Reconsidering the Abuse That Dare Not Speak Its Name: A Criticism of Recent Legal Scholarship Regarding Same-Gender Domestic Violence

Ryiah Lilith
American University, Washington College of Law
RECONSIDERING THE ABUSE THAT DARE NOT SPEAK ITS NAME:† A CRITICISM OF RECENT LEGAL SCHOLARSHIP REGARDING SAME-GENER
DOMESTIC VIOLENCE

Ryiah Lilith*

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† This title is a modification of “the love that dare not speak its name,” a euphemism
for homosexuality used by Oscar Wilde in one of his public speeches and often re-
peated by scholars to describe eras replete with homophobic intolerance. See, e.g.,
LILIAN FADERMAN, ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE
IN TWENTIETH-CENTURY AMERICA 139 (1991) (titling a chapter on lesbians in the
post-WW II period “The Love that Dares Not Speak Its Name: McCarthyism and Its
Legacy”). Several authors have substituted “abuse” for “love” to refer to either the de-
nial of intimate abuse in same-gender couples or the lack of research and knowledge
about lesbian and gay domestic violence. See, e.g., Sandra E. Lundy, Abuse that Dare
Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Mas-

* J.D. Candidate, May 2001, American University, Washington College of Law. B.S.,
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Introduction

In the last decade, numerous law journals and legal periodicals have published articles focusing on domestic violence in lesbian and gay male relationships. Many of these articles are critical of the feminist

1. Notes on terminology used in the subtitle and throughout this Article:
   (1) In keeping with common parlance, “domestic violence” is used despite criticisms that “domestic” trivializes the degree of violence or does not apply to contexts other than cohabitating couples. See, e.g., Isabel Marcus, Reframing “Domestic Violence”: Terrorism in the Home, in The Public Nature of Private Violence: The Discovery of Domestic Abuse 11, 27 (Martha Fineman & Roxanne Mykitiuk eds., 1994) (noting that attributing “the term ‘domestic relations’ to an issue tends to remove it from the national civil rights agenda” and that the term “domestic” often signals the segregation and limitation of inquiry on an issue); Denise Bricker, Note, Fatal Defense: An Analysis of Battered Woman’s Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners, 58 BROOK. L. REV. 1379, 1382 (1993) (noting that the term “domestic” implies that violent occurrences within households across America are “minor and uninteresting” and encourages society to overlook the brutality and terror that women in these situations experience); “Domestic violence” is construed broadly to include verbal, emotional, psychological, mental, and physical forms of abuse, and is used interchangeably with “domestic abuse,” “intimate violence,” “partner abuse,” etc.

   (2) Terms such as “same-gender” couple and “female-on-female” or “male-on-male” domestic violence are interspersed with “lesbian” or “gay,” to recognize that one or both of the individuals in a same-gender couple may identify as bisexual. For the same reason “opposite-gender” is used along with “heterosexual.”

   (3) The term “gender” is used in reference to the dichotomies of female/male, woman/man, girl/boy, and masculine/feminine. Although inconsistent with the convention of referring to physiological differences (i.e. female/male) as “sex” and cultural distinctions (i.e. feminine/masculine, woman/man, girl/boy) as “gender,” the exclusive use of “gender” underscores the “socially constructed, overlapping nature of all category distinctions, even the biological ones.” SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXED 134 n.2 (1998).

2. See, e.g., Kathleen Finley Duthu, Why Doesn’t Anyone Talk About Gay and Lesbian Domestic Violence?, 18 T. JEFFERSON L. REV. 23 (1996); Phyllis Goldfarb, Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence, 64 GEO. WASH. L. REV. 582 (1996); Nancy J. Knauer, Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes, 8 TEMP. POL. & CIV. RTS. L. REV. 325 (1999); Lundy, supra note 1; Ruthann Robson, Lavender Bruises: Intralebian Violence, Law and Lesbian Legal Theory, 20 GOLDEN GATE U. L. REV. 567 (1990); Angela West, Prosecutorial Activism: Confronting Heterosexism in a Lesbian Battering Case, 15 HARV. WOMEN’S L.J. 249 (1992); Bricker,
same-gender domestic violence, which considers patriarchy to be the underlying cause of violence against women, and point out that gendered explanations of why men batter their female partners cannot account for same-gender abuse. While each article concentrates on a different aspect of same-gender domestic violence—from the applicability of battered woman’s syndrome to gay men to a deconstruction of gender stereotypes in the legal discourse surrounding lesbian battering—most characterize same-gender domestic violence in terms of a non-gendered model of domestic violence. This legal scholarship focuses on reported similarities between heterosexual and same-gender domestic violence, and calls for gender neutral theories.

While models of domestic violence which are based entirely on the phenomena of male-on-female abuse will obviously not shed much light on the subject of same-gender abuse, there is still a great deal of debate among social scientists over whether all intimate violence—regardless of the gender of the abuser and the victim—is sufficiently similar to be explained through one comprehensive theory. Unfortunately, most legal scholarship does not adequately portray this uncertainty.


3. See, e.g., Knauer, supra note 2, at 327 (“Same-sex domestic violence also challenges our highly gendered (and heteronormative) understanding of domestic violence because it cannot be explained by reference to gender difference [or] the historical subjugation of women. . . .”).

4. See Bricker, supra note 1.

5. See Goldfarb, supra note 2.

6. See, e.g., Lundy, supra note †, at 275 (rejecting the tendency to perceive domestic violence in "sex-based terms"); Bricker, supra note 1, at 1383 n.20 ("This Note assumes that intimate violence and its effects are not gender-specific."); da Luz, supra note 2, at 252 n.6 ("[T]his Article assumes that partner abuse and its effects are not gender-specific.").

7. See, e.g., Bricker, supra note 1, at 1437 ("Intimate violence . . . does not appear to discriminate between heterosexual and same-sex partners. Our theories . . . should reflect this reality.").

8. See infra Part I.B.
Overall, the legal discourse pertaining to same-gender domestic violence misinterprets or misrepresents social science data and research in three ways. First, legal writings often state that same-gender domestic violence is as prevalent as male-on-female domestic violence. However, most studies of same-gender domestic violence examine the dynamics of abuse rather than the prevalence, providing no support for assertions of parity. Second, legal writings often fail to distinguish between female-on-female and male-on-male domestic violence, but instead refer to same-gender abuse generally. In contrast, most of the studies cited in legal scholarship focus exclusively on domestic violence in either lesbian or gay male couples, but not both. Third, legal writings often do not disclose or discuss methodological problems within the studies cited.

In particular, one measure of domestic violence, the Conflict Tactics Scale ("CTS"), has been heavily criticized when used to study abuse in heterosexual relationships. Yet much of the legal discourse pertaining to same-gender domestic violence relies on studies that apply this measure to gauge degrees of same-gender abuse without any consideration of its shortcomings, either generally or in this particular context.

This article argues that while recent legal scholarship effectively disputes the applicability of a gendered model of domestic violence to same-gender abuse, it goes too far in embracing a completely gender-neutral model. Part I explains the theoretical problems with the non-gendered model of domestic violence by examining in detail the research which is most often cited in legal writings in support of this model. Part II briefly explores the pragmatic implications for lesbian and gay male victims of domestic violence when law enforcement policies such as mandatory arrest are based on a model of domestic violence which ignores contexts such as gender. Finally, Part III recommends initially abandoning any single model of domestic violence that assumes a priori gender neutrality, and instead constructing multiple models limited to specific contexts and dynamics. Once these multiple models have been adequately assessed and tested, their common threads can be identified and woven into an integrated meta-model.

9. See infra note 27 and accompanying text.
10. See infra Part I.C.
11. See infra Part I.D.
12. See infra notes 120–131 and accompanying text.
I. Theoretical Issues

A. The Non-Gendered Model of Domestic Violence

Most legal scholars addressing same-gender domestic violence express a similar purpose for writing their articles—to increase the responsiveness and efficacy of the legal system. For example, one author intends her article "to offer suggestions for improving legal and other assistance" to victims of same-gender domestic violence, while another intends to "find[] without merit, challenges to expanding the law to include same-sex partner abuse in domestic violence statutes." The argument for expanding legal protection to include lesbian and gay male couples is greatly bolstered by the assumption that same-gender violence is equivalent to heterosexual or male-on-female violence, but for the gender of the individuals involved. Indeed, two social scientists, whose single study of same-gender domestic violence is often cited in the legal scholarship, claim that "[d]omestic violence is not a gender issue" at all. They argue that diagnostic criteria, treatment approaches, and laws should therefore be based solely on batterers' behavior rather than on their gender.

This non-gendered, almost liberal feminist approach of judging people by their actions rather than their gender stands in direct opposition to the gendered model of domestic violence which was formulated

13. See, e.g., Duthu, supra note 2, at 40 (outlining the "most immediate needs and goals for San Diego County" in confronting same-gender domestic violence); Knauer, supra note 2, at 350 (calling for "[a] more realistic view of same-sex relationships" because "[o]nly then will domestic violence services live up to the promise of the gender-neutral vocabulary currently in use by domestic violence activists"); Bricker, supra note 1, at 1386–87 (describing her intent to explain how "stereotypes of and prejudices against gay men and lesbians similarly undermine the fair adjudication of their cases" and suggesting ways of countering this bias); Murphy, supra note 2, at 339 ("This Note will demonstrate that domestic violence between same-sex couples is as serious a problem as domestic violence between opposite-sex couples, but that present statutes provide victims of same-sex violence with less legal protection... Legitimate grounds exist for extending protection to victims of same-sex domestic violence and this Note will propose model legislation that does so.").

14. Lundy, supra note ¶, at 274.

15. da Luz, supra note 2, at 255.


as part of the battered women's movement. The initial gendered model, which considers domestic violence a by-product of patriarchy and male domination, relied exclusively on male-on-female violence, specifically husband-on-wife violence. It was based in part on the historical fact of men's proprietary interest in their wives, which entitled them to treat their wives as property and employ what were then considered reasonable disciplinary measures. The societal protection of a private or domestic sphere reinforced the sanctity of the marital home and helped to shield the abusive husband from any scrutiny.

The legal changes advocated by domestic violence activists were informed by this gendered model; thus, resulting domestic violence statutes initially addressed male-on-female abuse only, although many have since been amended or interpreted to apply to same-gender domestic violence. However, the gendered model of domestic violence as

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18. A history of the battered women's movement and a full explanation of the feminist model of domestic violence are beyond the scope of this Article. See generally Del Martin, Battered Wives (1976) (one of the initial feminist works on domestic violence); Susan Schechter, Women and Male Violence: The Visions and Struggles of the Battered Women's Movement (1982) (a history of the early battered women's movement); Lenore E. Walker, The Battered Woman (1979) (the classic work on domestic violence which forms the basis of much of the current understanding of the cycles and psychology of wife battering).

19. See Marcus, supra note 1, at 21 (discussing the “rule of thumb” and correction as institutionalized “principle[s] that sex-based power and control in the home [were] desirable as a matter of law and public policy”). The “rule of thumb” was an English common-law limitation on the degree of violence that a husband could inflict on his wife (he could not beat her with anything thicker than his thumb), while correction was an American common-law doctrine which “granted permission to a husband to inflict violence, characterized as ‘discipline’ or ‘correction’ upon his wife.” Marcus, supra note 1, at 21.

20. Coverture was a common law doctrine that legalized abuse of women in their husband's homes. According to the Supreme Court, “At the common law the husband and wife were regarded as one. The legal existence of the wife during coverture was merged in that of the husband... [T]hey were not liable for torts [e.g., assault, battery, intentional/negligent infliction of emotional distress] committed by one against the other.” United States v. Dege, 364 U.S. 51, 52-53 (1960) (denouncing coverture as “peculiar and obsolete,” “a completely discredited... archaic remnant of a primitive caste system” founded upon “medieval views” which are “offensive to the ethos of our society”).

21. Currently, 41 states and the District of Columbia have statutes which protect victims of same-gender as well as opposite-gender domestic violence. See National Coalition of Anti-Violence Programs [hereinafter NCAVP], Anti-Lesbian, Gay, Bisexual, and Transgender Domestic Violence in 1998, citing Ala. Code § 30-5-1 et. seq. (“present or former household members”); Alaska Stat. § 18.66.100 et. seq. (“adults or minors who live together or who have lived together... who are dating or who have dated... who are engaged in or who have engaged in a sexual
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As R. CODE 59-15-201 et. seq. (parties who are or were residing or cohabitating together); CAL. FAM. CODE §§ 6200 et. seq., 6500 et. seq. ("a cohabitant or former cohabitant" and "a person who the respondent is having or has had a dating or engagement relationship"); COLO. REV. STAT. § 14-4-102 (parties who are or were involved in an "intimate relationship" and parties who live or have lived together); CONN. GEN. STAT. §§ 46b-15, 46b-38c (parties who are or were residing together); D.C. CODE ANN. § 16-1005 (parties who share or have shared a residence and parties who maintain or have maintained a "romantic relationship not necessarily including a sexual relationship"); GA. CODE ANN. § 19-13-4 ("persons living or formerly living in the same household"); HAW. REV. STAT. §§ 586-3 et. seq. (family and household members or persons residing or formerly residing in the same dwelling unit); IDAHO CODE § 39-6302 et. seq. (parties who reside or have resided together as "construed liberally"); 725 ILL. COMP. STAT. 5/112A-14 (parties who are or were living together, have or had a dating relationship, and includes persons with disabilities and their personal assistants); IND. CODE §§ 34-26-2-1 et. seq. ("individuals at least 18 years of age and emancipated minors"); IOWA CODE § 236.4 et. seq. ("persons cohabitating" currently or in the past year); KAN. STAT. ANN. § 60-3105 et. seq. (parties who reside or have resided together); KY. REV. STAT. ANN. § 403.75 et. seq. ("unmarried couples who are living together or have formerly lived together"); ME. REV. STAT. ANN. tit. 19-A § 4001 et. seq. (individuals "presently or formerly living together and individuals who are or were sexual partners"); MASS. GEN. LAWS ch. 209A § 3 (persons who are or were residing together and persons who are or have been in a "substantive dating or engagement relationship"); Mich. Comp. Laws § 27A.2950 et. seq. (persons who reside or have resided together or have or have had a dating relationship); MINN. STAT. § 518B.01 (persons who reside or resided together or are involved in a significant romantic or sexual relationship); MO. REV. STAT. § 455.010 et. seq. (adults who reside or have resided together); NEB. REV. STAT. § 42-924 (persons who reside or resided together); NEV. REV. STAT. § 33.017 et. seq. (persons who are or were "actually residing" together or are or were in a dating relationship); N.H. REV. STAT. ANN. § 173-B:4 (persons who are or were cohabiting and are or were involved in a romantic relationship); N.J. STAT. ANN. § 2C:25-28 (current or former household members and persons in "dating relationships"); N.M. STAT. ANN. § 40-13-5 (persons with a "continuing personal relationship"); N.C. GEN. STAT. § 50B-2 ("former and current household members.")

However, NCAVP notes that this same statute "specifically provides that any protection order . . . will not serve as a defense to persons prosecuted for fornication, adultery, or the 'crime against nature.'" See Appendix B at 31.); N.D. CENT. CODE § 14-07.1-02 (persons who are or were residing together, are in a dating relationship, or if the court determines that the relationship between that person and the alleged abusing person is sufficient to warrant the issuance of a domestic violence protection order); OHIO REV. CODE ANN. §§ 2919.26, 3113.31 ("person living as a spouse" interpreted to include same-gender couples); OKLA. STAT. tit. 22 § 60.2 (family or household members or persons who are or were in a dating relationship); OR. REV. STAT. § 107.710 (persons who have been in sexually intimate relationship with abuser); 23 PA. CONS. STAT. § 6108 (persons who are or were living as spouses or current or former sexual or intimate partners); R.I. GEN. LAWS §§ 8-8.1-3 ("persons who are or have been in a substantive dating . . . relationship within the past six months" and current or former cohabitants within the past three years); S.D. CODED LAWS § 25-10-3 ("persons living in the same household" and "persons who have
resulting from male supremacy does not adequately account for same-gender abuse.\(^{22}\) For example, female partners have never possessed any

lived together"); Tenn. Code Ann. § 36-3-606 (adults or minors who are or were living together, dating, or having a sexual relationship and who are not the primary aggressor); Tex. Fam. Code Ann. § 85.022 (current and former "persons living together in the same dwelling, without regard to whether they are related to each other"); Utah Code Ann. § 30-6-1 et. seq. (persons 16 and older who are or were living as spouses or reside or resided in the same residence); Vt. Stat. Ann. tit. 15 § 1103 (persons who "are living or have lived together, are sharing or have shared occupancy of a dwelling, are engaged in or have engaged in a sexual relationship, or minors who are dating or who have dated"); Wash. Rev. Code §§ 26.50.010, 26.50.060, 26.50.070, 10.99.040, 10.99.050 (adults who reside or have resided together; persons over 16 who reside or resided together and have or had a dating relationship; persons 16 and over who have or had a dating relationship, defined as "a social relationship of a romantic nature"); W. Va. Code § 48-2A-6 (persons who are or were living as spouses, who are or were dating, or are or were residing or cohabitating together and current or former sexual or intimate partners); Wis. Stat. § 813.12 ("person[s] currently or formerly residing in a place of abode with another person"); Wyo. Stat. Ann. §§ 35-21-103 (persons who are or were living together as if married and "other adults sharing common living quarters"). Nine states do not extend coverage of domestic violence protection to victims of same-gender domestic violence. See Ariz. Rev. Stat. §§ 13-3602, § 13-3624 (marital, blood, or opposite-gender relationship); 10 Del. Code Ann. § 1045 (marital, former marital, blood, opposite-gender cohabitants, or opposite-gender parents of a child); Fla. Stat. Ann. § 741.30 (current or former "family or household members"). However, since Florida criminalizes same-gender sexual activity, prohibits same-gender marriage, and bans gay men and lesbians from adopting children, the NCAVP classifies Florida as a state where protection to victims of same-gender domestic violence is "arguably unavailable." See Appendix B at 29.); La. Rev. Stat. Ann. § 46:2131 et. seq. (unmarried adults only if they reside together as common law spouses and if their children also live with them); Md. Code Ann. Fam. Law § 4-501 et. seq. (cohabitants defined as "a person who has had a sexual relationship with the respondent and resided with the respondent in the home for a period of at least 90 days within one year before the filing of the petition." However, the NCAVP classifies Maryland's statutory protection as "arguably unavailable" to victims of same-gender domestic violence because "proving a sexual relationship may leave the victim vulnerable to prosecution under state prohibition of 'unnatural or perverted sex practices' (Art. 27, § 554)." See Appendix B at 30.); Miss. Code Ann. § 93-21-1 et. seq. (persons living as spouses.

NCAVP notes that it would be "probably difficult to prove that same-sex domestic partners 'live as spouses' in a state with a sodomy law, a same-sex marriage ban, and no statewide civil rights protection for LGBT persons." See Appendix B at 30); Mont. Code Ann. § 40-15-102 (opposite-sex partners and family members); N.Y. Fam. Ct. Act § 828 (parties who are related by consanguinity or affinity, legally married, formerly married, or have a child in common); S.C. Code Ann. § 16-25-50 (blood and marital relationships and "a male and female" who are or were cohabitating); Va. Stat. Ann. §§ 16.1-253.1 et. seq. (parties who are or were cohabitating in the past 12 months, specifically excluding roommates and same-gender relationships).

\(^{22}\) See, e.g., Robson, supra note 2, at 586 ("Intimate intra-lesbian violence threatens the very gendered foundations of explanations for domestic violence.").
legal proprietary interest in one another; on the contrary, courts have often refused to recognize the ties between same-gender partners.23 Likewise, same-gender couples are neither afforded the "sanctity of marriage" nor the State’s protection of their private, domestic sphere.24

In light of these and other perceived shortcomings, the gendered model of domestic violence was increasingly challenged in the 1980s, causing the non-gendered, quasi-liberal feminist model of domestic violence to become more prevalent.25 While a non-gendered model underlies much of the current legal scholarship pertaining to same-gender domestic violence, it too cannot entirely explain same-gender domestic violence.


24. See Defense of Marriage Act, 1 U.S.C.A. § 7 (1996) (“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”).


26. See Mary Eaton, Abuse by Any Other Name, in THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE 195, 208 (Martha Albertson Fineman & Roxanne Mykitiuk, eds., 1994). Eaton explains that the increasing prominence of liberal feminist paradigms of domestic violence resulted from two factors:

[First, there was] the growing commitment by feminists to ensure that theories of intimate abuse translated into the provision of concrete relief to individual women and, concomitantly, the increasing willingness of some grass-roots feminists movements to collaborate with the state in that endeavor . . . . [Second,] the cost of state support for such initiatives has been the transmogrification of feminist discourse on domestic violence.

Another challenge to the radical feminist model of domestic violence came from a group of male sociologists who disputed the gendered understanding of domestic violence by claiming that women battered men as frequently as men battered women. See, e.g., Murray A. Straus & Richard J. Gelles, PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES 104-05 (1995) (arguing that “within the family or in dating and cohabitating relationships, women are about as violent as men . . . . Unless women also forsake violence in their relationships with male partners and children, they cannot expect to be free of assault.”).
B. Revisiting the Claim of Equal Frequency between Same-Gender and Opposite-Gender Domestic Violence

Most of the legal articles on same-gender domestic violence include copious citations to primary source studies, other legal scholars, and non-academic periodicals, as well as statutes, cases, and other legal materials not being addressed in this Article. These sources, however, can be traced back to a handful of preliminary studies, which are cited and re-cited without sufficient analysis of their reliability. While most legal writings use these studies only as part of an introduction or as background, the continual use and repetition of data that is ungeneralizable calls into question the arguments and theories—including the non-gendered model of domestic violence—that grow out of or are supported by these unsubstantiated premises.

Legal scholarship claims that lesbian and gay domestic violence occurs with the same frequency as heterosexual domestic violence—a pivotal fact in the construction of the non-gendered model of domestic violence. However, while social scientists are becoming increasingly interested in same-gender domestic violence, relatively few studies have been published. Thus, legal scholarship can only draw from the same

27. See, e.g., Duthu, supra note 2, at 23–24 n.4 (citing another legal author, Sandra E. Lundy, to support statement that prevalence of same-gender domestic violence is “very similar to those of heterosexual battering.” Lundy cited Island & Letellier and Renzetti).

28. See Bricker, supra note 1, at 1388 (“[V]iolence probably occurs at the same rate as it occurs in heterosexual households or in approximately twenty percent of all gay and lesbian relationships.”); Duthu, supra note 2, at 24 (noting that “it is generally accepted that domestic violence occurs in at least the same proportion in homosexual relationships . . .” as in opposite-gender relationships); Goldfarb, supra note 2, at 591–92 (“[T]he evidence that does exist, largely anecdotal in nature, suggests that the incidence of violence in gay and lesbian relationships is proportional to the incidence of violence in heterosexual relationships.”); Knauer, supra note 2, at 328–29 (“[O]ne thing that does seem clear is that same-sex domestic violence occurs with the same frequency as opposite-sex domestic violence.”); Lundy, supra note 1, at 277 (“Most researchers agree that the incidence of battering in lesbian and gay couples is about the same as it is for heterosexual couples . . .”); Murphy, supra note 2, at 339 (“Studies show that gay men and lesbians are victimized by abusive partners at rates proportionately comparable to those found among opposite-sex couples.”).

small pool of studies. While some legal scholars offer a disclaimer about the limitations of the research data on same-gender domestic violence,\textsuperscript{30} they still persist in utilizing this data in formulating their arguments. Several articles also cite two non-academic, non-peer-reviewed newspaper articles that reported some professionals’ belief in equal frequencies of same-gender and opposite-gender domestic violence based on their own experiences.\textsuperscript{31} Although legal scholars cannot easily assess the accuracy of individuals’ personal observations, they can—and should—carefully examine the few studies informing their work on same-gender domestic violence.

Two books in particular are heavily cited in the legal scholarship on same-gender domestic violence in support of the non-gendered model of domestic violence: *Men who Beat the Men who Love Them*, by David Island and Patrick Letellier; and *Violent Betrayal: Partner Abuse in Lesbian Relationships*, by Claire M. Renzetti. Upon closer analysis, however, neither book significantly bolsters arguments for the non-gendered model of domestic violence. Although these works are often cited specifically to support statements of equal frequency of heterosexual and same-gender domestic violence, neither book is a prevalence study. While both include a brief one-to-two-page discussion of the frequency of same-gender and opposite-gender domestic violence as part of the introduction, the books focus on identifying factors which potentially cause some lesbians and gay men to batter, and then assessing available solutions.

\begin{itemize}
  \item \textsuperscript{30} See Goldfarb, *supra* note 2, at 591 (characterizing evidence of the frequency of same-gender domestic violence as "largely anecdotal."); Knauer, *supra* note 2, at 328 (observing that "there remains little empirical work upon which to base conclusions regarding same-sex domestic violence."); Bricker, *supra* note 1, at 1388 ("There are no reliable statistics on the prevalence of intimate violence in the gay and lesbian community."); Murphy, *supra* note 2, at 340 (remarking that "few studies and little research has been done in the area of gay and lesbian violence").
  \item \textsuperscript{31} See Bricker, *supra* note 1, at 1338 n.37; da Luz, *supra* note 2, at 267 n.80; Goldfarb, *supra* note 2, at 591 n.33. All cite Elizabeth Rhodes, *Closed in Violence: Authorities, Experts Slowly Start to Offer More Help to Battered—and Battering—Partners of the Same Sex*, SEATTLE TIMES, May 23, 1991, at F1 ("[O]ur best guessimite... is that domestic violence is no less or no more prevalent than in the heterosexual community."). See Bricker, *supra* note 1, at 1388 n.37; da Luz, *supra* note 2, at 267 n.80; Goldfarb, *supra* note 2, at 592 n.40; Murphy, *supra* note 2, at 341 n.36. All cite Jane Garcia, *The Cost of Escaping Domestic Violence*, L.A. TIMES, May 6, 1991, at E2 (quoting "domestic abuse experts" as concluding that domestic violence "is as likely to occur among lesbians as among heterosexual couples").
\end{itemize}
1. Men who Beat the Men who Love Them
(by David Island and Patrick Letellier)

Many legal scholars cite Men who Beat the Men who Love Them\(^{32}\) to support their assertions that the frequency of same-gender domestic violence parallels that of opposite-gender domestic violence.\(^{33}\) Island and Letellier's work does not support such claims for two reasons: (1) the rates of same-gender domestic violence were not studied but rather derived from studies of heterosexual abuse; and (2) Island and Letellier assume, rather than prove, that the prevalence of domestic violence in gay male relationships is higher than in either heterosexual or lesbian relationships.

First, Island and Letellier merely approximate the rate of gay male domestic violence by extrapolating from numerical estimates of the size of the gay male population and the frequency of male-on-female domestic violence:\(^{34}\)

The incidence of gay men's domestic violence can best be calculated from the known rate of domestic violence among heterosexuals. In 1990, there are 9,500,000 adult gay males in the United States. If adult gay males couple at the same rate as heterosexuals (64 percent), then 6,000,000 gay men are coupled, with half of each couple (3,000,000) representing potential victims. Multiplying 3,000,000 times the 10.9 percent heterosexual battering rate yields a figure of 330,000 gay male victims of domestic violence each year.\(^{35}\)

In other words, Island and Letellier assume from the outset that the frequency of male-on-male domestic violence is the same as the frequency of male-on-female domestic violence. Yet legal writings often cite this initial, unsubstantiated assumption as though it were a conclu-

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32. ISLAND & LETELLIER, supra note 17.
33. See da Luz, supra note 2, at 267 n.80; Duthu, supra note 2, at 28 n.30; Goldfarb, supra note 2, at 591 n.39; Lundy, supra note †, at 277 n.21; Murphy, supra note 2, at 340 n.35.
34. See CLAIRE M. RENZETTI, VIOLENT BETRAYAL: PARTNER ABUSE IN LESBIAN RELATIONSHIPS 17 (1992) (cautioning that "the methodology underlying [Island and Letellier's] estimations has questionable reliability").
35. ISLAND & LETELLIER, supra note 17, at 14.
sion. When legal articles do comment on the limitations of these estimates, such warnings are only mentioned in a footnote.

Island and Letellier present no evidence that the frequency of gay male domestic violence is similar to the frequency of heterosexual domestic violence, but remark that "there is no reason at all to believe that the incidence of gay men's domestic violence is any less than that in the heterosexual community." If domestic violence is not gendered at all, as Island and Letellier conclude, then perhaps their assertion of equivalent rates of opposite-gender and gay male abuse would be accurate. However, other researchers have found the prevalence of domestic abuse in gay male relationships to range from 18 to 38 percent—not the 10.9 percent assumed by Island and Letellier which raises doubts about the accuracy of Island and Letellier's assumptions about the frequency of gay male domestic violence and their non-gendered model.

Second, and even more fundamentally, in calculating their estimates, Island and Letellier rely on the very gender-based assumptions that they dismiss. They recognize that the frequency of gay

36. See, e.g., Bricker, supra note 1, at 1389 n.39 (referring to Island & Letellier study as "empirical"); da Luz, supra note 2, at 267 n.80 (citing Island & Letellier as "estimating that gay male partner abuse occurs in at least 20%, and possibly 50%, of gay male relationships"); Murphy, supra note 2, at 340 (citing Island & Letellier after stating that "estimates conclude that each year between fifty and one hundred thousand lesbians are the victims of abuse and that as many as half a million gay men are battered").

37. See Lundy, supra note 1, at 278 n.24. Goldfarb writes:

If the rate of intimate violence in gay and lesbian relationships parallels these [opposite-gender] rates, then hundreds of thousands of lesbians and gay men are victims of intimate violence. In fact, David Island, co-author of Men Who Beat the Men Who Love Them... estimates that in the United States there are approximately 500,000 gay men and between 50,000 and 100,000 lesbians who are battered.

Goldfarb, supra note 2, at 592 n.40. Note that Goldfarb does not state explicitly that the Island & Letellier study relied on just such an assumption of a parallel rate of domestic abuse. But see Goldfarb, supra, at 590-01 (stating in the text that "[l]ittle solid information exists about the source, pattern, and frequency of intimate violence in same-sex relationships. The empirical research that would be required to develop such understanding has only just begun."). Goldfarb also includes such caveats about Renzetti's study, see supra, at n.33, 38, and refers to data on same-gender domestic violence as "preliminary," see supra, at 597.

38. Island & Letellier, supra note 17, at 13-14 (emphasis added).

39. Island & Letellier, supra note 17, at 2 ("Domestic violence is not a gender issue, since both men and women can be either batterer or victim. . . . Individual acts of domestic violence are not caused by . . . a violent, patriarchal society.").

male domestic violence, which they assume to be 10.9 percent, may be too conservative, not because of any research findings, but rather because of gender differences between women and men:

Men in heterosexual couples commit 95 percent of the battering. But, there are two men present in a gay couple, which means that either member has the same probability of being a batterer. Therefore, the probability of violence occurring in a gay couple is mathematically double the probability of that in a heterosexual couple.

Second, one of the members in a gay male couple is not a woman. Despite the fact that American society is violent, there still exists a strong ethic not to hit women. Thus, even though as many as 20 percent of the men in America batter their wives, the vast majority of men do not hit women. Not so with men, however. Men hit men with alacrity in America.

By pointing out that men commit the vast majority of domestic abuse, Island and Letellier acknowledge the gendered dynamic of domestic violence. Island and Letellier's theory links the propensity for domestic violence with men as men, regardless of their sexual orientation—the more men in the relationship, the higher the rate of domestic violence. Therefore, Island and Letellier deduce that gay male couples will have the highest rates of domestic violence and lesbian couples will have the lowest rates of domestic violence, with heterosexual couples falling in between. This rank ordering is hardly gender neutral; in fact, it is explicitly based on a gendered understanding of domestic violence.

2. Violent Betrayal: Partner Abuse in Lesbian Relationships
(by Claire Renzetti)

Legal scholarship in this area also includes citations to Violent Betrayal: Partner Abuse in Lesbian Relationships as establishing the comparable frequency between lesbian and male-on-female domestic violence.

41. Island & Letellier, supra note 17, at 14.
42. See generally Joyce Price, Domestic Violence Between Gays: A Hidden Crisis, Counselors Say, Wash. Times, July 20, 1990, at A3 (reporting on a presentation in which Island estimated that "500,000 homosexual males and between 50,000 to 100,000 lesbians annually are battered").
43. Renzetti, supra note 34.
violence,\textsuperscript{44} or same-gender and opposite-gender domestic violence.\textsuperscript{45} Such citations are incorrect, however, because Professor Renzetti's study "was not designed to measure the prevalence of abuse in lesbian relationships,"\textsuperscript{46} but rather to "address the issue of battering frequency in lesbian relationships that may be characterized as abusive."\textsuperscript{47} In other words, Renzetti was studying the patterns of abuse within violent lesbian relationships; she was not attempting to ascertain the ratio of violent/abusive lesbian relationships to non-violent/non-abusive lesbian relationships or the frequency of violence in lesbian relationships versus the frequency of violence in non-lesbian relationships. Renzetti only interviewed women who were involved in violent same-gender relationships or who had been involved in abusive same-gender relationships previously, and who self-identified as battered lesbians.\textsuperscript{48} She explicitly states that from her data "we cannot determine the prevalence of abuse in lesbian relationships."\textsuperscript{49} As with Men Who Beat the Men Who Love Them, some of the legal scholarship explains the limitations of Renzetti’s study in footnotes.\textsuperscript{50}

Interestingly, Renzetti published a follow-up article six years after Violent Betrayal was published to correct "common misunderstandings about violence in lesbian relationships"\textsuperscript{51} caused by misinterpretations of her study. Renzetti remarks:

I often see my research cited in support of the claim that lesbian battering and heterosexual battering occur at similar rates. My study, however, was not a study of prevalence; rather, it showed that lesbian battering does occur, that it is

\begin{footnotes}
\item[44.] See Murphy, supra note 2, at 340 n.34 (citing Renzetti’s statement that “[s]tudies report . . . that 25 percent of lesbians and 27 percent of heterosexual women admit being physically abused by their partners in committed relationships”).
\item[45.] See Lundy, supra note 1, at 277 n.20 (citing Renzetti to support the statement that “[m]ost researchers agree that the incidence of battering in lesbian and gay couples is about the same as it is for heterosexual couples—that is, approximately twenty-five to thirty-three percent of all such couples”).
\item[46.] Renzetti, supra note 34, at 19.
\item[47.] Renzetti, supra note 34, at 19.
\item[48.] Renzetti, supra note 34, at 13, 15 (discussing her research design).
\item[49.] Renzetti, supra note 34, at 20.
\item[50.] See Knauer, supra note 2, at 329 n.15 (“Although not designed to determine the prevalence of abuse in lesbian relationships, Renzetti's study does address the question of the incidence of battering in abusive relationships and the forms the battering takes.”).
\end{footnotes}
not so infrequent as to be an anomaly, and that once it occurs it is likely to reoccur and increase in frequency and severity—all important findings for responding to claims that lesbian battering is not a problem worthy of serious scholarship or domestic violence services, but none showing prevalence. In fact, I regard with skepticism the studies that report a prevalence statistic for lesbian battering because the sampling strategies they use simply do not allow for the measurement of "true prevalence." 52

In addition, this legal scholarship contains citations to Renzetti’s brief review of other studies. 53 These second-hand citations are problematic in that they often misreport or skew the actual findings. Without examining the original studies, any limitations which are not mentioned by Renzetti will remain unrevealed.

As an example of the former problem, one legal article cites to Renzetti for the proposition that “[m]ost researchers agree that the incidence of battering in lesbian and gay couples is about the same as it is for heterosexual couples—that is, approximately twenty-five to thirty-three percent of all such couples”—a citation to Renzetti’s brief review of other researchers’ studies, rather than to Renzetti’s work itself. However, the studies that Renzetti summarizes do not indicate a same-gender domestic violence rate ranging from twenty-five to thirty-three percent, but rather a range of 10.9 to 95 percent. 55 Indeed, Renzetti even comments on the next page (not cited in the article) that:

[I]t may appear at first glance that the incidence of partner abuse is unusually high in lesbian relationships. However, studies of homosexual partner abuse have had to utilize non-random, self-selected samples. Therefore they are not true prevalence studies. 56

52. Renzetti, supra, note 51, at 119.
53. See, e.g., Lundy, supra note †, at 277.
54. Lundy, supra note †, at 277.
55. See Renzetti, supra note 34, at 17–18. The 10.9 percent figure comes from Island & Letellier, supra note 17, and the 95 percent comes from an unpublished study by E.E. Kelly and L. Warshafsky, Partner Abuse in Gay Male and Lesbian Couples (July 1987).
56. Renzetti, supra note 34, at 19.
Not only does this article mischaracterize the statistics reviewed by Renzetti, it also ignores Renzetti's caution about using the studies as true indicators of the frequency of same-gender domestic violence.

A different legal article cites to the same page in Renzetti to support the statement that “[r]esearch suggests that domestic violence occurs in same-sex relationships with the same statistical frequency as in opposite-sex relationships.” The corresponding footnote explains that “[s]tudies report ... that twenty-five percent of lesbians and twenty-seven percent of heterosexual women admit being physically abused by their partners in committed relationships.” In addition to citing different figures from the same page of Renzetti’s previously discussed article, this article refers to “studies” when these percentages are derived from only one study.

In addition, many of the studies reviewed by Renzetti, and subsequently cited in legal articles, have their own methodological problems which Renzetti does not fully explore. For example, studies of smaller samples where the women were located through word of mouth (“snowball sampling”) yield higher rates of domestic violence than studies of larger samples conducted through national surveys. In general, larger samples, because of the diversity of participants, are more likely to be representative and accurate. In addition, snowball sampling can create bias if participants, in an attempt to be helpful, refer the researcher to other lesbians with a known history of domestic abuse. Further, some of the studies which Renzetti cites did not

57. See Murphy, supra note 2, at 340.
58. See Murphy, supra note 2, at 340.
59. See Renzetti, supra note 34, at 18 (summarizing the methodology and results of the P.A. Brand and A.H. Kidd study, Frequency of Physical Aggression in Heterosexual and Female Homosexual Dyads, 59 Psychol. Rep. 1307 (1986)).
60. See Renzetti, supra note 34, at 17–18. The ratio of sample size to frequency of violence in the studies that Renzetti cites is as follows: (1) in a sample of 48 lesbians, 95 percent had “used verbal abuse tactics” and forty-seven percent had “used physical aggression”; (2) in a sample of 169 lesbians, 73.4 percent “reported experiencing acts defined as physically, sexually, or verbally/emotionally aggressive”; (3) in a sample of 174 lesbians, 59.8 percent had experienced physical violence and eighty-one percent had experienced verbal or emotional abuse; (4) in a sample of 90 lesbian couples, 46.6 percent were violent; and (5) in a sample of 1,566 lesbians, 17 percent had experienced domestic abuse.
62. Stark & Roberts, supra note 61, at 90. A snowball sample is “assembled by referral, as persons having the characteristic(s) of interest identify others.”
63. See Burke & Follingstad, supra note 29, at 500 (discussing bias in small samples).
exclude force used in self-defense, which likely inflated the reported prevalence of abuse.

Legal scholars’ often matter-of-fact assertions of equal frequencies of same-gender and opposite-gender abuse are not well substantiated, especially when lesbian and gay male domestic violence are considered separately, as the next section indicates.

C. Failure to Distinguish Between Female-on-Female and Male-on-Male Domestic Violence

While some legal scholarship on same-gender domestic violence focuses on lesbian abuse, most considers same-gender domestic violence generally. Typically, a legal article would refer to same-gender domestic violence generally, but then cite to a study focusing on domestic violence only in lesbian couples or only in gay male couples. As a result, legal scholarship does not sufficiently address the differences between lesbian and gay male domestic violence, in terms of both prevalence and dynamics.

1. Prevalence

In describing the prevalence of domestic violence in lesbian and gay male relationships, most legal scholarship reports the frequency of same-gender domestic violence generally, but cites to studies that found differences in the rate of female-on-female and male-on-male domestic violence. For example, one article cites a study of gay male domestic violence as supporting the statement that “[e]stimates set same-sex partner abuse” between twenty and fifty percent. Similarly, one article which relies on Men Who Beat the Men Who Love Them to support the claim of equal rates of opposite-gender and same-gender violence notes only in a footnote that Island and Letellier assume different rates of female-on-female and male-on-male domestic violence. Another article

65. See Robson, supra note 2; Dupps, supra note 2.
66. da Luz, supra note 2, at 268 (emphasis added).
67. Goldfarb, supra note 2, at 592.
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juxtaposes the seemingly contradictory assertions that the incidence of gay male domestic violence and the incidence of lesbian domestic violence are both equivalent to the incidence of male-on-female domestic violence and yet also different from one another. A third article asserts that "[m]ost researchers agree that the incidence of battering in lesbian and gay couples is about the same as it is for heterosexual couples—and that the figures may be higher for gay men than for lesbians."

Conversely, even legal articles which cite studies reviewed by Renzetti avoid mentioning one unpublished study summarized in Violent Betrayal, which found less domestic violence in lesbian couples than in gay male couples. Even though the sample size was small—forty-eight lesbians and fifty gay men—a statistically significant difference between lesbian and gay male responses emerged: the women were less physically abusive towards their partners than the men. Similarly, a 1994 study of 706 lesbian couples and 560 gay couples that is never mentioned in the legal scholarship reported a statistically significant difference between the frequency of violence in lesbian and gay male

68. Bricker, supra note 1, at 1388 (writing that same-gender domestic violence "occurs at the same rate as it occurs in heterosexual households" and then noting in the next sentence that "[t]here is some evidence that violence may occur with more frequency between gay men than between lesbians").
69. Lundy, supra note t, at 277.
71. Statistical significance does not refer to the strength of the relationship, but rather to the likelihood that the relationship was caused by random variables or fluctuations. Technically, statistical significance is "a calculation of the odds that a difference or correlation is produced by random fluctuations between the sample and the population, between the parameter [the true value of the variable in the population] and the statistic [the observed value of the variable within a sample of the population]." STARK & ROBERTS, supra note 61, at 71. Generally in social science, in order to be considered statistically significant, the odds must be no greater than 1 in 20 that the relationship is random, although many social scientists are stricter and will ignore any relationship if the probability that the results are random is greater than 1 in 100. STARK & ROBERTS, supra note 61, at 71. The smaller the sample size, the more difficult it is to obtain statistically significant results. STARK & ROBERTS, supra note 61, at 71.
72. Of course, this one study is no more conclusive than any other single study. However, it does seem significant that legal scholarship that advocates the non-gendered model of domestic violence and cites to Renzetti fails to discuss this study.
73. This study was conducted after VIOLENT BETRAYAL—but still before much of the legal scholarship—was published.
couples: eleven percent of gay male couples and seven percent of lesbian couples reported physical abuse.\textsuperscript{74}

Another annual study that is only found in very recent legal scholarship is conducted by the National Coalition of Anti-Violence Programs ("NCADV"), an organization of twenty-five gay, lesbian, bisexual, and transgender ("GLBT") victim advocacy programs that tracks violence against and within the GLBT community.\textsuperscript{75} The NCADV began issuing its \textit{Annual Report on Lesbian, Gay, Bisexual, and Transgender Domestic Violence}, which contains its findings, in 1997. The one legal article which cites the NCADV report distinguishes it from non-empirical or anecdotal studies,\textsuperscript{76} despite the NCADV's warnings to interpret the study "cautiously:"

Because the data collection method used was self-reporting, not random sampling, these findings, while suggestive, are not generalizable . . . . [I]t must be reiterated that NCAVP members respond to geographic areas in which only 20% of the nation's population resides. Thus, a full 80% of the nation's population remains unaccounted for.

The NCADV report indicates that of 3,327 cases of domestic violence reported in 1997 from a sample of twelve cities, 1,581 (47.5 percent) were "female cases" and 1,746 (52.5 percent) were "male cases."\textsuperscript{77} These percentages seem to indicate equivalent rates of female-on-female and male-on-male domestic violence. However, "female cases" refer to a female victim, not necessarily a female abuser.\textsuperscript{78} Since the report includes domestic abuse of bisexual women,\textsuperscript{79} some incidents


\textsuperscript{76} Knauer, supra note 2, at 328–29. Knauer characterizes Renzetti and Island & Letelier by stating that "not one represents a broad-based empirical study," but then cites newspaper articles referring to the NCADV study for her assertion that "one thing that does seem clear is that same-sex domestic violence occurs with the same frequency as opposite-sex domestic violence." Knauer, supra note 2, at 328–29.


\textsuperscript{78} See \textit{Prevalence}, supra note 77, at 3.

\textsuperscript{79} Two of the surveyed organizations which contributed data explicitly served lesbians and bisexual women—the San Francisco Network for Battered Lesbians and Bisexual
of male-on-female domestic violence were likely included in "female cases". 80

But even more significantly, of the twenty-four organizations contributing data to the study, six serve only women. 81 Thus, all incidents of abuse reported by these organizations involved female victims (although not necessarily female abusers). For example, in Little Rock, Arkansas, where only the Women's Project contributed data, 82 100 percent of the domestic violence reported involved female victims. 83 Likewise, in Boston, Massachusetts, where one of three surveyed organizations was The Network for Battered Lesbians and Bisexual Women, 84 78.7 percent of the domestic violence cases involved female victims. 85 Conversely, in Chicago, Illinois, where none of the organizations focus exclusively on women, 86 only 31.5 percent of intimate abuse involved female victims. 87

2. Dynamics

Most legal articles compare and contrast the dynamics of male-on-female domestic violence with same-gender domestic violence and conclude that the dynamics are almost indistinguishable—with the exception of homophobia. 88 Undoubtedly, homophobia amplifies the

Women and The Network for Battered Lesbians and Bisexual Women. See Prevalence, supra note 77, at 4.

80. There could also be female-on-male domestic violence included in the “male cases” category. However, since ninety-five percent of domestic violence victims are women, see U.S. Dep’t of Justice, Bureau of Justice Statistics, Report to the Nation on Crime and Justice: The Data 21 (1983), the number of incidents reported by bisexual men who were abused by women would likely have been significantly less than the number reported by bisexual women.

81. These organizations are: Women's Project (AK); Asian Women's Shelter (CA); San Francisco Network for Battered Lesbians and Bisexual Women (CA); W.O.M.A.N., Inc. (CA); YWCA Women's Services Center (CA); and The Network for Battered Lesbian and Bisexual Women (MA).


83. See Prevalence, supra note 77, at 4.

84. See Appendix, supra note 82, at 21, 24.

85. See Prevalence, supra note 77, at 4.

86. See Appendix, supra note 82, at 21.

87. See Prevalence, supra note 77, at 4.

88. Duthu, supra note 2, at 30–33 ("With the exception of a few important differences, the dynamics of lesbian and gay domestic violence are very similar to the dynamics of male-to-female battering . . . . Use of homophobia is the crucial difference between
effects of domestic violence in numerous ways: by increasing the sense
of isolation felt by the victim; by internalizing homophobia which “may
lead one to become rigidly defensive about one’s [lesbian orientation]
and thus susceptible to denying [intra-lesbian domestic] violence even
when witnessed or experienced;” or by enabling the abuser to use
threats of disclosing the victim’s sexual orientation. However, research-
ers have also identified additional dynamics of domestic violence which
are not equally common to both lesbian and gay male couples, such as
(1) HIV status for gay male couples; and (2) butch-femme relations91 for
lesbian couples.92 Neither of these dynamics are discussed in legal schol-
arship.

Island and Letellier explain that “for many gay men involved with
violent partners, AIDS adds tremendous complications to their relation-
ships.” They remark that gay men whose batterers are HIV positive

89. Robson, supra note 2, at 581.
90. See generally, Mindy Benowitz, How Homophobia Affects Lesbians’ Response to Violence
in Lesbian Relationships, in Naming the Violence: Speaking Out About Lesbian
Battering 198 (Kerry Lobel ed., 1986).
91. Inclusion of this discussion about domestic violence in butch-femme couples is not
meant to imply or suggest that female-on-female domestic violence was ever confined
to butch-femme relationships, or that all butch-femme couples are violent. Rather,
this section describes one lesbian relationship dynamic that has no gay male analogue,
and considers how this dynamic affects lesbian domestic violence in certain contexts.
92. Researchers have also studied relationship quality, substance and alcohol abuse,
physical and sexual abuse in family of origin, levels of dependency and autonomy,
and power imbalances in both lesbian and gay male relationships. See Carolyn M.
West, Leaving a Second Closet: Outing Partner Abuse in Same-Sex Couples, in Partner
Violence: A Comprehensive Review of 20 Years of Research 163, 171–78
(Jana L. Jasinski & Linda M. Williams eds., 1998) (summarizing research on the
“correlates of same-sex partner violence”).
93. Island & Letellier, supra note 17, at 251.
will experience even greater difficulty leaving because of guilt and community disbelief that an HIV positive man would possess the strength to be abusive.94 Another researcher reports that:

If a batterer is HIV positive, he may threaten to infect his victim or use his failing health to make the victim feel guilty about leaving the abusive situation. Alternatively, if the victim has been infected with HIV, the batterer may threaten to withhold medical care or to reveal the victim's HIV-positive status, which may result in discrimination and the loss of income or insurance benefits.95

While HIV status can be a significant dynamic in abusive gay male relationships, it is not as likely to be a significant dynamic in abusive lesbian relationships because of the lower rates of HIV infection among lesbians.96

Since the legal scholarship on same-gender intimate abuse primarily advocates a non-gendered model of domestic violence, most articles do not consider gendering an abuser "masculine" and a victim "feminine." Those articles which do discuss this categorization dismiss it outright as "heteronormative," or "at best a misdescription."97

94. ISLAND & LETELLIER, supra note 17, at 251.
95. See West, supra note 92, at 170.
96. See Bryant & Demian, supra note 74, at 113–14 (finding that AIDS had a greater influence on the dynamics of gay male couples than lesbian couples).

Through December 1998, 109,311 women were reported with AIDS. Of these, 2,220 were reported to have had sex with women; however, the vast majority had other risks (such as injection drug use, sex with high-risk men, or receipt of blood or blood products). Of the 347 (out of 2,220) women who were reported to have had sex only with women, 98% also had another risk—injection drug use in most cases. As of December 1998, none of these investigations had confirmed female-to-female HIV transmission.

WSW, supra. In contrast, the CDC reports that in 1997 almost 125,000 gay and bisexual men were living with AIDS in the U.S. See CDC, Need for Sustained HIV Prevention Among Men who Have Sex with Men http://www.cdc.gov/hiv/pubs/facts/msm.htm (last modified Jan. 31, 2000).
98. See Eaton, supra note 26, at 207.
99. See Knauer, supra note 2, at 336 ("Leaving aside the contemporary resurgence of gender play within the lesbian communities, the continued reliance on gender seems at best a misdescription.").
However, there is historical evidence of some "butch" lesbians, who assumed a masculine gender image, abusing some "femme" lesbians, who assumed a feminine gender image. Rather than avoiding this evidence or using it to lend credence to the claim that lesbians relegate all domestic violence to maleness and masculine women, scholars need to consider the historical reality of butch-femme identities and how lesbian feminism grew out of the butch-femme tradition. Only through such consideration can scholars ascertain what effect the initial denial of non-butch-femme domestic violence has had on the lesbian community's reaction to female-on-female domestic violence.

Abusive butch-femme relationships provide a unique opportunity to understand the extent to which masculine-on-feminine violence can exist in lesbian couples. Although the only study of butch-femme dynamics and domestic violence is historical, butch-femme continues to be a central schema for a sizable minority of the modern lesbian community. While historians found no evidence of femme lesbians initiating domestic violence against their butch partners, they discovered that "[b]ecause this community was not completely tied into the dominant system of heterosexual male supremacy, violence did not function


101. See Kennedy & Davis, supra note 100, at 316. Kennedy and Davis remark:

On the one hand, butches hitting fems evokes everything that is wrong with male supremacy. It has been the quintessential example for contemporary feminists of why this gendered lesbian culture has nothing to offer and should be dismissed from our heritage. On the other hand, once we digest the evidence that such physical abuse occurred in a limited historical period of butch-femm culture, under specific social conditions, this history opens up new perspectives on the complex connections among gender, power and violence.

Kennedy & Davis, supra note 100, at 316.

in lesbian relationships in the same way as in heterosexual relationships.\textsuperscript{103} First, violence was not as long-lasting; most femmes left an abusive relationship within one to three years.\textsuperscript{104} There was very little social support or pressure for the continuation of a relationship.\textsuperscript{105} Further, most of the femme women supported themselves (and sometimes their partners) economically and so were not precluded from leaving by financial constraints.\textsuperscript{106} It was also considered unlikely that an abusive butch woman would stalk or harass a partner who left, since "community values and institutions emphasized the excitement of a new romance, rather than the necessity of continuing the old."\textsuperscript{107} Second, the controlling effect of the physical violence was truncated:

Most important, the use of violence by butches was not a secret. At this time, fems were neither isolated in their relationships nor ashamed of the violence. Most fems talked with others about violence and did not live under the threat of serious repercussion should they tell the truth; the "truth" was known. Since people went out regularly, any serious violence in the home was apparent to the community. Many fights actually took place in public, in the bars. Not only were there witnesses, but also observers would usually step in and interrupt a fight that got too bad.\textsuperscript{108}

One implication of considering the dynamics of butch-on-femme domestic violence is that, "ironically, lesbian-feminist culture of the 1970s, by adopting the ideology that only men were violent, created an atmosphere in which violence in lesbian relationships needed to be kept a secret and many women lost the protection of community limitation."\textsuperscript{109}

Legal scholars' support for the non-gendered model of domestic violence, and concomitant assertions of parallel rates and dynamics of

\textsuperscript{103} KENNEDY & DAVIS, supra note 100, at 319. There were similarities to modern male-on-female abuse, however, including self-defense and fighting back by femme women and the exacerbating role of alcohol.

\textsuperscript{104} KENNEDY & DAVIS, supra note 100, at 318.

\textsuperscript{105} KENNEDY & DAVIS, supra note 100, at 319 ("both butch and fem knew the relationship would not last forever").

\textsuperscript{106} See KENNEDY & DAVIS, supra note 100, at 319.

\textsuperscript{107} KENNEDY & DAVIS, supra note 100, at 319.

\textsuperscript{108} KENNEDY & DAVIS, supra note 100, at 319.

\textsuperscript{109} KENNEDY & DAVIS, supra note 100, at 319; cf. KENNEDY & DAVIS, supra note 100, at 421 ("[B]utch narrators . . . feel that today there is a lot of verbal abuse that goes unnoticed. They also suspect hidden physical violence in relationships.").
lesbian and gay male domestic violence, can be challenged not only through careful examination of statistical and historical data, but also through scrutiny of the research instruments used to gauge rates of domestic violence, as the next section indicates.

**D. Measurement Validity**

In arguing for the non-gendered model of domestic violence, legal scholars assume equivalent rates of male-on-male, male-on-female, female-on-female, and female-on-male abuse—a difficult assumption to prove given the wide-spread criticism and rebuttal of those studies which allegedly indicate that in the heterosexual context female-on-male abuse is as prevalent as male-on-female abuse. Most of this criticism focuses on the Conflict Tactics Scale ("CTS"), an instrument used to determine the frequency of subjects' use of violence to resolve inter-family conflicts. In addition to being used to demonstrate analogous rates of "husband abuse," the CTS has been utilized in studies of same-gender domestic violence. While some of these studies are cited in legal scholarship on same-gender domestic violence, no discussion of the flaws or bias associated with the CTS is included.

1. The Conflict Tactics Scale

The CTS "is designed to measure a variety of behaviors used in conflicts between family members." It consists of approximately 18

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10. Presumably, a non-gendered model of domestic violence would also posit equal frequencies of domestic violence perpetrated by and against transgender individuals.

11. By definition, the non-gendered model expects parallel rates of domestic violence regardless of the gender of the abuser and victim. In a confusing inversion of this logic, however, some legal scholarship contains contradictory assertions that domestic violence is gender-neutral, but men batter women much more than women batter men. Compare da Luz, supra note 2, at 252 ("The most prevalent form of domestic violence is abuse committed by a man against a woman, often his wife.") with da Luz, supra note 2, at 252 ("[T]his Article assumes that partner abuse and its effects are not gender-specific."). See also supra notes 66–69 and accompanying text (discussing assertions that domestic violence is gender-neutral combined with reports of different rates of female-on-female and male-on-male abuse).

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questions, focusing on the frequency of various methods or tactics utilized to resolve conflicts during a certain retrospective time period. The questions begin with "Reasoning" tactics, then "Verbal Aggression" tactics, and "Violence" tactics; the latter are subdivided into "Minor" and "Severe" violence. The first question is a rational discussion tactic, "discussed an issue calmly," which is considered the least coercive, and the last question is a violence tactic, "used a knife or fired a gun," which is considered the most coercive.

In 1975 and 1985, Murray A. Straus and Richard J. Gelles conducted national CTS telephone surveys of 8,145 households to determine frequencies of domestic violence and child abuse. According to both surveys, women and men utilize violent tactics at similar rates:

Of those couples reporting any violence, 49 percent were situations ... where both were violent .... [A] comparison of the number of couples in which only the husband was violent with those in which only the wife was violent shows the figures to be very close: 27 percent violent husbands and 24 percent violent wives. (1975 survey)

The rate of 116 per 1,000 couples shows that almost 1 out of 8 husbands carried out 1 or more violent acts during the year of this study .... [T]he rates for violence by wives are remarkably similar [124 per 1,000 couples]. (1985 survey)

113. See Murray A. Straus, Measuring Intrfamilv Conflict and Violence: The Conflict Tactics (CT) Scales, in Physical Violence, supra note 112, at 32-33 (displaying CTS "Couple Form R"). Since the CTS measures partner abuse and child abuse, there is more than one version. Also, the CTS is not copyrighted, and Straus allows researchers to create modified versions by adding additional questions. See Murray A. Straus, The Conflict Tactics Scale and Its Critics: An Evaluation and New Data on Validity and Reliability, in Physical Violence, supra note 112, at 57.


115. See Murray A. Straus, Measuring Intrfamilv Conflict and Violence, in Physical Violence, supra note 112, at 33 (displaying CTS "Couple Form R").

116. See Behind Closed Doors: Violence in the American Family (Murray A. Straus et al. eds., 1980) (reporting and discussing the results of the 1975 survey); Straus & Gelles, supra note 26 (reporting and discussing the results of the 1985 survey).

117. Straus & Gelles, supra note 26, at 37.

Other surveys using the CTS have also found parallel rates of female-on-male and male-on-female violence.\footnote{119}

The CTS is widely criticized and characterized as an instrument which yields gender-biased results. For example, studies of couples in which both parties answered the CTS revealed that men underreport their own violent tactics.\footnote{120} The two national surveys mentioned previously only interviewed one person per couple, as did many subsequent replication studies.\footnote{121} In addition, the CTS only measures violent acts, not injuries\footnote{122} or other consequences of the violence,\footnote{123} and does not consider whether violent tactics were used in self-defense.\footnote{124} Moreover, in order to reach the conclusion that the "causal accounts of violence will be gender-blind,"\footnote{125} the CTS has to ignore most contextual factors surrounding the abuse:\footnote{126}

To illustrate our point further, we take a fictitious case involving a mother with three children. Her husband works for an accounting firm, and she is a homemaker. She has twice been hospitalized as a result of his abuse. One night he comes home late and drunk. She begins to raise her voice and call him names. He starts to walk toward her; she tells him not to touch her. He smiles and continues toward her. She throws a

\begin{footnotes}
\item[121] See Jouriles & O'Leary, supra note 120, at 219 ("Many researchers have relied on retrospective reports of a single spouse for their data on the incidence and frequency of relationship violence.").
\item[123] See Nancy R. Rhodes, \textit{The Assessment of Spousal Abuse: An Alternative to the Conflict Tactics Scale}, in \textit{Intimate Violence: Interdisciplinary Perspectives} 27, 29 (Emilio C. Viano ed., 1992) ("Violent encounters vary greatly in the types of actions, the intensity of those actions, and the nature of the short- and long-term consequences. The degree of physical danger and continuing psychological trauma is an important indicator of intensity, and this is not adequately captured on the CTS.").
\item[125] Dobash et al., supra note 119, at 74.
\item[126] See Kathleen J. Ferraro & John M. Johnson, \textit{How Women Experience Battering: The Process of Victimization}, 30 Soc. Problems 325, 325 (1983) ("The scale is not designed to explore the context of violent actions, or their meanings for the victim or perpetrator.").
\end{footnotes}
vase at him, and it hits him in the arm. He grabs her by the hair and tells her that if she doesn’t shut up, he will smash her face. So far, it’s 1:2 on the CTS. She then kicks him hard in the shins. It’s now 2:2. He pounds her head into the wall several times, and she reaches out and scratches his face. He lets go, and she runs out of the house and goes to her sister’s house for the next three days. It’s 3:3 on the CTS.\footnote{127}

Similarly, the CTS is criticized because of its assumption that violence stems from conflict rather than issues of power and control.\footnote{128}

Further, the CTS contains no mechanism for measuring or accounting for gender role assumptions of the subjects. Thus, it is possible that violent tactics by a man could easily be forgotten if one generally believed that male violence was intrinsic or normative, while equally violent behavior by a woman could be so shockingly unexpected that it is remembered and reported.\footnote{129} Likewise, the very language of some of the questions seems to be targeting women. For example, three questions ask if the subject ever “sulked,” “stomped out,” or “cried.”\footnote{130} Women could conceivably answer affirmatively more often than men simply because of the stereotypically feminine characterization of the tactic. At the very least, these questions are more prone to subjective interpretation than other questions which inquire about very specific acts (e.g. “used a knife or fired a gun”).\footnote{131}

\footnote{127. Tineke Ritmeester & Ellen Pence, A Cynical Twist of Fate: How Processes of Ruling in the Criminal Justice System and the Social Sciences Impede Justice for Battered Women, 2 S. CAL. REV. & WOMEN’S STUD. 255, 277 (1992).}

\footnote{128. See Kersti A. Yllo, Through a Feminist Lens: Gender, Power, and Violence, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 47, 53 (Richard J. Gelles & Donileen R. Loske eds., 1993). Yllo explains that:

Gelles and Straus themselves recognize that “over and over again, case after case, interview after interview, we hear batterers and victims discuss how power and control were at the core of events that led up to the use of violence.” Yet these core elements are missing in the “conflicts of personal interests” approach to measuring violence.

Yllo, supra at 53 (citations omitted).}

\footnote{129. See Breines & Gordon, supra note 122, at 512.}

\footnote{130. Murray A. Straus, Measuring Intrafamily Conflict and Violence: The conflict Tactics (CT) Scales, in PHYSICAL VIOLENCE, supra note 112, at 33 (Figure 3.1).}

\footnote{131. See generally Rhodes, supra note 123, at 29 (criticizing the CTS for its lack of uniformity).}
2. Studies of Same-Gender Domestic Violence Using the CTS

While the legal scholarship on same-gender domestic violence does not include affirmations of the CTS, many of the cited studies of same-gender abuse utilize the CTS. As described previously, research on same-gender domestic violence has reported prevalence rates ranging from four to ninety-five percent. However, studies that utilize a form of the CTS reveal prevalence rates of thirty-one to sixty-seven percent for lesbians and twenty-five to thirty-eight percent for gay men, while studies which rely on an instrument other than the CTS found lower rates of domestic violence: four to twenty-five percent for lesbians and eleven percent for

132. See, e.g., Lundy, supra note †, at 277 (citing studies reviewed by Renzetti); Murphy, supra note 2, at 340 (citing studies reviewed by Renzetti). Four of the seven studies reviewed by Renzetti used the CTS. See Renzetti, supra note 34, at 17–18. See also Goldfarb, supra note 2, at 592 (citing Jane García who cites Vallerie Coleman); Bricker, supra note 1, at 1389 (citing Vallerie Coleman); da Luz, supra note 2, at 267 (citing Jane García who cites Vallerie Coleman); Murphy, supra note 2, at 340 (citing Jane García who cites Vallerie Coleman). Vallerie Coleman's study of domestic violence in 90 lesbian couples used the CTS in a modified form, which included a question about threatening to "out" a partner's sexual orientation. See Vallerie Coleman, Violence in Lesbian Couples: A Between Groups Comparison, Appendix F (1990) (unpublished doctoral dissertation, California School of Professional Psychology).

133. See supra Part II.C.1.


135. See Bologna et al., supra note 134 (twenty-five percent); Gardner, supra note 134 (thirty-eight percent); Waldner-Haugrud et al., supra note 134, at 178 (29.7 percent).

Thus, use of the CTS seems to result in higher reports of same-gender domestic violence generally, with lesbians reporting more domestic violence than gay men. This pattern is similar to results from studies which found gender bias when researchers used the CTS to assess heterosexual abuse—men tend to underreport their use of violence, while women tend to inflate their use of violence.\textsuperscript{138}

While legal scholarship does not include citations to many of these studies, the studies which are cited tend to be those which utilize the CTS.\textsuperscript{139} But even without this direct link, by advocating a non-gendered model of domestic violence legal scholars are aligning themselves with others who advocate the same model—including Straus and Gelles. This legal scholarship is assuming a stance contrary to that of most social scientists, which if continued could result in a schism between legal perceptions of same-gender domestic violence and scientific paradigms.

II. PRAGMATIC IMPLICATIONS: MANDATORY ARREST LAWS

In relying on the non-gendered model of abuse, legal scholarship on same-gender domestic violence is not only advocating a questionable theoretical model, but also lending credence to problematic legal policies, such as mandatory arrest,\textsuperscript{140} which rely on a non-gendered and

\textsuperscript{137} PSYCHOL. REP. 1307, at 1311 (1986) (twenty-five percent); Bryant & Demian, \textit{supra} note 74, at 112 (seven percent); \textsc{Joann Loulan}, \textit{Lesbian Passion} 187 (1987) (reporting that of 1566 lesbians surveyed thirteen percent had been abused by a “female lover/friend” and four percent had been abused by a “female mate”).

\textsuperscript{138} See Bryant & Demian, \textit{supra} note 74, at 112 (eleven percent).

\textsuperscript{139} See \textit{supra} note 120 and accompanying text.

decontextualized understanding of domestic violence. Mandatory arrest laws require police officers in domestic violence situations to arrest anyone for whom they have probable cause to believe assaulted his or her partner.\textsuperscript{141} Just like the CTS, mandatory arrest policies often do not sufficiently consider the context surrounding the violence, including a prior history of abuse or whether force was used in self-defense.\textsuperscript{142} Instead, police officers are obligated to arrest anyone who used violence, even if they did not cause any injury or were acting only in self-defense.\textsuperscript{143} 

\textsuperscript{141} See supra note 140.

\textsuperscript{142} See generally Liza Mundy, Fault Line, \textit{The Washington Post Magazine}, Oct. 26, 1997 (following several cases of women arrested in Fairfax County, Virginia shortly after that state's mandatory arrest law was passed).

\textsuperscript{143} Conversely, some states have pro- or presumptive-arrest laws which allow police the discretion to arrest only the primary aggressor. See, e.g., Wash. Rev. Code Ann. § 10.31.100(2)(b) (West 1990) (amending prior law such that "mandatory arrest applies only to the primary aggressor"); see also Joan Zorza, \textit{Mandatory Arrest for Domestic Violence: Why It May Prove the Best First Step in Curbing Repeat Abuse}, Crim. Just., Fall 1995, at 2, 53 (1995) ("Fewer women were inappropriately ar-
Some legal scholarship explicitly advocates application of all domestic violence provisions, including mandatory arrest policies, to lesbian and gay male couples. Even without explicitly favoring mandatory arrest policies, however, legal scholarship advocating the non-gendered model implicitly supports legal policies and actions that fail to consider the context surrounding incidents of domestic violence, including gender, but also race, class, and sexual orientation of the parties, and any history of abuse. Indeed, some supporters of the CTS argue that prosecutors and others in the criminal justice system should utilize the CTS in “screen[ing] cases prior to making decisions about case dis- position” and making sentencing recommendations; others have made the CTS available to domestic violence attorneys as a tool to ascertain “the client’s involvement in marital violence [which] will probably not be readily apparent.”

Theoretically, it might seem that mandatory arrest policies would reduce the possibility of discrimination because all perpetrators would have to be arrested regardless of these social markers. But, under a mandatory arrest policy, police officers must still make their own individual determination of probable cause of domestic assault, and in the

rested when police were told to consider which party was the real aggressor and which party was acting in self-defense. This worked best when primary aggressor and/or self-defense language was both in the statute and a major component of police training.

144. E.g., one article does not use the term “mandatory arrest” but calls for limitations in “the discretion of individual officers” and argues that “[l]aws can and should guide police and judicial action by encouraging intervention, prosecution, and adequate police reporting.” See da Luz, supra note 2, at 289.

145. See Duthu, supra note 2, at 35 (arguing that in cases of same-gender domestic violence “officers should comply with mandatory arrest policies”); West, supra note 2, at 253 n.8 (describing mandatory arrest as “the most effective means of reducing the incidence of domestic violence”); da Luz, supra note 2, at 266, n.79 (characterizing mandatory arrest laws as “advances” which “gay and lesbian victims of partner abuse have been statutorily and socially excluded from”).


148. See Sarah M. Buel, Mandatory Arrest for Domestic Violence, 11 HARV. WOMEN'S L.J. 213, 224 (1988) (“A mandatory arrest law can help eradicate [the] problem [of police racism] by requiring officers to arrest whenever specific, objective conditions are met, thus resulting in less discrimination than a discretionary system.”).
process can be effected by racism, \textsuperscript{149} classism, \textsuperscript{150} sexism, \textsuperscript{151} and homophobia.\textsuperscript{152} For example, although police reports indicate that women abuse their male partners in approximately three to five percent of all domestic violence cases, \textsuperscript{153} studies of mandatory arrest policies in various cities indicate that women are arrested at disproportionately high rates. The National Institute of Justice ("NIJ") studies in the early 1980s revealed that in Milwaukee, Wisconsin nine percent of those arrested for domestic violence were women; in Colorado Springs, Colorado, eleven percent of those arrested for domestic violence were women; and in Charlotte, North Carolina eighteen percent of those arrested for domestic violence were women.\textsuperscript{154}

An independent study of arrest rates of women for domestic violence under mandatory arrest laws in Ann Arbor and Ypsilanti, Michigan, found that 9.5 percent of those arrested for domestic violence in Ann Arbor were women, and 15.9 percent of those arrested for domestic violence in Ypsilanti were women.\textsuperscript{155} In terms of race, 55.6 percent of female arrestees and 57.9 percent of total arrestees in Ann

\textsuperscript{149} See Andrea D. Lyon, Be Careful What You Wish For: An Examination of Arrest and Prosecution Patterns of Domestic Violence Cases in Two Cities in Michigan, 5 Mich. J. Gender & L. 253, 287 (1999) (finding a statistically significant difference in arrest rates under two different arrest policies where the race of the male abuser differs from victim); Miriam H. Ruttenberg, A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy, 2 Am. U. J. Gender & L. 171, 198 (1994) ("Black women also suffer abuse at the hands of their husbands, but coming face-to-face with state intervention in the form of mandatory arrest often proves more dangerous than helpful.").

\textsuperscript{150} See Barbara Fedders, Lobbying for Mandatory Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement, 23 N.Y.U. Rev. L. & Soc. Change 281, 293 (1997) (explaining that "police racism and classism may operate to make them more incredulous of the testimonies of women of color and low-income women than of white and middle-class women, such that what is in fact a situation mandating arrest may not be perceived as such, and vice versa") (citations omitted).

\textsuperscript{151} See supra notes 148–55 and accompanying text.

\textsuperscript{152} See Fedders, supra note 150, at 281 (observing that "the issue of sexual orientation has been largely absent from mainstream debates on mandatory-arrest policies"). Based on the often homophobic responses of police to same-gender domestic violence, or lesbians and gay men generally, the possibility of homophobia affecting police officers' determinations of probable cause under mandatory arrest policies is quite high. See, e.g., Knauer, supra note 2, at 348 (discussing homophobic responses of police to 911 calls by lesbians and gay men); Lundy, supra note 1, at 290 (describing the legal system as a "nightmare for lesbian and gay people").


\textsuperscript{154} Zorza, supra note 143, at 9.

\textsuperscript{155} Lyon, supra note 149, at 271.
Arbor were either Black or Latino/a, although Ann Arbor’s racial minority population, according to the 1990 U.S. Census, was only eighteen percent. In Ypsilanti, 42.2 percent of female arrestees and 54.8 percent of total arrestees were Black, although Ypsilanti’s racial minority population was only thirty-one percent. In addition, the study found that police were less likely to arrest a woman if they were made aware of a prior history of abuse, but were more likely to arrest a woman if they had previously been called to her residence.

Mandatory arrest policies could quite conceivably exacerbate the problem of dual arrests of both abuser and victim in cases of same-gender domestic violence. Much of the legal scholarship recognizes the difficulties caused by this misdiagnosis of mutual battering—“the idea that most abusive intimate relationships are characterized by reciprocal violence in which each partner is both a perpetrator and a victim of abuse.” While the misdiagnosis of mutual battery is also a possibility in heterosexual relationships—especially when instruments such as the CTS are utilized—legal scholarship identifies it as a particular problem for victims of same-gender domestic violence.

156. Lyon, supra note 149, at 277.
157. Lyon, supra note 149, at 254.
158. Lyon, supra note 149, at 277.
159. Lyon, supra note 149, at 254.
160. Lyon, supra note 149, at 272.
161. Renzetti, supra note 34, at 107.
162. E.g., Lundy, supra note 1, at 283 (“[T]he myth of mutual battering is particularly invidious for same-sex couples, since a common misconception in both the heterosexual and homosexual communities is that any violence between two men or two women is by its very nature ‘just fighting’ which is actively initiated by both parties.”); Robson, supra note 2, at 579. Robson explains:

In the legal arena, the mutual combat concept may be more attractive in situations where the hetero-relational factors are less evident. Many judges and legal officials have been educated in domestic violence issues in ways which emphasize the dominant/submissive patriarchal arrangement based on objective criteria such as gender. When such factors are absent, judges may be more likely to feel inadequate to determine against whom the restraining order should issue. In the face of such inadequacy, such judges may either deny the restraining order or issue a mutual restraining order.

Robson, supra note 2, at 579. Further, women may be more likely to use force to defend themselves against a female abuser than a male abuser. Compare U.S. DEP’T OF JUSTICE, VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS 19 (1998) (reporting that thirty-four percent of women physically defended themselves against nonlethal violence by a male intimate; forty-three percent defended themselves by trying to escape) with Renzetti, supra note 34, at 110 (explaining that of 100 battered lesbians interviewed, 78 defended themselves). Although the juxtaposition of these two studies
While it might be likely that application of mandatory arrest policies to cases of same-gender domestic violence increases the likelihood of the victim being arrested along with the abuser and functions to perpetuate the myth of mutual battering in lesbian and gay couples, no studies of the effects of mandatory arrest laws on same-gender domestic violence have been conducted. Given the methodological problems associated with the studies of mandatory arrest laws, and the continuing debates among social scientists about the efficacy of these laws, the desirability of applying mandatory arrest policies to lesbian and gay male violence—or domestic violence generally—is unclear. Yet legal scholarship on same-gender domestic violence which advocates mandatory arrest policies does not disclose this uncertainty, but instead includes citations to social scientists or legal scholars who support mandatory arrest policies, without citing to opponents of mandatory arrest laws or discussing methodological problems with studies of mandatory arrest policies.

One legal scholar cites to the NIJ study of Minneapolis, Minnesota, which compared the effects of three different police responses to
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domestic violence—arrest, mediation, and ordering the abuser to leave the premises for eight hours—on recidivism rates. Six months after the initial police response, ten percent of those arrested, nineteen percent of those who received mediation, and twenty-four percent of those who were ordered off the premises were involved in additional incidents of domestic violence. However, the researchers for this study warned that mandatory arrest policies should not be implemented without further study, a fact not mentioned by this legal scholar. Since additional studies have not consistently replicated the results of the Minneapolis study, another fact not mentioned by this legal scholar—one of the original researchers, Professor Lawrence Sherman, has opposed mandatory arrest laws.

Sherman, and many other social scientists, have pointed out that the series of NIJ studies were riddled with methodological problems. For example, the internal validity of the original Minneapolis study was compromised because the assignment of cases to one of three police responses was not entirely random. In addition, replication studies which corrected for the internal validity problems yielded different results—namely, that arrest did not necessarily deter future acts of domestic violence. Further, post-arrest consequences were not

167. See da Luz, supra note 2, at 266.
168. da Luz, supra note 2, citing CAL. COMM’N ON THE STATUS OF WOMEN, REPORT ON VIOLENCE 10 (1993). See also Gelles, supra note 26, at 32.
169. See Schmidt & Sherman, supra note 164, at 44 (“Although the study authors opposed mandating arrest until further studies were completed, within 8 years legislatures in 15 states (including 1 in which a replication was being conducted) and the District of Columbia moved to enact [mandatory arrest] laws.”).
170. Supra note 37, at 47 tbl. 4.1 (summarizing the results of the NIJ Minneapolis and replication studies).
172. A complete summary of the literature on the methodological problems with the NIJ studies is beyond the scope of this article. For a more detailed discussion see SHERMAN ET AL., supra note 171.
174. See Gelles, supra note 164, at 35 (“[T]he design . . . attempted to correct for the threats to the internal validity of the Minneapolis study. The major finding was . . . contrary to the evidence from Minneapolis, that arrest and the immediate period of custody associated with arrest were not a deterrent to continued domestic violence.”); Hirschel & Hutchison, supra note 164, at 68 tbl.5.1 (reporting that in the Charlotte, North Carolina replication study, there was no statistically significant difference between arrest and other police responses in deterring future acts of domestic violence).
consistent from study to study.\textsuperscript{175} In Minneapolis, arrest were followed by a night in jail and on average those arrested spent twenty-four hours in police custody. By contrast, arrested abusers spent an average of only two to sixteen hours in police custody in the replication studies.\textsuperscript{176} The studies also failed to consider rates of prosecution and conviction.\textsuperscript{177}

In sum, legal scholars writing about same-gender domestic violence need to carefully consider the shortcomings of the research on mandatory arrest laws—as well as the limitations of these laws and policies—before uncritically advocating their application to lesbian and gay male couples.

**Conclusion**

In the process of analogizing or equating same-gender domestic violence to opposite-gender domestic violence, legal scholarship often ignores the problematic assumptions and implications of the non-gendered model of domestic violence. Rather than continuing to follow the lead of legal scholars who “assume that intimate violence and its effects are not gender-specific,”\textsuperscript{178} legal scholarship should “advocate[] a way of thinking and talking about intimate violence that recognizes multiple contexts rather than an approach that simply translates the conceptual terminology of battering into a single gender-neutral discourse.”\textsuperscript{179} In working towards the latter, legal scholars should carefully scrutinize methodology and research instruments before relying on social science research, to ensure that the results are reliable and generalizable and that sufficient attention was paid to multiple contexts of domestic violence. Likewise, before advocating for changes in the law, legal scholars should insist that these changes be responsive to the individual contexts of domestic violence situations.

Although this article focuses on the shortcomings of the non-gendered model of domestic violence, a purely gender based model is no

\textsuperscript{175} See Wanless, supra note 164, at 556.
\textsuperscript{177} See Wanless, supra note 164, at 556 (stating “[n]one of the studies evaluated the impact of a comprehensive criminal justice system response—arrest, prosecution, sentencing—on abuser recidivism.”).
\textsuperscript{178} See Bricker, supra note 1, at 1383.
\textsuperscript{179} Goldfarb, supra note 2, at 620.
more satisfactory in accounting for same-gender abuse.\textsuperscript{180} Instead, multiple models should be constructed in order to convey more accurate, nuanced, and detailed understandings of the varied contexts of domestic violence: "Lesbians need our own conceptual paradigms for making sense of the particularities of intralesbian violence . . . So too, heterosexual women should not be required to forfeit too readily theoretical models which speak meaningfully to the violence of their intimate relations with men."\textsuperscript{181}

While the dynamics of domestic violence will vary within the context of each individual relationship, the same laws will still be invoked to protect (even if they fail to protect) all victims of domestic violence, regardless of their gender, race, class, age or sexual orientation. Thus, these multiple discrete models will have to co-exist with a larger, more comprehensive, meta-model of domestic violence. This meta-model would ideally explain the basic, most common, dynamics of domestic violence, and take into account homophobia and gender, along with other indica of social power:

Viewing domestic violence through an integrated framework permits us to see that domestic violence is a gender issue; that heterosexual domestic violence is, in fact, primarily perpetuated by men against women. We can also see that gender is only one of the several determining social and psychological factors and that the absence of gender inequity, as in same-sex relationships, by no means precludes the possibility that battering will occur . . . . Because of the pervasiveness of cultural sexism, homophobia, racism, classism, anti-Semitism, ageism, and ableism, some groups are empowered with privileges at the expense of others.\textsuperscript{182}

However, this meta-model of domestic violence should not be constructed by assuming a priori gender neutrality. Instead, the multiple contextual models need to be constructed, examined, and refined—first. Only then should the shared dynamics be synthesized and integrated into a meta-model. §

\textsuperscript{180} See Merrill, supra note 40, at 12.

\textsuperscript{181} Eaton, supra note 26, at 220. See also Robson, supra note 2, at 568–69 (calling for a lesbian legal theory to account for intralesbian domestic abuse).

\textsuperscript{182} See Merrill, supra note 40.