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Transgender People, Intimate Partner Abuse, and the Legal System

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TRANSGENDER PEOPLE, INTIMATE PARTNER ABUSE & THE LEGAL SYSTEM

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ABSTRACT

The unique experiences of transgender persons subjected to abuse have not been the focus of legal scholarship; instead, the experiences of trans 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 trans people experience intimate partner abuse. This is the first law review article to specifically concentrate on the intimate partner abuse of trans people. The article begins by discussing the difficulties of engaging in scholarship around this topic, noting the lack of a shared language or knowledge base for discussing intimate partner abuse in the trans community. The article then documents the barriers confronting trans people seeking relief from intimate partner abuse, situating those barriers in the broader context of the structural and institutional violence and discrimination that are so prevalent in the lives of trans people and looking particularly at the inadequacy of the legal system to address the needs of trans people subjected to abuse. This part of the article is informed by the observations and insights of legal professionals working with trans people subjected to intimate partner abuse, as well as the narratives of trans people who have engaged the legal system. The article then examines the gendered nature of intimate partner abuse against trans people, arguing that such abuse can be understood both 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. Recognizing that the legal system is the most developed and best funded response to domestic violence in the United States, the article questions whether the legal system can ever form the cornerstone of an effective response to intimate partner abuse for trans 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 trans people.

INTRODUCTION

On August 28, 2009, Paulina Ibarra, a 24 year-old transgender¹ woman, was stabbed to death in her apartment in Hollywood. Although her death

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

was originally investigated as a hate crime, police later dismissed that theory, because, said Lt. Wes Buhrmester of the Los Angeles Police Department, “it appears the victim knew her attacker.”² Neighbors heard fighting and a woman screaming; police arrived 7 minutes after a resident called 911 and found Ibarra lying on the floor.³ Jesus Catalan was arrested in July 2010 and, in April 2011, pled guilty to involuntary manslaughter in Paulina’s death.⁴ 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).”⁵ Catalan was sentenced to twelve years imprisonment and is eligible for parole in ten years.⁶

On March 30, 2010, Amanda Gonzalez-Andujar, a 29 year-old transgender woman, was found strangled to death and soaked with bleach in her apartment in New York City. Gonzalez-Andujar was lying naked on her bed; her apartment had been ransacked, her belongings destroyed, her laptop stolen.⁷ Detectives quickly came to suspect that Gonzalez-Andujar had been killed by a man she had been dating and said that the damage in the apartment was likely attributable to a struggle between Gonzalez-Andujar and her killer.⁸ Security videos from the apartment building showed Gonzalez-Andujar’s alleged killer, Rasheen Everett, entering the building at approximately 9 a.m. on March 27; shortly thereafter, neighbors heard screaming and loud noises coming from Gonzalez-Andujar’s apartment. Everett left the building 17 hours later, carrying two bags.⁹ Gonzalez-Andujar and Everett may have met in an Internet chat room;¹⁰ sources speculated that Everett stole Gonzalez-Andujar’s laptop to prevent police from finding e-mail correspondence between them.¹¹ Everett has

² Karen Ocamb, *Suspect Sought in Transgender Murder in Hollywood*, November 13, 2009, available online at <http://www.lgbtpov.com/2009/11/suspect-sought-in-transgender-murder-in-hollywood/>; but see KTLA News, *Suspect Arrested in Hollywood Transgender Murder: Paulina Ibarra was found stabbed to death inside her Hollywood apartment last August*, July 9, 2010, available online at <http://www.ktla.com/news/landing/ktla-transgender-murder-arrest.0.739885.print.story> (citing LAPD officer Sarah Faden’s assertion that “the slaying was investigated as a hate crime.”)

³ Ocamb, id.

⁴ Karen Ocamb, *Jesus Catalan Pleads Guilty to Involuntary Manslaughter in Killing of Transgender Paulina Ibarra*, April 26, 2011, available online at <http://www.lgbtpov.com/2011/04/jesus-catalan-pleads-guilty-to-involuntary-manslaughter-in-killing-of-transgender-paulina-ibarra>

⁵ Id.

⁶ Id.

⁷ Michael J. Feeney and John Lauinger, *Transgender woman Amanda Gonzalez-Andujar found dead, naked in ransacked apartment*, NEW YORK DAILY NEWS, March 31, 2010, available online at http://articles.nydailynews.com/2010-03-31/news/27060521_1_1_queens-apartment-transgender-woman-medical-examiner.

⁸ Rocco Parascandola, *Transgender woman Amanda Gonzalez-Andujar was strangled by man she was dating, cops suspect*, NEW YORK DAILY NEWS, April 1, 2010, available online at http://articles.nydailynews.com/2010-04-01/news-27060540_1_queens-apartment-transgender-woman-victim.

⁹ Al Baker, *In Woman’s Death, an Arrest but No Motive*, NEW YORK TIMES, Section A22, April 15, 2010.

¹⁰ Id.

¹¹ Parascandola, *supra* note 8.

been charged with murder, burglary, tampering with physical evidence, and possession of stolen property.¹² If convicted, Everett could be sentenced to at least 25 years imprisonment.¹³

Paulina Ibarra was killed by a man she knew. Amanda Gonzalez-Andujar may have been killed by a man she was dating. Yet none of the articles about their deaths mention the possibility that what Ibarra and Gonzalez-Andujar experienced was intimate partner violence. Hate crimes, possibly, but intimate partner violence never appears as part of the official narratives of what happened to these women¹⁴—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 by men they know, intimate partner violence is often the first scenario police consider. Did the gender identities of Ibarra and Gonzalez-Andujar preclude the media and the police from seeing their deaths as resulting from intimate partner violence?¹⁵

¹² New York State Unified Court System Web Crims, *Case Details—Charges*, Case # 01592-2010 (Defendant Rasheen Everett), available online at http://iapps.court.state.ny.us/webcrim_attorney/Detail?which=cha...&courtType=S&recordType=C&recordNum=6N1Krm_PLUS_tLUTKUCKgBiM6AA==.

¹³ Michelle Garcia, *Arrest in Murder Case in Queens* ADVOCATE.COM, April 15, 2010, available online at <http://www.advocate.com/printArticle.aspx?id=109908>. 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. OF GENDER, SOC. POL'Y & L. 269 (2009).

¹⁴ For another example of an intimate partner murder described as a hate crime, see Eliza Gray, *Transitions: What will it take for American to accept transgender people for who they really are?*, THE NEW REPUBLIC, July 14, 2011, at 10; see also Dan Frosch, *Death of a Transgender Woman is Called a Hate Crime*, N.Y. TIMES, August 2, 2008, available online at <http://www.nytimes.com/2008/08/02/us/02murder.html>. Attorney Pooja Gehi suggests that these are not isolated instances, that much intimate partner abuse in the trans 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 trans people and the assumption that when a trans 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). Interview with Pooja Gehi, Esq., Staff Attorney, Sylvia Rivera Law Project, August 18, 2011 (notes on file with the author); see also EMI KOYAMA, THE TRANSFEMINIST MANIFESTO AND OTHER ESSAYS ON TRANSFEMINISM 5 (1999) (explaining that trans women are frequently attacked by the heterosexual men “who courted them” after their trans status is discovered). Attorney Terra Slavin pointed out the Ibarra case to me as an example of this phenomenon. Interview with Terra Slavin, Esq., DV Lead Staff Attorney, LA. Gay & Lesbian Center, July 22, 2011 (notes on file with author). In a similar vein, disputes have arisen about whether to call the recent death of a Pakistani-Canadian woman, Shaher Bano Shahdady, an honor killing or domestic violence. Ravenna Aulakh, *Domestic violence or ‘honour’ killing?*, THE STAR (TORONTO), August 5, 2011, available online at <http://www.thestar.com/printarticle/1035512>.

¹⁵ In a recent murder in Harlem, friends and family of trans woman Camila Guzman immediately suspected that her boyfriend, Equan Southall, had killed her. 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. Southall reportedly turned himself in to police shortly and confessed to committing the murder shortly thereafter. Julie Bolcer, *Boyfriend Arrested in Murder of Transgender Woman in New York*, ADVOCATE.COM, August 31, 2011, available online at <http://www.advocate.com/printArticle.aspx?id=228639>; interview with Sharon Stapel, Executive Director, New York City Anti-Violence Project, August 31, 2011 (notes on file with author). What never appeared in the media, but which 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 & Marie

If so, that oversight would not be terribly surprising. There is little information about intimate partner violence in the transgender community in either the legal or social science literature. Reports and studies of abuse of transgender people are frequently lumped together with intimate partner violence in the lesbian, gay and bisexual communities, making it difficult if not impossible to disaggregate the data specific to trans people; where information about violence against transgender individuals does exist, that violence is often characterized as generalized violence or hate crimes rather than intimate partner violence.

But transgender people do experience intimate partner violence. Although research on intimate partner violence in the transgender community is scarce, existing studies confirm that significant numbers of trans people are subjected to intimate partner violence.¹⁶ Needs assessments of transgender people in Chicago and Philadelphia revealed high rates of intimate partner violence among respondents; 56.3% of respondents in Philadelphia and 66% in Chicago reported violence in their homes.¹⁷ Trans people made up at least 4.7% of the survivors accessing services through the member programs of the National Coalition of Anti-Violence Programs.¹⁸

If intimate partner violence is in large part about controlling and enforcing gender norms within relationships, transgender people, by virtue of their failure to conform to such norms, are particularly vulnerable to

Romeo, Domestic Violence Program Coordinator, New York City Anti-Violence Project, October 19, 2011 (notes on file with author).

¹⁶ But, as Caroline White and Joshua Goldberg have noted,

It is impossible to discuss the extent of violence against trans people with any certainty, as current tracking mechanisms are problematic....Even the usual sources of reporting of interpersonal violence are largely unavailable to trans survivors: police and emergency medical services are compromised options because of their histories of violence against trans people, particularly sex trade workers and prisoners....gendered anti-violence organizations—often the first line of contact for survivors—are often inaccessible because of general public uncertainty whether they provide services to trans survivors.

Caroline White & Joshua Goldberg, *Expanding Our Understanding of Gendered Violence: Violence Against Trans People and Their Loved Ones*, 25 CANADIAN WOMEN'S STUDIES 124 (2006), available online at <http://lion.chadwyck.com/display/printView.do?area=abell>.

¹⁷ Gretchen P. Kenagy, *Transgender Health: Findings from Two Needs Assessment Studies in Philadelphia*, 30 HEALTH AND SOCIAL WORK 19, 23 (2005); Gretchn P. Kenagy & Wendy B. Bostwick, *Health and Social Service Needs of Transgender People in Chicago*, 8 INTERNATIONAL JOURNAL OF TRANSGENDERISM 57, 62 (2005). In an older study from San Francisco, 37% of trans women reported physical abuse within the last year; 44% of them were abused by an intimate partner. Among trans men, 27% reported physical abuse within the past year; 30% of those trans men were abused by an intimate partner. San Francisco Department of Public Health, *The Transgender Community Health Project* 5, 9 (1999), available online at <http://hivinsite.ucsf.edu/InSite?page=cftg-02-02>. 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 online at <http://www.survivorproject.org/defbarresp.html> (50 % of respondents to Gender, Violence, and Resource Access Survey of trans and intersex individuals reported having been raped or assaulted by intimate partner)

¹⁸ National Coalition of Anti-Violence Programs, LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER DOMESTIC/INTIMATE PARTNER VIOLENCE IN THE UNITED STATES IN 2009 14 (2010). I write "at least" because it is possible that, rather than identifying themselves as trans 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).

abuse. Moreover, they experience that abuse in a specific context that makes accessing resources to address abuse challenging at best. Given that the domestic violence legal system that doesn't work well even for those people around whose goals and needs it was designed (white, straight, middle class women), trans people subjected to abuse are seriously unlikely to find relief by turning to the legal system for assistance.

This article will look at the phenomenon of abuse in the transgender community, focusing on the structural and institutional barriers that make trans people unlikely to access the best funded and most often suggested resource for addressing domestic violence: the justice system.¹⁹ The article will suggest the need to rethink using the justice system to meet the needs not just of trans people, but of all people facing similar structural barriers.

Part I of this article will outline the challenges of writing about intimate partner abuse of trans people. Part II examines the experiences of intimate partner abuse in the trans community, situating those experiences in the wider context of the lives of trans people and drawing heavily on the experiences of advocates working with trans people subjected to abuse. Part III considers the ways in which the abuse of trans 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 trans 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. TALKING TRANS: THE CHALLENGES OF WRITING ABOUT INTIMATE PARTNER ABUSE IN THE TRANSGENDER COMMUNITY

I am mindful of the responsibilities attendant to the task I have taken on as a cisgender²⁰ person writing about the trans community. Julia Serrano 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....Non-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.²¹

¹⁹ See *infra* Part IV.

²⁰ The term "cisgender" refers to people whose gender identity is consistent with their biological sex. See text accompanying note 28 *infra*.

²¹ JULIA SERANO, WHIPPING GIRL: A TRANSSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY 212 (2007). I have taken Jacob Hale's Suggested Rules for Non-Transsexuals Writing about

Notwithstanding Serrano's caution, I have chosen to write this article because of the dearth of legal scholarship on the intimate partner abuse of trans 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 trans people as a means to an end or an intellectual curiosity but considers the well-being of trans people as an end in itself."²²

A major challenge of writing this article was a challenge of language. We do not yet have a common language accepted by all interested parties for talking about the experiences of transgendered people. "Transgender" itself is a contested term. 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."²³ One danger of using transgender in this broad way is the possibility of excluding those who do not identify themselves as transgendered or glossing over differences in identity—race, class, disability, sexual orientation—that shape an individual trans person's experiences.²⁴

Sociologist Val Jenness learned this lesson in her study of transgender inmates in California. A consultant on her research team, who she 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

Transsexuals, Transsexuality, Transsexualism, or Trans_____ (available online at <http://sandystone.com/hale.rules.html>) to heart in writing this piece. Those rules include starting from a place of humility and recognizing that I am not a trans person; remembering my subject position and power as a writer; paying close attention to and incorporating the writings of trans people; and working to avoid essentialization of the experiences of trans people. I hope that I have been successful in hewing to them.

²² Paisley Currah, Richard M. Juang, and Shannon Price Minter, "Introduction," in *TRANSGENDER RIGHTS* xxii (Paisley Currah, Richard M. Juang & Shannon Price Minter, eds. 2006).

²³ VIVIAN K. NAMASTE, *INVISIBLE LIVES: THE ERASURE OF TRANSSEXUAL AND TRANSGENDERED PEOPLE* 1 (2000); see also Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUMBIA L. REV. 392 (2001); JOEY L. MOGUL, ANDREA J. RITCHIE, AND KAY WHITLOCK, *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 (2005); 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).

²⁴ 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); see also NAMASTE, *id.* at 266-67 ("this umbrella term may erase the specificity of different transgendered, and especially transsexual, individuals").

transgender because it is, they argued, well equipped to capture a range of identities.²⁵

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 trans advocates in the legal domain articulate rights claims on behalf of trans people, however, this definition will (and has already begun to) taper.²⁶

Moreover, David Valentine argues, the definition of transgender is “tentative and shifting, precisely because the meanings of the term are still being negotiated.”²⁷

Understanding that the choice to use the umbrella term “transgender” is contested, there is some general agreement around the usage; as Paisley Currah, Richard M. Juang, and Shannon Price Minter note, “Since 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.”²⁸ 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 problems. While some use the term “cisgender” to refer to people whose gender identity is consistent with their biological sex,²⁹ others have not adopted the term. Similarly, the use of pronouns can be problematic in discussing the lives of trans people. While some trans people have adopted the terms “hir” and “ze” as generic pronouns for both genders, others are uncomfortable with the terms because they identify solely and strongly as their chosen 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 use the gender non-specific terms when discussing hypothetical people, and gender specific terms for people who have identified as a particular gender.³⁰

The decision about whether to use the term passing—a term that is quite

²⁵ See Jenness, *supra* note 18, at 527-28.

²⁶ Libby Adler, *T: Appending Transgender Equal Rights to Gay, Lesbian and Bisexual Equal Rights*, 19 COLUM. J. GENDER & L. 595, 607 (2010); *but see* SERANO, WHIPPING GIRL, *supra* note 21, at 26 (describing transgender as a “strategic essentialist political term”).

²⁷ DAVID VALENTINE, IMAGINING TRANSGENDER: AN ETHNOGRAPHY OF A CATEGORY 38 (2007).

²⁸ CURRAH, JUANG & MINTER, *supra* note 22, at xiv.

²⁹ Dean Spade, *Be Professional!*, 33 HARV. J. L & GENDER 71, 76 (2010).

³⁰ Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY W. L. J. 15, 17, n.7 (2003). My thanks to Professor Erez Aloni for suggesting this solution.

contested among trans 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.”³¹ Passing is a complicated concept; it can be a derogatory term to the extent that it signifies deception by the trans person or represents images imposed upon trans people by a society with expectations about how men and women should look and act.³² I have chosen to use the term sparingly and in the context of discussing the desire to be perceived by others as one’s chosen gender, but I recognize that even with this limited use, the presence of the term in this article may be perceived as offensive.

The lack of hard data on the experiences of trans people with intimate partner violence is another factor that makes this a difficult article to write. This lack of data—this informational erasure, in the words of Christoph Hanssmann—is not confined to the context of intimate partner violence. One participant in a study on research and the trans community explained, “I’m one of the dead ones. Remember...just because you’re [transsexual], 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.”³³ To the extent that scholarship exists, it often discusses the abuse of lesbian, gay, bisexual and transgendered (LGBT) people, but frequently fails to focus its attention specifically on trans people; too often, the “T” is appended to the “LGB” without any meaningful consideration of the issues particular to the “T” community.³⁴ Kristin Tucker, Program Manager at the Northwest Network, suggests that the lack of data stems from the failure of those seeking to study trans people to do so with the goal

³¹ KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN AND THE REST OF US* 125 (1994). One trans man, though, used the term passing to refer to his life as a woman. Trevor says, “No 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...now 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).

³² 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 its use doubly problematic for trans 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”).

³³ Hanssmann, *supra* note 24, at 568 (quoting from study by Trans PULSE).

³⁴ Adler, *supra* note 26, at 599-600; 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 ever have been included under the LGB umbrella, given that being transgendered is not a sexual orientation but a gender identity. 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); see also Dylan Vade, *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) (explaining that “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.”).

of improving the lives of the community. Because institutions and system actors have shown no inclination to use their scholarship in this way, trans people have not been willing to make themselves available for studies. Tucker notes that the work that does exist on violence in trans communities comes from institutions within the community itself, like the National Coalition of Anti-Violence Programs.³⁵ Most of the available research focuses on the abuse of trans women; for that reason, the experiences of trans men are not as well documented in this article.

A final difficulty involves teasing out intimate partner violence from the other forms of violence that trans 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 trans people experience should be characterized as hate crimes, bullying, intimate partner abuse, or simply random acts of violence, ordinary assaults. Whether characterized as hate crimes or as assaults or other crimes³⁶, however, violence against trans people is disturbingly common. Surveys of trans people document the disproportionately high rates of violence they experience. A 2001 survey found that over their lifetimes, almost 60% of trans people experienced either violence or harassment: over half of trans people experienced verbal abuse, 23% were stalked, almost 20% were assaulted without a weapon, 10% were assaulted with a weapon, and almost 14% experienced rape or sexual abuse.³⁷ Other surveys have found similarly high rates of violence against trans people.³⁸ In its most recent survey of hate violence in the lesbian, gay, bisexual, transgender, queer, and HIV-affected communities in the United States, the National Coalition of Anti-Violence Programs (NCAVP) found that trans people were twice as likely to be assaulted or discriminated against and 1.5 times more likely to experience intimidation than cisgender white people.³⁹ Transgender people of color were 2.5 times

³⁵ Interview with Kristin Tucker, Program Manager, Northwest Network, July 25, 2011 (notes on file with the author).

³⁶ See, e.g., Tammye Nash, *Investigation Continues into Marcal Tye's Murder*, DALLASVOICE.COM, April 1, 2011, available online at <http://www.dallasvoice.com/investigation-continues-marcal-tyes-murder-1071197.html> (sheriff who identified Tye as cross-dresser stated that Tye's murder not a hate crime, a judgment later confirmed by the FBI); Michael Theis, *Police Search for Subjects in Transgender Assault*, FREDERICKSBURG (VA) PATCH, May 25, 2011, available online at <http://fredericksburg.patch.com/articles/police-search-for-suspects-in-transgender-assault> (although victim believed her gender identity played a role in her attack, Virginia's hate crimes statute does not provide protection based on gender identity).

³⁷ Emilia L. Lombardi, Riki Anne Wilchins, Dana Priesing & Diana Malouf, *Gender Violence: Transgender Experiences with Violence and Discrimination*, 42 J. HOMOSEXUALITY 89, 95-96 (2001); see also Lori Sexton, Valerie Jenness & Jennifer Macy Sumner, *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men's Prisons*, 27 JUSTICE QUARTERLY 835, 858 (2010), (summarizing studies on rape in transgender population); SHELLEY, *supra* note 31, at 91 (finding that 50% trans people surveyed had been physically assaulted).

³⁸ Sexton, Jenness & Sumner, *supra* note 37, at 858. (summarizing surveys finding that 37% of trans people experienced physical abuse because of their gender identity or presentation; between 43 and 59% experienced some form of violence).

³⁹ NATIONAL COALITION 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).

as likely to experience discrimination and twice as likely to experience intimidation as cisgender white people.⁴⁰ Trans people reported higher rates of serious injury related to assault, but were the least likely of any group to get medical attention.⁴¹

Trans women are particularly likely to be marked for violence. The 2010 NCAVP survey found that 44% of the murder victims in their study were trans women, but trans women made up only 11% of their sample; in the 2009 report, half of the murders reported were of trans women.⁴² Surveys of the trans community have found that 98% of violence in the trans community was targeted at trans women, and that trans women of color accounted for 70% of the murders of trans people reported internationally in 2003.⁴³

II. INTIMATE PARTNER ABUSE AND THE TRANS COMMUNITY

How trans people experience abuse within their intimate relationships, and how trans identity affects their ability to access public systems, like the legal system, for support, is shaped by the context within which trans people live their daily lives. That context makes the experience of abuse quite different from that of the stereotypical victim around whom domestic violence law and policy was constructed. Situating the specific experiences of abuse within that broader societal context is essential if we are to begin to understand and develop an accessible response for trans people subjected to abuse.⁴⁴

A. THE TRANS EXPERIENCE OF INTIMATE PARTNER ABUSE

Intimate partner abuse is frequently defined as physical, sexual and/or emotional abuse perpetrated against an intimate partner in order to assert power and control over that partner.⁴⁵ Trans 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,”⁴⁶ physical, sexual and emotional (as well as other forms of)

⁴⁰ *Id.*

⁴¹ *Id.* at 7-8.

⁴² *Id.* at 7.

⁴³ Caroline White Holman & Joshua M. Goldberg, *Social and Medical Transgender Case Advocacy*, 9 INT’L J. OF TRANSGENDERISM 197, 206 (summarizing studies).

⁴⁴ I am conscious of Libby Adler’s warning that to succeed in winning protections for trans people under the law, advocates have constructed a victimization narrative for trans 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 26, at 612. I have raised similar concerns in the context of domestic violence law and policy. See LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 61 (2012) (arguing that inscribing battered women syndrome in the law perpetuates problematic stereotypes about women subjected to abuse).

⁴⁵ GOODMARK, A TROUBLED MARRIAGE, *supra* note 44, at 30.

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Nicola Brown, *Holding Tensions of Victimization and Perpetration: Partner Abuse in Trans Communities* in JANICE RISTOCK, INTIMATE PARTNER VIOLENCE IN LGBTQ LIVES 156 (2011).

abuse may manifest quite differently when a trans person is the subject of that abuse.⁴⁷

Trans advocacy groups have identified forms of abuse unique to relationships involving trans people subjected to abuse. Physical abuse tactics include “assault, mutilation or denigration of body parts such as chest, genitals, and hair that signify specific cultural notions of gender.”⁴⁸ Other forms of physical abuse may entail touching one’s body in ways or places one has asked not to be touched⁴⁹ or insisting that rough sex is the way that “real” men or women enjoy intercourse.⁵⁰ Trans specific forms of emotional abuse include calling someone by the wrong pronoun or referring to them as “it”⁵¹, threatening to reveal the trans person’s gender identity or biological sex to employers, landlords, immigration officials, friends, or family members⁵², and making threats related to the trans person’s custody of or relationship with hir children.⁵³ Some trans people experience low-self esteem and anxiety around body issues.⁵⁴ Abusers play on these emotions by telling the trans person that ze isn’t a “real” man or woman⁵⁵, ridiculing their bodies⁵⁶, and dictating how their gender identity is expressed (through selection of clothes, hairstyles, and such).⁵⁷ Abusers also destroy or hide clothing, wigs, binders, and other accessories used to reinforce the trans person’s gender identity.⁵⁸

The medical needs of trans people also provide opportunities for abuse. Abusers deny access to trans people’s medical treatments or hormones, destroy needed medical supplies, and coerce their partners to refrain from pursuing medical treatment.⁵⁹ Abusers may also withdraw or withhold

⁴⁷ It may be difficult to find a common vocabulary to describe trans 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.” Janice Ristock & Norma Timbang, *Relationship Violence in Lesbian/Gay/Bisexual/Transgender/Queer [LGBTQ] Communities: Moving Beyond a Gender-Based Framework* 3 (2005).

⁴⁸ White & Goldberg, *supra* note 16, at 5.

⁴⁹ Family Service Toronto, *Loves Me, Loves Me Not: A Resource for Trans People Who May Be Wondering About Their Relationship*; FORGE, *Transgender/SOFFA: Domestic Violence/Sexual Assault Resource Sheet*

⁵⁰ FORGE, *id.*

⁵¹ Family Service Toronto, *Loves Me, Loves Me Not: A Resource for Trans People Who May Be Wondering About Their Relationship*; FORGE, *Transgender/SOFFA*, *supra* note 49.

⁵² Family Service Toronto, *Loves Me, Loves Me Not: A Resource for Trans People Who May Be Wondering About Their Relationship*; FORGE, *Transgender/SOFFA*, *supra* note 49.; White & Goldberg, *supra* note 16, at 5.

⁵³ FORGE, *Transgender/SOFFA*, *supra* note 49; White & Goldberg, *supra* note 16.

⁵⁴ As Emi Koyama writes, “It is easy for an abuser to make a woman feel ugly, ashamed, worthless and crazy when she is a trans woman. 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.” Koyama, *supra* note 14, at 5-6; *see also* Courvant & Cook-Daniels, *supra* note 17, at 5.

⁵⁵ Family Service Toronto, *Loves Me, Loves Me Not: A Resource for Trans People Who May Be Wondering About Their Relationship*; FORGE, *Transgender/SOFFA*, *supra* note 49..

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ FORGE, *Transgender/SOFFA*, *supra* note 49..

support for trans specific medical care or services (surgery, hormones, or electrolysis, for example). Other forms of economic abuse include exploiting the trans person's financial dependence by requiring financial compensation or insisting that the person engage in illegal activities (selling drugs, prostitution) to earn money.⁶⁰

Trans people are uniquely vulnerable to abuse given their marginalization within the mainstream culture. "Non-trans perpetrators are acutely aware of the individual and institutional vulnerabilities faced by trans people and these vulnerabilities feature explicitly in the abuse tactics and harm done."⁶¹ There is no homogenous trans experience of abuse, however. Any analysis of trans abuse must be cognizant of the ways in which identity shapes the experience of abuse. Gender identity intersects with, for example, race, class, disability, and sexual orientation to produce each individual's unique experience of abuse.⁶² Accounts of trans abuse that fail to explore how intersecting identities create and reinforce abuse and oppression are incomplete and insufficient to help inform law and policy options for addressing that abuse.

A. *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.⁶³ As a consequence, services and supports are largely dedicated to achieving separation.⁶⁴ 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.⁶⁵ Trans people subjected to abuse have the same hesitancy about ending their relationships and face many of the same barriers as cisgender people, but those concerns and obstacles play out differently in the context of trans people's lives.

The relationship a trans person has with hir abusive partner may be that person's only source of support, in any number of ways. Trans people receive less support from their families than cisgender people⁶⁶, which may make them more reliant upon their partners for love and stability. Support for making one's abuse public may be hard to find in the wider trans

⁶⁰ White & Goldberg, *supra* note 16, at 5.

⁶¹ Brown, *Holding Tensions of Victimization and Perpetration*, *supra* note 46, . at 162.

⁶² Joshua Mira Goldberg & Caroline White, *Reflections on Approaches to Trans Anti-Violence Education*, IN INTIMATE PARTNER VIOLENCE IN LGBTQ LIVES 59, 67-68(Janice Ristock ed. 2011) ; Hanssmann, *supra* note 24, at 560.

⁶³ GOODMARK, A TROUBLED MARRIAGE, *supra* note 44, at 82.

⁶⁴ *Id.* at 83-96

⁶⁵ *Id.* at 96-101

⁶⁶ 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. OF LGBT HEALTH RESEARCH 11, 13 (2007)..

community. The same type of “gag order” that keeps women of color and lesbians from reporting abuse for fear of bringing unwanted negative scrutiny to their communities operates within the trans community as well.⁶⁷ As advocate Kristin Tucker explains, in a political and social climate in which strangers regularly subject trans people to vicious abuse and where earning social recognition and acceptability is so difficult, it seems unwise to talk about the ways in which trans people are abused in intimate relationships.⁶⁸

Trans people may rely on their partners for other forms of support as well. Trans people are among the most economically vulnerable populations in America. “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.”⁶⁹ Trans people are more than ten times more likely to be homeless than the general population of the United States; studies have found that between 6.4 and 25.5% of trans people were homeless at the time of the study.⁷⁰ A 2001 study found that transsexuals were almost three times more likely to experience economic discrimination (defined as being fired, not being hired, being demoted, losing promotions, or being unfairly disciplined at work) than cisgender people.⁷¹ Studies estimate that between 23 and 51% of trans people in the United States are unemployed.⁷² A Canadian study found that 40% of the trans people surveyed were unemployed, despite the fact that 71% of those surveyed had at least two years of post-secondary education.⁷³ Half of the trans people responding to one survey reported experiencing employment discrimination.⁷⁴

State assistance for trans people having difficulty finding work may not be available—or safe. In a survey of the transgender population in San Francisco, 20% of respondents reported experiencing discrimination at the

⁶⁷ Brown, *Holding Tensions of Victimization and Perpetration*, *supra* note 46, , at 153; FORGE, *Transgender/SOFFA*, *supra* note 49., at 1.

⁶⁸ Tucker interview, *supra* note 35.

⁶⁹ 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* 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 common among transpeople); SHANNON MINTER & CHRISTOPHER DALEY, *TRANS REALITIES: A LEGAL NEEDS ASSESSMENT OF SAN FRANCISCO’S TRANSGENDER COMMUNITIES* 14 (2003). (finding that 40% of trans people lacked health insurance); O’Flaherty & Fisher, *supra* note __, at 211 (noting increased risk of homelessness for trans people).

⁷⁰ MINTER & Daley, *supra* note 69, at 32; Sexton, Jenness & Sumner, *supra* note 37, at 857.

⁷¹ Lombardi *et al.*, *supra* note 37, at 96. The study also found that experiencing economic discrimination because one was transgendered correlated strongly with experiencing a violent incident because one was transgendered. *Id.* at 98.

⁷² Sexton, Jenness & Sumner, *supra* note 37, at 847.

⁷³ SHELLY, *supra* note 31, at 82 (citing study).

⁷⁴ MINTER & DALEY, *supra* note 69, at 43.

hands of social service agencies.⁷⁵ Welfare benefits have largely been restricted to custodial parents of minors, making few trans people eligible for benefits.⁷⁶ Trans people who are eligible for welfare benefits, like others seeking state aid, must engage in a work activity to receive benefits. 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.⁷⁷

Economic discrimination, correspondingly high unemployment, and the lack of government assistance create incentives for trans people to seek work in the underground economy. Two studies have found that about 40% of trans people have participated in sex work;⁷⁸ anecdotal evidence supports these studies.⁷⁹ Trans people turn to sex work to meet their “desperate financial needs, which were largely attributed to discrimination against transgenders in the regular job market;”⁸⁰ as one trans woman who worked as a prostitute in Los Angeles for twenty years told researchers, “Look at me. That’s the only line of business some of us can get. They aren’t going to hire us at Target. Only real girls get hired at Target.”⁸¹ Many trans 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.”⁸²

These indicia of economic discrimination in the lives of trans people

⁷⁵ MINTER & DALEY, *supra* note 69, at 43.

⁷⁶ Seeking financial assistance from the state can be a jarring experience as well. As Kristin Bumiller observes in the context of women subjected to abuse, “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 (2010).

⁷⁷ Richard E. Blum, Barbara Ann Perina, & Joseph Nicholas DeFilippis, *Why Welfare is a Queer Issue*, 26 N.Y.U. J. L. & SOC. CHANGE 201, 205-06 (2000-01). Joseph DeFilippis further explained that work sites required trans people to wear “‘proper’ business clothing...if 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.

⁷⁸ Sexton, Jenness, & Sumner, *supra* note 37, at 854.

⁷⁹ See, e.g., —

⁸⁰ T. Nemoto *et al.*, *Social Context of HIV Risk Behaviours Among Male-to-Female Transgenders of Colour*, 16 AIDS CARE 724, 728 (2004); see also Sexton, Jenness & Sumner, *supra* note 37, at 856. Trans people engaged in gender transition also turned to sex work to pay the prohibitive bills associated with their treatment. Nemoto, *et al.*, *id.* at 729.

⁸¹ Sexton, Jenness & Sumner, *supra* note 37, at 847.

⁸² Blum, Perina & DeFilippis, *supra* note 77, at 206.

must be understood against a backdrop of wider systemic and structural inequality that disproportionately affects them. Ethnographer David Valentine points to a range of policies responsible for the economic marginalization of trans 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.”⁸³

Trans people are frequently under or unemployed, or forced into work in the underground economy.⁸⁴ Given that context, separating from an abusive partner who is providing economic support may not be a trans person’s best option. Similarly, given the difficulties that trans people face in qualifying for and keeping insurance coverage⁸⁵, trans people might be reluctant to terminate relationships with partners whose insurance plans are covering crucial medical services and medications.

Access to safe shelter upon separation from an abusive partner is particularly problematic for trans people. Housing insecurity is a tremendous issue for trans people, who are often homeless or at risk of homelessness, finding temporary shelter moving from friend to friend.⁸⁶ 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 make finding alternate shelter extremely challenging, if not completely impossible.

Domestic violence services are, for the most part, gender segregated.⁸⁷ Shelters for women subjected to abuse approach the question of admitting trans women in three ways: by flatly refusing to admit trans women, by accepting only those trans women whose gender presentation is sufficiently feminine to “pass,” and by having a policy of accepting clients based on gender identity rather than biological sex.

Those shelters that refuse to admit trans women do so largely because they do not see trans women as women⁸⁸; instead, trans women are usually defined “as men, regardless of how the individual battered TG person

⁸³ VALENTINE, *supra* note 27, at 227.

⁸⁴ Factor & Rothblum, *supra* note 66, at 13.

⁸⁵ Kari E. Hong interviewed transsexuals and medical providers across the country to study “how transsexuals are treated when they seek medical care.” Through those interviews, Hong found that some transsexuals were being denied coverage entirely because they were transsexual and others, although enrolled, were denied coverage for treatment not related to their gender identity, including anti-depression medication and on-going long-term psychological care. Kari E. Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination Against Transsexuals*, 11 COLUMBIA J. GENDER & L. 88, 96-97 (2002).

⁸⁶ Brown, *Holding Tensions of Victimization and Perpetration*, *supra* note 46, at 156.

; Daniella Lichtman Esses, *Afraid to Be Myself, Even At Home: A Transgender Cause of Action Under the Fair Housing Act*, 42 COLUMBIA J. L. & SOC. PROBS. 465, 483 (2009); Sexton, Jenness & Sumner, *supra* note 37, at 857.

⁸⁷ Courvant & Cook-Daniels, *supra* note 17, , at 6; Shelley, *supra* note 31, at 105; Dean Spade, *Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, in TRANSGENDER RIGHTS 227 (Paisley Currah, Richard M. Juang & Shannon Price Minter, eds. 2006)

⁸⁸ THE TRANS ACCESSIBILITY PROJECT, Chapter 5 at 1.

identifies him- or herself or lives his or her life.”⁸⁹ These shelters often admit residents based on their sex at birth rather than their gender identity,⁹⁰ in some cases without regard to whether the individual has undergone sex reassignment surgery. Underlying the refusal to admit trans women to shelters is fear; trans women are seen as “invaders” if they attempt to access gender-segregated services.⁹¹

Other shelters and domestic violence services providers open their doors to trans women on the condition that they look to others like women—that they “pass.” Safety⁹² and the comfort of other residents were the rationales given for these policies, according to Vivian Namaste:

I was informed that an MTF transsexual 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.⁹³

Such shelters often make case by case decisions about whether trans women are eligible for their services, basing those decisions on the trans woman’s “appropriateness” as a client,⁹⁴ requiring that the client be undergoing or have completed sex reassignment surgery,⁹⁵ or providing services only if the trans woman promises not to “exhibit any crossgendered expression or disclose information relating to being trans.”⁹⁶ In addition to “passing,” the trans woman may also have to conform to other stereotypes of women subjected to abuse in order to qualify for services; “[t]he 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.”⁹⁷

⁸⁹ Charlene Allen & Beth Levanthal, *History, Culture and Identity: What Makes GLBT Battering Different*, in *SAME SEX DOMESTIC VIOLENCE: STRATEGIES FOR CHANGE 77* (BETH LEVENTHAL & SANDRA E. LUNDY EDS. 1999).

⁹⁰ 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.*

⁹¹ Courvant & Cook-Daniels, *supra* note 17., at 6.

⁹² 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...this discourse does not concern itself with the physical safety of a transsexual or transgendered woman, or with her psychological well-being.” NAMASTE, *supra* note 23, at 182.

⁹³ NAMASTE, *supra* note 23, at 180.

⁹⁴ Holman & Goldberg, *supra* note 43, at 202.

⁹⁵ NAMASTE, *supra* note 23, at 178.

⁹⁶ White & Goldberg, *supra* note 16, at 6.

⁹⁷ Goldberg & White, *supra* note __, at 62. Emi Koyama tells the story of Akasha, a trans woman sex

Trans 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. Trans women subjected to abuse are frequently sent to men's homeless shelters, where they are vulnerable to attack.⁹⁸ Once in men's shelters, trans 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."⁹⁹

In some areas, particularly in major cities, shelters are required by statute or policy to admit residents to shelter based on gender identity rather than biological sex or sex at birth. Such requirements exist in both New York City and the District of Columbia. In New York, explains attorney Pooja Gehi, trans 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. Prior to that change, trans 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 into shelter at all. Despite the changes, trans women subjected to abuse are still afraid to access shelters. Gehi reports that she refers trans clients subjected to abuse only to the very few shelters that she knows are trans affirming and supportive.¹⁰⁰ 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 sex, many shelters are refusing to follow the law. Trans women are turned away from women's shelters if gatekeepers for those services refuse to recognize them as women. Trans women accessing emergency shelter resources for victims of crime are regularly sent not to the hotel for women, but to the hotel used by men. One of Lynn's clients called her from that hotel crying, saying that the hotel was terrifying and that she would have been better off staying with her abuser.¹⁰¹

Trans women are leery of seeking domestic violence services as a result of this gender segregation. They worry that they will not be eligible for

worker who sought shelter after being beaten by her partner. Akasha could not reveal her identity as a sex worker to the shelter staff; "[b]eing the first trans woman at the shelter was trouble enough." Shelter staff outed her a transgendered to other residents. Akasha believed that the shelter took her in only because of local civil rights ordinances that require trans inclusion. Emi Koyama, *Disloyal to Feminism: Abuse of Survivors Within the Domestic Violence Shelter System*, in INCITE! WOMEN OF COLOR AGAINST VIOLENCE, 211-13.

⁹⁸ Trans 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 transgendered 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 need 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." *Lesbian, Gay, Bisexual, and Transgender Communities and Intimate Partner Violence*, 29 *FORDHAM URBAN L.J.* 121, 147 (2001).

⁹⁹ *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 (2000-2001).

¹⁰⁰ Gehi interview, *supra* note 14.

¹⁰¹ Interview with Morgan Lynn, Supervising Attorney, Washington Empowered Against Violence, Inc., September 8, 2011 (notes on file with author)

services because they are not “real” women and fear that their experiences of abuse will not be believed.¹⁰² They are concerned that they will make the cisgender women seeking services uncomfortable¹⁰³ and believe that they will not be comfortable in these non-welcoming spaces.¹⁰⁴ The denial of services, Vivian Namaste argues, disproportionately affects the most marginalized among the trans community: “those who are seropositive, prostitutes, in prison, poor, young, and/or homeless.”¹⁰⁵

The inability to access domestic violence services further marginalizes trans women subjected to abuse. As Ryka Aoki writes, “When a trans woman cannot be allowed in most women’s shelters, this does not help her live better. When we deny services to trans women, especially crisis intervention services, we tacitly condone violence against them.”¹⁰⁶ Moreover, Vivian Namaste argues, refusing to admit trans women to women’s shelters because they do not “pass” as women reinforces the negative body image of some trans women.¹⁰⁷ Denying trans women services exacerbates their isolation, “a position that is both easily encouraged and exploited by those who batter and abuse women. In this manner, the institutional workings of women’s shelters may actually function to consolidate” violence against trans people.¹⁰⁸ Attorney Wayne Thomas believes that the inability to secure safe shelter is the single most important issue facing trans people subjected to abuse. Thomas explains that safe housing is the priority for most trans people subjected to abuse; other issues, including accessing the legal system, are secondary and will never be addressed if stable housing is not established.¹⁰⁹

B. *Trans Abuse and the Legal System*

For trans people, like others subjected to abuse, there are clearly numerous barriers to using the separation-based options offered by the legal system. But the legal system’s treatment of trans people subjected to abuse may be the most substantial obstacle trans people face. As a result, very, very few trans people subjected to abuse choose to engage the legal system.¹¹⁰ In fact, advocates report, many, even most, trans people

¹⁰² Trans Accessibility Project, chapter 5, at 3; Courvant & Cook-Daniels, *supra* note 17, at 7.

¹⁰³ Courvant & Cook-Daniels, *supra* note 17, at 6.

¹⁰⁴ Anthony DiStefano, *Intimate Partner Violence Among Sexual Minorities in Japan: Exploring Perceptions and Appearances*, 56 J. HOMOSEXUALITY 121, 136 (2009).

¹⁰⁵ NAMASTE, *supra* note 23, at 189.

¹⁰⁶ Ryka Aoki, *On Living Well and Coming Free*, in BORNSTEIN & BERGMAN, GENDER OUTLAWS: THE NEW GENERATION 146 (2010).

¹⁰⁷ NAMASTE, *supra* note 23, at 181.

¹⁰⁸ *Id.* at 182.

¹⁰⁹ Interview with Wayne Thomas, Gay Men’s Domestic Violence Partnership, August 29, 2011.

¹¹⁰ All of the advocates with whom I spoke agreed that few trans people choose to use the legal system and that most trans people subjected to abuse actively avoid the legal system. Telephone interview with Linnet Caban, Residential Manager, Domestic Violence Center of Howard County, August 18, 2011 (notes on file with the author); Gehi interview, *supra* note 14; Ringer and Romeo interview, *supra* note 15; Slavin interview, *supra* note 14; Thomas interview, *supra* note 109; Tucker interview, *supra* note 35. Kristin Tucker estimates that only about 10% of the trans people that she has worked with called 911 in response to abuse; a slightly higher

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. Some have faced serious violence at the hands of state actors and are skeptical about the system's ability or willingness to protect them. 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.¹¹¹

1. Police

"My friends were beat up in the streets and we all knew better than to call the cops."¹¹² For trans people, "dealing with the police is usually humiliating at best and dangerous at worst."¹¹³ Reports of harassment and abuse of trans people by police are common; studies routinely find high percentages of police among the perpetrators of abuse and harassment against trans people.¹¹⁴ Given that context, it is not surprising that the 2010 NCAVP study found that trans people were the least likely group to report incidents of abuse or violence to police.¹¹⁵

Historically, the police were responsible for enforcement of laws explicitly created to ensure conformity with gender norms.¹¹⁶ More recently, policing of gender norms has taken the form of refusals to recognize trans people's chosen gender identities and harassment and profiling based on gender non-conformance. Trans women report police using their male names and male pronouns to describe them, even when they have changed their identification documents.¹¹⁷ As Vivian Namaste notes, "transgender sex workers stated that police officers seemed to make a point of calling them 'sir,' 'boy,' and 'guy.'" Officers demanded, "What are you? Are you a guy or a girl? We don't like these fucking half-breeds,"¹¹⁹ or referred to trans people as objects, using the pronoun "it" to describe them rather than appropriate gendered pronouns.¹²⁰

Policing of gender norms also involves what Andrea Ritchie calls

percentage choose to use the civil protection order system. Tucker interview, *supra* note 35.

¹¹¹ Slavin interview, *supra* note 14.

¹¹² Sassafras Lowrey, *Today's New Name May Be Tomorrow's Old*, in KATE BORNSTEIN & S. BEAR BERGMAN, *GENDER OUTLAWS: THE NEXT GENERATION* 199 (2010).

¹¹³ Aoki, *supra* note 106, at 148-49.

¹¹⁴ MOGUL, RITCHIE & WHITLOCK, *supra* note 23, at 47-48 (citing studies, including study finding that trans people are at greater risk of experiencing police violence and misconduct than cisgender people).

¹¹⁵ NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS, *supra* note 39, at 32.

¹¹⁶ Such laws included statutes requiring that individuals wear three articles of clothing that conformed to their biological sex. Jaime E. Hovey, *Nursing Wounds: Why LGBT Elders Need Protection From Discrimination and Abuse Based on Sexual Orientation and Gender Identity*, 17 *ELD. L.J.* 95, 104 (2009); Tucker interview, *supra* note 35.

¹¹⁷ NAMASTE, *supra* note 23, at 170.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 171.

¹²⁰ One trans woman told Namaste that when her mother arrived to post bail for her, officers shouted, "Its mother is here to bail it out." *Id.* at 170.

“subconscious gender policing,” wherein “departure from socially constructed norms of ‘appropriate’ gender expression is perceived as grounds for suspicion and securing submission to gender roles.”¹²¹ 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.¹²²

That suspicion leads police to profile trans people in a variety of ways. Simply by virtue of the way that they look, trans people, and particularly trans people of color, are frequently viewed by police as suspect.¹²³ Carrie Davis of the New York City Lesbian and Gay Community Services Center Gender Identity Project explained how trans women were being caught up in “morals sweeps” in the West Village area of New York City, where trans women were routinely arrested, charged, convicted, and sentenced to ninety days in Rikers Island for “hanging out in the West Village.”¹²⁴ Davis 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....The sweeps will continue.”¹²⁵

Profiling of trans people is frequently based on police assumptions that trans people are engaged in sex work. As discussed earlier, studies estimate that 40% of trans people have been sex workers, often driven to the work by the limited economic opportunities they find elsewhere. Police, however, often seem to assume that all trans people, particularly trans women, are engaged in sex work; as Andrea Ritchie writes, “Transgender 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 subjected to sexual abuse by police officers.”¹²⁶ This sexualization of trans women, Ritchie argues, often manifests in “verbal abuse—officers regularly call

¹²¹ Andrea J. Ritchie, *Law Enforcement Violence Against Women of Color*, in INCITE! WOMEN OF COLOR AGAINST VIOLENCE, COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 142-43 (2006).

¹²² *Id.* at 143; *see also* MOGUL, RITCHIE & WHITLOCK, *supra* note 23, 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 24, at 558.

¹²³ Gehi, *supra* note 69, at 324.

¹²⁴ Daniel L. Alterman *et al.*, *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, 146 (2000-2001).

¹²⁵ *Id.* at 146-47.

¹²⁶ Ritchie, *supra* note 121, at 144; *see also* Arkles, *supra* note 69, at 526; Shield, *supra* note 23, at 377. Shield notes that the profiling of trans people as sex workers contributes to the large numbers of trans people who report having been incarcerated. *Id.*

transgender women of color ‘fags,’ ‘whores,’ ‘sluts,’ ‘bitches,’ and ‘prostitutes’ when they encounter them on the street.”¹²⁷ Profiling also leads to harassment and pretextual arrests of trans people.¹²⁸ As Joey Mogul, Andrea Ritchie and Kay Whitlock explain,

Transgender women, particularly transgender women of color, are so frequently perceived to be sex workers by police that the term *walking while trans*, a derivative of the more commonly known term *driving while Black*, 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, regardless of what they are doing at the time.¹²⁹

Police perpetration of violence against trans people is depressingly common. In 2000, the NCAVP reported that 50% of the bias-related violence reported by transgender women in San Francisco was committed by police and private security officers.¹³⁰ A 2003 study by the National Center for Lesbian Rights and Transgender Law Center found that 25% of trans people in San Francisco had been harassed or abused by police officers.¹³¹ 10 percent of respondents surveyed by the Transgender Sexual Violence Project reported that they had been sexually abused by police officers, one respondent on two separate occasions.¹³² In 2008, the NCAVP reported, “[L]aw enforcement officers remain one of the prime categories of offenders documented by NCAVP each year.”¹³³ In a study of 244 transgender women in Los Angeles, 37% reported being verbally abused by police.¹³⁴ Andrea Ritchie describes how Jalea Lamot, a Latina trans woman, was sexually harassed by officers responding to a call for emergency medical assistance, and then, along with her family, beaten and pepper-sprayed when police realized she was transsexual.¹³⁵ Vivian Namaste recounts how a trans woman was pulled over for a broken headlight, then arrested and jailed when the officer realized she was a trans woman; the arresting officers told her, “People like you should all be killed at birth.”¹³⁶ Attorney Pooja Gehi reports that police officers in New York

¹²⁷ *Id.*

¹²⁸ MOGUL, RITCHIE & WHITLOCK, *supra* note 23, at 53.

¹²⁹ *Id.* at 60; *see also* 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 (2000-01) (quoting Jenny Casciano, the site director of a drop in zone for LGBTQ youth: “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 arrest for being out in public after a specific period of time (They actually do not need to do anything anymore to get arrested.)”); Gehi (interview), *supra* note 14; Ritchie, *supra* note 121, at 146.

¹³⁰ MOGUL, RITCHIE & WHITLOCK, *supra* note 23, at 47.

¹³¹ *Id.* at 48; *see also* NAMASTE, *supra* note 23, at 173.

¹³² FORGE, *Transgender/SOFFA*, *supra* note 49, at 9.

¹³³ MOGUL, RITCHIE, & WHITLOCK, *supra* note 23, at 129.

¹³⁴ *Id.* at 66.

¹³⁵ Ritchie, *supra* note 121, at 139.

¹³⁶ NAMASTE, *supra* note 23, at 169; *see also* Caban interview, *supra* note 110 (recounting how a trans friend was beaten by police outside of a nightclub when police saw him kissing someone).

engage in invasive genital searches and gratuitous pat-downs of trans people to determine their “real” gender.¹³⁷

Finally, the police ignore the violence done to trans people by others, by refusing to take reports, failing to classify crimes against trans people as hate motivated crimes, or failing to respond at all.¹³⁸ In one particularly disturbing incident, Los Angeles police refused to respond to a violent assault on an undocumented Latina trans woman; the police were reported to have said, “If they kill her, call us.”¹³⁹

The police have tremendous power: the power to determine “which laws to enforce, how to enforce them, and which people to target for enforcement.”¹⁴⁰ The failure of police to enforce the laws that protect trans people, and worse, police profiling, victimization, and abuse of trans people, deters trans people from turning to the law for assistance. Violence against trans people is certainly underreported because of both the paucity of the police response and the frequency with which police are the perpetrators of violence against trans people.¹⁴¹ As a result, trans people must “negotiate the world without recourse to this social service. In this manner, the workings of a specific institution (a discriminatory police department) marginalize transsexual people and, indeed, render them invisible.”¹⁴²

Police violence against trans people serves the same function as hate crimes: it prevents trans people from feeling safe enough to engage in society. As Richard Juang notes, “From the schoolyard thug to the bully with a badge, both opportunistic violence and state-sanctioned violence are a barbed-wire cage that keeps us from full cultural, economic, and political participation.”¹⁴³

Trans people’s reluctance to engage the legal system when subjected to abuse is at least partially attributable to negative experiences with police responses to abuse cases. Trans people who report abuse often find that their claims are greeted with skepticism.¹⁴⁴ Police categorize trans women as “bad victims,” their gender nonconformity seen as a failure to behave appropriately.¹⁴⁵ Narratives about police failures to treat trans abuse claims seriously or to make reports are common.¹⁴⁶ As Joey L. Mogul, Andrea J.

¹³⁷ Gehi interview, *supra* note 14.

¹³⁸ MOGUL, RITCHIE AND WHITLOCK, *supra* note 23, at 120.

¹³⁹ *Id.* at 130.

¹⁴⁰ *Id.* at 48.

¹⁴¹ *Id.* at 121.

¹⁴² NAMASTE, *supra* note 23, at 173.

¹⁴³ Richard M. Juang, *Transgendering the Politics of Recognition*, in TRANSGENDER RIGHTS (Paisley Currah, Richard M. Juang & Shannon Price Minter, eds. 2006), at 253.

¹⁴⁴ INCITE!, *Policing Gender*, *supra* note __, at 2.

¹⁴⁵ L.J. Moran & A.N. Sharpe, *Violence, Identity, and Policing: the Case of Violence Against Transgender People*, 4 CRIMINAL JUSTICE: INT’L JOURNAL OF POLICY AND PRACTICE 395, 408 (2004).

¹⁴⁶ See, e.g., INCITE!, *supra* note __, at 2; Mogul, Ritchie & Whitlock, *supra* note 23; NATIONAL

Ritchie and Kay Whitlock write,

For transgender women, the problem [of not being believed when they report domestic violence] is endemic. Archetypes of transgender people as deceptive, mentally unstable, and sexually degraded permeate responses to domestic violence committed against them as much as they do other law enforcement activities....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.¹⁴⁷

Arrests of trans people who call police to report abuse are common. As attorney Pooja 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."¹⁴⁸ Advocate Kristin Tucker agrees; unless the trans person is dramatically harmed and her partner completely unharmed, the potential for the arrest of the trans person subjected to abuse is very real.¹⁴⁹ In much the same way that aggressive arrest policies have been used against women subjected to abuse¹⁵⁰, mandatory and preferred arrest laws frequently operate to the detriment of trans people subjected to abuse.¹⁵¹ In one case, a trans woman called District of Columbia police after being choked by her male partner. The police arrested her instead, referred to her as "mister" after seeing her identification, detained her for hours at the police station, and charged her with assaulting her partner. The charges were ultimately dropped.¹⁵² Trans people are particularly likely to be arrested if they fight back against their abusers.¹⁵³ Worse still are reports of police brutality

COALITION OF ANTI-VIOLENCE PROGRAMS, SURVIVAL, SUPPORT AND RESILIENCE: STORIES OF LGBTQ SURVIVORS AND VICTIMS OF DOMESTIC/INTIMATE PARTNER VIOLENCE 6 (2010).

¹⁴⁷ Mogul, Ritchie & Whitlock, *supra* note 23, at 137-38.

¹⁴⁸ Gehi, *supra* note 69, at 325-26; *see also* Caban interview, *supra* note 110 (explaining that police frequently arrest everyone or no one when responding to domestic violence claims by trans people); Gehi interview, *supra* note 14 (same); Lynn interview, *supra* note 101 (clients have been arrested when they called police for protection).

¹⁴⁹ Tucker interview, *supra* note 35.

¹⁵⁰ BUMILLER, *supra* note 76, at Kindle 256.

¹⁵¹ These same laws are also used against gender non-conforming youth who have altercations with their parents. Adler, *supra* note 26, at 613.

¹⁵² INCITE!, *Policing Gender*, *supra* note __, at 2. In another incident, a Los Angeles trans woman repeatedly called police for help after being beaten by her abusive boyfriend. Despite showing police the visible bruises on her body, the police told her they could not help. The police did take action later, however, arresting the trans woman on an old solicitation charge. *Id.* The consequences of being wrongly arrested can be disastrous, particularly for undocumented trans women, who may find themselves subject to deportation after calling police for help. Lynn interview, *supra* note 101.

¹⁵³ Arkles, *supra* note 69, at 520. Domestic violence advocate Victoria Cruz explains the Catch-22 trans people women face when they call police: fighting back makes it more likely that a trans woman will be arrested,

against trans people subjected to abuse committed in the course of a domestic violence call.¹⁵⁴ Domestic violence advocates Jarad Ringer and Marie Romeo estimate that 70 to 80% of their trans clients subjected to abuse experience some form of institutional violence, including police brutality, when they seek assistance from formal systems.¹⁵⁵

Not all trans people experience skepticism or violence at the hands of police. Some advocates report mixed experiences with police intervention, depending upon the responses of the individual officers involved.¹⁵⁶ Kristen Tucker notes that the very few of her clients who have interacted with Seattle police have had moderately positive experiences. Her clients have felt validated by those interactions, believing that the police saw them as having been subjected to abuse, rather than dismissing their experiences.¹⁵⁷

But those experiences are the exception rather than the rule, and negative interactions with police can have a profound impact on trans people's willingness to seek police protection. Knowing that trans people frequently fear police involvement, that fear becomes a tactic abusers use to control their partners. The Network/LaRed, a service provider for LGBT clients in Boston, reported that one undocumented Latina trans 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 was 'illegal,' they would arrest her instead."¹⁵⁸ Trans women believe that not only will the police not protect them, they will humiliate and ridicule them instead. As one trans 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."¹⁵⁹ One bad experience with police may be enough to ensure that a trans person subjected to abuse will not attempt to access the legal system

but police are skeptical of trans women's claims of abuse because "they thought, 'Well, she's a man; why can't you fight back?'" *Lesbian, Gay, Bisexual, and Transgender Communities and Intimate Partner Violence*, 29 *FORDHAM URB. L.J.* 121, 148 (2001). Being penalized for fighting back against an abuser is similarly problematic for lesbians and African American women. See generally Leigh Goodmark, *When is a Battered Woman Not A Battered Woman? When She Fights Back*, 20 *YALE J. L. & FEMINISM* 75 (2008).

¹⁵⁴ Kylar W. Broadus, *The Criminal Justice System and Trans People*, 18 *TEMP. POL. & CIV. RTS. L. REV.* 561, 567-68 (2009) (describing how trans woman was thrown against wall and to floor, breaking her wrist, then handcuffed despite the injury by police responding to domestic violence call); see also INCITE! Women of Color Against Violence, *supra* note __, at 150 (arguing that police brutality against women of color frequently occurs during responses to domestic violence calls).

¹⁵⁵ Ringer & Romeo interview, *supra* note 15.

¹⁵⁶ Lynn interview, *supra* note 101.

¹⁵⁷ Tucker interview, *supra* note 35.

¹⁵⁸ MOGUL, RITCHIE & WHITLOCK, *supra* note 23, at 139; see also *Lesbian, Gay, Bisexual, and Transgender Communities and Intimate Partner Violence*, *supra* note 98, 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 of being revictimized.")

¹⁵⁹ NAMASTE, *supra* note 23, at 172.

again and will advise others to avoid the system as well.¹⁶⁰ The advice provided by advocates to trans 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, trans people cannot assume that police will treat them sensitively or take their claims seriously, and police intervention may do far more harm than good, particularly for undocumented trans people and those involved in the underground economy.¹⁶¹

2. The Court System

Trans people are disproportionately involved in the court system, particularly the criminal system. A 1997 study by the San Francisco Department of Public Health revealed that 67% of transgender women and 30% of transgender men had been incarcerated¹⁶²; transgender people of color have been especially affected by the ever-increasing trend towards incarceration in the United States.¹⁶³ On the civil side, trans people may find themselves dependent upon courts to determine their legal gender, with a myriad of rights and claims dependent upon that finding. The authority to determine legal gender affords courts the opportunity to do great violence to trans people; by refusing to affirm someone's gender identity, courts deny state recognition of the core of someone's being.¹⁶⁴ Even when the ultimate issue in a case is not a determination of legal gender, courts can affirm or deny the personhood of trans 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 trans people.

Judges profile trans people in many of the same ways that police do. As Joey L. Mogul, Andrea J. Ritchie and Kay 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.*¹⁶⁵

That undercurrent of distrust and fear colors the way that judges treat individual litigants; trans people report that judges refer to them as "it" in

¹⁶⁰ 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).

¹⁶¹ Caban interview, *supra* note 110; Family Service Toronto, *supra* note 49, at 2; Lynn interview, *supra* note 101; Tucker interview, *supra* note 35.

¹⁶² MOGUL, RITCHIE & WHITLOCK, *supra* note 23, at xii (citing study).

¹⁶³ Arkles, *supra* note 69, at 516.

¹⁶⁴ Tey Meadow, "A Rose is a Rose": *On Producing Legal Gender Classifications*, 24 GENDER & SOCIETY 814, 821 (2010).

¹⁶⁵ MOGUL, RITCHIE & WHITLOCK, *supra* note 23, at 23.

open court¹⁶⁶, and advocates confirm that some judges seem flustered or uneasy in the presence of trans people.¹⁶⁷

Trans people's interactions with other legal system actors are similarly problematic. At worst, court staff ridicule trans people seeking assistance,¹⁶⁸ referring to them by demeaning terms like "he/she."¹⁶⁹ Court staff sometimes seem uncomfortable working with trans litigants, particularly if the client does not "pass" easily in hir chosen gender; staff relieve this tension by avoiding trans people, interacting with attorneys rather than communicating directly with trans litigants.¹⁷⁰ Court staff may also require trans people to use the names that appear on their state-issued identification, even if that documentation no longer matches the person's gender presentation.¹⁷¹ The amount of respect afforded trans people by the same individual can vary; one probation officer referred to a trans client on 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.¹⁷²

Trans people are frequently denied effective, competent legal services because lawyers are overtly discriminatory or dismissive; even well-meaning lawyers serve clients poorly when they fail to understand the realities of their trans clients' lives.¹⁷³ Some lawyers simply refuse to serve trans people, telling them to access services elsewhere.¹⁷⁴ Lawyers may also deploy harmful stereotypes of trans people as deceptive and deviant to persuade finders of fact. In the case of Monica James, an African-American trans woman on trial for attempted murder and other crimes involving an off-duty, white, 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."¹⁷⁵

¹⁶⁶ See MOGUL, RITCHIE & WHITLOCK, *supra* note 23, at 74; Rudy Serra & Annette E. Skinner, *Counseling the Gay, Lesbian, Bisexual or Transgender Client*, 80 MICH. B. J. 52, 57 (2001).

¹⁶⁷ See, e.g., Caban interview, *supra* note 110; Lynn interview, *supra* note 101; Thomas interview, *supra* note 109. Advocates note that interactions with judges vary a great deal, that some treat judges 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 the litigation. See Part III x, *infra*.

¹⁶⁸ Caban interview, *supra* note 110.

¹⁶⁹ Gehi interview, *supra* note 14.

¹⁷⁰ Thomas interview, *supra* note 109.

¹⁷¹ Gehi interview, *supra* note 14; Slavin interview, *supra* note 14. Again, advocates note that the experiences of trans people vary considerably depending upon the individuals with whom they interact. As Morgan Lynn observes, though, the system should uniformly respect the gender identities of trans people; it shouldn't involve "personality-based gatekeeping" dependent upon the good will of individual court staff. Lynn interview, *supra* note 101.

¹⁷² Thomas interview, *supra* note 109. 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.*

¹⁷³ MOGUL, RITCHIE & WHITLOCK, *supra* note 23, at 75.

¹⁷⁴ Slavin interview, *supra* note 14.

¹⁷⁵ MOGUL, RITCHIE & WHITLOCK, *supra* note 23, at 76.

The prosecutor also used male pronouns to refer to Ms. James throughout the trial.¹⁷⁶

Involvement with the criminal courts often leads to incarceration for trans people. Trans people suffer gravely in prison, where in most states they are housed according to their birth sex rather than their chosen gender.¹⁷⁷ Trans people, especially trans women, are at heightened risk of sexual abuse in prison, at the hands of both other prisoners and correctional officers.¹⁷⁸ Trans 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.”¹⁷⁹

Some trans women report being strip-searched or frisked four and five times daily while incarcerated.¹⁸⁰ Some systems segregate transgendered inmates from the general population, requiring inmates to self-identify as trans but allowing staff to make the final determination as to whether an inmate will be categorized as transgendered; in segregating trans inmates, Russell K. Robinson argues, the system may be exposing them to harm.¹⁸¹ The criminal system routinely refuses to recognize the chosen names and gender identities of trans inmates, and denies trans people medical care related to their gender, restricting access to hormones and gender reassignment surgery.¹⁸²

a. The Family Court System

Trans people have ample reason to avoid the family court system as well. Several courts have found that, for the purposes of adjudicating the validity of a marriage, a transsexual’s birth sex is determinative, notwithstanding any surgical transition a person may have undergone.¹⁸³ 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.¹⁸⁴ As a result, transsexuals who

¹⁷⁶ MOGUL, RITCHIE & WHITLOCK, *supra* note 23, at 76.

¹⁷⁷ MOGUL, RITCHIE & WHITLOCK, *supra* note 23, at 107.

¹⁷⁸ Arkles, *supra* note 69, at 526-27; MOGUL, RITCHIE & WHITLOCK, *supra* note 23, at 100.

¹⁷⁹ MOGUL, RITCHIE, AND WHITLOCK, *supra* note 23, at 101.

¹⁸⁰ Arkles, *supra* note 69, at 527; MOGUL, RITCHIE, AND WHITLOCK, *supra* note 23, at 101.

¹⁸¹ See generally Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race and Incarceration*, 99 CAL. L. REV. 1309 (2011).

¹⁸² MOGUL, RITCHIE & WHITLOCK, *supra* note 23, at 110-12.

¹⁸³ Luke Boso, *A (Trans)Gender-Inclusive Equal Protection Analysis of Public Female Toplessness*, 18 L. & SEXUALITY 143, 146 (2009).

¹⁸⁴ 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 & Judge Lola Maddox, *In Re Marriage of Simmons: A Case for Transsexual Marriage Recognition*, 37 LOY. U. CHI. L.J. 533, 565 (2006) (arguing that “because a transsexual individual, even with a birth certificate indicating their identified sex, may still encounter legal issues in the

have married people whose biological sex matches their birth sex have found their marriages invalidated in states that do not recognize same sex marriage.¹⁸⁵ Simply crossing state lines may change the validity of a marriage, given the different standards courts have used to determine a transsexual's legal sex. As Julie A. Greenberg and Marybeth Herald write, "Under current legislation and state court rulings, a male-to-female transsex person is legally a woman in approximately one-half of the states and legally a man in the other half."¹⁸⁶ Trans people who opt not to undergo surgical transition have no right to marry as the gender with which they identify; to the extent that trans people marry people whose biological sex matches their gender identity, those marriages would certainly be invalid in those states that do not permit same sex marriage.

Defending trans parents' relationships with their children poses similar challenges. Trans parents "face tremendous discrimination and bias, particularly in custody and visitation cases."¹⁸⁷ Court decisions on the validity of marriages involving transsexuals operate particularly harshly on transsexual parents, whose rights to children may be lost if their marriages are invalidated. Sterling Simmons faced just this situation in 2005, when an Illinois appellate court found that because he still had external female genitalia, his marriage to his wife, Jennifer, was invalid.¹⁸⁸ The court further held that the invalidation of his marriage also meant that the agreement governing the artificial insemination of his wife, which led to the birth of a child in 1992, was similarly invalid, divesting Simmons of any parental right to the child.¹⁸⁹ The court refused to extend to Simmons the presumption that a child born to the marriage through artificial insemination is the child of the father, because, again, the court found that Simmons was not a man.¹⁹⁰ Finally, the court refused to recognize a de facto parenting relationship between Simmons and his child, holding that rights to parent

courtroom...transsexual marriage rights with respect to their identified sex will continue to be nonexistent.")

¹⁸⁵ HUMAN RIGHTS CAMPAIGN (MOULTON & SEATON), *TRANSGENDER AMERICANS: A HANDBOOK FOR UNDERSTANDING* 33 (2005) (citing to decisions from courts in Florida, Illinois, Kansas, Ohio, and Texas). In cases where courts have upheld marriages involving transsexuals, those courts have focused on whether the trans person was of the opposite sex 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 trans person's fertility, and the appearance of the trans person's genitals. Even in some cases where these factors were satisfied, however, the court invalidated the marriage nonetheless. A. Spencer Bergstedt, *Estate Planning and the Transgender Client*, 30 W. NEW ENG. L. REV. 675, 697 (2008). Bergstedt notes that neither the federal nor state Defense of Marriage Acts address marriages involving trans people. *Id.* at 692.

¹⁸⁶ Julie A. Greenberg & Marybeth Herald, *You Can't Take It With You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819, 823-24 (2005).

¹⁸⁷ HUMAN RIGHTS CAMPAIGN, *supra* note 185, at 37; *see also* Courvart & Cook-Daniels, *supra* note 17., at 6 ("because of prejudice and ignorance about trans persons, courts are extremely unlikely to grant them custody no matter how abusive the other parent is.")

¹⁸⁸ *In re. Marriage of Simmons*, 355 Ill. App. 3d 942, 948 (2005). The court made its finding despite the fact that Simmons had legally changed hir gender on hir birth certificate from female to male in 1994, arguing that "the mere issuance of a new birth certificate cannot, legally speaking, make petitioner a male." *Id.* at 949.

¹⁸⁹ *Id.* at 951.

¹⁹⁰ *Id.* at 952.

could only be claimed through the marriage and paternity statutes—statutes that the court had already found did not provide protection for Simmons’ relationship with his child.¹⁹¹

Michael Kantaras could have experienced the same decimation of his family after a Florida appellate court ruled that Kantaras’ marriage to wife Linda was an invalid same-sex marriage.¹⁹² Kantaras, a transsexual man, married Linda in 1989, adopted Linda’s son later that year, and was known to all as the father of their daughter, conceived through artificial insemination with sperm from Michael’s brother and born in 1992.¹⁹³ After Michael filed for divorce in 1998 and asked for custody of both children, Linda argued that Michael’s adoption of his son was void under Florida’s law banning adoptions by homosexuals and that he was not the biological or legal parent of their daughter.¹⁹⁴ The Florida court agreed “with the Kansas, Ohio, and Texas courts in their understanding of the common meaning of male and female, as those terms are used statutorily, to refer to immutable traits determined at birth” and held that Michael and Linda’s marriage was void.¹⁹⁵ Despite the fact that its ruling rendered Michael a legal stranger to his children, the court remanded the case for a determination as to the children’s legal status.¹⁹⁶ Michael Kantaras was luckier than Sterling Simmons; Michael and Linda reached a settlement in 2005 that allowed him to retain his parental rights and share custody of the children.¹⁹⁷ Michael’s right to a continued relationship with his children was left entirely in the hands of his ex-wife; the courts offered him no recourse.¹⁹⁸

Because so few custody cases are reported, it is hard to know what really happens at the trial court level. But *J.L.S. v. D.K.S.*, a Missouri appellate case, gives some indication of the ways in which transsexual parents are treated by the courts.¹⁹⁹ The trial court noted that D.K.S. “was a loving and caring father and that mother would not have a problem with his

¹⁹¹ *Id.* at 953-54. Notwithstanding its finding that he lacked any legal relationship with the child, the trial court did award Simmons visitation, which was not challenged on appeal. *Id.* at 946. The Illinois Supreme Court denied Simmons’ request for review of the appellate court’s decision. *Simmons v. Simmons*, 216 Ill. 2d 734 (2005).

¹⁹² *Kantaras v. Kantaras*, 884 So.2d 155 (2004).

¹⁹³ *Id.* at 156.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 155.

¹⁹⁶ *Id.* at 161; see also Taylor Flynn, *The Ties That (Don’t) Bind: Transgender Family Law and the Unmaking of Families*, in CURRAH, JUANG & MINTER, *supra* note 22, at 33 (explaining that the court’s ruling “invalidated Michael’s marriage, left open the possibility that Michael’s legal rights to his children could be voided in the future, and (in his home state and most others) prohibited Michael from marrying again.”)

¹⁹⁷ HUMAN RIGHTS CAMPAIGN, *supra* note 185, at 39.

¹⁹⁸ In the realm of adding insult to injury, both the *Simmons* and *Kantaras*, opinions note that although the men will be referred to as “he,” (the *Simmons* court doing so out of “respect for petitioner”), the use of the pronoun “has no legal significance.” See *In re. Marriage of Simmons*, 355 Ill. App. 3d at 945 n.1; *Kantaras v. Kantaras*, 884 S.2d at 155 n.1.

¹⁹⁹ *J.L.S. v. D.K.S.*, 943 S.W.2d 766 (1997).

contact with the children if he was not acting like a woman.”²⁰⁰ The phrase “acting like a woman” is particularly telling, establishing both the mother and the court’s belief that despite her gender reassignment surgery, D.K.S. was not actually a woman, but rather a man pretending to be a woman, and therefore not to be trusted. Among the reasons that the appellate court denied D.K.S. legal custody of her children was the lack of evidence of how “father’s sex reassignment surgery and new identity will affect the manner in which mother and father function as a parental unit when making important decisions regarding the children”²⁰¹—essentially, denying legal custody because of the mother’s discomfort with D.K.S.’s gender. The court upheld a restriction on D.K.S.’s ability to live with other transsexuals or sleep with other women, explaining that the court need not ignore the effect of a parent’s conduct on a child’s moral development.²⁰² The dissent took that argument a step further, citing approvingly a case in which the child had not yet shown any ill effects of exposure to gay parenting but the parents’ rights were limited nonetheless because “[t]he court does not need to wait...till the damage is done.”²⁰³

The reported cases all involve transsexuals who have undertaken some level of surgical gender reassignment. For trans 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 are likely to be even less tolerant. The perils of dealing with the family court are magnified for low-income trans people. The cost of retaining lawyers and experts in family law matters is prohibitive for those with means, but impossible for “trans persons who are multiply marginalized, including many trans persons of color, as well as those who are immigrants, sex workers, poor, or homeless.”²⁰⁴ In the end, as advocate Pooja Gehi notes, all of the same stereotypes that work against trans people in the world work against them in family court.²⁰⁵ Little wonder, then, that trans parents fear involvement with the family courts.

b. Eligibility for relief from abuse

If few trans people are calling police, fewer still are turning to courts and judges for protection from abuse. Not only must they evaluate how they might be treated in the court system; trans people have to determine

²⁰⁰ *Id.* at 771.

²⁰¹ *Id.* at 774.

²⁰² *Id.* at 775.

²⁰³ *Id.* at 781 (citing *N.K.M. v. L.E.M.*, 606 S.W.2d 179, 186 (Mo. App. 1980)). For more stories like these, see CARLOS BALL, *THE RIGHT TO BE PARENTS: LGBT FAMILIES AND THE TRANSFORMATION OF PARENTHOOD* (publication forthcoming 2012).

²⁰⁴ Flynn, *The Ties That (Don't) Bind*, *supra* note 196, at 36; see also Gabriel Arkles, Pooja Gehi, & Elana Redfield, *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. FOR SOC. JUST. 579, 589 (2010) (explaining that “[t]he intersection of transphobia, homophobia, racism, ableism, and classism is common in custody decisions involving low-income transgender people.”)

²⁰⁵ Gehi interview, *supra* note 14.

whether they are even eligible for relief. That determination turns on two factors: whether state law provides protection for abuse in same-sex relationships and whether the trans person and hir abuser are considered the same sex under the law.

Gender neutral provisions covering individuals who are cohabiting, living together, or are engaged in romantic or dating relationships are used to protect same-sex individuals from abuse in a number of states.²⁰⁶ The protective order statutes of three states (Louisiana, Montana, and South Carolina), however, explicitly deny protection to people in same-sex relationships.²⁰⁷

For trans people in relationships with individuals whose biological sex is the same as their chosen gender identity, establishing eligibility under state civil protection order laws is complicated by how state law defines gender. Some state laws hold that a person's biological sex at birth is hir gender regardless of the gender identity the individual chooses and/or any medical intervention that individual has undertaken to make hir biological sex more closely conform to hir gender identity.²⁰⁸ In those states, a trans woman in a relationship with a biological man would not be eligible for relief under state civil protection order statutes if state law does not provide

²⁰⁶ Morrison, *supra* note 160., at 95.

²⁰⁷ La. Rev. Stat. Ann. §§ 46-2131-46:2143 (2011); Mont. Code Ann. §§ 40-15-101—40-15-408 (2011); S.C. Code Ann. §§ 20-4-10 – 20-4-160 (2011). Adele Morrison notes that although criminal laws against 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 160, at 134.

²⁰⁸ See *In re Heilig*, 372 Md. 692, 717-18, 816 A.2d 68, 83-84 (2003) (summarizing “22 states and the District of Columbia have enacted statutes expressly enabling a person who has undergone a change in gender to have his or her birth certificate amended to reflect the change About 20 states have statutes dealing generally with amendments to birth certificates but which do not speak expressly, one way or the other, to gender changes. Only one state – Tennessee – statutorily forbids a change in birth certificate by reason of gender change”) (See Tenn. Code Ann. § 68-3-203 (2002)); note 8: See [Ala.Code. § 22-9A-19 \(2002\)](#) (order of court of competent jurisdiction and surgery required); [Ariz.Rev.Stat. § 36-326 \(2001\)](#) (change may be made based on sworn statement from licensed physician attesting to either surgical operation or chromosomal count, although registrar may require further evidence); [Ark.Code Ann. § 20-18-307 \(2002\)](#) (order of court of competent jurisdiction and surgery required); [Cal. Health & Safety Code. § 103425, 103430 \(2002 Supp.\)](#) (court order and surgery apparently required); [Col.Rev.Stat. Ann. § 25-2-115 \(2002\)](#) (same); [D.C. Code Ann. § 7-217 \(2002\)](#) (same); [Ga.Code Ann. § 31-10-23 \(2002\)](#) (same); [Haw.Rev.Stat. § 338-17.7 \(2002\)](#) (physician affidavit and surgery required; registrar can require additional information); [410 Ill. Comp. Stat., 535/17 \(2002\)](#) (same); [Iowa Code § 144.23 \(2002\)](#) (physician affidavit and surgery “or other treatment”); [La.Rev.Stat. Ann. § 40:62 \(2002\)](#) (order of court of competent jurisdiction and surgery required); [Mass. Ann. Laws ch. 46, § 13 \(2002\)](#) (same); [Mich. Comp. Laws § 333.2831 \(2002\)](#) (affidavit of physician certifying sex reassignment surgery); [Miss.Code Ann. § 41-57-21 \(2001\)](#) (registrar may correct certificate that contains incorrect sex on affidavit of two persons having personal knowledge of facts; not clear whether restricted to initial error in certificate or includes gender change); [Mo. Rev. Stat § 193.215 \(2001\)](#) (order of court of competent jurisdiction and surgery required); [Neb.Rev.Stat. § 71-604.1 \(2002\)](#) (affidavit of physician as to sex reassignment surgery and order of court of competent jurisdiction changing name required); [N.J. Stat. Ann. 26:8-40.12 \(2002\)](#) (certificate from physician attesting to surgery and order of court of competent jurisdiction changing name); [N.M. Stat. Ann. § 24-14-25 \(2002\)](#) (same); [N.C. Gen.Stat. 130A-118 \(2001\)](#) (affidavit of physician attesting to sex reassignment surgery); [Or.Rev.Stat. § 432.235 \(2001\)](#) (order of court of competent jurisdiction and surgery required); [Utah Code Ann. § 26-2-11 \(2002\)](#) (order of Utah District Court or court of competent jurisdiction of another State required; no specific requirement of surgery); [Va.Code Ann. § 32.1-269 \(2002\)](#) (order of court of competent jurisdiction indicating sex has been changed by “medical procedure”); [Wis. Stat. § 69.15 \(2001\)](#) (order of court or administrative order).

protection for individuals in same-sex relationships.²⁰⁹ 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 trans person "passed." If the trans person was perceived as being of a different gender than hir abuser, that person had access to protection. Otherwise, protection was denied those in same sex relationships (and those who did not present as successfully in their chosen gender).²¹⁰

c. Identity-related issues in seeking relief from abuse

Establishing eligibility for relief is only the first hurdle for trans people subjected to abuse considering using the legal system. Trans people must also weigh the consequences of confronting a host of identity related issues. Trans people are, to greater or lesser degrees, at the mercy of the state in asserting their gender identities. Although trans 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 trans 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. As sociology professor Tey Meadow argues, "institutions gender individuals."²¹¹ Meadow continues,

The state "gives gender" to individuals, by which I mean, they engage in projects which assist some individuals with solidifying gender recognition while preventing the recognition of others. Gender is, in this formulation, a kind of intangible resource, finite, controlled and distributed by the state.²¹²

The state, law professor Taylor Flynn notes, has the power to legally determine an individual's gender and to use that determination to parcel out state benefits ranging from identification documents to marriage and its associated rights.²¹³ Legal standards for recognizing a gender identity different than one's birth sex often require that a transgender person has

²⁰⁹ ; see also Morrison, *supra* note 160, at 95.

²¹⁰ Stapel Interview, *supra* note 15.; 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 (2007-08). Stapel views passing as a derogatory term; for that reason, I have placed it in quotes. Stapel observes that trans people have sometimes benefitted from the legal system's uncertainty surrounding their gender identity. Trans people whose gender identity was opposite from their partner's gender gained access to protections and benefits that others in same-sex relationships could not access, so long as state actors did not realize that they were transgendered. That access immediately became suspect or was questioned as soon as someone figured out that petitioner was transgendered, however. Stapel interview, *id.*; see also Daniel Borunda, *Woman Designated Male at Birth Allowed to Marry Woman in Texas*, NEW YORK LAWYER, May 5, 2010 (describing how trans woman was permitted to marry her female partner because her birth certificate listed her as male, notwithstanding sexual reassignment surgery).

²¹¹ Meadow, *supra* note 164, at 816.

²¹² *Id.* at 831 (citation omitted); see also .

²¹³ Taylor Flynn, *Instant (Gender) Messaging: Expression-Based Challenges to State Enforcement of Gender Norms*, 18 TEMPLE POL. & CIV. RTS. L. REV. 465, 467 (2009).

undergone invasive, costly, and for some, unnecessary medical procedures, requirements that prevent many trans people from legally establishing their chosen gender identities.²¹⁴ Moreover, because gender recognition laws vary from state to state, trans people risk losing legal recognition and rights when they move between states.²¹⁵

As a practical matter, incongruence between one's presentation and one's documentation exposes trans people to the possibility of violence and harassment. "Having to 'come out' as transgender every time a person needs to show a piece of identification of whenever an employer or landlord conducts a routine background check exposes a transgender person to unnecessary personal and financial risks."²¹⁶ On a theoretical level, creating obstacles to asserting one's chosen gender identity functions as a sort of "social erasure,"²¹⁷ a refusal to recognize the existence of trans people in their chosen gender. Living in a system where full rights of citizenship are dependent upon that recognition means that trans people are precluded by the state from exercising those rights.²¹⁸

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. 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 transgendered, possibly for the first time.²¹⁹ Such exposure can lead to negative reactions from family and friends, discrimination by landlords, employers and others, and potentially, greater violence.²²⁰ The public nature of the process also puts

²¹⁴ 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 "Of 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 481-82. Sociologists Patricia Gagné and Richard Tewksbury discovered that some transgendered people who had not undergone medical procedures used legal name changes to get around statutes that required medical intervention; once the name changes were granted, trans people used the legal documentation to change not just their names, but also their legal sex on their driver's licenses. While this strategy provided greater security in the form of documents that matched their chosen gender identities, it exposed them to the risk of having to explain why their genitalia did not match their documentation. Patricia Gagné & Richard Tewksbury, *Conformity Pressures and Gender Resistance Among Transgendered Individuals*, 45 SOC. PROB. 81, 95 (1998).

²¹⁵ Newlin, *supra* note 215. This is a particular problem in those states that amend birth certificates through administrative proceedings rather than via judicial action, as administrative proceedings are not entitled to full faith and credit from other states. *Id.* at 483.

²¹⁶ MINTER & Daley, *supra* note 69, at 34.

²¹⁷ Gagné & Tewksbury, *Conformity Pressures*, *supra* note 215, at 95.

²¹⁸ Barbara Klugman, *Locating and Linking Sexuality in Development and Human Rights*, 19 INT'L J. SEX. HEALTH 65, 66 (2007).

²¹⁹ Trans Accessibility Project, chapter 3 at 6.

²²⁰ Brown, *Holding Tensions of Victimization and Perpetration*, *supra* note 46, at 155.

; Courvant & Cook-Daniels, *supra* note 17., at 5.

trans people on display and opens their lives to scrutiny before both system actors and courtroom observers. Attorney Terra Slavin has seen trans women who seek protection from abuse gawked at by spectators questioning their identity, an experience that makes accessing the court system daunting for trans people.²²¹ For undocumented trans 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.²²²

How trans people are identified in court documents is another potential source of disempowerment within the legal system. Attorney Morgan Lynn notes that trans people are pressured to check the boxes that are provided on court documents, even if those boxes don't accurately reflect how the trans person sees himself. Courts usually require trans people to use their legal names and legal genders in petitions for protection²²³; courts want to know if they are talking to mister or miss.²²⁴ But trans people may not use these terms to describe themselves or might fear being accused of fraud for checking the "wrong" gender box.²²⁵ Advocate Linnet Caban has seen the impact of being required to use one's legal name and gender on the trans people with whom ze works. Caban reports that clients feel insecure about their ability to convince judges of their need for protection—and inauthentic because they are not being recognized for who they are.²²⁶ The insistence that trans people use their legal names can also have ramifications for the enforceability 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?²²⁷

These identity-related issues continue when trans people come before judges to argue their cases. Being referred to by the wrong pronoun or by one's legal name signals to the trans person subjected to abuse the court's lack of concern for their plight. As advocate Victoria Cruz explains, "If the survivor is transgender and their name has not been changed, and the [court] starts calling them by 'mister,' the survivor will clam up and say, 'Well, this person has no respect for me.' It gives the general impression that the

²²¹ Slavin observes that the eroticization and dehumanization of trans people reflected in this kind of staring is both socially acceptable and commonplace. Slavin interview, *supra* note 14.

²²² Lynn interview, *supra* note 101. This fear is common among cisgender undocumented women subjected to abuse as well. GOODMARK, A TROUBLED MARRIAGE, *supra* note 44, at 73.

²²³ Gehi interview, *supra* note 14.

²²⁴ Lynn interview, *supra* note 101. This insistence on fitting trans people into the gender binary would be particularly problematic for those on the genderqueer spectrum, who may identify as neither male nor female. *Id.*

²²⁵ Michael Silverman, *Issues in Access to Healthcare by Transgender Individuals*, 30 WOMEN'S RTS. L. REP. 347, 349 (2009).

²²⁶ Caban interview, *supra* note 110.

²²⁷ Lynn interview, *supra* note 101. 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.*

institutions of authority have no sensitivity or respect for transgendered persons.”²²⁸ Knowing that judges will insist on using birth names or legal gender prevents trans people from using the legal system.²²⁹

d. Credibility

The credibility of trans people is called into question simply by virtue of their nonconforming gender identity. As Julia Serano writes, “Because I’m transsexual, I am sometimes accused of impersonation or deception when I am simply being myself.”²³⁰ Transgendered witnesses are depicted as “less credible than a ‘normally’ gendered person.”²³¹ These same undercurrents of mistrust and skepticism are in operation when trans people subjected to abuse seek assistance from the courts. Attorney Wayne Thomas has litigated cases against defendants who raise the fact that someone has transitioned as a way of arguing that the person is too confused to be believable.²³² Advocate Kristen Tucker observes that the inability to produce documentation that links one’s gender identity to one’s legal identity is construed by courts as fraudulent, notwithstanding the expense and institutional barriers that preclude trans people from securing such documentation.²³³

Other advocates believe that the criminal histories and illegal employment of some trans people subjected to abuse are more to blame for courts’ skepticism about their claims.²³⁴ The prevalence of sex work among trans people is particularly damaging to their credibility, in two different ways. Sex workers are viewed as less credible, or fear that they will be viewed as less credible, because they are engaged in criminal activity.²³⁵ Being engaged in sex work also makes courts view claims of abuse more skeptically²³⁶; abuse is seen as a byproduct of sex work, even when that abuse happens within non-commercial intimate relationships. These credibility challenges are particularly acute for more marginalized trans people—poor people, people of color, and HIV positive people. As

²²⁸ *Lesbian, Gay, Bisexual, and Transgender Communities and Intimate Partner Violence*, *supra* note ___, at 149.

²²⁹ Gehi interview, *supra* note 14.

²³⁰ Julia Serano, *Performance Piece*, in BORNSTEIN & BERGMAN, *GENDER OUTLAWS: THE NEW GENERATION* 87 (2010); *see also* Susan Stryker, *(De)Subjugated Knowledges: An Introduction to Transgender Studies* in *THE TRANSGENDER STUDIES READER* 9 (Susan Stryker and Stephen Whittle eds 2006) (“Transgender people who problematize the assumed correlation of a particular biological sex with a particular social gender are often considered to make false representation of an underlying material truth, through the willful distortion of surface appearance. Their gender presentation is seen as a lie rather than as an expression of a deep, essential truth; they are bad by definition.”)

²³¹ John M. Ohle, *Constructing the Trannie: Transgender People and the Law*, 8 J. GENDER RACE & JUST. 237, 267 (2004); *see also* Gordene MacKenzie and Mary Marcel, *Media Coverage of the Murder of U.S. Transwomen of Color*, in *LOCAL VIOLENCE, GLOBAL MEDIA: FEMINIST ANALYSES OF GENDERED REPRESENTATIONS* 84 (Lisa M Cuklanz & Sujata Moorti eds. 2009).

²³² Thomas interview, *supra* note 109.

²³³ Tucker interview, *supra* note 35.

²³⁴ Slavin interview, *supra* note 14.

²³⁵ Lynn interview, *supra* note 101.

²³⁶ Caban interview, *supra* note 110; Lynn interview, *supra* note 101.

attorney Pooja 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 trans litigants are wealthy and white.²³⁷

e. Gender and the trans litigant

Abuse narratives that are successful in the legal system share key features: a meek, passive, powerless white woman; physical violence; a monstrous, controlling abuser.²³⁸ Gender is at the core of these narratives. Victims are weak women; abusers are strong men.²³⁹ 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.²⁴⁰

How do stereotypes about domestic violence operate in cases involving trans litigants? Theorists have argued that the operation of gender norms within the law requires trans litigants to tell these stereotypical stories.²⁴¹ The inability to conform to the gender binary or to present convincingly in the “victimized” gender is thought to prevent trans people from benefitting from the protection of gender-based laws.²⁴²

What is happening in the courtrooms where trans people’s claims of abuse are heard is somewhat more complex, however. Advocates explain that they do, in fact, deploy stereotypical gendered domestic violence narratives on behalf of trans clients—when those narratives fit the facts of a case. These narratives might seem to be particularly effective in cases involving trans women—especially trans women who easily “pass”—and heterosexual men.²⁴³ But even armed with the stories that conform to what judges expect to hear in domestic violence cases, advocates find judicial resistance to the abuse narratives of trans litigants. Some judges are skeptical of gender-based claims of violence made by trans litigants, insisting that because the trans woman is not biologically female, the abuse must instead be mutual violence within a same-sex relationship. Others have suggested that the claim of abuse is not credible because, by virtue of hir gender, the petitioner should have been able to protect himself.²⁴⁴

Advocates have found that to prevail in cases involving abuse of trans

²³⁷ Gehi interview, *supra* note 14; *see also* MacKenzie & Marcel, *supra* note 232, at 84 (arguing that the testimony of trans women of color is particularly suspect). 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 a victim may in many cases become the functional equivalent of being a perpetrator in the eyes of the law.” Bumiller, *supra* note 76, at 277-79 (Kindle version).

²³⁸ Goodmark, *When is a Battered Woman Not a Battered Woman?*, *supra* note 153, at 82-92.

²³⁹ GOODMARK, *A TROUBLED MARRIAGE*, *supra* note 44, at 63-70; Morrison, *supra* note 160, at 91.

²⁴⁰ Goodmark, *When is a Battered Woman Not a Battered Woman?*, *supra* note 153, at 91-92.

²⁴¹ Meadow, *supra* note 164., at 819.

²⁴² Sue Landsittel, *Strange Bedfellows: Sex, Religion, and Transgender Identity Under Title VII*, 104 NORTHWESTERN U. L. REV. 1145, 1163 (2010); Ohle, *supra* note 232, at 269.

²⁴³ Slavin interview, *supra* note 14.

²⁴⁴ Gehi interview, *supra* note 14; *see also* Slavin interview, *supra* note 14.

clients, they need to tell more complex, individualized stories. As Terra Slavin explains, advocates can't simply rely on the assumption that trans women will be perceived as victimized by virtue of their gender.²⁴⁵ 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.²⁴⁶

Other advocates are consciously moving away from gendered narratives in an attempt to increase the availability of protection from abuse for LGBT individuals. Kristen Tucker of the Northwest Network describes domestic violence 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. Domestic violence is conceived of as a pattern of abuse, coercion and control that is affected by gender (and potentially supported by gender privilege), but experienced across genders.²⁴⁷

Even as they move away from reliance on gendered narratives, however, advocates believe that gender is very much a subtext in cases involving trans 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.²⁴⁸ Judges fail to find that abuse has occurred in cases involving trans clients that advocates believe would resolve quite differently if the petitioner were cisgender.²⁴⁹

3. Advising trans clients subjected to abuse

Given what they know about its operation, advocates for trans people subjected to abuse find themselves in the difficult position of trying to advise clients about whether to use the legal system for protection. For the most part, advocates take a cautious stance on using the legal system. Advocates and clients explore the potential dangers of calling the police, helping clients to determine when police intervention might be necessary, despite the risks of calling.²⁵⁰ Advocates walk clients through the court

²⁴⁵ Slavin interview, *supra* note 14.

²⁴⁶ Lynn interview, *supra* note 101.

²⁴⁷ Tucker interview, *supra* note 35; Thomas interview, *supra* note 109.

²⁴⁸ Lynn interview, *supra* note 101.

²⁴⁹ Caban interview, *supra* note 110; Slavin interview, *supra* note 14; Tucker interview, *supra* note 35. In addition, some judges are simply uncomfortable with, or hostile to, trans people—both the idea of trans 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 described judges as a mixed bag, although all noted that it was hard to assess how judges treated trans litigants in protective order cases because so few of their clients actually chose to go to court. Caban interview, *id.*; Lynn interview, *supra* note 101; Slavin interview, *supra* note 14; Thomas interview, *supra* note 109; Tucker interview *supra* note 35, *id.* Nonetheless, all of the advocates knew of trans 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 trans litigants will be explored in Section V, *infra*.

²⁵⁰ Caban interview *supra* note 110, *id.*; Tucker interview *supra* note 35, *id.* Kristen Tucker, for example, counsels clients on how primary aggressor statutes might work to the detriment of the client, explaining the training that police officers receive make them ill-equipped to assess who is responsible for abuse unless there is severe physical violence, and identifies the potential outcomes of calling police, including the possibility that the person subjected to abuse will be arrested, that both partners will be arrested, or that neither will be arrested.

process, giving them a sense of what to expect when they go to court, what a protective order can and cannot do to keep them safe, and the likelihood of success, all of which is informed by the client's gender identity.²⁵¹ Advocates also help clients think through how their partners might react to being called into court²⁵² and to consider other alternatives to using the court system.²⁵³ Finally, advocates warn clients that involving the legal system in their lives means a loss of control; once the police or courts are involved, the client is only one of several decision-makers with some ability to determine how a case will proceed.²⁵⁴ The goal of this counseling, says Jarad Ringer, is to ensure that clients are able to make informed decisions about whether to use the legal system; success, Ringer says, is when a client is able to make that decision for himself.²⁵⁵

III. PATRIARCHY, GENDER CONFORMITY AND THE ABUSE OF TRANS 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 on abuse perpetrated by men against women almost exclusively, and abuse perpetrated against white, middle class, heterosexual women particularly.²⁵⁶ Prevailing theories describe domestic violence as a means of reinforcing patriarchy and enforcing control of women within intimate relationships with men. While patriarchy as it is outlined in the classic domestic violence literature is one vehicle for understanding abuse in the trans community, intimate partner abuse of trans people can be seen as gendered in other ways as well—as a means of enforcing appropriate gender roles and policing gender conformity. More problematically, intimate partner abuse among trans people may be gendered in the sense that trans men and women understand their experiences of abuse through gendered lenses, as part of what it means to be a “woman” or a “man.”

Tucker stresses, however, that her main goal is to ascertain what will make the client feel safer and to help the client make the choices that make the most sense to hir. Tucker interview *supra* note 35, *id.*

²⁵¹ Caban interview *supra* note 110, *id.*; Gehi interview, *supra* note 14; Lynn interview, *supra* note 101; Ringer & Romeo interview, *supra* note 15; Slavin interview, *supra* note 14; Thomas interview, *supra* note 109; Tucker interview, *supra* note 35, *id.*

²⁵² Thomas interview, *supra* note 109, *id.*

²⁵³ Gehi interview, *supra* note 14.

²⁵⁴ Lynn interview, *supra* note 101. This is true for cisgender women subjected to abuse as well. See BUMILLER, *supra* note 76, at 1816-18 (Kindle version).

²⁵⁵ Ringer & Romeo interview, *supra* note 15.

²⁵⁶ Morrison, *supra* note 160, 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 LGBT movement—that its white, affluent orientation that makes it deaf to needs of others within the community. MOGUL, RITCHIE & WHITLOCK, *supra* note, at xviii.

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. Men used physical violence to assert their dominant positions over women in families and, by extension, in society²⁵⁷; the state facilitated these assertions of superiority through violence by turning a blind eye to violence in the home and refusing to intervene on the rare occasion that that violence was made public through calls to police or the pressing of charges.²⁵⁸ Supported by statistics showing the vast majority of victims of intimate partner violence were women²⁵⁹, advocates argued that domestic violence was inherently a gendered phenomenon—women were victims, men were perpetrators. Despite contentions by some social scientists that women are just as violent as men²⁶⁰—debates that continue to the present²⁶¹--domestic violence law and policy was built upon these central tenets. To dismantle the patriarchy, a strong state response to violence against women was necessary, not only to protect individual women, but also to rectify women's societal inequality.

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

interpersonal violence and abuse against transsexual, transgendered and cross-dressing persons...represents 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.²⁶²

²⁵⁷ As law 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." ELIZABETH SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 22 (2000); see also Emily Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WISCONSIN L. REV. 1657, 1666 (2004). 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. BUMILLER, *supra* note 76, (Kindle at 2140-41)

²⁵⁸ GOODMARK, *A TROUBLED MARRIAGE*, *supra* note 44, at 9..

²⁵⁹ Patricia Tjaden & Nancy Thoennes, *PREVALENCE, INCIDENCE AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 2* (1998).

²⁶⁰ See, e.g., Michael S. Kimmel, "Gender Symmetry" in *Domestic Violence: A Substantive and Methodological Research Review*, 11 *VIOLENCE AGAINST WOMEN* 1332 (2002); Murray A. Straus, *Physical Assaults by Wives: A Major Social Problem*, in *CURRENT CONTROVERSIES ON FAMILY VIOLENCE* (RICHARD J. GELLES & DONILEEN LOSEKE EDS. 1993).

²⁶¹ WALTER S. DEKESEREDY, *VIOLENCE AGAINST WOMEN: MYTHS, FACTS, CONTROVERSIES* 43-59 (2011).

²⁶² Tarynn M. Witten & A. Evan Eyler, *Hate Crimes and Violence Against the Transgendered*, 11 *PEACE REV.* 461, 461 (1999); see also Flynn, *Transforming the Debate*, *supra* note 23, 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.") SERANO, *WHIPPING GIRL*, *supra* note 21, at 3 (contending that "most of the anti-trans sentiment that I have had to deal with as a transsexual woman is probably better described

Similarly, transgender activist Kate Borstein writes, “The most obviously violent structure within the cult of gender is sexism, misogyny. Misogyny is necessary to maintain the cult of gender, the struggle to be one or the other.”²⁶³

In his study of violence among trans people in Japan, Anthony DiStefano found that intimate partner abuse followed what he calls “traditional gender lines....the partner who ascribes to a more masculine role tends to perpetrate violence against the partner who takes the more feminine role.”²⁶⁴ 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....Choosing to act out abusively toward an intimate partner is coded as an aspect of being a man.”²⁶⁵

Some trans women see their abuse as consistent with the patriarchy narrative. For trans women who identify themselves as heterosexual women, their stories of abuse—that they, as straight women, are being victimized by their boyfriends—read as stories consistent with the traditional domestic violence narrative, in which abuse is being used by men to assert their status, their right to control their partners.²⁶⁶

B. Enforcing Gender Roles

Intimate partner abuse of trans people may also serve as a form of policing binary gender norms. As law student Sydney Tarzwell writes, “‘Trans’ as a prefix signals both crossing and changing. Transgender individuals—individuals who are both crossing and changing gender categories—are incompatible with a system that relies on rigidly demarcated gender boundaries to function.”²⁶⁷ Stretching the boundaries of that system—a system that operates not only on a societal level, but between individuals as well—can surface the desire to exert control over the

as misogyny.”); ALLISON COPE & JULIE DARKE, TRANS ACCESSIBILITY PROJECT: MAKING WOMEN’S SHELTERS ACCESSIBLE TO TRANSGENDERED WOMEN (1999), available online at <http://www.queensu.ca/humanrights/tap/toc.htm> (arguing that genderism is a weapon of sexism). *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) (asserting that “abuse in lesbian, gay, bisexual, and trans relationships represents a significant theoretical challenge to the ‘grand narrative’ or partner violence as an outgrowth of patriarchy and power imbalances.”)

²⁶³ BORNSTEIN, GENDER OUTLAW, *supra* note 31, at 104-05.

²⁶⁴ DiStefano, *supra* note 104, at 133.

²⁶⁵ Morrison, *supra* note 160, at 91, 139.

²⁶⁶ Gehi interview, *supra* note 14.

²⁶⁷ Sydney Tarzwell, *The Gender Lines Are Marked With Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUMBIA HUM. RTS. L. REV. 167, 170 (2006); *see also* Holly Boswell, *The Transgender Paradigm Shift Toward Free Expression*, in GENDER BENDING 54 (Bonnie Bullough, Vern L. Bullough & James Elias eds. 1997).

Deleted: (1994)

ways in which trans people express their gender identities.²⁶⁸ The need to engage in gender policing grows from the doubt, confusion and anxiety cisgender people experience when confronted with the transgression of gender roles.²⁶⁹ Choosing to live consistently with one's gender identity—what some may see as transgression--can have “grave consequences” for trans people.²⁷⁰

Intimate partner abuse may be one of those consequences. Gender policing in the context of intimate partner relationships poses an odd dichotomy. Those involved with transgender individuals often know that they are living outside of societal gender norms, and may even be attracted to trans people because they identify as something other than the binary gender norms. Nonetheless, abusers may use the transgendered person's “transgressive” status to punish them, employing tactics that look much like those used in hate crimes. As Gordene MacKenzie and Mary Marcel explain,

Transgender women who don't ‘pass’ as their desired gender are marked as monstrous, as ‘men in dresses,’ for example, who become easy targets for ‘disciplinary violence.’ Those who do ‘pass,’ however, are blamed for triggering their assailants’ rage on the grounds that they ‘deceived’ the men involved, and thus become *legitimate targets of men's rage*...the power to determine and control the transgender persons’ gender identity is located outside herself or himself.²⁷¹

In his study of transgender people subjected to abuse in Japan, for example, Professor Anthony DiStefano talked with a trans woman named Chaiaki, who “reported personal experience of psychological abuse by

²⁶⁸ 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 (2010).

²⁶⁹ L. Camille Hébert, *Transforming Transsexual and Transgender Rights*, 15 WM. & MARY J. WOMEN & L. 535, 565-66 (2009); NAMASTE, *supra* note 23, at 135-36, 141; SERANO, WHIPPING GIRL, *supra* note 21, at 11; SHELLEY, *supra* note 31, at 91-92.

²⁷⁰ Meadow, *supra* note 164, at 818. For Gwen Araujo, a transwoman murdered on October 3, 2002, by four young men that she knew (and with three of whom she had been involved sexually), the consequence was murder; as Victoria Steinberg explains, “The 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.’” Victoria L. Steinberg, *A Heat of Passion Offense: Emotions and Bias in “Trans Panic” Mitigation Claims*, 25 BOSTON COLL. THIRD WORLD L.J. 499, 515 (2005); *see also* Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207, 209 (2008) (arguing that violence is the punishment for transgression of gender roles). As with the murders described at the outset of this article, although Araujo had been involved with intimate relationships with some of her killers, her murder has never been described as intimate partner abuse.

²⁷¹ MacKenzie & Marcel, *supra* note 232, at 82-83. Trans women may be particularly at risk for gendered violence; as Vivian Namaste explains, “If gender ambiguity is habitually resolved within a masculinist frame of reference, then genetic males who live as women will be among those most at risk of assault. Simply put, within Western societies, it is easier for females to pass as men than for males to pass as women.” NAMASTE, *supra* note 23, at 145; *see also* Stephen Whittle, *Foreword*, in THE TRANSGENDER STUDIES READER xiv (Susan Stryker and Stephen Whittle eds 2006) (explaining that “transwomen are most frequently the victims of discrimination because of their visibility.”)

partners who intentionally called her a man, which she explained was particularly hurtful to [trans women].”²⁷² That type of denigration is common outside of intimate relationships, used as a means of policing gender boundaries by reminding trans people of their failure to “pass” in their chosen gender. Such degradation is intended to prevent trans people from openly expressing their gender identities, both in society generally and within interpersonal relationships.²⁷³ 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 are told, through the act of sexual assault, that they are ‘really’ women, and they will be treated as such. Biology is destiny.”²⁷⁴

Intimate partner violence against trans 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 about hir own sexuality in the cisgender partner, who sees not just hir partner, but hirself as transgressing gender norms by engaging in the relationship. Such abuse may be particularly painful for trans people who do not see themselves as transgressing gender norms, but rather conforming to their true gender identity. While the abuse born of gender policing may not look like that which is 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 and accepted as your chosen gender is of central importance to many transgender people. passing allows trans people to live openly and comfortably in their chosen gender and decreases the trans person’s exposure to violence and discrimination²⁷⁵; as trans feminist Emi Koyama writes, “As trans women, we have learned that our safety is often dependent on how well we can ‘pass’ as ‘normal’ women.”²⁷⁶ But that external validation can empower others to define the trans person—passing delegates the determination as to whether the trans person’s gender presentation is authentic. As Kate Bornstein explains, “Most passing is

²⁷² DiStefano, *supra* note 104, at 130; *see also* Courvant & Cook-Daniels, *supra* note 17., at 5 (explaining that abusers use shame and self-doubt about their gender identities against their partners to convince them that no one else would want them).

²⁷³ Lombardi *et al.*, *supra* note 37, at 100; *see also* Tucker interview, *supra* note 35 (explaining that domestic violence is about the enforcement of gender roles, with violence as a consequence of transgression).

²⁷⁴ NAMASTE, *supra* note 23, at 146-47.

²⁷⁵ BORNSTEIN, GENDER OUTLAW, *supra* note 31., at 126-27 (“Passing emphatically equals membership, and passing includes all the privileges of gender membership;” Gagné & Tewksbury, *supra* note 215, at 115 (finding that trans men who did not, for whatever reason, pass were more likely to experience harassments, threats and assault)).

²⁷⁶ KOYAMA, THE TRANSFEMINIST MANIFESTO, *supra* note 14. One study found that the more convincingly a transwoman passes, however, the greater hir fear of being assaulted as a woman. Gagné & Tewksbury, *supra* note 215, at 94. Jennifer Finney Boylan describes this fear in her memoir, SHE’S NOT THERE:

undertaken in response to the cultural imperative to be one gender or the other. In this case, passing becomes the outward manifestation of shame and capitulation.”²⁷⁷ Moreover, as activist Pat Califia notes, “[E]ven after hormones and surgery, voice lessons and electrolysis, body-building and tattoos, some transgendered people are never going to be able to ‘pass’ in their gender of preference.”²⁷⁸ This may be particularly true for trans women, who often have a more difficult time passing than trans men.²⁷⁹ Caroline White and Joshua Goldberg summarize the Catch-22 that trans people face around passing; “The tyranny of passing as non-trans and the systemic violence of not passing cannot be underscored enough in trans survivors’ lives.”²⁸⁰

Passing can serve as external validation of the trans person’s success in assuming a new gender identity.²⁸¹ Although passing is a fraught concept, the desire to have external validation of one’s chosen gender identity is undeniably important to many trans people. Trans 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 trans women engage in sex work and unprotected sex because doing so validates them as women and increases their self-esteem.²⁸² As one study concludes, “The need for affirmation of one’s transgender identity is strong. Being recognized and affirmed in the crossgender role as sexually desirable is extremely important. The hunger for such affirmation may override any fear of HIV/AIDS and lead to unsafe sexual activity....”²⁸³ That desire may also make trans women more vulnerable to staying in abusive relationships.²⁸⁴

Intimate partner abuse may be gendered to the extent that it reinforces one’s chosen gender identity. Recall law professor Adele Morrison’s

²⁷⁷ BORNSTEIN, GENDER OUTLAW, *supra* note 31, at 125; *see also* Leslie Feinberg, *Transgender Liberation: A Movement Whose Time Has Come* in THE TRANSGENDER STUDIES READER, *supra* note __, at 207 (“Passing means hiding. Passing means invisibility.”)

²⁷⁸ PAT CALIFIA, SEX CHANGES: THE POLITICS OF TRANSGENDERISM 209 (1997).

²⁷⁹ SHELLEY, *supra* note 31, at 51.

²⁸⁰ White & Goldberg, *supra* note 16.

²⁸¹ W.O. Bockting, B.E. Robinson, & B.R.S. Rosser, *Transgender HIV Prevention: A Qualitative Needs Assessment*, 10 AIDS CARE 505 (1998), available online at <http://search.ebscohost.com/login.aspx?direct=true&db=pbh&AN=906165&site=ehost-live>. passing may also make transpeople 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 identities. Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory* 28 L. & SOC. INQUIRY 1 (2003).

²⁸² Nemoto *et al.*, *supra* note 80, at 729; Willy Wilkinson, *Public Health Gains of the Transgender Community in San Francisco: Grassroots Organizing and Community-Based Research* in TRANSGENDER RIGHTS (Paisley Currah, Richard M. Juang & Shannon Price Minter, eds. 2006) at 193. Financial necessity remains the most common reason transpeople engage in sex work, however; this issue will be discussed at greater length in Part II *infra*.

²⁸³ Bockting, Robinson & Rosser, *supra* note 282.

²⁸⁴ Brown, *Holding Tensions of Victimization and Perpetration*, *supra* note 46, at 154.

contention that battering is gendered male, victimization is gendered female.²⁸⁵ To the extent that they act in accordance with these societal gender norms regarding abuse, trans people are able to reinforce their chosen gender identities. For trans men, the desire to conform to gender norms can both push them to abuse and prevent them from reporting being abused. Participants in Nicola Brown's study of sexual-minority women partnered with trans men reported that "at times [the trans men's community] encouraged competitiveness around machismo and created 'peer pressure' to exhibit a stereotypical masculinity 'especially when you want to pass.'"²⁸⁶ For some of the trans men, that stereotypical masculinity extended to subjecting their partners to emotional, verbal, physical and financial abuse.²⁸⁷ Similarly, in his study of study of sexual minority men in Japan, Anthony DiStefano heard the story of a trans man whose partner "told him, 'You need to be more masculine. You're not manly enough...'. This was psychologically agonizing to him...So conversely after that, he ended up being violent, himself...punching his partner and such."²⁸⁸ For trans men, abuse can serve as a means of distancing oneself from women, of establishing oneself definitively as "not woman."²⁸⁹

Acting consistently with gender norms may also color the way that trans 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. She²⁹⁰ felt humiliated and emasculated by the idea of going in front of a judge and saying, "my wife hit me and I need protection."²⁹¹

²⁸⁵ Morrison, *supra* note 160, at 139.

²⁸⁶ Brown, *Stories from Outside the Frame*, , *supra* note 263, at 382.

²⁸⁷ Brown, *Stories from Outside the Frame*, , *supra* note 263., at 376-77

²⁸⁸ DiStefano, *supra* note 104, at 138; *see also* Slavin interview, *supra* note 14 (agreeing that some trans men see violence as part of their role as men). *But see* Carolyn Grose, *A Persistent Critique: Constructing Clients' Stories*, 12 CLIN. L. REV. 329, 356 (2006) (citing client's defense to claim that ze had abused hir 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.")

²⁸⁹ Brown, *Stories from Outside the Frame*, , *supra* note 263, at 382.

²⁹⁰ Grose notes that she has used the gender pronoun preferred by her client. Sheila did not identify as lesbian or transgender; "She is simply living her life, as someone assigned female at birth, who is playing traditionally male social and cultural roles." Grose, *supra* note 289, at 355. Although her client identified as a man, she used the pronoun "she" to describe herself, and I have used it here. *Id.* at 330 n. 2.

²⁹¹ Grose, *supra* note 289, 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* Slavin interview, *supra* note 14 (agreeing that some trans men are reluctant to report abuse because role of victim does not fit male narrative). Rhonda Factor and Esther Rothblum posit that trans men may be more likely to suffer harassment and discrimination because they feel a false sense of safety as men that may make them 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 trans women." Factor & Rothblum, *supra* note 66, at 27.

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

For trans women, gender affirmation may come through the experience of being abused. As researcher Val Jenness learned in her study of trans women in California's prisons, trans women were vastly more likely to be abused by partners than other inmates, an experience that the trans prisoners saw as affirming their femininity—"he treats me like his wife."²⁹² The desire to be experienced, understood and affirmed as women by the men around them shapes how trans women assimilate the abuse to which they are subjected; they experience that abuse as ratifying their success in passing as women.²⁹³ The need for gender affirmation may make trans women more likely to remain in abusive relationships as well.²⁹⁴

Given the importance many trans women place on gender affirmation, challenging a trans woman's status as a woman is a particularly effective tactic for abusers. "Trans 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 woman feel ugly, ashamed, worthless and crazy when she is a trans woman."²⁹⁵ Abuse may seem a small price to pay for having one's gender identity affirmed in a world that questions that identity constantly.²⁹⁶

Intimate partner abuse often serves to reinforce gender norms. Many individuals subjected to abuse are transgressive in some way: women who fight back against their abusers, women who are economically better off than their partners, women who assert their power and independence. Trans people particularly challenge gender norms in ways that their partners may find disconcerting or frightening--even for those who seek trans people out as partners. Gender underpins the abuse of trans people in ways both similar to and very different from prevalent theoretical conceptions of the relationship between gender and abuse.

IV. BUILDING A BETTER RESPONSE

A. *Within the Legal System*

The vast majority of trans people subjected to abuse never come into contact with the legal system, purposefully avoiding a system that they believe will not help them. But some of the very few trans people subjected

²⁹² Interview with Valerie Jenness, University of California, Irvine, Department of Criminology, Law and Society, Department of Sociology, June xx 2011 (notes on file with author).

²⁹³ Interview with Valerie Jenness, *id.* Jenness describes that feeling as the desire to "secur[e] the standing of 'girl' in an alpha male environment." Valerie Jenness, *From Policy to Prisoners to People: A 'Soft Mixed Methods' Approach to Studying Transgender Prisoners*, 39 J. CONTEMP. ETHNOGRAPHY 517, 528 (2010).

²⁹⁴ Nemoto *et al.*, *supra* note 80, at 733.

²⁹⁵ Koyama, *supra* note 14, at 5.

²⁹⁶ Terra Slavin explains that when one's gender identity is constantly questioned, the desire to stay with a person who affirms that identity is extremely important, even if the partner is abusive. Slavin interview, *supra* note 14.

to abuse who choose to use the legal system are, according to advocates, getting decent outcomes in their cases.²⁹⁷ This suggests that notwithstanding the many hurdles trans people subjected to abuse confront when turning to the legal system, 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 trans 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.”²⁹⁸ The challenge, as Morrison recognizes, and as the advocates who work with trans 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.²⁹⁹

Building such a system may require rejecting the primacy of the criminal justice system in domestic violence law and policy.³⁰⁰ The continued involvement of trans people in unlawful work, the long history of police involvement in gender role enforcement, the frequency and severity of police abuse of trans people, the horrendous conditions of confinement that trans people endure in the criminal system, and the inability of police to tell abusers from abused all militate against seeing the criminal system as a safe haven for trans people subjected to abuse. Particularly for trans people of color and undocumented trans immigrants, the stakes of turning to an oppressive state system for relief from abuse may always be too high.³⁰¹

A responsive system would also 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 trans people subjected to abuse. Although gender neutral statutes would seem to have the same effect as specific provisions authorizing trans people to seek protection, in practice, “the lack of explicit inclusion has given those in the system a way out” of assisting trans people.³⁰² Moreover, if targeted language is not included, trans people may not believe that they are eligible to seek the protection of courts.³⁰³ The law should further permit trans people to seek protection in the gender identity of their choice—using the

²⁹⁷ Tucker interview, *supra* note 35.

²⁹⁸ Morrison, *supra* note 160, at 155.

²⁹⁹ *Id.*

³⁰⁰ Gehi interview, *supra* note 14; MOGUL, RITCHIE & WHITLOCK, *supra* note 23, at 139; Morrison, *supra* note 160, at 148-49; Ringer and Romeo interview, *supra* note 15. As Terra Slavin notes, the disproportionate amount of institutional violence trans people experience makes it oxymoronic to turn to institutional systems to protect them. Slavin interview, *supra* note 14.

³⁰¹ INCITE! WOMEN OF COLOR AGAINST VIOLENCE, *supra* note ___, at 2.

³⁰² Morrison, *supra* note 160, at 142.

³⁰³ *Id.*

names, pronouns and genders in which they live on a day-to-day basis.³⁰⁴ Finally, the legal system should provide trans people with the full range of remedies and resources that it provides cisgender people subjected to abuse.³⁰⁵

Changing the culture of the legal system is as important as substantively changing the law. Courts should be a space where trans people subjected to abuse feel safe and welcome. Courts should affirm and validate the stories of trans people subjected to abuse.³⁰⁶ Judges and other court officers should respect and value the personhood of trans litigants.³⁰⁷ Clearly, a fundamental shift in society's treatment of trans people is required; the judiciary could help to start that movement.³⁰⁸ Just as the legal system has learned to open its doors to other marginalized communities, the legal system could become a welcoming space for trans people.³⁰⁹

Finally, building a more responsive legal system will mean expanding our understanding of abuse beyond the current binary conception of men as abusers, women as victims. Trans abuse complicates those notions. The stereotypical narrative fits some cases, but is inapposite in many others. Trans women subjected to abuse, like other marginalized women, may be more likely to fight back against their abusers. The unwillingness to acknowledge the abuse of trans women, reflected in policies that deny trans women (and likely trans men) access to domestic violence services and in the courts' refusal to recognize the claims of trans people subjected to abuse, serves to restrict the access of both trans and cisgender men to "victim" status. So long as abusers continue to be coded men and victims coded female, trans people subjected to abuse will remain in limbo. Trans people may be subjected to abuse both as a function of their chosen gender identity and because of their failure to conform to their biological sex—because they are women and because they are men. Understanding abuse as an exercise of power and control that is affected by gender, but is not fundamentally a gendered experience, will be essential if trans people are to secure the protection they need.³¹⁰ Disaggregating abuse and gender could also undermine the power of abuse as a proxy for gender affirmation. If abuse is no longer coded female, trans women will no longer see the

³⁰⁴ Caban interview, *supra* note 110; Lynn interview, *supra* note 101.

³⁰⁵ One example: trans people engaged in sex work or other illegal activities are not eligible for crime victim compensation funds, precluding them from seeking emergency financial assistance that could help to prevent or alleviate further abuse. Slavin interview, *supra* note 14; *see also* Njeri Mathis Rutledge, *Looking a Gift Horse in the Mouth: The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims* (publication forthcoming 2012).

³⁰⁶ Gehi, interview, *supra* note 14; Lynn interview, *supra* note 101.

³⁰⁷ Slavin interview, *supra* note 14.

³⁰⁸ Some have suggested that judicial education is essential in making this shift. *See* Caban interview, *supra* note. I am somewhat more skeptical of the utility of judicial education. Goodmark, *When Is A Battered Woman Not A Battered Woman? When She Fights Back*, *supra* note 153, at 124.

³⁰⁹ My thanks to Professor David Jaros for this insight.

³¹⁰ Tucker interview, *supra* note 35.

experience of abuse as simply part of being a woman or as proof that their partners do, in fact, accept them as women.

At present, “transgendered people occupy a near-total blind spot in our society and legal system.”³¹¹ With a greater societal acceptance of trans people, the failure to see trans people as legal subjects could abate. Reforming the legal system could be appropriate for the moment in which we currently find ourselves, as trans people begin to achieve societal recognition—a flawed step towards a more responsive system. Until that system does change, however, trans people will need options that provide immediate safety. A growing consensus is emerging that community-based options are the way to provide that safety.

B. The Extra-Legal Response

Given the hostility of the legal system to their claims, trans people subjected to abuse have long sought assistance outside of formal, state-run systems. Trans people subjected to abuse have relied on friends and family, biological and chosen, created support networks specifically for the trans community, and advocated for access to state funded domestic violence services.³¹² More recently, a growing chorus has championed the idea of creating and supporting 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.³¹³ As advocates Gabriel Arkles, Pooja Gehi and Elana Redfield explain,

the structures that result in decreased life chances for members of our communities, and for all people of color, poor people, trans 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.³¹⁴

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 community in designing strategies for addressing abuse that are responsive to the needs and desires of each individual.³¹⁵ Ultimately, community accountability “means you don’t have

³¹¹ Steinberg, *supra* note 271, at 522.

³¹² Goldberg & White, *supra* note __, at 57-58.

³¹³ GOODMARK, A TROUBLED MARRIAGE, *supra* note 44, at 137-41.

³¹⁴ Arkles, Gehi & Redfield, *supra* note 204, at 581.

³¹⁵ GOODMARK, A TROUBLED MARRIAGE, *supra* note 44, at 186, 195.

to do it all yourself.”³¹⁶

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.³¹⁷ The strategy grows from Generation FIVE’s commitment to developing a just world, which they define as a world that deploys a “liberatory approach to violence. A liberatory approach seeks safety and accountability without relying on alienation, punishment, or State or systemic violence, including incarceration and policing.”³¹⁸ The group argues that given the state’s appropriation of violence and force for its own purposes, “The 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.”³¹⁹

The goals of transformative justice include safety and healing for people subjected to abuse, accountability and transformation of those who abuse, community response and accountability, and transformation of the community and of social conditions that create and perpetuate various forms of violence.³²⁰ 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.³²¹ 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.”³²²

Generation FIVE recognizes that communities may be ill equipped to take on responsibility for addressing violence; after all, they note, “the

³¹⁶ Leah Lakshmi Piepzna-Samarasinha, *Where the revolution started: an introduction*, in *THE REVOLUTION STARTS AT HOME: CONFRONTING PARTNER ABUSE IN ACTIVIST COMMUNITIES* 6

³¹⁷ GENERATION FIVE, *TOWARD TRANSFORMATIVE JUSTICE: A LIBERATORY APPROACH TO CHILD SEXUAL ABUSE AND OTHER FORMS OF INTIMATE AND COMMUNITY VIOLENCE: A CALL TO ACTION FOR THE LEFT AND THE SEXUAL AND DOMESTIC VIOLENCE SECTORS 2* (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* 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.” *TOWARD TRANSFORMATIVE JUSTICE*, *id.* at 21.

³¹⁸ *Id.* at 5.

³¹⁹ *Id.* at 9.

³²⁰ *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 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.

³²¹ *Id.* at 8.

³²² *Id.* at 12.

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.”³²³ But Generation FIVE sees addressing individual acts of violence as the first step towards “mobilizing people to address conditions that create injustice in our communities,” inspiring people to work towards broader social change.³²⁴ By creating 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 is unable to provide.³²⁵

Asking the community to take responsibility for responding to abuse is a complicated matter. Communities may not be able or willing to protect trans people subjected to abuse; “often 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.”³²⁶ Some people subjected to abuse report that the worst abuse they encountered was not from their partners, but from the community based organizations that purported to serve them.³²⁷ Nonetheless, advocates like Kristen Tucker and others are increasingly looking to the development of community based interventions that provide support and healing to trans people subjected to abuse and that transform the conditions that support violence as the best alternative to a system that trans people approach with deep suspicion and skepticism.³²⁸

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 needs of people subjected to abuse. That system, however, has been inadequate even for those it was designed to serve—the white, straight women who are the stereotypical victims of domestic violence.³²⁹ For marginalized populations, the system as it currently exists is even less responsive; for trans people, the prospect of using the legal system is so

³²³ *Id.* at 21.

³²⁴ *Id.* at 24.

³²⁵ *Id.* at 27-31. 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 building a collective, preparation and capacity building, naming and defining the abuse, conducting assessment, developing a safety strategy, supporting healing and resilience, holding accountability, working for community transformation, and strengthening collective resistance. The group is working to create and study pilot projects in the hopes of identifying replicable models of transformative justice practice. *Id.* at 32.

³²⁶ MOGUL, RITCHIE & WHITLOCK, *supra* note 23, at 149.

³²⁷ Ana Lara, *there is another way*, in *THE REVOLUTION STARTS AT HOME*, *supra* note 317, at 16.

³²⁸ Tucker interview, *supra* note 35.

³²⁹ GOODMARK, *A TROUBLED MARRIAGE*, *supra* note 44, at 4-8.

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 trans people is hardly surprising, however, given how little was understood about the particular experiences of trans 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 trans people, experience abuse and what laws and policies might best address their needs.³³⁰ It is certainly possible that trans 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 trans 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 domestic violence. Rather than assuming we 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 domestic violence.

³³⁰ NAMASTE, *supra* note, at 269.