client be undergoing or have completed sex reassignment surgery,¹⁰⁵ or requirements conditioning the provision of services on whether the transgender woman promises not to “exhibit any cross-gendered expression or disclose information relating to being [transgender].”¹⁰⁶ In addition to “passing,” the transgender woman may also have to conform to other stereotypes of women subjected to abuse, like passivity or powerlessness, in order to qualify for services.¹⁰⁷ As Goldberg and White observe:

The result is a hierarchy of inclusion where the degree to which the survivor matches the current dominant construction of woman or man within the traditional gender or sex and other societal classifications (white, middle-class, able-bodied, heterosexual) indicates the degree they are likely to be included in discussions about violence and considered acceptable or “appropriate” to access anti-violence services.¹⁰⁸

¹⁰² Vivian Namaste notes that conversations about safety in the context of shelters revolve around the “psychological and physical space of non-transsexual shelter residents and staff members [T]his discourse does not concern itself with the physical safety of a transsexual or [transgender] woman, or with her psychological well-being.” NAMASTE, *supra* note 32, at 182.

¹⁰³ *Id.* at 180.

¹⁰⁴ Holman & Goldberg, *supra* note 53, at 202.

¹⁰⁵ NAMASTE, *supra* note 32, at 178.

¹⁰⁶ White & Goldberg, *supra* note 22, at 126.

¹⁰⁷ GOODMARK, *supra* note 26, at 63 (describing the stereotypes attributed to women subjected to abuse).

¹⁰⁸ Joshua Mira Goldberg & Caroline White, *Reflections on Approaches to Trans Anti-Violence Education*, in INTIMATE PARTNER VIOLENCE IN LGBTQ LIVES, *supra* note 56, at 56, 62. Emi Koyama tells the story of Akasha, a transgender woman sex worker who sought shelter after being beaten by her partner. Emi Koyama, *Disloyal to Feminism: Abuse of Survivors Within the Domestic Violence Shelter System*, in THE COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 208, 211–13 (Andrea Smith et al. eds., 2006). Akasha could not reveal her identity as a sex worker to the shelter staff. *Id.* at 212. “Being the first [transgender] woman at the shelter was trouble enough” Shelter staff outed her as transgender to other residents.

Transgender women who are denied access to domestic violence services, particularly shelters, are left with few options when they decide to seek separation from their partners. Transgender women subjected to abuse are frequently sent to men's homeless shelters, where they are vulnerable to attack.¹⁰⁹ Once in men's shelters, transgender women "are told that they cannot wear any feminine clothing and have to present as men, which obviously is not only disrespectful but personally painful as well."¹¹⁰

In some areas, particularly in major cities, shelters are required by statute or policy to admit residents based on gender identity rather than birth-assigned sex. Such requirements exist in both New York City and the District of Columbia. In New York, explains attorney Pooja Gehi, transgender advocates worked for a very long time to get shelters to agree to house residents based on their gender identity rather than their birth sex.¹¹¹ Prior to that change, transgender women subjected to abuse rarely accessed the shelter system because if they could not go to a women's shelter, they were not willing to go to a shelter at all.¹¹² Despite the changes, transgender women subjected to abuse are still afraid to access shelters. Gehi reports that she refers transgender clients subjected to abuse only to the very few shelters that she knows are transgender affirming and supportive.¹¹³ Similarly, attorney Morgan Lynn notes that although under the District of Columbia's human rights law people are supposed to be sheltered based on gender identity rather than birth-assigned sex, many shelters refuse to follow the law.¹¹⁴ Transgender women are turned away from women's shelters if gatekeepers for those services refuse to recognize them as women.¹¹⁵ Transgender women accessing emergency shelter resources for victims of crime are regularly sent to hotels used for men, and *not* to hotels for women.¹¹⁶ One of Lynn's clients, a transgender woman, called her from a men's hotel crying,

Id. Akasha believed that the shelter took her in only because of local civil rights ordinances that require transgender inclusion. *Id.*

¹⁰⁹ Transgender woman Victoria Cruz, a domestic violence advocate with the New York City Gay and Lesbian Anti-Violence Project explained:

If I am a victim of domestic violence and need to go someplace, I have no place to go, because male-to-female [transgender] survivors are funneled into the men's shelter system. I don't have to tell you what would happen there. My most vulnerable episodes there would be when I needed to take a shower or go to the bathroom. I would be revictimized then not only by the residents, but also by the service providers.

Valerie B et al., Conference, *Lesbian, Gay, Bisexual, and Transgender Communities and Intimate Partner Violence*, 29 FORDHAM URB. L.J. 121, 147 (2001).

¹¹⁰ Symposium, *Does New York City Look Different to You? The Changing Legal Landscape of Queer New York City*, 26 N.Y.U. REV. L. & SOC. CHANGE 139, 149 (2000).

¹¹¹ Interview with Pooja Gehi, *supra* note 17.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Interview with Morgan Lynn, Supervising Attorney, Wash. Empowered Against Violence, Inc. (Sept. 8, 2011) (notes on file with author).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

saying that the hotel was terrifying and that she would have been better off staying with her abuser.¹¹⁷

Transgender women may be leery of seeking domestic violence services as a result of this gender segregation. They worry that they will not be eligible for services because they are not perceived as “real” women and fear that their experiences of abuse will not be believed.¹¹⁸ They worry that they will make the cisgender women seeking services uncomfortable¹¹⁹ and believe that they will not feel at ease in these unwelcoming spaces.¹²⁰ The denial of services, Vivian Namaste argues, disproportionately affects the most marginalized within the transgender community: “those who are sero-positive, prostitutes, in prison, poor, young, and/or homeless.”¹²¹

The inability to access domestic violence services further marginalizes transgender women subjected to abuse. As Ryka Aoki writes, “When we deny services to trans women, especially crisis intervention services, we tacitly condone violence against them.”¹²² Moreover, Vivian Namaste argues, refusing to admit transgender women to women’s shelters because they do not “pass” as women reinforces the negative body image that some transgender women possess.¹²³ Ultimately, denying transgender women services exacerbates their isolation, rendering them more susceptible to abuse by their partners.¹²⁴

C. *Transgender Abuse and the Legal System*

Like others subjected to abuse, transgender individuals clearly face numerous barriers to accessing the separation-based options offered by the legal system. But the legal system’s treatment of transgender people subjected to abuse may be the most substantial obstacle transgender people face in accessing legal protection from abuse. As a result, few transgender people subjected to abuse choose to engage with the legal system.¹²⁵ In fact, advo-

¹¹⁷ *Id.*

¹¹⁸ COPE & DARKE, *supra* note 98, at 3; COURVANT & COOK-DANIELS, *supra* note 23, at 7.

¹¹⁹ COURVANT & COOK-DANIELS, *supra* note 23, at 7.

¹²⁰ Anthony S. DiStefano, *Intimate Partner Violence Among Sexual Minorities in Japan: Exploring Perceptions and Appearances*, 56 J. HOMOSEXUALITY 121, 136 (2009).

¹²¹ NAMASTE, *supra* note 32, at 189.

¹²² Ryka Aoki, *On Living Well and Coming Free*, in GENDER OUTLAWS: THE NEXT GENERATION 143, 148 (Kate Bornstein & S. Bear Bergman eds., 2010).

¹²³ NAMASTE, *supra* note 32, at 181.

¹²⁴ *Id.* at 182.

¹²⁵ All of the advocates with whom I spoke agreed that few transgender people choose to use the legal system and that most transgender people subjected to abuse actively avoid the legal system. Telephone Interview with Linnet Caban, Residential Manager, Domestic Violence Ctr. of Howard Cnty. (Aug. 18, 2011) (notes on file with author); Interview with Pooja Gehi, *supra* note 17; Telephone Interview with Jarad Ringer & Marie Romeo, *supra* note 19; Interview with Terra Slavin, *supra* note 17; Interview with Wayne Thomas, *supra* note 95; Interview with Kristin Tucker, *supra* note 43. Kristin Tucker estimates that only about 10% of the transgender people with whom she has worked called 911 in response to abuse; a slightly higher percentage chose to use the civil protection order system. *Id.*

cates report, most transgender people subjected to abuse actively avoid involvement with the legal system. As attorney Terra Slavin explains, her clients avoid the system because they fear inviting state scrutiny of their lives, particularly if they are undocumented or engaging in survival sex work.¹²⁶ Some have faced serious violence at the hands of state actors and are skeptical about the system's ability or willingness to protect them.¹²⁷ Others avoid the system because they do not conform to the stereotypical images of women subjected to abuse and believe that the system will not be responsive as a result.¹²⁸

1. Police.

Negative interactions with and perceptions of the police, both generally and in the specific context of cases involving intimate partner abuse, keep transgender people subjected to abuse from asking for help from the police. For transgender people, "dealing with the police is usually humiliating at best and dangerous at worst."¹²⁹ "My friends were beat up in the streets and we all knew better than to call the cops."¹³⁰ Reports of harassment and abuse of transgender people by police are common; studies routinely find high percentages of police among the perpetrators of abuse and harassment against transgender people.¹³¹ Given that context, it is not surprising that the 2010 NCAVP study found that transgender people were less likely than lesbian, gay, or bisexual respondents to report incidents of abuse or violence to police.¹³²

Historically, the police have been responsible for enforcement of laws explicitly created to ensure conformity with gender norms; such laws included statutes requiring that individuals wear three articles of clothing that conformed to their birth-assigned sex.¹³³ More recently, however, policing of gender norms has taken the form of refusals to recognize transgender people's authentic gender identities, as well as harassment and profiling based on gender nonconformity. Transgender women report police using their male names and male pronouns to describe them, even when they have

¹²⁶ Interview with Terra Slavin, *supra* note 17.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Aoki, *supra* note 122, at 146.

¹³⁰ Sassafras Lowrey, *Today's New Name May Be Tomorrow's Old*, in GENDER OUTLAWS, *supra* note 122, at 198, 199.

¹³¹ FRANK H. GALVAN & MOHSEN BAZARGAN, INTERACTIONS OF LATINA TRANSGENDER WOMEN WITH LAW ENFORCEMENT 6 (2012); MOGUL ET AL., *supra* note 32, at 47–48 (citing studies, including one finding that transgender people are at greater risk of experiencing police violence and misconduct than cisgender people).

¹³² NCAVP 2010, *supra* note 48, at 32.

¹³³ Jaime E. Hovey, *Nursing Wounds: Why LGBT Elders Need Protection from Discrimination and Abuse Based on Sexual Orientation and Gender Identity*, 17 ELDER L.J. 95, 104 (2009); Interview with Kristin Tucker, *supra* note 43.

changed their identification documents.¹³⁴ As Vivian Namaste notes, “transgender sex workers stated that police officers seemed to make a point of calling them ‘sir,’ ‘boy,’ and ‘guy.’”¹³⁵ Officers demanded, “What are you? Are you a guy or a girl? We don’t like these fucking half-breeds,”¹³⁶ or referred to transgender people as objects, using the pronoun “it” to describe them rather than appropriate gendered pronouns.¹³⁷

Policing of gender norms also involves what Andrea Ritchie calls “sub-conscious gender policing,” wherein “departure from socially constructed norms of ‘appropriate’ gender expression is perceived as grounds for suspicion and securing submission to gender roles.”¹³⁸ Ritchie continues:

The interactions of transgender women, often perceived as the “ultimate” gender transgressors, with law enforcement are generally marked by insistence on gender conformity and punishment for failure to “comply,” including harassment, verbal abuse, and physical violence at the hands of police, often based on perceptions that they are fraudulent, deceitful, violent, or mentally unstable because of their perceived gender disjuncture.¹³⁹

That suspicion leads police to profile transgender people in a variety of ways. Simply by virtue of their appearance, transgender people, and particularly transgender people of color, are frequently viewed by police as suspect.¹⁴⁰ Profiling of transgender people is often based on police assumptions that transgender people are engaged in sex work. One study found, for example, that 40% of transgender inmates in California had participated in the sex trade industry, often driven to this work as a result of the limited eco-

¹³⁴ NAMASTE, *supra* note 32, at 170.

¹³⁵ *Id.*

¹³⁶ *Id.* at 171.

¹³⁷ *Id.* at 170. One transgender woman told Namaste that when her mother arrived to post bail for her, officers shouted, “Its mother is here to bail it out.” *Id.* Jahaida, a transgender woman involved in a New York support group for transgender women subjected to abuse, described how an NYPD officer followed a transgender woman on the street in his car. Using his intercom, which could be heard by everyone on the street, he asked, “Where you going, man?” Interview with Trans Women Support Group (Feb. 22, 2012) (notes on file with author); see also GALVAN & BAZARGAN, *supra* note 131, at 8.

¹³⁸ Andrea J. Ritchie, *Law Enforcement Violence Against Women of Color*, in *THE COLOR OF VIOLENCE*, *supra* note 108, at 138, 142–43.

¹³⁹ *Id.* at 143; see also MOGUL ET AL., *supra* note 32, at 67. Christoph Hanssmann notes that in a climate of increasing “surveillance and criminalization, trans communities become even more vulnerable to police violence and surveillance.” Hanssmann, *supra* note 33, at 558.

¹⁴⁰ GALVAN & BAZARGAN, *supra* note 131, at 7; Gehi, *supra* note 80, at 325. Carrie Davis of the New York City Lesbian and Gay Community Services Center’s Gender Identity Project described how women were caught up in “morals sweeps” in the West Village area of New York City, which saw women routinely arrested, charged, convicted, and sentenced to ninety days in Rikers Island for “hanging out in the West Village.” Symposium, *supra* note 110, at 146. Davis also described the attitude of a vice squad officer in the West Village: “People are going to be arrested based on how they look and where they are” *Id.* at 146–47.

conomic opportunities they find elsewhere.¹⁴¹ Police, however, frequently seem to assume that *all* transgender people are engaged in sex work; as Andrea Ritchie writes, “[t]ransgender women are framed by law enforcement agents as not only the ultimate gender transgressors, but also as overly sexualized, as indicated by the fact that they are pervasively profiled as sex workers and routinely subject to sexual abuse by police officers.”¹⁴² This sexualization of transgender women, Ritchie argues, often manifests itself in “verbal abuse — officers regularly call transgender women of color ‘fags,’ ‘whores,’ ‘sluts,’ ‘bitches,’ and ‘prostitutes’ when they encounter them on the street.”¹⁴³ Profiling also leads to harassment and pretextual arrests of transgender people.¹⁴⁴ As Joey Mogul, Andrea Ritchie, and Kay Whitlock explain, “[t]ransgender women, particularly transgender women of color, are so frequently perceived to be sex workers by police that the term *walking while trans* . . . was coined to reflect the reality that transgender women often cannot walk down the street without being stopped, harassed, verbally, sexually and physically abused, and arrested”¹⁴⁵

Police perpetration of violence against transgender people is depressingly common. In 2011, the National Transgender Discrimination Survey found that 22% of transgender respondents had been harassed by police (the numbers were higher for people of color); 6% had been physically assaulted, and 2% had been sexually assaulted. Twenty percent reported denials of equal service by police and 46% of those surveyed said they were uncomfortable seeking police assistance.¹⁴⁶ A 2012 study of Latina transgender women in Los Angeles found that 66% had been verbally abused by law enforcement, 21% physically assaulted, and 24% sexually assaulted.¹⁴⁷ An-

¹⁴¹ Sexton et al., *supra* note 46, at 854. *But see* GRANT ET AL., *supra* note 21, at 3 (reporting that 16% of respondents had participated in the underground economy, including drug sales and sex work).

¹⁴² Ritchie, *supra* note 138, at 144; *see also* Arkles, *supra* note 80, at 526. *Cf.* GALVAN & BAZARGAN, *supra* note 131, at 8; Shield, *supra* note 32, at 377 (noting that the profiling of transgender people as sex workers contributes to the large numbers of transgender people who report having been incarcerated).

¹⁴³ Ritchie, *supra* note 138, at 144.

¹⁴⁴ *See* MOGUL ET AL., *supra* note 32, at 53.

¹⁴⁵ *Id.* at 61; *see also* Interview with Pooja Gehi, *supra* note 17; Ritchie, *supra* note 138, at 146. Jenny Casciano, the site director of a drop-in zone for LGBTQ youth, describes:

We have a lot of young transgender women who are working the stroll, and they have a barrage of legal problems ranging from arrests for prostitution and soliciting, to arrests for being out in public after a specific period of time. (They actually do not need to do anything anymore to get arrested.)

Jenny Casciano et al., *Client-Centered Advocacy on Behalf of At-Risk LGBT Youth*, 26 N.Y.U. REV. L. & SOC. CHANGE 221, 223–24 (2001).

¹⁴⁶ GRANT ET AL., *supra* note 21, at 158.

¹⁴⁷ GALVAN & BAZARGAN, *supra* note 131, at 6. The majority of these surveys are conducted in larger cities, such as New York City and Los Angeles, that are known for being more accepting of the LGBT population. Given the problems documented in these cities, it is worth considering just how negative the experiences of transgender people must be in cities that are not thought to be as tolerant. My thanks to Editor-in-Chief Jason Lee of the *Harvard Civil Rights-Civil Liberties Law Review* for this observation.

drea Ritchie describes one instance in which officers responded to a Latina transgender woman, Jalea Lamot, who had called for help. After realizing that Lamot was transgender, the responding officers beat and pepper-sprayed her and her family.¹⁴⁸ Vivian Namaste recounts how a transgender woman was pulled over for a broken headlight, and then arrested and jailed when the officer realized she was a transgender woman; the arresting officers told her, “People like you should all be killed at birth.”¹⁴⁹ Attorney Pooja Gehi reports that police officers in New York engage in invasive genital searches and gratuitous pat-downs of transgender people, believing that such searches will enable police to determine their “real” gender.¹⁵⁰

Finally, the police ignore the violence done to transgender people by others by refusing to take reports, failing to classify crimes against transgender people as hate-motivated crimes, or failing to respond at all.¹⁵¹ In one particularly disturbing incident, Los Angeles police refused to respond to “a violent assault on an undocumented Latina transgender” woman; the police were reported to have said, “If they kill her, call us.”¹⁵²

The police have tremendous power: the power to determine “which laws to enforce, how to enforce them, and which people to target for enforcement.”¹⁵³ The failure of police to enforce the laws that protect transgender people, coupled with police profiling, victimization, and abuse of transgender people, deters transgender people from turning to the law for assistance and results in underreporting of violence against transgender people.¹⁵⁴ As a result, transgender people feel they must “negotiate the world without recourse to this social service. In this manner, the workings of a specific institution (a discriminatory police department) marginalize trans[gender] people and, indeed, render them invisible.”¹⁵⁵ That invisibility and lack of police response can be especially problematic for transgender people subjected to abuse who seek legal protection.

Transgender people who do report abuse often find that their claims are greeted with skepticism.¹⁵⁶ Police may tend to categorize transgender women as “bad victims,” with their gender nonconformity interpreted as a fail-

¹⁴⁸ Ritchie, *supra* note 138, at 138.

¹⁴⁹ NAMASTE, *supra* note 32, at 169; *see also* Telephone Interview with Linnet Caban, *supra* note 125 (recounting how a transgender friend was beaten by police outside of a nightclub when police saw him kissing someone).

¹⁵⁰ Interview with Pooja Gehi, *supra* note 17.

¹⁵¹ MOGUL ET AL., *supra* note 32, at 120.

¹⁵² *Id.* at 130.

¹⁵³ *Id.* at 48.

¹⁵⁴ *See id.* at 121.

¹⁵⁵ NAMASTE, *supra* note 32, at 173.

¹⁵⁶ *See* INCITE! WOMEN OF COLOR AGAINST VIOLENCE, LAW ENFORCEMENT VIOLENCE AGAINST WOMEN OF COLOR & TRANS PEOPLE OF COLOR: A CRITICAL INTERSECTION OF GENDER VIOLENCE & STATE VIOLENCE 38–39, available at http://www.incite-national.org/media/docs/3696_TOOLKIT-FINAL.pdf (last visited Oct. 26, 2012).

ure to behave appropriately.¹⁵⁷ Narratives about police failures to treat transgender abuse claims seriously or to file reports are common.¹⁵⁸ As Mogul, Ritchie, and Whitlock write:

Many transgender survivors of domestic violence report that when the police do respond to interpersonal violence committed against them, once officers determine they are transgender, they either simply leave, saying something along the lines of, “Oh guys, it’s a man, forget it,” shift the focus of their investigation to the transgender person, or engage in further abuse.¹⁵⁹

Arrests of transgender people who call the police to report abuse are common. As Gehi explains:

[W]hen my clients who are survivors of domestic violence call the police for assistance, they often end up getting arrested either instead of, or along with, their abuser Rather than investigate the situation, police officers tend to arrest based on assumptions and often explain that since they were “confused,” they just arrested everyone.¹⁶⁰

Advocate Kristin Tucker agrees; unless the transgender person is dramatically harmed and her partner completely unharmed, the potential for the arrest of the transgender person subjected to abuse is very real.¹⁶¹

In much the same way that aggressive arrest policies have been used against women subjected to abuse,¹⁶² mandatory and preferred arrest laws frequently operate to the detriment of transgender people subjected to abuse.¹⁶³ In one case, a transgender woman called District of Columbia police after being choked by her male partner.¹⁶⁴ The police arrested her instead, referred to her as “mister” after seeing her identification, detained her

¹⁵⁷ See Leslie J. Moran & Andrew N. Sharpe, *Violence, Identity, and Policing: The Case of Violence Against Transgender People*, 4 CRIM. JUST. 395, 408 (2004).

¹⁵⁸ See, e.g., INCITE!, *supra* note 156, at 38–40; MOGUL ET AL., *supra* note 32, at 118–20; NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS, SURVIVAL, SUPPORT AND RESILIENCE: STORIES OF LGBTQ SURVIVORS AND VICTIMS OF DOMESTIC/INTIMATE PARTNER VIOLENCE 4–5 (Oct. 2010).

¹⁵⁹ MOGUL ET AL., *supra* note 32, at 138.

¹⁶⁰ Gehi, *supra* note 80, at 325–26; see also Telephone Interview with Linnet Caban, *supra* note 125 (explaining that police frequently arrest everyone or no one when responding to domestic violence claims by transgender people); Interview with Pooja Gehi, *supra* note 17 (same); Interview with Morgan Lynn, *supra* note 114 (stating that clients have been arrested when they called police for protection).

¹⁶¹ Interview with Kristin Tucker, *supra* note 43.

¹⁶² BUMILLER, *supra* note 90, at 11.

¹⁶³ Mandatory arrest laws require police to make arrests in domestic violence cases whenever police have probable cause to do so, depriving police of significant discretion. Preferred arrest laws enable police to make individualized determinations about arrests, but stress that arrest is the preferred response to a domestic violence call when probable cause exists. Cf. GOODMARK, *supra* note 26, at 108–10. These same laws are also used against gender nonconforming youth who have altercations with their parents. Cf. Adler, *supra* note 31, at 613–14.

¹⁶⁴ INCITE!, *supra* note 156, at 39.

for hours at the police station, and charged her with assaulting her partner. The charges were ultimately dropped.¹⁶⁵ Transgender people are particularly likely to be arrested if they fight back against their abusers.¹⁶⁶ Worse still are stories of police brutality committed in the course of responding to a report of intimate partner abuse by a transgender individual.¹⁶⁷ Advocates Jarad Ringer and Marie Romeo estimate that 70% to 80% of their transgender clients subjected to abuse experience some form of institutional violence, including police brutality, when they seek assistance from formal systems.¹⁶⁸

Not all transgender people experience skepticism or violence at the hands of police. Sixty-eight percent of respondents to the 2011 National Transgender Discrimination Survey reported that officers generally treated them with respect.¹⁶⁹ Some advocates report mixed experiences with police intervention, depending on the responses of the individual officers involved.¹⁷⁰ Kristin Tucker notes that although very few of her clients choose to call the police, those who have interacted with Seattle police have had moderately positive experiences. Her clients felt validated by those interactions, believing that the police saw them as having been subjected to abuse, rather than dismissing their experiences.¹⁷¹

Negative interactions with police can have a profound impact on transgender people's willingness to seek police protection. Knowing that transgender people frequently fear police involvement, abusers use that fear as a tactic for controlling their partners.¹⁷² Notwithstanding the positive interac-

¹⁶⁵ *Id.* In another incident, a Los Angeles transgender woman repeatedly called the police for help after being beaten by her abusive boyfriend. The police told her they could not help. The police did take action later, however, arresting the transgender woman on an old solicitation charge. *See id.* The consequences of being wrongly arrested can be disastrous, particularly for undocumented transgender women, who may find themselves subject to deportation after calling the police for help. Interview with Morgan Lynn, *supra* note 114.

¹⁶⁶ *See* Arkles, *supra* note 80, at 520. Domestic violence advocate Victoria Cruz explains the Catch-22 transgender women face when they call police: fighting back makes it more likely that a transgender woman will be arrested, but police are skeptical of transgender women's claims of abuse when they do not fight back because officers wonder, "Well, she's a man; why can't you fight back?" Valerie B et al., *supra* note 109, at 148. Being penalized for fighting back against an abuser is similarly problematic for lesbians and African American women. *Cf.* Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 *YALE J.L. & FEMINISM* 75, 96, 104 (2008).

¹⁶⁷ *See, e.g.*, Kylar W. Broadus, *The Criminal Justice System and Trans People*, 18 *TEMP. POL. & CIV. RTS. L. REV.* 561, 567–68 (2009) (describing how a transgender woman was thrown against a wall and to the floor, breaking her wrist, and then handcuffed by police responding to the domestic violence call despite the obvious injury). *Cf.* Ritchie, *supra* note 138, at 150 (arguing that police brutality against women of color frequently occurs during responses to domestic violence calls).

¹⁶⁸ Telephone Interview with Jarad Ringer & Marie Romeo, *supra* note 19.

¹⁶⁹ GRANT ET AL., *supra* note 21, at 159. The rates of respectful treatment were far higher for those with higher incomes and greater educational attainment, as well as for white respondents. *Id.*

¹⁷⁰ Interview with Morgan Lynn, *supra* note 114.

¹⁷¹ Interview with Kristin Tucker, *supra* note 43.

¹⁷² *See, e.g.*, MOGUL ET AL., *supra* note 32, at 139 (describing how an undocumented Latina transgender woman "who was repeatedly physically and sexually abused by her partner never called the police because her abuser would tell her that as soon as the police heard she

tions that some transgender people subjected to abuse have with police, transgender women often believe, based on their own experiences and on the stories shared within the transgender community, that not only will the police not protect them, they will humiliate and ridicule them as well. As one transgender woman prostitute who had been beaten by her boyfriend told Vivian Namaste, “I couldn’t phone the police. What am I going to say? ‘Oh, I had my boyfriend here and he just found out I had a penis and almost killed me’?! . . . It would have been a big joke.”¹⁷³ One bad experience with police may be enough to ensure that a transgender person subjected to abuse will not attempt to access the legal system again and will advise others to avoid the system as well.¹⁷⁴ The advice provided by advocates to transgender people considering calling the police is nuanced and equivocal; while the function of police intervention is to ensure the safety of people subjected to abuse, transgender people cannot assume that police will treat them sensitively or take their claims seriously.¹⁷⁵ Indeed, police intervention may do far more harm than good, particularly for undocumented transgender people and those involved in the underground economy.¹⁷⁶ Knowing that police may be unsympathetic at best and abusive at worst, many transgender people decide not to report intimate partner abuse.¹⁷⁷

2. The Court System.

Transgender people subjected to abuse may also be skeptical of their chances of finding protection from abuse within the court system. Transgender people are disproportionately involved in the court system, particularly the criminal justice system. A 2011 survey found that 17% of transgender people had been incarcerated at some point in their lives; 21% of transgender women and 10% of transgender men reported being incarcerated.¹⁷⁸ Transgender people of color have been especially affected by the

was ‘illegal’ they would arrest her instead”); Valerie B et al., *supra* note 109, at 148 (“I was a victim of domestic violence, and what my ex-lover held against me was that ‘if the cops come, I’m going to tell them you’re a man.’ I held back from calling policemen because fear [sic] of being revictimized.”).

¹⁷³ NAMASTE, *supra* note 32, at 172.

¹⁷⁴ See Adele M. Morrison, *Queering Domestic Violence to “Straighten Out” Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law’s Conventional Responses to Domestic Violence*, 13 S. CAL. REV. L. & WOMEN’S STUD. 81, 109 (2003). As one transgender woman explained, transgender women do not report domestic violence because they believe that “if the NYPD don’t give a fuck, laugh, treat us as jokes, why would anyone else care?” Interview with Trans Women Support Group, *supra* note 137.

¹⁷⁵ FAMILY SERV. TORONTO, *supra* note 58, at 2; Telephone Interview with Linnet Caban, *supra* note 125; Interview with Morgan Lynn, *supra* note 114; Interview with Kristin Tucker, *supra* note 43.

¹⁷⁶ Interview with Morgan Lynn, *supra* note 114.

¹⁷⁷ Interview with Chanel Lopez, *supra* note 64.

¹⁷⁸ GRANT ET AL., *supra* note 21, at 163. By comparison, a 1997 study based on 1991 incarceration rates found that 9% of cisgender men and 1.1% of cisgender women were likely to be incarcerated at some point in their lives. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF

ever-increasing trend toward incarceration in the United States.¹⁷⁹ On the civil side, transgender people may find themselves forced to ask courts to determine their legal gender, with a myriad of rights and claims dependent upon that determination.¹⁸⁰ The authority to determine legal gender affords courts the power to do great harm to transgender people; by refusing to affirm someone's gender identity, courts deny state recognition of the core of a person's being.¹⁸¹ Even when the ultimate issue in a case is *not* a determination of legal gender, courts can profoundly affect transgender people simply in the way that they choose to treat the litigants before them. As a result, courts wield tremendous power over the lives of transgender people.

(a.) *Individuals within the Court System.*

Transgender people subjected to abuse hesitate to engage the court system as a result of the discrimination and insensitivity they face at the hands of the judiciary. Judges profile transgender people in many of the same ways that police do. As Mogul, Ritchie, and Whitlock write:

The specter of criminality moves ceaselessly through the lives of LGBT people in the United States. It is the enduring product of persistent melding of homosexuality and gender nonconformity with concepts of *danger, degeneracy, disorder, deception, disease, contagion, sexual predation, depravity, subversion, encroachment, treachery, and violence.*¹⁸²

That undercurrent of distrust and fear colors the way that judges treat individual litigants. A transgender advocate reported judges referring to transgender people as "it" in open court,¹⁸³ and advocates confirm that some judges seem flustered or uneasy in the presence of transgender people.¹⁸⁴

JUSTICE, SPECIAL REPORT NCJ-160092, LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON 1 (Mar. 1997).

¹⁷⁹ Arkles, *supra* note 80, at 516; *see also* GRANT ET AL., *supra* note 21, at 163 (noting much higher rates of incarceration among transgender people of color).

¹⁸⁰ Such claims might include a spouse's death benefits, for example. *See* Jennifer Madison, *Firefighter's Transgender Widow Sues for Her Husband's Benefits After He Dies in Blaze*, MAILONLINE (Apr. 30, 2012, 6:05 PM), <http://www.dailymail.co.uk/news/article-2137610/Nikki-Araguz-Transgender-widow-sues-husbands-benefits-dies-fighting-blaze.html>.

¹⁸¹ *See* Tey Meadow, "A Rose is a Rose": *On Producing Legal Gender Classifications*, 24 GENDER & SOC'Y 814, 821 (2010) (describing how courts have approached the conceptualization of legal gender).

¹⁸² MOGUL ET AL., *supra* note 32, at 23 (emphasis in original).

¹⁸³ Interview with Chanel Lopez, *supra* note 64; *see also* MOGUL ET AL., *supra* note 32, at 74; Rudy Serra & Annette E. Skinner, *Counseling the Gay, Lesbian, Bisexual, or Transgender Client*, 80 MICH. B.J. 52, 57 (2001).

¹⁸⁴ *See, e.g.*, Telephone Interview with Linnet Caban, *supra* note 125; Interview with Morgan Lynn, *supra* note 114; Interview with Wayne Thomas, *supra* note 95. Advocates note that interactions with judges vary a great deal; that some judges treat transgender litigants with appropriate respect; and that when judges rule against transgender clients, it can be difficult to determine whether the judge's ruling is influenced by the litigant's gender identity, though gender identity often seems to be a subtext in litigation. *See infra* section III.A. Given this uncertainty, it is particularly important that lawyers and clients discuss exactly how the client

Some advocates believe that the criminal histories and illegal employment of some transgender people subjected to abuse are to blame for courts' skepticism of their claims.¹⁸⁵ The prevalence of sex work among transgender people is particularly damaging to their credibility in two ways. First, sex workers are viewed as less credible (or fear that they will be viewed as less credible) because they are engaged in criminal activity.¹⁸⁶ Second, past engagement in sex work causes courts to view claims of abuse more skeptically;¹⁸⁷ abuse may be seen as a byproduct of sex work, even when that abuse happens within noncommercial intimate relationships. These credibility challenges are particularly acute for more marginalized transgender people — poor people, people of color, and HIV-positive people. As Gehi notes, the same stereotypes that operate in other parts of the legal system are present in the domestic violence system; there is a reason that successful transgender litigants are typically wealthy and white.¹⁸⁸

Transgender people's interactions with other legal system actors can be similarly problematic.¹⁸⁹ At worst, court staff ridicule transgender people seeking assistance,¹⁹⁰ referring to them using demeaning terms like "he/

wants to present his case — to what extent the client wants to "fight institutionalized transphobia" and the impact that a given decision might have on the client's case. Interview with Andrew Sta. Ana, Equal Justice Works Fellow, Sanctuary for Families N.Y. (Feb. 22, 2012) (notes on file with author); *see also* Interview with Ursula Campos-Gatjens, Domestic Violence Counselor/Advocate, N.Y.C. Anti-Violence Project (Feb. 22, 2012) (notes on file with author). Andrew Sta. Ana recalls a trial where he and the client decided to defend the client's gender identity, regardless of the outcome; although they lost the case, Sta. Ana reports, it meant a great deal to the client to have taken that position. Interview with Andrew Sta. Ana, *supra*.

¹⁸⁵ Interview with Terra Slavin, *supra* note 17.

¹⁸⁶ Interview with Morgan Lynn, *supra* note 114.

¹⁸⁷ Telephone Interview with Linnet Caban, *supra* note 125; Interview with Morgan Lynn, *supra* note 114.

¹⁸⁸ Interview with Pooja Gehi, *supra* note 17; *see also* Gordene MacKenzie & Mary Marcel, *Media Coverage of the Murder of U.S. Transwomen of Color*, in *LOCAL VIOLENCE, GLOBAL MEDIA: FEMINIST ANALYSES OF GENDERED REPRESENTATIONS* 79, 84 (Lisa M. Cuklanz & Sujata Moorti eds., 2009) (discussing how the testimony of transgender women of color is treated as particularly suspect in the courts). Marginalized cisgender women subjected to abuse face the same problem; as Kristin Bumiller writes:

In all situations, prosecutors pursue cases on behalf of the state rather than the victim; but when victims are from criminalized communities (due to poverty, immigrant status, ethnicity, or race) their status as victim may in many cases become the functional equivalent of being a perpetrator in the eyes of the law.

BUMILLER, *supra* note 90, at 14.

¹⁸⁹ Twelve percent of transgender people surveyed in the 2011 National Transgender Discrimination Survey reported being denied equal treatment or being harassed by judges or court staff. GRANT ET AL., *supra* note 21, at 5.

¹⁹⁰ Telephone Interview with Linnet Caban, *supra* note 125. Virginia Goggin recalled an incident where district attorneys and court staff alike laughed at a transgender woman who was being arraigned. Interview with Virginia Goggin, Staff Attorney, LGBT Law Project, Matrimonial and Family Law Unit, N.Y. Legal Assistance Grp. (Feb. 22, 2012) (notes on file with author). When Goggin raised the misbehavior, she was told that court staff had been trained about working with transgender people and took that type of incident seriously. *Id.* Goggin notes that unless courtroom staff members are confronted for such behavior, courtroom culture will continue to tolerate mistreatment of transgender people. *Id.*

she.”¹⁹¹ Court staff sometimes seem uncomfortable working with transgender litigants, particularly if the client does not “pass” easily in hir authentic gender; staff relieve this tension by avoiding transgender people, interacting with attorneys rather than communicating directly with transgender litigants.¹⁹² Court staff may also require transgender people to use names that appear on their state-issued identification, even if that documentation no longer matches the person’s gender presentation.¹⁹³ Moreover, respectful treatment by a state actor one day does not guarantee the same response on another day; one probation officer referred to a transgender client by both her given and chosen names in phone messages until the client failed to appear for a scheduled meeting, at which point the probation officer, clearly upset with the client, stopped using both the client’s preferred name and related gender pronouns.¹⁹⁴

Transgender people may also be denied effective, competent legal services as a result of overtly discriminatory or dismissive behavior by lawyers. Even well-meaning lawyers serve clients poorly when they fail to understand the realities of their transgender clients’ lives.¹⁹⁵ Some lawyers simply refuse to serve transgender people, telling them to access services elsewhere.¹⁹⁶ Lawyers may also utilize harmful stereotypes of transgender people as deceptive and deviant in their efforts to persuade finders of fact. In the case of Monica James, a transgender woman on trial for attempted murder and other crimes involving an off-duty, gay police officer, the prosecutor asked the jury, “How can you trust this person? He tells you he is a woman; he is clearly a man.”¹⁹⁷ The prosecutor also used male pronouns to refer to Ms. James throughout the trial.¹⁹⁸ Attorney Andrew Sta. Ana recalls other

¹⁹¹ Interview with Pooja Gehi, *supra* note 17. Victoria Cruz described how she heard a clerk talking and laughing about “the trans case” — her case — before her case was called; once court convened, she saw the court clerk move over to get a better look at her after she explained that she was transgender. Interview with Victoria Cruz, Senior Domestic Violence Counselor/Advocate, N.Y.C. Anti-Violence Project (Feb. 22, 2012) (notes on file with author).

¹⁹² Interview with Wayne Thomas, *supra* note 95.

¹⁹³ Interview with Pooja Gehi, *supra* note 17; Interview with Terra Slavin, *supra* note 17. Kristin Tucker observes that the inability to produce documentation linking one’s gender identity to one’s legal identity is construed by courts as suspect, notwithstanding the expense and institutional barriers that preclude transgender people from securing such documentation. Interview with Kristin Tucker, *supra* note 43. While some advocates note that the experiences of transgender people vary considerably depending on the individuals with whom they interact, Morgan Lynn observes that the system should uniformly respect the gender identities of transgender people; it should not involve “personality-based gatekeeping” dependent on the goodwill of individual court staff. Interview with Morgan Lynn, *supra* note 114.

¹⁹⁴ Interview with Wayne Thomas, *supra* note 95. Thomas notes that it was almost as if the probation officer was saying, “If this interaction is going to be more formal [because you have missed our meetings], I’m going with your legal name.” *Id.*

¹⁹⁵ MOGUL ET AL., *supra* note 32, at 75.

¹⁹⁶ Interview with Terra Slavin, *supra* note 17.

¹⁹⁷ MOGUL ET AL., *supra* note 32, at 76. Attorney Wayne Thomas has litigated cases against defendants who raise the fact of gender transition as support for the argument that the person allegedly subjected to abuse is too confused to be believable. Interview with Wayne Thomas, *supra* note 95.

¹⁹⁸ MOGUL ET AL., *supra* note 32, at 76.

trials where opposing counsel intentionally and repeatedly used the wrong gender pronoun as a tactic to break a witness down, destroying the witness's sense of self and credibility.¹⁹⁹

Transgender people suffer gravely in jails and prisons,²⁰⁰ where they are usually housed according to their birth-assigned sex rather than their authentic gender.²⁰¹ Transgender people, especially transgender women, face heightened risk of sexual abuse in prison at the hands of both other prisoners and correctional officers.²⁰² Transgender women

suffer from . . . sexual degradation and harassment from penal officials who routinely subject them to excessive, abusive, and invasive searches, groping their breasts, buttocks, or genitalia, repeatedly leering at them while they shower, disrobe, or use the bathroom, and generally, in the words of Human Rights Watch, . . . creating an environment that is “highly sexualized and excessively hostile.”²⁰³

Some transgender women report being strip-searched or frisked four to five times daily while incarcerated.²⁰⁴ Some systems segregate transgender inmates from the general population, requiring inmates to self-identify as transgender, but allowing staff to make the final determination as to whether an inmate will be categorized as transgender.²⁰⁵ Corrections officials routinely refuse to recognize the chosen names and gender identities of transgender inmates and deny transgender people medical care relating to their gender — this can include restricting access to hormone treatments and gen-

¹⁹⁹ Interview with Andrew Sta. Ana, *supra* note 184.

²⁰⁰ See generally *supra* text accompanying note 178.

²⁰¹ MOGUL ET AL., *supra* note 32, at 107; Broadus, *supra* note 167, at 568; Richael Faithful, *Transitioning Our Prisons Toward Affirmative Law: Examining the Impact of Gender Classification Policies on U.S. Transgender Prisoners*, 5 MODERN AM. 3, 5 (2009).

²⁰² Arkles, *supra* note 80, at 526–27; Broadus, *supra* note 167, at 568; see also MOGUL ET AL., *supra* note 32, at 100.

²⁰³ MOGUL ET AL., *supra* note 32, at 101.

²⁰⁴ *Id.*; see also Arkles, *supra* note 80, at 527.

²⁰⁵ In 2012, in accordance with the Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601–15609 (2006), the Department of Justice passed rules that address the screening and placement of transgender prisoners. The rules prohibit officials from engaging in a search or physical exam of a transgender inmate for the sole purpose of investigating hir genitals. 28 C.F.R. § 115.15 (2012) (adult prisons and jails); *id.* § 115.115 (lockups); *id.* § 115.215 (community confinement facilities); *id.* § 115.315 (juvenile facilities). The regulations also preclude officials from assigning inmates based on their genital status; instead, the facility must consider whether placement in a particular facility would endanger the inmate's health and safety and whether the placement would cause management or security concerns, giving serious consideration to the inmate's views about hir safety. *Id.* § 115.42 (adult prisons and jails); *id.* § 115.242 (community confinement facilities); *id.* § 115.342 (juvenile facilities). The regulations also require that “transgender [inmates] shall be given the opportunity to shower separately from other [inmates].” *Id.* § 115.42 (adult prisons and jails); *id.* § 115.242 (community confinement facilities); *id.* § 115.342 (juvenile facilities). These regulations may alleviate some of the problems transgender inmates currently confront.

der reassignment surgery.²⁰⁶ Knowing both that the possibility of arrest and incarceration are very real if an abuse claim is made, and of the negative experiences of transgender people who become defendants, transgender people subjected to abuse may be understandably wary of engaging the criminal system.

(b.) *The Family Court System.*

Transgender people subjected to abuse might seek protective orders through the family court system, but those courts have also been hostile to the claims of some transgender litigants. Transgender people subjected to abuse may be wary of relying on the family court system for protection given its insensitivity to other claims by transgender litigants. For instance, several courts have found that, for the purposes of adjudicating the validity of a marriage, a transsexual's birth-assigned sex is determinative, notwithstanding any surgical transition a person may have undergone.²⁰⁷ Although a transsexual may have official documents recognizing hir gender identity, courts have refused to recognize those documents as dispositive in the context of challenges to marriages.²⁰⁸ As a result, transsexuals who have married individuals whose anatomical sex matches their birth-assigned sex have found their marriages invalidated in states that do not recognize same-sex marriage.²⁰⁹

Defending transgender parents' relationships with their children poses similar challenges. "Transgender parents face tremendous discrimination

²⁰⁶ MOGUL ET AL., *supra* note 32, at 110–12.

²⁰⁷ See, e.g., *Kantaras v. Kantaras*, 884 So. 2d 155, 155 (Fla. Dist. Ct. App. 2004); *In re Marriage of Simmons*, 825 N.E. 2d 303, 311 (Ill. App. Ct. 2005); *In re Estate of Gardner*, 42 P.3d 120, 136–37 (Kan. 2002); *In re Ladrach*, 32 Ohio Misc. 2d 6, 10 (Ohio Prob. Ct. 1987); see also Luke Boso, A (*Trans*)Gender-Inclusive Equal Protection Analysis of Public Female Toplessness, 18 LAW & SEXUALITY 143, 146 (2009); Elizabeth E. Monnin-Browder, *Relationship Recognition and Protections*, in *TRANSGENDER FAMILY LAW: A GUIDE TO EFFECTIVE ADVOCACY* 36, 46–50 (Jennifer L. Levi & Elizabeth E. Monnin-Browder eds., 2012). It is important to recognize that a number of jurisdictions both in the United States and internationally have upheld the validity of marriages involving transgender people as well. *Id.* at 43–46.

²⁰⁸ Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman?*, 52 FLA. L. REV. 745, 758 (2000); see also Katie D. Fletcher, *In re Marriage of Simmons: A Case for Transsexual Marriage Recognition*, 37 LOY. U. CHI. L.J. 533, 565–66 (2006) (arguing that "absent a statute or enforcement of an existing statute clearly allowing a transsexual's re-assigned sex and/or court decisions recognizing a transsexual's reassigned sex, transsexual marriage rights with respect to their identified sex will continue to be nonexistent").

²⁰⁹ MOULTON & SEATON, *supra* note 32, at 35 (citing to decisions by courts in Florida, Illinois, Kansas, Ohio, and Texas). In cases where courts have upheld marriages involving transsexuals, those courts have focused on whether the transgender person was legally considered to be of the opposite sex from hir spouse at the time that the marriage took place, whether the cisgender individual knew of hir partner's transsexuality, whether the couple could engage in penetrative vaginal intercourse, the transgender person's fertility, and the status of the transgender person's genitals. A. Spencer Bergstedt, *Estate Planning and the Transgender Client*, 30 W. NEW ENG. L. REV. 675, 697 (2008). Even in some cases where these factors were satisfied, however, the court invalidated the marriage nonetheless. *Id.* Bergstedt notes that neither the federal Defense of Marriage Act nor parallel state enactments address marriages involving transgender people. *Id.* at 692.

and bias, particularly in custody and visitation cases.²¹⁰ Court decisions on the validity of marriages involving transsexuals operate particularly harshly on transsexual parents, who may lose legal and/or physical custody of their children if their marriages are invalidated or if they choose to undergo gender reassignment surgery.²¹¹ Indeed, the reported cases all involve transsexuals who have undertaken some level of surgical gender reassignment. For transgender people who eschew surgery altogether, who have not been diagnosed with gender identity disorder, or who do not have medical experts willing to testify for them, courts may be even less tolerant.

The perils of dealing with family court are magnified for low-income transgender people. The cost of retaining lawyers and experts in family law matters is prohibitive even for those with means, and especially so for “[transgender] persons who are multiply marginalized, including many [transgender] persons of color, as well as those who are immigrants, sex workers, poor, or homeless.”²¹² In the end, as Gehi notes, all of the same stereotypes that work against transgender people in the world work against them in family court.²¹³ Little wonder, then, that transgender parents fear involvement with the family courts.

(c.) *Eligibility for Relief from Abuse.*

Not only must transgender individuals subjected to abuse evaluate how they might be treated in the court system, they must also determine whether they are even eligible for relief. That determination turns on two factors: whether state law provides protection from abuse in same-sex relationships and whether the transgender person and his abuser are considered to be of the same sex under the law.

Gender neutral provisions applicable to individuals who are cohabiting, living together, or engaged in romantic or dating relationships are used to

²¹⁰ MOULTON & SEATON, *supra* note 32, at 37; *see also* COURVANT & COOK-DANIELS, *supra* note 23, at 6 (“[B]ecause of prejudice and ignorance about [transgender] persons . . . courts are extremely unlikely to grant them custody no matter how abusive the other parent is.”); Interview with Chanel Lopez, *supra* note 64 (describing a custody case in which an unrepresented transgender woman with five-year-old daughter was questioned about how her gender identity might hurt her daughter).

²¹¹ *See, e.g., Kantaras*, 884 So. 2d at 155 (invalidating the marriage of a transsexual man and finding that adoption of his wife’s child was void); *Simmons*, 825 N.E. 2d at 313 (invalidating the marriage of a transsexual man and his wife, and divesting the transgender man of any parental rights, despite the fact that the child was born of the marriage); *J.L.S. v. D.K.S.*, 943 S.W.2d 766, 775 (Mo. Ct. App. 1997) (upholding the denial of legal custody to a transsexual man because of concerns about how sex reassignment surgery would affect the parents’ ability to function as a parental unit).

²¹² Taylor Flynn, *The Ties That (Don’t) Bind: Transgender Family Law and the Unmaking of Families*, in *TRANSGENER RIGHTS*, *supra* note 30, at 32, 36; *see also* Gabriel Arkles et al., *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. FOR SOC. JUST. 579, 589 (2010) (“The intersection of transphobia, homophobia, racism, ableism, and classism is common in custody decisions involving low-income transgender people.”).

²¹³ Interview with Pooja Gehi, *supra* note 17.

protect same-sex individuals from abuse in a number of states.²¹⁴ The protective order statutes of some states, however, deny protection to people in same-sex relationships.²¹⁵

For transgender people whose sex at birth matches that of their current cisgender partner, establishing eligibility under state civil protection order laws is complicated by how state law defines gender. Some state courts have held that a person's birth-assigned sex is hir gender regardless of the individual's professed gender identity and/or any medical intervention that individual has undertaken to make hir physical sex more closely conform to hir gender identity.²¹⁶ In those states, a transgender woman in a relationship with a cisgender man would not be eligible for relief under state civil protection order statutes unless state law provides protection for individuals in same-sex relationships.²¹⁷ Sharon Stapel, executive director of the New York City Anti-Violence Program, recalls that prior to New York's adoption of gender-neutral language in its protective order statute, the ability to use the civil system depended on how well the transgender person "passed." If the transgender person was perceived as being of a different gender than hir abuser, that person had access to protection.²¹⁸ Otherwise, protection was denied to transgender people involved in same-sex relationships (and those who did not present as successfully in their authentic gender).²¹⁹

²¹⁴ Morrison, *supra* note 174, at 95.

²¹⁵ Louisiana, Montana, and South Carolina are three such states. See LA. REV. STAT. ANN. § 46-2132 (2011); MONT. CODE ANN. § 45-5-206 (2011); S.C. CODE ANN. § 20-4-20(b) (2011). Adele Morrison notes that although criminal laws targeting domestic violence do not make specific reference to gender, "the fact that a statute is not facially gendered does not mean that it is gender neutral. This is because the relationship definitions are gendered." Morrison, *supra* note 174, at 134.

²¹⁶ See, e.g., *In re Ladrach*, 32 Ohio Misc. 2d 6, 10 (Ohio Prob. Ct. 1987); see also *supra* text accompanying notes 207 & 208. Although most states will amend a birth certificate to reflect a person's authentic gender (with varying requirements as to the level of medical intervention required), Tennessee law forbids changing a birth certificate to reflect a change from one's birth-assigned gender. TENN. CODE ANN. § 68-3-203(d) (2006). Neither Idaho nor Ohio will change a birth certificate to reflect a change in gender, and although Texas law permits such changes, anecdotal evidence from Texas suggests that some officials refuse to do so unless compelled by court order. See *Sources of Authority to Amend Sex Designations on Birth Certificates*, LAMBDA LEGAL, <http://www.lambdalegal.org/publications/sources-of-authority-to-amend> (last visited Oct. 17, 2012).

²¹⁷ Morgan Lynn et al., *Intimate Partner Violence*, in *TRANSGENDER FAMILY LAW: A GUIDE TO EFFECTIVE ADVOCACY*, *supra* note 207, at 179, 190; see also Morrison, *supra* note 174, at 95 (explaining that "the inclusion of same-sex couples and LGBT individuals in domestic violence law has occurred only through the back door of such laws [S]tatutes have stopped short of explicitly referring to LGBT individuals in gender-specific language.").

²¹⁸ Interview with Sharon Stapel, *supra* note 19.

²¹⁹ *Id.*; see also Sharon Stapel, *Falling to Pieces: New York State Civil Legal Remedies Available to Lesbian, Gay, Bisexual, and Transgender Survivors of Domestic Violence*, 52 N.Y.L. SCH. L. REV. 247, 249 (2007–2008). Stapel views "passing" as a derogatory term; for that reason, I have placed it in quotes. Stapel observes that transgender people have sometimes benefitted from the legal system's uncertainty surrounding their gender identity. Transgender people whose gender identity was opposite of their partner's gender identity gained access to protections and benefits that others in same-sex relationships could not, so long as state actors did not realize that they were transgender. That access immediately became sus-

Although transgender people can, of course, make decisions about how to present in public — what to wear, and what to call themselves among friends and family — when transgender people interact with the state, the state has the power to determine what an individual’s officially recognized gender identity will be and to prevent an individual from asserting the gender identity of hir choice in certain contexts. Legal standards for recognizing a gender identity different than one’s birth-assigned sex often require that a transgender person have undergone invasive, costly, and, for some, unnecessary medical procedures — requirements that prevent many transgender people from obtaining legal recognition of their authentic gender identities.²²⁰ Moreover, because gender recognition laws vary from state to state, transgender people risk losing legal recognition and rights when they move between states.²²¹

(d.) *Seeking State Protection from Abuse.*

Establishing eligibility for relief is only the first hurdle for transgender people subjected to abuse who are considering using the legal system. Transgender people must also weigh the consequences of turning to state systems for relief from abuse.

The court process is a public process. In many states, court records of criminal and civil cases are open to the general public; in an increasing number of states, those records are available online, making it far easier to find information about people using the domestic violence legal system.²²²

pect or was questioned once someone ascertained the petitioner’s transgender status, however. Interview with Sharon Stapel, *supra* note 19; see also Daniel Borunda, *Woman Designated Male at Birth Allowed to Marry Woman in Texas*, N.Y. LAW JOURNAL (May 5, 2010), available at <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202475594337&slreturn=20120929175942> (describing how a transgender woman was permitted to marry her female partner because her birth certificate listed her as male, notwithstanding sex reassignment surgery).

²²⁰ Alice Newlin, *Should a Trip from Illinois to Tennessee Change a Woman into a Man?: Proposal for a Uniform Interstate Sex Reassignment Recognition Act*, 17 COLUM. J. GENDER & L. 461, 465 (2008). Newlin explains that “[o]f the twenty-five jurisdictions to enact statutes allowing transgender people to modify birth records, all but a handful require proof that the individual seeking modification has undergone some form of sex reassignment surgery.” *Id.* at 481. Sociologists Patricia Gagné and Richard Tewksbury discovered that some transgender people who had not undergone medical procedures used legal name changes to get around statutes requiring medical intervention; once the name changes were granted, transgender people used the legal documentation to change not just their names, but also their legal sex on their driver’s licenses. Patricia Gagné & Richard Tewksbury, *Conformity Pressures and Gender Resistance Among Transgendered Individuals*, 45 SOC. PROBS. 81, 95 (1998). While this strategy provided greater security in the form of documents that matched their authentic gender, it exposed them to the risk of having to explain why their genitalia did not match their documentation. *Id.*

²²¹ Gagné & Tewksbury, *supra* note 220, at 95. This is a particular problem in those states that amend birth certificates through administrative processes rather than via judicial action, as a state’s administrative proceedings are not entitled to full faith and credit from other states. Newlin, *supra* note 220, at 483.

²²² See, e.g., *Maryland Judiciary Case Search*, MARYLAND JUDICIARY, <http://casesearch.courts.state.md.us/inquiry/inquiry-index.jsp> (last visited Oct. 17, 2012).

Courtrooms themselves are open to the public; petitioners seeking relief from abuse or testifying in criminal cases frequently tell their stories in front of a gallery of onlookers. Engaging the legal system may mean “coming out” — publicly identifying oneself as transgender, possibly for the first time.²²³ Such exposure can lead to negative reactions from family and friends, discrimination by landlords, employers, and others, and potentially, greater violence.²²⁴ The public nature of the process also puts transgender people on display and opens their lives to scrutiny before both system actors and courtroom observers. Attorney Terra Slavin has seen transgender women who seek protection from abuse gawked at by spectators who question their gender identity, an experience that can make accessing the court system daunting for transgender people.²²⁵

The legal system may also require transgender people seeking protection from abuse to deny their authentic gender in order to qualify for the court’s assistance. Attorney Morgan Lynn notes that transgender people are pressured to complete forms that require designation of an individual’s sex, checking boxes that are listed on court documents, even if those boxes do not accurately reflect how the transgender person sees herself.²²⁶ Courts usually require transgender people to use their legal names and legal genders in petitions for protection;²²⁷ courts want to know if they are talking to a “mister” or a “miss.”²²⁸ But transgender people may not use these terms to describe themselves or might fear being accused of fraud for checking the “wrong” gender box.²²⁹ Advocate Linnet Caban has seen firsthand the impact of being required to use one’s legal name and gender on legal documents. Caban reports that clients are frequently insecure about their ability to convince judges of their need for protection and feel inauthentic because they are not recognized for who they are.²³⁰ The insistence that transgender people use their legal names can also have ramifications for the enforceabil-

²²³ COPE & DARKE, *supra* note 98, at ch. 3.

²²⁴ COURVANT & COOK-DANIELS, *supra* note 23, at 5; *see also* Brown, *supra* note 56, at 155–56.

²²⁵ Interview with Terra Slavin, *supra* note 17. Slavin observes that many people consider the eroticization and dehumanization of transgender people reflected in this kind of staring to be both socially acceptable and commonplace. *Id.* For undocumented transgender women, reporting abuse to the legal system brings the risk that their immigration status will be made public as well, creating significant apprehension that disclosure will lead to deportation. Interview with Morgan Lynn, *supra* note 114. This fear is also common among cisgender undocumented women subjected to abuse. GOODMARK, *supra* note 26, at 73.

²²⁶ Interview with Morgan Lynn, *supra* note 114.

²²⁷ Interview with Pooja Gehi, *supra* note 17.

²²⁸ Interview with Morgan Lynn, *supra* note 114. This insistence on fitting transgender people into the existing gender binary is particularly problematic for those on the genderqueer spectrum, who may identify as neither male nor female, or as not entirely male or female. *Id.*; *see also* Jonathan L. Koenig, *Distributive Consequences of the Medical Model*, 46 HARV. C.R.-C.L. L. REV. 619, 622 n.15 (2011) (defining genderqueer).

²²⁹ Michael Silverman, *Issues in Access to Healthcare by Transgender Individuals*, 30 WOMEN’S RTS. L. REP. 347, 349 (2009).

²³⁰ Telephone Interview with Linnet Caban, *supra* note 125.

ity of the orders that they secure. Imagine a client who goes by the name Jennifer, who calls herself Jennifer, and who looks like Jennifer — but whose order was issued to José. Will the police be willing to enforce an order granted to José when responding to Jennifer’s 911 call?²³¹

Confronted with the possibility that the legal system will refuse to recognize hir authentic gender and require the transgender litigant to acknowledge publicly and respond to an identity that ze does not recognize as authentic, the transgender person subjected to abuse may simply opt out of that system altogether.

3. *Gender Stereotypes and the Transgender Litigant.*

Abuse narratives that succeed in the legal system share key features: a meek, passive, powerless victim; physical violence; and a monstrous, controlling abuser.²³² Gender sits at the core of these narratives. Victims are weak women; abusers are strong men.²³³ Securing a criminal conviction or order of protection requires that victims tell abuse stories that resonate with how judges, prosecutors, police, and juries understand domestic violence.²³⁴

How do stereotypes about domestic violence operate in cases involving transgender litigants? The operation of gender norms within the legal system could require transgender litigants to tell these stereotypical stories.²³⁵ The inability to conform to the gender binary or to present convincingly in the “victimized” gender is thought to prevent transgender people from benefiting from the protection of gender-based laws.²³⁶

What happens in the courtrooms where transgender people’s claims of abuse are heard is somewhat more complex, however, and has not been well documented. As a result, the bulk of the information I rely upon in this section comes from advocates who are trying these cases every day in courtrooms around the country. These advocates represent the best source of information currently available about the ways in which gendered narratives operate in cases involving transgender persons subjected to abuse.

Advocates do, in fact, deploy stereotypical gendered domestic violence narratives on behalf of transgender clients — when those narratives fit the facts of a case.²³⁷ These narratives might seem to be particularly effective in

²³¹ Interview with Morgan Lynn, *supra* note 114. Lynn and attorney Wayne Thomas began discussing this issue after Thomas had just such a case; Lynn has been able to address this issue by obtaining court orders that include both her clients’ legal names and “AKAs” (“also known as” names). *Id.*

²³² See Goodmark, *supra* note 166, at 82–92 (describing those narratives).

²³³ See, e.g., GOODMARK, *supra* note 26, at 63–70; Morrison, *supra* note 174, at 91.

²³⁴ Goodmark, *supra* note 166, at 91–92.

²³⁵ See Meadow, *supra* note 181, at 819 (citing Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 LAW & SOC. INQUIRY 1, 6 (2003)).

²³⁶ See Sue Landsittel, *Strange Bedfellows?: Sex, Religion, and Transgender Identity Under Title VII*, 104 Nw. U. L. REV. 1147, 1163 (2010); John M. Ohle, *Constructing the Trannie: Transgender People and the Law*, 8 J. GENDER RACE & JUST. 237, 269–70 (2004).

²³⁷ Interview with Terra Slavin, *supra* note 17.

cases involving transgender women — especially transgender women who easily pass — and heterosexual men.²³⁸ But even when armed with stories that conform to what judges expect to hear in domestic violence cases, advocates encounter judicial resistance to the abuse narratives of transgender litigants. Some judges are skeptical of gender-based claims of violence made by transgender litigants, insisting that because a transgender woman is not “biologically female” in the traditional sense, the abuse must instead be mutual violence within a same-sex relationship.²³⁹ Others have suggested that a claim of abuse is not credible because, by virtue of her gender, the petitioner should have been able to protect herself.²⁴⁰

Advocates have found that to prevail in cases involving abuse of transgender clients, they need to tell more complex, individualized stories. As Terra Slavin explains, advocates cannot simply rely on the assumption that transgender women will be perceived as victimized by virtue of their gender.²⁴¹ Morgan Lynn frequently finds herself describing clients to the court as “complicated survivors”: people who fought back or otherwise broke the rules in some way, but need the court’s protection nonetheless.²⁴²

Other advocates are consciously moving away from gendered narratives in an attempt to increase the availability of protection from abuse for LGBT individuals. Kristin Tucker describes intimate partner abuse as being something that deeply involves, but is not based on, gender; while gender and abuse are related, one need not be a woman to be abused.²⁴³ Intimate partner abuse is conceived as a pattern of violence, coercion, and control that is *affected* by gender (and potentially supported by gender privilege), but experienced *across* gender.²⁴⁴

Even as they move away from reliance on gendered narratives, however, advocates believe that gender is very much a subtext in cases involving transgender litigants’ claims of abuse. Narratives for judges are still situated in the gender binary and based on assumptions about how men and women act and respond.²⁴⁵ Advocates believe that cases in which judges fail to find that abuse has occurred would resolve quite differently if the petitioner were cisgender.²⁴⁶

²³⁸ *Id.*

²³⁹ Interview with Pooja Gehi, *supra* note 17.

²⁴⁰ *Id.*; see also Interview with Terra Slavin, *supra* note 17.

²⁴¹ Interview with Terra Slavin, *supra* note 17.

²⁴² Interview with Morgan Lynn, *supra* note 114.

²⁴³ Interview with Kristin Tucker, *supra* note 43.

²⁴⁴ *Id.*; see also Interview with Wayne Thomas, *supra* note 95.

²⁴⁵ Interview with Morgan Lynn, *supra* note 114.

²⁴⁶ Telephone Interview with Linnet Caban, *supra* note 125; Interview with Terra Slavin, *supra* note 17; Interview with Kristin Tucker, *supra* note 43. In addition, some judges are simply uncomfortable with, or hostile to, transgender people — both the idea of transgender people and their physical presence. Judges appear confused, unable to use appropriate pronouns, and unwilling to listen to claims that they might otherwise find compelling. Most of the advocates I interviewed described judges as a mixed bag, though all noted the difficulty in assessing how judges treated transgender litigants in protective order cases because so few of

III. PATRIARCHY, GENDER CONFORMITY, AND THE ABUSE OF TRANSGENDER PEOPLE

Since the birth of the battered women's movement in the 1970s, domestic violence has been described as a gendered phenomenon. Societal conceptions of domestic violence focus almost exclusively on abuse perpetrated by men against women, and abuse perpetrated against white, middle class, heterosexual women particularly.²⁴⁷ Prevailing theories describe domestic violence as a means of reinforcing patriarchy and enforcing control of women within intimate relationships with men.²⁴⁸ While patriarchy, as outlined in the classic domestic violence literature, is one vehicle for understanding abuse in the transgender community, intimate partner abuse of transgender people can be seen as gendered in other, more complicated ways as well — as a means of enforcing appropriate gender roles and policing gender conformity. More problematically, intimate partner abuse among transgender people may be gendered in the sense that transgender men and women understand their experiences of abuse through gendered lenses — as part of what it means to be “male” or “female.” Gender itself becomes a weapon to be used against the transgender person subjected to abuse in unique and particularly damaging ways. Gender is at the heart of, and makes transgender people more vulnerable to, intimate partner abuse.

A. Patriarchy

Gender is at the core of domestic violence law and policy. The early battered women's movement attributed domestic violence to men's need to shore up the patriarchy.²⁴⁹ Men used physical violence to assert their dominant positions over women in families and, by extension, in society;²⁵⁰ the

their clients actually choose to go to court. Telephone Interview with Linnet Caban, *supra* note 125; Interview with Morgan Lynn, *supra* note 114; Interview with Terra Slavin, *supra* note 17; Interview with Wayne Thomas, *supra* note 95; Interview with Kristin Tucker, *supra* note 43. Nonetheless, all of the advocates knew of transgender petitioners who had prevailed in their civil protective order cases, suggesting that the legal system might be a viable avenue for protection in some cases. How to make the system responsive to the needs of transgender litigants will be explored *infra* Part IV.

²⁴⁷ See Morrison, *supra* note 174, at 132. Women of color and low-income women have often been marginalized within the domestic violence movement; the same critique has been made of the LGBT movement — that its white, affluent orientation makes it deaf to the needs of others within the community. See MOGUL ET AL., *supra* note 32, at xviii.

²⁴⁸ See Kersti A. Yllö, *Through a Feminist Lens: Gender, Diversity, and Violence: Extending the Feminist Framework*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 19, 22 (Donileen R. Loseke et al. eds., 2005).

²⁴⁹ *Id.*; see generally ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAW-MAKING (2000).

²⁵⁰ As Professor Elizabeth Schneider explains: “Battering, and the problem of power and control, were understood within a systemic framework as part of the larger dilemma of gender subordination, which included gender role socialization; social and economic discrimination in education, workplace, and home; and lack of access to child care.” SCHNEIDER, *supra* note 249, at 22; see also Emily Sack, *Battered Women and the State: The Struggle for the Future of*

state facilitated these assertions of superiority through violence by turning a blind eye to abuse in the home and refusing to intervene on the rare occasions that that violence was made public through calls to police or the pressing of charges.²⁵¹ Despite contentions by some social scientists that women are just as violent as men²⁵² — debates that continue to the present²⁵³ — domestic violence law and policy were built upon these central tenets.²⁵⁴ To dismantle the patriarchy, a strong state response to violence against women was necessary, not only to protect individual women, but also to remedy women's societal inequality.²⁵⁵

Some have argued that the need to maintain male supremacy motivates intimate partner abuse of transgender people as well. Tarynn Witten and Evan Eyler argue that:

[I]nterpersonal violence and abuse against transsexual, transgender[] and cross-dressing persons . . . represent[] a form of gender terrorism whose underlying motivation is the maintenance of a social system in which males dominate females through emotional, verbal and physical acts of force, and in which the line between the genders must be rigidly maintained in support of this social schema.²⁵⁶

Similarly, as transgender activist Kate Bornstein writes: “The most obviously violent structure within the cult of gender is sexism, misogyny. Mis-

Domestic Violence Policy, 2004 WIS. L. REV. 1657, 1666 (arguing that the state enforced patriarchy by condoning male violence against women). Kristin Bumiller warns that the excessive focus on gender identity as the cause of violence risks obscuring the importance of race and culture in abuse. See BUMILLER, *supra* note 90, at 154.

²⁵¹ See GOODMARK, *supra* note 26, at 9.

²⁵² See, e.g., Michael S. Kimmel, “Gender Symmetry” in *Domestic Violence: A Substantive and Methodological Research Review*, 8 VIOLENCE AGAINST WOMEN 1332, 1333 (2002); Murray A. Straus, *Physical Women’s Violence Toward Men is a Serious Social Problem*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 55, 55 (Donileen R. Loseke et al. eds., 2005).

²⁵³ See, e.g., WALTER S. DEKESEREDY, VIOLENCE AGAINST WOMEN: MYTHS, FACTS, CONTROVERSIES 43–58 (2011).

²⁵⁴ See GOODMARK, *supra* note 26, at 14–18.

²⁵⁵ Cf. JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 29 (2006) (arguing that governance feminist victories in rape and domestic violence served “as leverage points for the desubordination of women”).

²⁵⁶ Tarynn M. Witten & A. Evan Eyler, *Hate Crimes and Violence Against the Transgendered*, 11 PEACE REV. 461, 461 (1999); see also COPE & DARKE, *supra* note 98, ch. 3 (arguing that genderism is “a weapon of sexism”) (citing SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM (1988)); SERANO, *supra* note 29, at 3 (contending that “most of the anti-[transgender] sentiment that I have had to deal with as a transsexual woman is probably better described as misogyny”); Flynn, *supra* note 32, at 393 (arguing that “discrimination against women, gay persons, and other transsexual individuals, as well as other groups that are typically perceived as independent from one another, springs from the same source, the privileging of the masculine and subordination of the feminine” (footnotes omitted)). *But see* Nicola Brown, *Stories from Outside the Frame: Intimate Partner Abuse in Sexual-Minority Women’s Relationships with Transsexual Men*, 17 FEMINISM & PSYCH. 373, 374 (2007) (“[A]buse in lesbian, gay, bisexual, and [transgender] relationships represents a significant theoretical challenge to the ‘grand narrative’ of partner violence as an outgrowth of patriarchy and power imbalances.”).

ogyny is necessary to maintain the cult of gender, the struggle to be one or the other.”²⁵⁷

In his study of violence among transgender people in Japan, Anthony DiStefano found that intimate partner abuse followed what he calls “traditional gender lines [T]he partner who ascribes to a more masculine role tends to perpetrate violence against the partner who takes the more feminine role.”²⁵⁸ DiStefano’s observations support law professor Adele Morrison’s argument that regardless of who actually perpetrates the abuse, battering is gendered male in that it is “a behavior that is an aspect of the ‘socially constructed’ (gendered) man’s behavior, which can be committed regardless of the biological sex, sexual orientation or sexual community of the offender.”²⁵⁹ Further, “choosing to act out abusively toward an intimate partner is coded as an aspect of being a man.”²⁶⁰

Some transgender women see their abuse as consistent with the patriarchy narrative. That is, for transgender women who identify as heterosexual women, their stories of abuse — that they, as straight women, are being victimized by their boyfriends — are consistent with the traditional domestic violence narrative in which abuse is used by men to assert their status and their right to control their partners.²⁶¹ As Jahaida, a transgender woman subjected to abuse in her relationship, explained, when she played the male role in a relationship, she thought she had to be dominant; now, as a woman, she sees her role as being submissive to her partner.²⁶² While this is almost certainly *not* the experience of all transgender women, some transgender women have internalized patriarchal relationship narratives and understand the abuse they endure within that framework.

B. Enforcing Gender Roles

Intimate partner abuse of transgender people may also serve as a form of policing binary gender norms. In such relationships, abuse is deployed to punish the transgender partner for that person’s failure to conform to traditional gender categories or presentations. For Gwen Araujo, a transgender woman murdered on October 3, 2002, by four young men that she knew (three of whom were previous sexual partners), the punishment was death. As Victoria Steinberg explains, “[t]he defendants in Araujo’s case made clear that their well-policed gender and sexuality boundaries were threatened, resulting in a feeling that ‘the way things are supposed to be had been shattered,’” a situation that the young men believed could only be recti-

²⁵⁷ BORNSTEIN, *supra* note 38, at 105.

²⁵⁸ DiStefano, *supra* note 120, at 133.

²⁵⁹ Morrison, *supra* note 174, at 92.

²⁶⁰ *Id.* at 139.

²⁶¹ Interview with Pooja Gehi, *supra* note 17.

²⁶² Interview with Trans Women Support Group, *supra* note 137.

fied through Araujo's murder.²⁶³ Having a sexual or romantic partner stretch the boundaries of the binary gender system — a system that operates not only on a societal level, but between individuals as well — can provoke an abuser's desire to exert control over the way in which a transgender partner expresses hir gender identity.²⁶⁴ The cisgender abuser's need to engage in gender policing may grow from the doubt, confusion, and anxiety some cisgender people experience when confronted with the transgression of gender roles.²⁶⁵

Gender policing in the context of intimate partner relationships poses an odd dichotomy. Those involved in intimate relationships with transgender individuals often know that their partners are living outside of societal gender norms. Nonetheless, abusers may use the transgender person's "transgressive" status to punish them. In his study of transgender people subjected to abuse in Japan, for example, Professor Anthony DiStefano talked with a transgender woman named Chaiaki, who "reported personal experience of psychological abuse by partners who intentionally called her a man, which she explained was particularly hurtful to [transgender women]."²⁶⁶ That type of denigration is common outside of intimate relationships and is used as a way of policing gender boundaries by reminding transgender people of their failure to "pass" in their chosen gender; such denigration may be deployed for similar reasons within intimate relationships. Indeed, this type of conduct is intended to prevent transgender people from openly expressing their gender identities, both in society generally and within interpersonal relationships.²⁶⁷ Similarly, Vivian Namaste notes that "[w]hen FTMs [female-to-male transsexuals] are assaulted, for instance, rape is a routine part of the violence they endure FTMs who are raped

²⁶³ Victoria L. Steinberg, *A Heat of Passion Offense: Emotions and Bias in "Trans Panic" Mitigation Claims*, 25 B.C. THIRD WORLD L.J. 499, 515 (2005); see also O'Flaherty & Fisher, *supra* note 80, at 209 (arguing that violence is the punishment "for transgressing gender boundaries"). As with the murders described at the outset of this Article, although Araujo had engaged in intimate relationships with some of her killers, her murder has never been described as intimate partner abuse.

²⁶⁴ Professor Petra Doan calls this attempt at control the "tyranny of gender," which "arises when people dare to challenge the hegemonic expectations for appropriately gendered behavior in western society." Petra L. Doan, *The Tyranny of Gendered Spaces — Reflections from Beyond the Gender Dichotomy*, 17 GENDER, PLACE & CULTURE 635, 635 (2010).

²⁶⁵ See, e.g., NAMASTE, *supra* note 32, at 135–36, 141; SERANO, *supra* note 29, at 11; SHELLEY, *supra* note 38, at 91–92; L. Camille Hébert, *Transforming Transsexual and Transgender Rights*, 15 WM. & MARY J. WOMEN & L. 535, 565–66 (2009).

²⁶⁶ DiStefano, *supra* note 120, at 130; see also COURVANT & COOK-DANIELS, *supra* note 23, at 5 (explaining that abusers use "shame and self-doubt" about their transgender partner's gender identity "to convince them that no one else will want them").

²⁶⁷ See Lombardi et al., *supra* note 46, at 100 (explaining that transgender individuals who are seen as breaking gender norms are more likely to be severely punished for it); Interview with Kristin Tucker, *supra* note 43 (explaining that domestic violence is about the enforcement of gender roles, with violence a consequence of transgression).

are told, through the act of sexual assault, that they are ‘really’ women, and they will be treated as such. Biology is destiny.”²⁶⁸

Intimate partner abuse against transgender people, then, works on multiple levels. Violence serves both to maintain control within individual relationships, and to reinforce societal gender norms; abuse is the ultimate assertion of control in a relationship that may prompt deep and unsettling feelings of insecurity or discomfort in the cisgender partner, who sees not just hir partner, but *herself* as transgressing gender norms by engaging in the relationship. Such abuse may be particularly painful for the transgender partner who does not view himself as transgressing gender norms, but rather as conforming to hir authentic gender identity. While abuse born of gender policing may not look like the type of policing typically associated with the battering of heterosexual women, it serves nonetheless as a desperate assertion of control within an intimate context.

C. Abuse as Reinforcing Gender Identity

Being recognized as one’s authentic gender is of central importance to many transgender people,²⁶⁹ and passing can serve as one indicia of that recognition. Passing allows transgender people to live openly and comfortably in their authentic gender and decreases the transgender person’s exposure to violence and discrimination.²⁷⁰ As transgender feminist Emi Koyama writes: “As trans[gender] women, we have learned that our safety is often dependent on how well we can ‘pass’ as ‘normal’ women”²⁷¹ That external validation, however, can empower others to define the transgender person, as it relinquishes the determination as to whether the transgender person’s gender presentation is authentic. As activist Pat Califia notes: “[E]ven after hormones and surgery, voice lessons and electrolysis, bodybuilding and tattoos, some transgender[] people are never going to be able to ‘pass’ in their gender of preference.”²⁷² This may be particularly true for

²⁶⁸ NAMASTE, *supra* note 32, at 146–47 (footnote omitted). Other forms of abuse that serve to reinforce gender norms include telling someone that they are not a “real” man or woman, controlling a partner’s style of dress, or refusing to provide a partner with access to clothing or medical treatment needed for the transgender person to present in a manner consistent with hir authentic gender. FORGE, *supra* note 58, at 4.

²⁶⁹ See generally PAT CALIFIA, *SEX CHANGES: THE POLITICS OF TRANSGENDERISM* (1997). Califia is somewhat critical, however, of that need for recognition, suggesting that the standards for gender performance should change and that the achievement of gender conformity need not be considered a victory. See *id.* at 276–77.

²⁷⁰ See BORNSTEIN, *supra* note 38, at 126–27 (“Passing emphatically equals membership, and passing includes all the privileges of gender membership.”); Gagné & Tewksbury, *supra* note 220, at 94 (finding that transgender women who did not, for whatever reason, pass were more likely to experience harassment, threats, and assault).

²⁷¹ KOYAMA, *supra* note 17, at 5. One study found that once a transgender woman passes, however, her fears often increase because of a heightened sense of vulnerability. See Gagné & Tewksbury, *supra* note 220, at 94. Jennifer Finney Boylan describes her experience with a would-be rapist in her memoir, *SHE’S NOT THERE: A LIFE IN TWO GENDERS* 189–91 (2003).

²⁷² CALIFIA, *supra* note 269, at 209.

transgender women, who often have a more difficult time passing than transgender men.²⁷³

Passing can serve as external validation of the transgender person's successful gender performance.²⁷⁴ Although passing is a fraught concept, the desire to have external validation of one's authentic gender identity is undeniably important to many transgender people. Transgender people may, as a result of that need for approval, engage in activities that ratify their gender identity at the risk of their health or safety. Studies have found that some transgender women engage in sex work and unprotected sex because doing so validates them as women and increases their self-esteem.²⁷⁵ As one study concludes, "[t]he need for affirmation of one's transgender identity is strong. Being recognized and affirmed in the crossgender role as sexually desirable is extremely important."²⁷⁶ That desire may make transgender women more vulnerable to staying in abusive relationships.²⁷⁷

Intimate partner abuse may be gendered to the extent that it reinforces one's authentic gender. Recall law professor Adele Morrison's contention that battering is gendered male, and victimization is gendered female.²⁷⁸ For transgender men, the desire to conform to gender norms may both push them to abuse and prevent them from reporting being abused. Participants in Nicola Brown's study of the partners of transgender men reported that "at times [the transgender men's community] encouraged competitiveness around machismo and created 'peer pressure' to exhibit a stereotypical masculinity 'especially when you want to pass.'"²⁷⁹ For some of the transgender men, that stereotypical masculinity extended to subjecting their partners to emotional, verbal, physical, and financial abuse.²⁸⁰ Similarly, as described in Anthony DiStefano's study, a transgender man was told by his partner: "You need to be more masculine. You're not manly enough . . ." This was psychologically agonizing to him So conversely after that, he ended up

²⁷³ SHELLEY, *supra* note 38, at 51.

²⁷⁴ See W.O. Bockting et al., *Transgender HIV Prevention: A Qualitative Needs Assessment*, 10 AIDS CARE 514, 522 (1998). Passing may also make transgender people more likely to prevail in court; Anna Kirkland observes that transsexuals are more likely to win legal victories when they demonstrate traditional sex and gender role adherence in their chosen gender performance. See generally Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 LAW & SOC. INQUIRY 1 (2003).

²⁷⁵ Willy Wilkinson, *Public Health Gains of the Transgender Community in San Francisco: Grassroots Organizing and Community-Based Research*, in TRANSGENDER RIGHTS, *supra* note 30, at 192, 193; T. Nemoto et al., *Social Context of HIV Risk Behaviours Among Male-to-Female Transgenders of Colour*, 16 AIDS CARE 729, 732 (2004). Financial necessity remains the most common reason transgender people engage in sex work. See *supra* section II.C.1.

²⁷⁶ Bockting et al., *supra* note 274, at 521.

²⁷⁷ See Brown, *supra* note 56, at 154.

²⁷⁸ Morrison, *supra* note 174, at 139.

²⁷⁹ Brown, *supra* note 256, at 382.

²⁸⁰ See *id.* at 376-77.

being violent, himself . . . punching his partner and such.”²⁸¹ For transgender men, abuse can serve as a means of distancing oneself from women and of establishing oneself definitively as “not woman.”²⁸²

Acting consistently with gender norms may also color the way that transgender men experience abuse. Law professor Carolyn Grose describes a client’s reaction to the idea that she should seek legal protection from her abusive wife:

[A] husband would not go to court to seek protection from his wife. Men don’t get hit by their wives, and if they do, they certainly don’t drag it out in public and ask for the court’s protection. She felt humiliated and emasculated by the idea of going in front of a judge and saying, “my wife hit me and I need protection.”²⁸³

Being coded a man, then, may require both acting abusively and denying that one is subjected to abuse.

For transgender women, gender affirmation may come through the experience of being abused. As researcher Val Jenness learned in her study of transgender women in California’s prisons, transgender women are vastly more likely to be abused by partners than are other inmates, an experience that the transgender prisoners saw as affirmation of their femininity — “he treats me like his wife.”²⁸⁴ Didi, a transgender woman subjected to abuse, explains that she sought out men who were more aggressive than she — “gangster guys.”²⁸⁵ If they were not tough, Didi was not interested in them because, she says, “being beaten made me feel more like a woman.”²⁸⁶ Cha-

²⁸¹ DiStefano, *supra* note 120, at 138; *see also* Interview with Terra Slavin, *supra* note 17 (agreeing that some transgender men see violence as part of their role as men). *But see* Carolyn Grose, *A Persistent Critique: Constructing Clients’ Stories*, 12 CLINICAL L. REV. 329, 354–55 (2006). Grose cites a client’s defense to a claim that she had abused her wife: “A boy would never hit a girl; I was raised that a boy should never raise his hand to a girl. I would never hit my wife.” *Id.* Grose notes that she has used the gender pronoun preferred by her client. Sheila, Grose’s client, did not identify as lesbian or transgender; “[s]he is simply living her life, as someone assigned female at birth, who is playing traditionally male social and cultural roles.” *Id.* at 355. Although the client identified as male, she used the pronoun “she” to describe herself, and I have used it here. *Id.* at 330 n.2.

²⁸² *See* Brown, *supra* note 256, at 382–84.

²⁸³ Grose, *supra* note 281, at 355. In court, Sheila’s student attorneys elicited “the only story Sheila would be comfortable telling . . . that she was a loyal and devoted husband who would never hit her wife; and that she felt pain and humiliation, as the husband, at having to come seeking the court’s protection against her wife.” *Id.* at 365; *see also* Interview with Terra Slavin, *supra* note 17 (agreeing that some transgender men are reluctant to report abuse because the role of victim does not fit the male narrative). Rhonda J. Factor and Esther D. Rothblum posit that transgender men may be more likely to suffer harassment and discrimination because they possess a false sense of safety as men and thus feel less vulnerable than they did as women. “Perhaps this false sense of safety, a desire to experience themselves as strong and independent, and/or a desire to be perceived as strong and independent, may lead them to be less cautious than transwomen.” Factor & Rothblum, *supra* note 76, at 27.

²⁸⁴ Interview with Valerie Jenness, Univ. of Cal., Irvine, Dep’t of Criminology, Law, and Soc’y, Dep’t of Sociology (June 2011) (notes on file with author).

²⁸⁵ Interview with Trans Women Support Group, *supra* note 137.

²⁸⁶ *Id.*

nel Lopez, an advocate and counselor for transgender women subjected to abuse, says clients frequently tell her that being beaten affirms their femininity. Particularly when a transgender woman is just beginning her transition, Lopez explains, she may feel that the beating is a good thing — affirmation of her identity as a woman at a time when she may not be “passable.”²⁸⁷ The desire to be perceived, understood, and affirmed as women by the men around them shapes how transgender women process the abuse to which they are subjected; they perceive abuse as ratifying their success in passing as women.²⁸⁸

Abuse reaffirms some transgender women’s femininity. Statements that question that femininity may be particularly hurtful.²⁸⁹ Given the importance many transgender women place on gender affirmation, challenging a transgender woman’s status as a woman is an effective tactic for abusers. “[Transgender] women are . . . more vulnerable to emotional and verbal abuse by their partners,” writes Emi Koyama, “because of their often low self-esteem and negative body image. It is easy for an abuser to make a trans[gender] woman feel ugly, ashamed, worthless, and crazy”²⁹⁰

Intimate partner abuse often serves to reinforce gender norms. Many individuals subjected to abuse — cisgender and transgender — are transgressive in some way: women who fight back against their abusers, women who are economically better off than their partners, or women who assert their power and independence, for instance. Transgender people in particular challenge gender norms in ways that their partners may find disconcerting or frightening — even for those who seek transgender people out as partners.

IV. RETHINKING THE RESPONSE TO ABUSE OF TRANSGENDER PEOPLE

Current law and policy responses to intimate partner abuse, both criminal and civil, largely fail to meet the needs of transgender people subjected to abuse. This section suggests changes within the legal system that could help it better serve the needs of transgender people subjected to abuse, and argues for a community-based, extralegal system of response for those people who choose not to engage with the legal system.

A. *Within the Legal System*

The vast majority of transgender people subjected to abuse never come into contact with the legal system, purposefully avoiding a system that they

²⁸⁷ Interview with Chanel Lopez, *supra* note 64.

²⁸⁸ Interview with Valerie Jenness, *supra* note 284. Jenness describes that feeling as the desire to “secur[e] the standing of ‘girl’ in an alpha male environment.” Jenness, *supra* note 24, at 528 (citation omitted).

²⁸⁹ See KOYAMA, *supra* note 17, at 12.

²⁹⁰ *Id.*

believe will not help them. But some of the very few transgender people subjected to abuse who actually choose to use the legal system are, according to advocates, achieving positive outcomes.²⁹¹ Notwithstanding the many hurdles transgender people subjected to abuse confront when turning to the legal system, then, there is some hope that the legal system could be a viable option for responding to abuse. Being able to rely on the legal system would benefit transgender people subjected to abuse. As Adele Morrison writes: “The state stepping in to protect those who are being harmed and the system stopping that from happening again and preventing it in the first place are what victims want.”²⁹² The challenge, as Morrison and the advocates who work with transgender people subjected to abuse recognize, is transforming the system from one that “picks and chooses who is worthy of protection and from whom those people need to be protected” to one that treats all who are subjected to abuse and who choose to engage with the state with dignity and concern.²⁹³

Building such a system may require rejecting the primacy of the criminal justice system in domestic violence law and policy.²⁹⁴ The continued involvement of transgender people in unlawful work, the long history of police involvement in gender role enforcement, the frequency and severity of police abuse of transgender people, the horrendous conditions of confinement that transgender people endure in the criminal system, and the inability of police to tell abusers from the abused all militate against characterizing the criminal justice system as a safe haven for transgender people subjected to abuse. Particularly for transgender people of color and undocumented transgender immigrants, the stakes of turning to an oppressive state system for relief from abuse may always be too high.²⁹⁵

A responsive system would require fundamental changes to both the law itself and to those who enforce it. Civil protection order statutes should clearly and unequivocally provide protection for transgender people subjected to abuse. Although gender neutral statutes might seem to promise the same result as specific provisions authorizing transgender people to seek state protection, in practice, “the lack of explicit inclusion has given those in

²⁹¹ Interview with Kristin Tucker, *supra* note 43.

²⁹² Morrison, *supra* note 174, at 155.

²⁹³ *Id.*

²⁹⁴ See MOGUL ET AL., *supra* note 32, at 139–40; Morrison, *supra* note 174, at 148–49; Interview with Pooja Gehi, *supra* note 17; Telephone Interview with Jarad Ringer & Marie Romeo, *supra* note 19. As Terra Slavin notes, the disproportionate amount of institutional violence transgender people experience makes it oxymoronic to turn to institutional systems to protect them. Interview with Terra Slavin, *supra* note 17.

²⁹⁵ See Ritchie, *supra* note 138, at 142–43. Cf. Sylvanna Falcón, “National Security” and the Violation of Women: Militarized Border Rape at the US-Mexico Border, in COLOR OF VIOLENCE, *supra* note 108, at 119, 122–26. (Though this Article makes no specific mention of transgender immigrants, it is reasonable to assume that the experiences of undocumented immigrants discussed by Falcón would be similar or made worse for undocumented transgender immigrants.)

the system a way out” of assisting transgender people.²⁹⁶ Moreover, if targeted language is not included, transgender people may not believe that they are eligible to seek the protection of courts.²⁹⁷ Additionally, the law should permit transgender people to seek protection consistent with their authentic gender identity — using the names, pronouns, and genders in which they live on a day-to-day basis.²⁹⁸ Finally, the legal system should provide transgender people with the full range of remedies and resources that it provides cisgender people subjected to abuse.²⁹⁹

Changing the culture of the legal system is as important as substantively changing the law. Courts should be a space where transgender people subjected to abuse feel safe and welcome. Courts should affirm and validate the stories of transgender people subjected to abuse.³⁰⁰ Judges and other court officers should respect and value the personhood of transgender litigants.³⁰¹ Clearly, a fundamental shift in society’s treatment of transgender people is required; the judiciary could help to start that movement.³⁰² Just as the legal system has learned to open its doors to other marginalized communities, the legal system could become a welcoming space for transgender people.³⁰³

Finally, building a more responsive legal system will require expansion of our understanding of abuse beyond the current binary conception of men as abusers and women as victims. The stereotypical narrative of intimate partner abuse fits some cases, but is inapposite in many others.³⁰⁴ Transgender women subjected to abuse, like other marginalized women,³⁰⁵ may be more likely to fight back against their abusers. So long as abusers continue to be coded male and victims coded female, transgender people subjected to

²⁹⁶ Morrison, *supra* note 174, at 142.

²⁹⁷ *Id.*

²⁹⁸ Telephone Interview with Linnet Caban, *supra* note 125; Interview with Morgan Lynn, *supra* note 114.

²⁹⁹ One example: transgender people engaged in sex work or other illegal activities are not eligible for crime victim compensation funds in many jurisdictions, precluding them from seeking emergency financial assistance that could help to prevent or alleviate further abuse. Interview with Terra Slavin, *supra* note 17; *see generally* Njeri Mathis Rutledge, *Looking a Gift Horse in the Mouth — The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims*, 19 DUKE J. GENDER L. & POL’Y 223 (2011) (discussing the purpose of crime victim compensation and identifying barriers preventing domestic violence victims in general from making use of those funds).

³⁰⁰ Interview with Pooja Gehi, *supra* note 17; Interview with Morgan Lynn, *supra* note 114.

³⁰¹ Interview with Terra Slavin, *supra* note 17.

³⁰² Some have suggested that judicial education is essential in making this shift. *See* Telephone Interview with Linnet Caban, *supra* note 125. I am somewhat more skeptical of the utility of judicial education. *See* Goodmark, *supra* note 166, at 124.

³⁰³ My thanks to Professor David Jaros for this insight.

³⁰⁴ As attorney Andrew Sta. Ana notes, the legal system often fails when it tries to get people out of the boxes into which they are categorized — like victim and perpetrator. Only by reviewing our “internal and external messages about gender” can we start to reshape these narratives. Interview with Andrew Sta. Ana, *supra* note 184.

³⁰⁵ *See* Goodmark, *supra* note 166, at 92–111.

abuse will remain in limbo. Transgender people may be subjected to abuse both as a function of their expressed gender identity and as a result of their failure to conform to their birth-assigned sex. Understanding abuse as an exercise of power and control that is *affected* by gender, but not necessarily one that is *inherently* gendered, will be essential if transgender people are to secure the protection they need.³⁰⁶ Disaggregating abuse and gender could also undermine the power of abuse as a proxy for gender affirmation. If victimization is no longer coded female, transgender women will cease to see the experience of abuse as simply part of being a woman, and will be less likely to interpret abuse as proof that their partners accept them as women.

At present, “transgender[] people occupy a near-total blind spot in our society and legal system.”³⁰⁷ With a greater societal acceptance of transgender people, the failure to see transgender people as worthy of legal protection could abate. With the transgender community gradually obtaining greater societal recognition, reforming the legal system could be appropriate for the moment in which we currently find ourselves — a flawed step toward a more responsive system. Until that system emerges, however, transgender people will need options that provide immediate assistance.

B. *The Extralegal Response*

Given the hostility of the legal system to their claims, transgender people subjected to abuse have long sought assistance outside of formal, state-run systems. Transgender people subjected to abuse have relied on friends and family (biological and chosen), created support networks specifically for the transgender community, and advocated for access to state-funded domestic violence services.³⁰⁸ More recently, a growing chorus has championed the idea of creating and maintaining community-based services and supports for all people subjected to abuse in lieu of continuing to fund and expand systems that require involvement with the state.³⁰⁹ As advocates Gabriel Arkles, Pooja Gehi, and Elana Redfield explain:

[T]he structures that result in decreased life chances for members of our communities, and for all people of color, poor people, trans[gender] people, queer people, and people with disabilities, are deeply rooted in and inextricably linked with the legal system as we know it. If the problems faced by our communities are rooted in and enforced by the legal system, then meaningful change would have to come from outside of it.³¹⁰

³⁰⁶ See Interview with Kristin Tucker, *supra* note 43.

³⁰⁷ Steinberg, *supra* note 263, at 522.

³⁰⁸ Holman & Goldberg, *supra* note 53, at 198.

³⁰⁹ See GOODMARK, *supra* note 26, at 137–41.

³¹⁰ Arkles et al., *supra* note 212, at 581.

Community-based strategies can help people subjected to abuse find justice without requiring the intervention of the legal system, and can make services and supports available without subjecting them to state scrutiny or eligibility standards. Community accountability efforts like those of Creative Interventions in California help people subjected to abuse define what justice means for them in the context of their relationships, families, and communities, and engage the communities (as defined by the people subjected to abuse seeking assistance) in designing strategies for addressing abuse that are responsive to the needs and desires of each individual.³¹¹ Ultimately, community accountability “means you don’t have to do it all yourself.”³¹²

Domestic violence advocates could learn from the community-based work being done around related issues. Generation FIVE, an organization working to eradicate child sexual abuse within five generations, is employing a community-based advocacy strategy to help social justice movements and community organizations “build their capacity to respond to and prevent violence” using a construct they call “transformative justice.”³¹³ The strategy grows from Generation FIVE’s commitment to developing a just world, which it defines as a world that deploys a “liberatory approach to violence.” “A liberatory approach seeks safety and accountability,” the group explains, “without relying on alienation, punishment, or State or systemic violence, including incarceration and policing.”³¹⁴ The group argues that given the state’s appropriation of violence and force for its own purposes, “[t]he conditions that allow all forms of violence to continue cannot be truly transformed by the State, being an institutional formation that is itself reliant on its exercise of violence.”³¹⁵

The goals of transformative justice include “[s]urvivor safety, healing and agency; [a]ccountability and transformation of those who abuse; [c]ommunity response and accountability; [and] [t]ransformation of the community and social conditions that create and perpetuate violence.”³¹⁶

³¹¹ GOODMARK, *supra* note 26, at 186, 195.

³¹² Leah Lakshmi Piepzna-Samarasinha, *Where the Revolution Started: An Introduction*, in *THE REVOLUTION STARTS AT HOME: CONFRONTING PARTNER ABUSE IN ACTIVIST COMMUNITIES* 5, 6 (Ching-In Chen et al. eds., 2011), available at http://www.incite-national.org/media/docs/0985_revolution-starts-at-home.pdf.

³¹³ GENERATION FIVE, *TOWARD TRANSFORMATIVE JUSTICE: A LIBERATORY APPROACH TO CHILD SEXUAL ABUSE AND OTHER FORMS OF INTIMATE AND COMMUNITY VIOLENCE* 2 (June 2007). Donna Coker has used the term “transformative justice” to refer to restorative justice programs that “help[] women build a community that supports women’s autonomy without forcing women to choose between their ethnic/racial communities and safety.” Donna Coker, *Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence*, in *RESTORATIVE JUSTICE AND FAMILY VIOLENCE* 128, 148 (Heather Strang & John Braithwaite eds., 2002). Generation FIVE uses the term “transformative justice” differently, arguing that restorative justice has “largely been co-opted by the State for use in coercive contexts in which the integrity of such a model is put into question.” GENERATION FIVE, *supra*, at 21.

³¹⁴ GENERATION FIVE, *supra* note 313, at 5.

³¹⁵ *Id.* at 9.

³¹⁶ *Id.* at 5–6. Safety is defined across a number of dimensions: physical, sexual, emotional/psychological, political, economic, and public. *Id.* at 42. Accountability is seen not as a

Generation FIVE rejects the idea that accepting violence at the hands of the state, in the form of interaction with state systems that condone and exploit racism, sexism, homophobia, and class oppression, is the necessary cost of eradicating interpersonal violence.³¹⁷ Moreover, Generation FIVE notes that marginalized people who turn to the state for protection “are rarely satisfied with the results in terms of the survivors’ safety and healing or a sense of justice.”³¹⁸

Generation FIVE recognizes that communities may be ill-equipped to take on responsibility for addressing violence; after all, it notes, “the viability of this approach depends on community structures and institutions that, in many cases, have been devastated by the very systems of oppression and State violence against which social justice movements are working.”³¹⁹ But Generation FIVE sees addressing individual acts of violence as the first step toward “mobilizing people to address conditions that create injustice in our communities,” inspiring people to work toward broader social change.³²⁰ By cultivating a sense of responsibility for addressing violence among all members of the community, supporting the self-determination of people subjected to abuse, fostering community norms that challenge violence, and using the community to ensure accountability, communities can provide people subjected to abuse with forms of justice that the state cannot.³²¹

LGBTQ organizations are in the beginning stages of developing community accountability models to address intimate partner abuse. NCAVP has convened a Transformative Justice Study Group to consider ways of addressing violence without resorting to the criminal justice system.³²² Community United Against Violence (CUAV) in San Francisco, California, uses peer counseling, education and outreach, and grassroots organizing to address intimate partner violence in the LGBTQ community. The organization opposes the increasing use of the criminal justice system in cases of intimate partner violence, but acknowledges that it has not yet developed a workable model of community accountability that engages both those who abuse and

tool of punishment, but as a means of transformation, reliant on the ability to see the humanity in the person who abuses. *Id.* at 46–47.

³¹⁷ *See id.* at 8.

³¹⁸ *Id.* at 12.

³¹⁹ *Id.* at 21.

³²⁰ *Id.* at 24.

³²¹ *Cf. id.* at 27–31 (discussing transformative justice in the context of child sexual abuse). Although Generation FIVE has not provided a “how to” manual for implementing transformative justice strategies, the group identifies the key practices of transformative justice. Those practices include: “[b]uilding a collective; [p]reparation and capacity building, [n]aming and defining . . . abuse; [c]onducting assessment . . . ; [d]eveloping a safety strategy; [s]upporting healing and resilience; [h]olding accountability; [w]orking for community transformation; [and] [s]trengthening collective resistance.” *Id.* The group is working to create and study pilot projects in the hopes of identifying replicable models of transformative justice practice. *Id.* at 32.

³²² NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER AND HIV-AFFECTED INTIMATE PARTNER VIOLENCE 6–7 (Oct. 2010), available at http://www.avp.org/documents/ipvreportfull-web_000.pdf.

those who are abused.³²³ These advocates could build on efforts like The Audre Lorde Project's Safe OUTside the System (SOS) Collective, which challenges hate and police violence in New York City by using community-based strategies to stop violence without involving law enforcement.³²⁴

Asking the community to take responsibility for responding to abuse is a complicated matter. Communities may not be able or willing to protect transgender people subjected to abuse: "[O]ften the very families, neighborhoods, and networks we rely on to address violence internalize and reflect the very systems of oppression that drive the criminal legal system."³²⁵ Some people subjected to abuse report that the worst abuse they encountered came not from their partners but from the community-based organizations that purported to serve them.³²⁶ Nonetheless, advocates like Kristin Tucker and others increasingly look to the development of community-based interventions that provide support and healing to transgender people subjected to abuse, and that pursue transformation of the conditions that support violence as the best alternative to a system that transgender people rightfully approach with deep suspicion and skepticism.³²⁷

CONCLUSION

The choice to vest the legal system with primary responsibility for addressing domestic violence assumes that the legal system can adequately meet the myriad of needs of people subjected to abuse. That system, however, has been inadequate even for those it was designed to serve — white, straight women who represent the stereotypical victims of domestic violence.³²⁸ For marginalized populations, the system as it currently exists is even less responsive; for transgender people, the prospect of using the legal system is so fraught that very, very few even consider it a viable option, and those that do turn to the system have decidedly mixed results.

The legal system's inability to meet the needs of transgender people is hardly surprising, however, given how little was understood about the particular experiences of transgender people (and other marginalized communities) with intimate partner abuse at the time the system was developed. Essentially, we have created an entire system of law and policy without having a clear sense of how whole populations of people, including transgender people, experience abuse and what laws and policies might best address their

³²³ CMTY. UNITED AGAINST VIOLENCE, CUAUV AT 30: A POWERFUL NEW VISION TO TRANSFORM VIOLENCE INTO SAFETY 4–5 (Mar. 2009), available at http://www.cuav.org/media/docs/2411_CUAV_StrategicPlan2009.pdf.

³²⁴ *Safe OUTside the System: The SOS Collective*, THE AUDRE LORDE PROJECT, <http://alp.org/community/sos> (last visited Oct. 14, 2012).

³²⁵ MOGUL ET AL., *supra* note 32, at 149.

³²⁶ Ana Lara, *There is Another Way*, in *THE REVOLUTION STARTS AT HOME*, *supra* note 312, at 15, 16.

³²⁷ Interview with Kristin Tucker, *supra* note 43.

³²⁸ GOODMARK, *supra* note 26, at 4–8.

needs.³²⁹ It is certainly possible that transgender people could find justice within the justice system (albeit a significantly altered justice system). It is equally possible that better solutions might lie beyond the reach of the state. But the experiences of transgender people and other marginalized communities with the legal system suggest that those concerned with the needs of people subjected to abuse should reconsider the decision to make the legal system the primary societal response to intimate partner abuse. Rather than assuming that we already know which interventions would be most useful to people subjected to abuse, we should ask what systems, supports, and services would be most beneficial to them. Learning more about how marginalized communities experience domestic violence, from the people experiencing it, would be a good place to start in rebuilding our systemic response to intimate partner abuse.

³²⁹ See NAMASTE, *supra* note 32, at 269.