

“Bashing Back”: Gay and Lesbian Street Patrols and the Criminal Justice System

Kirstin S. Dodge*

I. Introduction

Burlington, Vt.: An assailant brutally attacked a gay man outside of Pearls, a gay bar, leaving him unconscious in a pool of blood. As a result of the assault, the victim suffered multiple skull fractures, brain damage, and partial blindness. After his arrest, the suspect said to police, “You want to know the truth? I went looking for it. I went to Pearls, found a fag, and kicked the shit out of him.”¹

[Six police officers] forced me against the police car with my face against the car. . . . At that point, they punched me and used a nightstick. They pulled me up off the car, they called me a faggot and put me down on the ground. They kicked me and spat on me, pulled me up from the ground, put me back down on the ground and kicked me again.²

The message is simple: queer folk are banding together and walking the streets in cities around the United States to protect their own. Their tactics and strategies differ, but the basic aim is always the same: stop the violence in gay and lesbian neighborhoods.³

Targeted, assaulted, battered, and murdered because of their sexual orientation, people in the gay and lesbian community are fighting for their lives. But in their struggle, they cannot simply turn to the police and courts to protect them. Police dismiss the violence directed against the community and insult and demean lesbian and gay persons who come to them for help.⁴ Sometimes,

* B.A. Yale University, 1988, J.D. Harvard Law School, 1992. Special thanks to Professors Charles Ogletree and Martha Minow, and to Ruth Bolden, Jill Hargis, and Anita Krattinger. Thanks, also, to Alex Cleghorn and the Seattle Q-Patrol.

1. Steve Karpf, *Don't Tread On Us!: The Rise of Community Safety Patrols*, GAY COMMUNITY NEWS, Aug. 11-17, 1991, at 8, 9 (incidents extracted from NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE, ANTI-GAY/LESBIAN VIOLENCE, VICTIMIZATION AND DEFAMATION IN 1990 (1991)).

2. Nina Reyes, *Cops Charged With Brutality Again After Demo*, OUTWEEK, Feb. 27, 1991, at 11.

3. Steve Karpf, *Getting Defensive: Queer Patrols Hit the Streets*, GAY COMMUNITY NEWS, Aug. 11-17, 1991, at 1.

4. See *infra* notes 99-103, 119-123 and accompanying text.

both in and out of uniform, the police are among the attackers.⁵ Even when police bring those who assault gay men and lesbians into the criminal justice system, courts have expressed empathy for the assailants' actions, both explicitly, in the form of judicial opinions, and implicitly, in the form of light sentences.⁶

Abandoned and even assaulted by those charged with protecting them, those in gay and lesbian communities⁷ have taken matters into their own hands; they have organized groups of citizens trained to patrol predominantly gay neighborhoods to deter assaults against members of the community and to directly intervene in bashings when they happen. This self-help effort has met with great criticism both from within and outside of the gay and lesbian community.⁸ The concerns expressed by opponents are weighty, and the stakes of this debate are high. The debate implicates conceptions of individual and community rights to self-help that go to the heart of power struggles in society and of the legitimacy and viability of our legal system. It involves legal, ethical, and practical concerns regarding self-defense, crime control, and levels of violence in and among a heterogeneous society. I attempt here to address these issues in all their complexity, but with constant attention to the urgent need to reach "action-decisions" to combat

5. See *infra* notes 105-117 and accompanying text.

6. See *infra* notes 128-136 and accompanying text.

7. My arguments throughout this paper may be objected to on the grounds that I come dangerously close to essentializing the multiple experiences of gay men and lesbians into a singular "gay and lesbian experience" or "gay and lesbian community" or "perspective." Scholars, activists, and observers both inside and outside the feminist community have criticized the tendency toward essentialism in feminist theory because it seems to posit a singular "woman's experience" that leaves out the experiences of women of color, poor women, and lesbians. See, e.g., Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 907 (1989) ("[T]he feminist project of incorporating 'women's experience' into legal definitions is not as simple as 'one, figure out who or what is 'women'; two, consult women's experience; and three, add it to law and stir.' Women's experiences are diverse and often contradictory.").

The commonality I am ascribing to the gay men and lesbians in this article is that of 1) living in or visiting neighborhoods or businesses that are known as areas where gay men and lesbians congregate and are thus targeted by bashers, 2) knowing about the violence facing the community and feeling threatened by it, and 3) being identified or identifiable as a gay man or lesbian by a basher. To the degree that heterosexuals live, work, or visit with and among the gay community, are aware and afraid of the violence facing the community, and may be mistaken as gay men or lesbians by bashers, they, while not part of the gay and lesbian community *per se*, will have the perspective of a "gay man or lesbian" for purposes of this article. By contrast, individual gay men or lesbians who do not associate with areas known to be gay areas are not aware of the violence facing the gay and lesbian community and are not identified by bashers as gay or lesbian do not share the "gay or lesbian perspective" described here despite being a part of the larger "gay and lesbian community."

8. See *infra* part III.D.

violence against the gay and lesbian community. Ultimately, these are not theoretical issues. The debate plays itself out on the streets far more than in the pages of this article.

I begin in Part II with an investigation of the violence being directed against the gay and lesbian community and the criminal justice system's lack of response, particularly police indifference and even hostility toward the victims of this violence. Part III describes the spectrum of response by the gay and lesbian community and explores in depth one of the reactions: the emergence of street patrols in many gay and lesbian communities. I set out a case study of one particular street patrol, Seattle's Q-Patrol. Working from interviews and personal experience gained in a two month period I spent training and patrolling with the group, I provide a close-up view of who the patrollers are and what they do. Finally, I consider objections raised to street patrols, particularly that street patrols are counterproductive, may degenerate into vigilantism, or may engage in racist behavior.

In Part IV I move from looking at street patrols on the street to street patrols in the criminal justice system. I begin with a discussion of conceptions of "self-help" that have endured from our system's common-law heritage, particularly those justifying self-defense, and argue that these form a strong foundation justifying the gay and lesbian community's active response to the violence it faces. I then work through application of the modern self-defense doctrine that individual lesbians and gay men and patrol members will face if they are prosecuted for using force in resisting gaybashing. I argue that in order to remain true to its conceptual and legitimating foundations, self-defense doctrine should be applied in a manner that takes into account the perspectives of the gay and lesbian community and finds justifiable some actions by gay men and lesbians that may go beyond current measures of appropriate use of force. Finally, I discuss the implications of citizen street patrols on police-community relations and conclude that the patrols are likely to help improve relations between the police and the community.

I conclude by arguing that, taken altogether, the criminal justice system should accomodate and even encourage forceful resistance to gaybashing violence, including methods such as formation of community street patrols.

II. A Community Under Siege

A. The Violence

Hate crimes are assaults, batteries, and other crimes motivated by the race, religion, ethnicity, disability, or sexual orienta-

tion of the victim.⁹ Such assaults tend to be extremely violent; victims of hate crimes are three times more likely to need hospitalization for their injuries than victims of non-bias assaults.¹⁰ Assaultants tend to attack in groups, at an average of four assaultants for each victim.¹¹ The number of such assaults has increased steadily in the past several years¹² and shows no signs of abating.¹³

While hate-motivated attacks on people of color, Jewish people, and gay and lesbian people are similar in that they are motivated by bigotry, are extraordinarily violent, and bring up similar issues regarding the response of the police and criminal justice system, no single article can do justice to the particular history and dynamics of each community. Much has been written recently about hate crimes against racial and ethnic minorities, especially in connection with police neglect and even brutalization of these communities.¹⁴ Although many of the arguments presented here may be applicable to the broader range of communities facing hate-motivated violence, I focus in this article on "gaybashing": the physical assault of persons perceived by the attacker to be gay or lesbian¹⁵ and whom the attacker targets because of their perceived sexual orientation.

While hate-motivated violence generally is triggered by a perception that the victim has crossed a line into the assaultants' territory,¹⁶ gay bashers often go "hunting" for their victims¹⁷ in areas

9. Many have urged that sex or gender belong on this list as well. Several states have expanded their definitions in this manner. See, e.g., MINN. STAT. 606.2231 (1989); 13 VT. STAT. ANN. § 1455 (1991); CAL. CIVIL CODE §§ 51.7, 52b (West 1982). See generally CENTER FOR WOMEN'S POL'Y STUD., VIOLENCE AGAINST WOMEN AS BIAS-MOTIVATED HATE CRIME: DEFINING THE ISSUES (1991).

10. Neal R. Peirce, *Recurring Nightmare of Hate Crimes*, NAT'L J., Dec. 15, 1990, at 3045 (citing the findings of John McDevitt, a Northeastern University criminologist who studied 450 Boston hate crimes).

11. *Id.*

12. See, e.g., *id.*

13. See, e.g., Kathryn Robinson, *The Hate Boom*, SEATTLE WEEKLY, July 17, 1991, at 37 (in 1990, "the Anti-Defamation League of B'nai B'rith logged the highest number of anti-Semitic incidents in 11 years of monitoring").

14. See, e.g., Joseph M. Fernandez, *Recent Development: Bringing Hate Crime Into Focus — The Hate Crime Statistics Act of 1990*, PUB. L. NO. 101 - 275, 26 HARV. C.R.-C.L. L. REV. 261 (1991); Abraham Abramovsky, *Bias Crime: A Call for Alternative Responses*, 19 FORDHAM URB. L.J. 875 (1992). In addition, many of the articles I cite in this paper also refer to racist and anti-semitic assaults.

15. By use of the terms "lesbians and gay men" I do not mean to ignore or exclude bisexuals. I use "lesbians and gay men" as short-hand, and also because attacks on bisexual persons are motivated because of the same-sex sexual activities in which they engage. For a more detailed discussion of gaybashing violence than this article allows, see generally GARY DAVID COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN (1991).

16. Constance L. Hays, *Anti-Gay Attacks Increase And Some Fight Back*, N.Y. TIMES, Sept. 3, 1990, § 2, at 23, 26.

known to be heavily populated with gay men and lesbians or in which gay bars or bookstores are located. "They come here with a purpose They're armed, usually with a baseball bat, a golf club, sometimes a knife or a two-by-four."¹⁸ Men between the ages of sixteen and twenty-five are largely responsible for gaybashing assaults.¹⁹ According to Matt Foreman of the New York Gay and Lesbian Anti-Violence Project, "[t]he best sense we have, and it keeps coming up in a lot of these cases, is that gay-bashing is a fairly hip thing to do these days. It's a sporting event for a lot of young men. It's rare that someone's over twenty-five, and it's always gangs."²⁰ Incidents are especially widespread on college campuses.²¹ Gaybashing incidents have included bombings and attempted bombings of gay and lesbian bookstores²² and danceclubs.²³

Incidents of gaybashing increased markedly throughout the latter half of the 1980s. In 1987, a Justice Department report suggested that violence against lesbians and gay men was probably the most common type of hate crime.²⁴ The rate of gaybashings has continued to increase since then. In 1990, the National Gay and Lesbian Task Force reported a sixty-five percent increase in anti-

17. *Id.*; see also, *Gay Bashings: Eight Nabbed in Chelsea Spree*, NEWSDAY, Sept. 14, 1992, at 5 (quoting New York Human Rights Commissioner Dennis de Leon: "[T]he nature of [gaybashing] bias crime is almost like a hunting ritual where people come into the area to hunt for gay men and lesbians and beat them up.") [hereinafter *Gay Bashings*].

18. Hays, *supra* note 16, at 26.

19. *Id.*

20. *Id.*

21. See, e.g., Evan G.S. Siegel, *Comment: Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351, 1351-53 (1990) (citing Gibbs, *Bigots in the Ivory Tower*, TIME, May 7, 1990, at 104 (reporting 1,411 incidents of "gay bashing" on campus)); Alexander Reid, *Region's Gay and Lesbian Students Discuss Bias, Violence, Activism*, BOSTON GLOBE, Feb. 18, 1990, at 31 (anti-homosexual violence on campus at Northeast colleges); *Group Disciplined for Harassing Lesbian Sorority*, L.A. TIMES, Feb. 11, 1990, at 52 (sexual harassment and threats directed at lesbians at U.C.L.A.); Priscilla Van Tassel, *Rutgers Panel Seeks Ways to Assure Gay Rights*, N.Y. TIMES, Mar. 5, 1989, § 12NJ, at 1 (anti-homosexual violence at Rutgers University).

22. A gay bookstore in Philadelphia was bombed two times in two months during the summer of 1991. *Penn. Bookstore Bombed Again*, GAY COMMUNITY NEWS, Aug. 25-31, 1991, at 2.

23. In May 1990, "three neo-Nazis were arrested for plotting to bomb a Seattle establishment frequented by gays." Linda Keene & Anita Cal, *Hate Crimes on Rise in NW — Homosexuals, Racial Minorities are Targets*, SEATTLE TIMES, June 8, 1990, at B1.

24. Carrie G. Costello, *Legitimate Bonds and Unnatural Unions: Race, Sexual Orientation, and Control of the American Family*, 15 HARV. WOMEN'S L. J. 79, 135 (1992) (citing *A Gay Basher Asks: Why?*, S.F. EXAMINER, June 7, 1989, reprinted in GAY AND LESBIAN ALLIANCE AGAINST DEFAMATION/L.A., HOMOPHOBIA: DISCRIMINATION BASED ON SEXUAL ORIENTATION 6.1 (1989)).

gay violence in New York over 1989 levels.²⁵ In 1991, incidents increased another sixteen percent.²⁶ While the numbers of incidents supplied by the New York City Police Department have been much lower than those reported by gay and lesbian agencies, the department's own figures showed that bias incidents nearly doubled from 1989 to 1990.²⁷ In Boston, anti-gay incidents increased seventy-five percent in 1990.²⁸ In Los Angeles, incidents rose twenty-two percent in 1990²⁹ and another fifty percent in 1991.³⁰ The National Gay and Lesbian Task Force reported 1,822 criminal anti-gay incidents in five major cities in 1991, a thirty-one percent increase over 1990.³¹ Actual numbers of incidents were highest in New York and San Francisco, but the group also reported a 202% increase in the Minneapolis-St. Paul region.³² By the Spring of 1991, New York Attorney General Robert Abrams had identified "psychological and physical violence against gays as the fastest-growing form of bias crime in the nation."³³

Some have suggested that the increase in bashings is due at least in part to an increase in the reporting of incidents.³⁴ Gaybashings have historically been underreported because of victims' fears that reporting such incidents would lead to public exposure of their sexual orientation.³⁵ Police insensitivity can also lead to underreporting, as when officials ask victims for their name and

25. See Evelyn Hernandez, *Gay Bashing Is Up in City, Report Finds*, NEWSDAY, Mar. 7, 1991, at 21; Renee Graham, *86% of Gay Men, Lesbians Polled Report Bias*, BOSTON GLOBE, Mar. 7, 1991, at 27.

26. Dennis Hevesi, *Group Finds a 65% Rise in Bias Crime*, N.Y. TIMES, Feb. 27, 1992, at B4.

27. *Id.*

28. Graham, *supra* note 25, at 27.

29. Duke Helfand, *Attacks on Gays Explored*, L.A. TIMES, Dec. 12, 1991, at J1, J6.

30. Janet Rae-Dupree, *Two Arrested in Attack on Woman, Gay Man*, L.A. TIMES, Mar. 2, 1992, at B1.

31. Lida Poletz, *Antigay Crimes Rise 31%, Study Says, 202% Rise Found in Twin Cities*, STAR TRIB., Mar. 20, 1992, at 7A.

32. *Id.*

33. Robinson, *supra* note 13, at 40.

34. See Karpf, *supra* note 3.

35. Richard Seven, *Gays Plan Anti-Harassment Patrol — Group Cites Increase in Assaults on Capitol Hill*, SEATTLE TIMES, Oct. 12, 1990, at A1; *Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1542 (1989) [hereinafter *Sexual Orientation and the Law*]. Surveys of the gay and lesbian community have suggested that 90% of all gay bashings go unreported. Costello, *supra* note 24, at 136 n.296 (citing *A Gay Basher Asks: Why?*, S.F. EXAMINER, June 7, 1989, reprinted in GAY AND LESBIAN ALLIANCE AGAINST DEFAMATION/L.A., HOMOPHOBIA: DISCRIMINATION BASED ON SEXUAL ORIENTATION 6.1 (1989)). Such exposure carries with it the threat of losing friends, family, jobs, and housing and of opening the victim to increased risk of gaybashing assaults. *Id.*

address in front of their attackers.³⁶ Despite these risks, gay and lesbian community activists have made an effort to encourage people to report assaults against them in order to counter the claims that no problem of violence against gay men and lesbians exists.³⁷ Taken altogether, however, many still believe that the figures represent real increases in levels of violence directed at gay men and lesbians.³⁸

Dry statistics, though alarming, do not communicate the brutality of many of the attacks. Of all hate crimes, attacks on gay men are some of the most brutal: "They frequently involved torture, cutting, mutilation, and beating, and showed the *absolute intent to rub out the human being*."³⁹ Gay men have been beaten with chains, baseball bats,⁴⁰ and metal pipes,⁴¹ slashed with box cutters⁴² and broken bottles,⁴³ stomped,⁴⁴ stabbed, and beaten to death with hammers.⁴⁵ In some instances, the brutality and method of the assault rises to the macabre:

In Kentucky [in September, 1990,] assailants beat a young gay man with a tire iron, locked him in a car trunk with a bunch of snapping turtles and then tried to set the car on fire. He was left with severe brain damage.⁴⁶

36. See, e.g., *Gay Bashings*, *supra* note 17, at 5. See also note 87 and accompanying text.

37. See Hernandez, *supra* note 25, at 21; Graham, *supra* note 25, at 27.

38. Hernandez, *supra* note 25, at 21 (although gay and lesbian agencies reported more anti-gay episodes than the police, both the agencies' and the police's figures illustrated marked increases in the numbers of such acts over the previous year).

39. Robinson, *supra* note 13, at 38 (quoting the director of victim services at Bellevue Hospital in New York). See also Stephanie Chavez, *Hate Crimes Set a Record in L.A. County*, L.A. TIMES, Mar. 20, 1992, at A1.

40. Helfand, *supra* note 29; Elaine Herscher, *Anti-Gay Violence Growing in San Francisco, Rights Reports Say Thirty-one Percent Increase Nationally Last Year*, S.F. CHRON., Mar. 19, 1992, at A16.

41. Joe Haberstroh, *The Victims of Gay-Bashing — Speakers at Meeting Criticize Lack of Assistance from Police*, SEATTLE TIMES, Oct. 31, 1990, at E1; *Five Held in Alleged Gay-Bashing Incident*, STAR TRIB., July 28, 1992, at 1B (tire irons and steel pipes used as weapons).

42. Karpf, *supra* note 1, at 9.

43. Rose Marie Arce, *Anti-Gay Violence Up*, NEWSDAY, June 29, 1992, at 61.

44. Patrick McCartney, *Ventura County News Roundup: Port Hueneme: Victim of Gay Bashing Sues City*, L.A. TIMES (Venture County ed.), May 20, 1992, at B3 (54-year-old man "kicked and beat[en] so hard that most of the bones in his face were broken and had to be replaced by metal plates").

45. See *Nightline: Violent Hate Crimes Against Gays* (ABC television broadcast, Jan. 26, 1990) (interview with Randy Schell, Victim Counselor) [hereinafter *Nightline*]; Karpf, *supra* note 1, at 9. See also *Sailors Avoid Second Trial, Admit Assaulting Gay Men*, L.A. TIMES (San Diego County ed.), Nov. 21, 1991, at B8 (Navy sailors attacked men in a gay bar with pool cues and a brick, and broke one man's jaw with a bottle.).

46. Peirce, *supra* note 10. See also Larry Tye, *Hate Crimes on Rise in US*, BOSTON GLOBE, July 29, 1990, at 1.

[In] a series of attacks in San Francisco, in a park, . . . people's testicles were removed and were stuffed in their mouths.⁴⁷

Two men shouting anti-gay slurs punched a gay man, stepped on his face with spiked shoes and beat him with tree branches. One assailant also gouged his finger into the victim's eyes and poked a stick into the victim's eardrum, puncturing it.⁴⁸

Whatever the method, the damage inflicted in gaybashings is usually severe. Victims who were not killed have been left with multiple skull fractures,⁴⁹ brain damage, punctured lungs, and blindness.⁵⁰ In most bashings, the violence is accompanied by anti-gay slurs⁵¹ or claims by the bashers that they are "going to teach [the victim] a lesson" or "kill the faggot."⁵²

The hostility toward gay men and lesbians that seems to spur bashers to commit such acts of brutality may extend beyond the gay man or lesbian who is the direct target of an assault to their families and supporters. In one case, "[a] woman walking with her son was pelted with food by four men in a passing car. One of the men yelled, 'I bet you're proud of your dyke mom, little boy!'"⁵³ Despite the presence of the young boy, one of the men "got out, unzipped his pants, [and] made obscene gestures."⁵⁴

Attacks against lesbians often include sexual assault or rape, and assailants commonly call the woman a "dyke" and insist she "needs a real man."⁵⁵ Lesbians are also subject to the violence that is directed against many women, regardless of whether they are lesbian or heterosexual, by men they know.⁵⁶ In one such case, a lesbian's former boyfriend beat her and her lover unconscious. The attack fractured one woman's skull in five places, and necessitated extensive reconstruction surgery.⁵⁷

47. *Nightline*, *supra* note 45 (interview with Randy Schell).

48. Karpf, *supra* note 1, at 9.

49. Kay Longcope, *Reports of Antigay Violence Rising in State, Nation*, BOSTON GLOBE, June 8, 1990, at 19, 24; Karpf, *supra* note 1.

50. Karpf, *supra* note 1, at 9.

51. *See, e.g., id.*; Keene & Cal, *supra* note 23, at B1.

52. Karpf, *supra* note 1, at 9.

53. *Id.*

54. *Id.*

55. *See id.* ("Chicago: Three men grabbed a lesbian on her lunch hour, called her a 'dyke,' told her she needed sex from 'real men' and sexually assaulted her. She fought back and was able to escape." "Santa Cruz, Calif.: A man jumped a woman riding her bicycle, attempted to rape her, and said to her, 'I've been sent here to kill lesbians.'") *See generally*, RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW*, 145-155 (1992) (discussing violence against lesbians).

56. *See, e.g., D.J. Charged in Reporter's Slaying*, UPI, Sept. 17, 1992, available in LEXIS, Nexis Library, UPI File (lesbian's ex-boyfriend stalked and stabbed her to death, despite court order directing him to stay away from her).

57. Longcope, *supra* note 49.

Lesbians and gay men may not be able to escape the violence even by avoiding gay areas or staying in their own homes. Assaults by hostile neighbors are common,⁵⁸ and gay couples have been forced to move by constant verbal and physical harassment and even death threats:

Ft. Lauderdale, Fla.: A gay male couple in Ft. Lauderdale was forced out of their home after repeated harassment and threats by neighbors. Attacks against the men included a rock thrown through the window with the message "Move Out You Fags" painted on it. Neighbors also dumped beer cans and glass shards in their pool, mowed down trees and flowers, and shot arrows at them when they sat in the back yard.⁵⁹

Baltimore: A gay male couple was forced to move after months of harassment and efforts at intimidation. They were subjected to taunts, insults and pelted with objects. A window in their home was smashed, a fence torn down, one of their cars rolled on its top, and another spray painted with the word "queer." At one point, a crowd of thirty neighbors gathered outside their house and warned the couple to either leave or be killed.⁶⁰

The effect of gaybashing assaults on victims of such violence goes beyond the immediate damage that would accompany more random assaults. Because the assaults target victims for their individual and community identity, bashings result in severe emotional and psychological trauma not only to victims of such violence but to all members of gay and lesbian communities.⁶¹

Violence against gay men and lesbians is increasing, but the reasons are disputed. One theory suggests that bashings are encouraged by the perception of "the homosexual as victim. There is a perception that gays are weak."⁶²

58. See Keene & Cal, *supra* note 23 (lesbian's teenage neighbor screamed anti-gay slurs at her and punched her in the head); Matt Nagle, "Video Basher" Turns Himself in, Gets Sued, SEATTLE GAY NEWS, July 19, 1991, at 10 (gay man repeatedly harassed by 18-year-old neighbor, culminating in brutal beating of the gay man on his own front yard); Jacob Smith Young, *Light Sentence for Video Gay Basher*, GAY COMMUNITY NEWS, Sept. 1-14, 1991, at 2.

59. Karpf, *supra* note 1, at 9.

60. *Id.* See also Bob Lewis, *Gays Brave Censure, Plan to Open Resort*, L.A. TIMES, Nov. 8, 1992, at A39 (after learning that a gay couple in Kentucky planned to open an inn catering to gay men, townspeople hung effigies from trees along their driveways and left threats on their answering machine that "men armed with deer rifles and grenades would attack the 10-acre resort."); Richard Meryhew, "Gay-Bashing" Outburst Has Winona Concerned, STAR TRIB., Jan. 13, 1992, at 1B (apartment where group of young men perceived to be gay lived had window shot out, gasoline lit on property "spelling out in flames the name of one of the teenagers who frequent the place"; then 30 people gathered in front of their apartment "waving baseball bats and clubs and hollering 'Kill the faggots, kill the faggots.'").

61. See Abramovsky, *supra* note 14, at 885-86.

62. Telephone Interview with David Chinello, founding Chapter Coordinator, Seattle Q-Patrol (July 2, 1991) [hereinafter *Chinello Interview*].

Some suggest that a general social climate that accepts hatred of sexual minorities is responsible. Gay activists have laid some of the blame for anti-gay bias and bashing on Hollywood portrayals of lesbians and gay men as dangerous, psychopathic villains.⁶³

Others believe the violence is a backlash against the increased visibility of gay men and lesbians⁶⁴ that is further fueled by the perception that AIDS is a "gay disease."⁶⁵ But in a 1988 study by the State of New York for the Governor's Task Force on Bias-Related Violence, psychologists disputed the perception that the rise in antigay violence is a result of the AIDS epidemic. While researchers suggested that AIDS had offered "a convenient hook on which [bashers] can hang their pre-existing prejudices,"⁶⁶ they traced the underlying hostility to feelings of fear and self-righteousness. The study found that defensiveness or insecurity about one's own sexuality motivated many attackers. But it also found that the largest groups of persons biased against lesbians and gay men are those for whom homosexuals "stand as a proxy for all that is evil Such people see hating gay men and lesbians as a litmus test for being a moral person"⁶⁷ For those who ultimately act out their feelings violently, such self-righteousness "overcomes the normal inhibitions against aggression."⁶⁸

Author Bette Greene, who conducted extensive interviews with persons serving sentences for gaybashing, concluded that the teachings of many churches were a source of the hatred many violent perpetrators felt against lesbians and gay men. She, too, noted the self-righteousness of the assailants, "their feeling that they were doing something society would approve of — or at least silently condone."⁶⁹ Church teachings condemning homosexuality

63. Janice C. Simpson, *Out of the Celluloid Closet: Gay Activists are on a Rampage Against Negative Stereotyping and Other Acts of Homophobia in Hollywood*, TIME, Apr. 6, 1992, at 65; Lewis Beale, *Lesbian Killers on the Movie Screen: Gay Activists in the Streets*, NEWSDAY, Mar. 15, 1992, at 7.

64. Graham, *supra* note 25, at 46 (quoting Kevin Cathcart, executive director of Boston's Gay and Lesbian Advocates and Defenders: "Any time a marginalized or oppressed group seeks to organize for equality . . . there's a backlash. It's a guerrilla war being waged against lesbian and gay people to 'keep them in their place.'").

65. See *Chinello Interview*, *supra* note 62; David Tuller, *Lesbians, Gays Look Beyond AIDS*, S.F. CHRON., Nov. 13, 1990, at A1.

66. Daniel Goleman, *Homophobia: Scientists Find Clues to Its Roots*, N.Y. TIMES, July 10, 1990, at C11.

67. *Id.* (quoting Dr. Gregory Herek, a psychologist at the University of California at Davis).

68. *Id.* (quoting Dr. Bob Altmeyer, a psychologist at University of Manitoba).

69. Bruce McCabe, *Probing the Causes of Gay Bashing*, BOSTON GLOBE, May 4, 1992, at 34, 38 (interview with Bette Greene, author of *THE DROWNING OF STEPHEN JONES*, a novel based on the 1984 incident in which a group of teenagers in Maine threw a gay man off a bridge to his death, despite his pleas that he couldn't swim).

sometimes actively encourage violence against lesbians and gay men. One white supremacist church reportedly has disseminated a booklet titled "Death Penalty for Homosexuals Is Prescribed in the Bible."⁷⁰ A letter accompanying the book states: "When the truth contained in this booklet is embraced by society, and it will be, there's going to be a big rock party held on behalf of the perverts and their allies."⁷¹

The increase in violent incidents has also been linked to the open, vocal criticism of lesbians and gay men in recent political campaigns.⁷² A study conducted by the Philadelphia Lesbian and Gay Task Force reported increased violent attacks in the four days following the 1992 Republican Convention,⁷³ in which several speakers expressed open hostility to gay men and lesbians.⁷⁴

The political environment in Oregon and Colorado, where referenda to prevent or roll-back protections based on sexual orientation were on the 1992 ballot, has contributed to increased violence in those states. In Oregon, voters narrowly defeated Ballot Measure 9, which would have prohibited state protection in civil rights or hate crimes laws based on sexual orientation, classified homosexuals as "abnormal, wrong, unnatural and perverse," and would have required educators to equate homosexuality with pedophilia, sadism, and masochism, and to condemn all these behaviors.⁷⁵ The campaign sparked a wave of violence, including a firebombing that killed an African-American lesbian and a white gay man.⁷⁶ A similar wave of violence was reported in Colorado after voters passed Measure 2,⁷⁷ which repealed all civil rights protections for lesbians and gay men throughout the state.⁷⁸ According to activists in the state: "It was like a switch was thrown Nov. 3, and suddenly after then people could be intolerant . . ."⁷⁹ The Gay and Lesbian Com-

70. Irene K. Hislop, *View of an Enemy*, JUST OUT, Nov. 1992, at 12.

71. *Id.* ("Rock party" is a reference to the biblical punishment of stoning to death lawbreakers).

72. Sally Ann Stewart, *Hate Crimes: 'Litany of Shame,'* USA TODAY, Mar. 13, 1992, at 3A (quoting David Smith: "Pat Buchanan and David Duke are on TV every night and they make hate legitimate.").

73. *Study: Discrimination and Violence Against Gays Continues*, UPI, Sept. 30, 1992, available in LEXIS, Nexis Library, UPI File.

74. Turque, et. al. *Gays Under Fire*, NEWSWEEK, Sept. 14, 1992, at 36.

75. Timothy Egan, *Violent Backdrop for Anti-Gay Measure*, N.Y. TIMES, Nov. 1, 1992, at 40; Turque, *supra* note 74, at 36.

76. Egan, *supra* note 75, at 40.

77. John Gallagher, *Colorado Goes Straight to Hell*, THE ADVOCATE, Feb. 23, 1993, at 40 (quoting Tony Ogden, head of Equality Colorado).

78. *Id.* at 34.

79. *Id.* at 40.

munity Center of Colorado reported a 275% increase in bias-crime complaints after the measure passed.⁸⁰

Another theory blames the increase in violence on the serious failure of the criminal justice system and the gay and lesbian community to respond forcefully to bias crimes when they happen. Under this theory, bashers believe they are free to act out their hatred of gay men and lesbians because they will not suffer personal injury or legal consequences for gaybashing assaults.⁸¹

B. *Lack of Response by the Criminal Justice System*

Gay men and lesbians have been left to care for themselves in the face of the assaults against them. In some cases, crowds have simply watched an assault and done nothing to intervene.⁸² While the absence of intervention by bystanders is perhaps understandable and is not limited to gaybashing assaults,⁸³ much more disturbing is a widespread failure of the police to come to the aid of the victims of gaybashings. Those in the gay community believe that "law enforcement just isn't taking hate violence and anti-gay violence in particular seriously."⁸⁴ Police tend to ignore gaybashing and sometimes even assault gay men or lesbians themselves.⁸⁵ Even if gaybashers are brought to trial, their actions are often excused by judges or juries.⁸⁶

It is not as though gaybashers are never apprehended or punished. A nineteen-year-old man who assaulted and robbed a gay man, fracturing the victim's skull with a baseball bat, was convicted in Washington, D.C. and given maximum consecutive sentences of ten to thirty years for assault with intent to kill and five to fifteen years for armed robbery.⁸⁷ Two accomplices in the murder of a gay man in Queens, New York, were convicted of second-degree murder and sentenced to twenty-five years to life in

80. *Id.*

81. Interview with "Poet," member, Seattle Q-Patrol (July 1991)[hereinafter *Poet Interview*].

82. Nina Reyes, *Reign of Terror*, OUTWEEK, Oct. 17, 1990, at 34-35 ("Two lesbians embracing on a corner of Sixth Avenue [Manhattan] were surrounded by a gang of 12 teenage boys and girls who kicked them to the ground while spectators silently watched the brutal beating.").

83. See, e.g., Susan J. Hoffman, Note, *Statutes Establishing a Duty to Report Crimes or Render Assistance to Strangers: Making Apathy Criminal*, 72 Ky. L.J. 827 (1983-84); Jack Wenik, Note, *Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime*, 94 YALE L.J. 1787 (1985).

84. *Nightline*, *supra* note 45 (interview with Kevin Berrill, Director, Anti-Violence Project, National Gay and Lesbian Task Force).

85. See *infra* notes 105-117 and accompanying text.

86. See *infra* notes 128-43 and accompanying text.

87. *Man Gets Prison Term in 'Gay Bashing'*, WASH. POST, Jan. 17, 1990, at B8.

prison for their role in luring the man into a school yard and beating him with a hammer, wrench, and beer bottle while a third man stabbed him to death. The third, who became a state witness, pled guilty to manslaughter and was sentenced to eight to twenty-five years.⁸⁸

Another positive development was the passage, after years of lobbying, of the federal Hate Crime Statistics Act, signed by President Bush in 1990.⁸⁹ The law requires that the Justice Department collect any available bias-crime statistics from state, local, and federal police and publish the information in its Uniform Crime Report survey. But no federal law requires state and local agencies to collect or report hate crime data.⁹⁰ When the FBI released its first national report under the Hate Crime Statistics Act in early 1992, civil rights groups and law enforcement officials agreed that the report was "virtually useless" because of a lack of cooperation by local governments and law enforcement agencies.⁹¹ Even states that require collection of hate crimes data or that provide enhanced penalties for bias-motivated attacks often do not include reporting or protection for attacks based on the sexual orientation of the victim.⁹² In addition, the constitutionality of hate crimes statutes has been challenged, and their future is unclear.⁹³

88. *Two Accomplices Guilty of Murder In 'Gay Bashing' Case in Queens*, N.Y. TIMES, Nov. 21, 1991, at A1; *Two Get Life Sentences in Gay-Bash Murder*, Reuters, Jan. 10, 1992, available in LEXIS, Nexis Library, Reuter File.

89. Hate Crime Statistics Act, Pub. L. No. 101-275, 104 stat. 140 (codified as amended at 28 U.S.C. § 534 note (Supp. III 1992)); Dana Priest, *FBI Chief Cites Work on Hate Crimes; Gay Rights Activist Pleased With Agency's Invitation, Attitude*, WASH. POST, Apr. 5, 1991, at A17.

90. Priest, *supra* note 89, at A17.

91. Stephen Labaton, *Poor Cooperation Deflates F.B.I. Report on Hate Crimes*, N.Y. TIMES, Jan. 6, 1993, at A10.

92. Longcope, *supra* note 49. As of January, 1992, 13 states and the District of Columbia had hate crime statutes that extended protections to sexual orientation. Robert B. Mison, Comment: *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 172 n.286 (1992).

93. In *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2548 (1992), the Supreme Court struck down a statute that made it a misdemeanor to place on property a symbol that "arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender." *Id.* at 2541. In *Wisconsin v. Mitchell*, 113 S.Ct. 2194 (1993), the Court upheld a penalty enhancement statute that increased a convicted assailant's sentence when the defendant selects a victim on the basis of race, religion, color, disability, sexual orientation, national origin, or ancestry. The Court reasoned that "a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment." *Id.* at 4577. The effect of the Court's decisions on attempts by states to address the problem of bias crimes is still unclear. See generally Eric J. Grannis, Note, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes*, 93 COLUM. L. REV. 178 (1993); Edward Comitz, Comment: *Extinguishing the Burning Crosses: Washington's Malignant Harassment Statute in Light of the Issues of Overbreadth and Vagueness*, 16 U. PUGET SOUND L. REV. 373 (1992). The outcome of that debate does not materially

All law enforcement efforts that touch on issues of sexual orientation take place against a background context of hostility and mistrust. There is a long history of antagonism between the police and the gay and lesbian community:⁹⁴

You have to understand . . . that historically it was always us, the gays and lesbians, against them, the cops.

You see, it was the Police Department that was used to impose society's anti-gay prejudices. We didn't have churches or, in most cases, family homes to gather in. And so bars became our meeting places. And it was the bars that the cops constantly raided.

So here we were, being denied our rights to assemble and, in the process, sometimes being beaten up and always threatened with public exposure. We lived in constant terror of the police, and we carried this feeling in our heads.⁹⁵

In fact, raids, assaults, and insults *by police* sparked the emergence in 1969 of an organized gay and lesbian rights movement.⁹⁶ Tired of being hounded by police and energized by the civil rights movement, gay male transvestites and their supporters organized politically after three days of rioting started by a police raid on the Stonewall bar in Greenwich Village, New York.⁹⁷

More recent actions by law enforcement officers have continued to fuel resentment, distrust, and outright fear of the police by people in the gay and lesbian community. After the release of the videotape showing the beating of Rodney King on March 3, 1991, by Los Angeles police, gay and lesbian activists decried the media's failure to include in their other criticisms the homophobia of Chief Daryl Gates and officers of the Los Angeles Police Department (LAPD).⁹⁸ The gay and lesbian press reported that Gates told the chief of the Monterey Park Police that "homosexuals *are* evil, and they *do* evil"⁹⁹ and asserted that lesbians and gay men have "provided more complaints that have been unfounded than any other group I've known — not just unfounded, but way-out complaints

affect the analysis and arguments set forth in this article, which are based on the separate doctrine of self-defense and permissible citizen response to direct assaults, rather than state prohibition, categorization, or punishment of speech and acts. However, if states are restrained in their ability to address bias-motivated violence, violent attacks on gay men and lesbians may well increase even further, strengthening the arguments set forth here.

94. See *Sexual Orientation and the Law*, *supra* note 35, at 1542.

95. Barbara Delatiner, *From Dune Patrols to Gay-Rights Class*, N.Y. TIMES, Oct. 7, 1990, at 12.

96. See JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-1970* (1983).

97. *Id.*

98. Andy Mangels, *The Key to the Gates: A Look at Homophobia in the LAPD*, OUTWEEK, May 8, 1991, at 35.

99. *Id.* at 37 (emphasis in original).

that just didn't occur."¹⁰⁰ Gates reportedly assigned 150 vice officers to arrest gay men cruising in Griffith Park and at the same time refused to allow any of the officers to target or arrest gaybashers in the park.¹⁰¹ Instead, one former officer claims that officers often bragged about releasing gay-bashers they apprehended.¹⁰² Against this background, people in the community were enraged when the police called the stabbing murder of a gay man in front of a gay bar in a gay neighborhood a "random" attack¹⁰³ rather than an anti-gay assault. The resulting distrust of police leaves many unwilling to report assaults against them.¹⁰⁴

In addition to letting bashers go free, officers of the LAPD are known to engage in bashing themselves, in uniform. The Los Angeles Gay and Lesbian Community Services Center reported five incidents in which officers assaulted gay men or lesbians in the thirty days prior to the King beating, including an incident in which officers allegedly cracked the ribs of a gay man while he was handcuffed.¹⁰⁵ Many are afraid to complain, fearing retribution or, at the least, that they will not be believed.¹⁰⁶ This fear seems reasonable when one hears the reports of a former LAPD officer: "Gays are considered anti-police, so no matter if a hundred thousand gays came forward who say a police officer beat someone, and the officer said, 'I didn't do it,' the officer's word would be taken with the same credibility or more than the hundred thousand gays."¹⁰⁷

The LAPD is reportedly just as hostile to its own members when it learns they are gay. In one incident, two officers admitted that after a fellow officer's homosexuality became known, officers in his division met and "decided not to back up the 'fag,' in the hopes that he would be killed."¹⁰⁸ The officer left the force after receiving death threats and failing to receive back-ups on calls where the absence of support units could have been fatal.¹⁰⁹

New York City police have an equally bad reputation in the gay and lesbian community for ignoring complaints of bashings or releasing assailants despite the willingness of the victim to press

100. *Id.*

101. *Id.*

102. *Id.*

103. David Haldane, *Gays See Attacks Rising: Long Beach Stabbing Triggers Up-
roar: Police Call Attack Random*, L.A. TIMES, Aug. 5, 1990, at J3.

104. *Id.* at J3.

105. Karen Ocamb, *LA's Queer Response*, OUTWEEK, May 8, 1991, at 41.

106. *Id.*

107. Mangels, *supra* note 98, at 38.

108. *Id.* at 35.

109. *Id.*

charges.¹¹⁰ As in Los Angeles, New York police officers themselves have assaulted gay men and lesbians. In February, 1991, New York police officers arrested, verbally abused, spat on, and beat up an activist who was on a "guerilla action"¹¹¹ for ACT-UP.¹¹² The man was subjected to constant verbal abuse during the thirty-two hours he was in custody.¹¹³ Two weeks after that incident, at a rally held to protest the abuse, a line of police officers pulled their nightsticks and charged demonstrators.¹¹⁴ The demonstrators immediately sat down, but three of them were taken into custody. One of the men taken into custody was beaten severely enough by police officers that he was admitted to a hospital after being released from custody.¹¹⁵ Judge Edgar G. Walker of the Manhattan Criminal Court later dismissed assault and disorderly conduct charges against a victim of police clubbing at the demonstration, stating that the police conduct captured in a videotape of the incident showed "lawless behavior of those sworn to uphold the law."¹¹⁶

Incidents of attacks by police officers have been reported in other cities, as well. In Chicago, an off-duty police officer severely beat a gay man while screaming, "This is what I do to faggots."¹¹⁷ In Salt Lake City, three uniformed county police officers shouted anti-gay epithets, then assaulted two gay men. One of the officers reportedly said during the assault that there was a "homosexual problem" in the city.¹¹⁸

Activists also contend that the incident in which Milwaukee police officers returned a drugged, naked, bleeding, fourteen-year-old, Asian-American boy to the apartment of serial killer Jeffrey Dahmer showed the contempt in which the police hold the gay and

110. See Reyes, *supra* note 82, at 35:

[S]ix gay men walking home from a club . . . were set upon by a gang of more than a dozen young thugs yelling anti-gay epithets. One youth then pulled out a gun, put it to one of the gay men's heads and threatened, "Next time, I'll blow you away." The sole basher taken into custody following the assault was released after a 6th Precinct cop allegedly told the gay man that if he persisted in pressing charges against his attacker, counter-charges would be filed against him.

111. While the specific action in this case was not described in news reports, such actions usually consist of illegal posterizing or spray-painting stencils on buildings or sidewalks.

112. Reyes, *supra* note 2, at 10-11.

113. *Id.* at 11.

114. *Id.*

115. *Id.* at 10-11.

116. James Barron, *Judge Denounces 'Lawless' Beating by Police at Rally*, N.Y. TIMES, Oct. 1, 1991, at B1. The clubbing left the man with chronic pain and epileptic seizures. *Id.* at B4.

117. Karpf, *supra* note 1, at 9.

118. *Id.*

lesbian community.¹¹⁹ In reporting the incident, "the officers involved apparently joked and laughed about the incident with the dispatcher. 'Intoxicated Asian, naked male. Was returned to his sober boyfriend,' said a policeman, who added that his partner 'is going to get deloused.'"¹²⁰ Community leaders charged that this was only the most recent incident after "years of bigotry and neglect"¹²¹ of the gay and lesbian community by the police, especially towards gay men and lesbians of color.¹²² The incident was seen as another example that gay men and lesbians cannot rely on the police to come to their aid, even in life-threatening situations.¹²³

Some police forces have made efforts to respond to the violence against the community and to reduce officer hostility against gay men and lesbians. Community relations with the police have improved in areas where police forces have instituted sensitivity training and screened recruits for anti-gay bias,¹²⁴ or where active efforts have been made to arrest bashers. In Houston, for example, the gay community praised the police for instituting a sting operation in a primarily gay area that had been the site of numerous bashings.¹²⁵

In addition to police hostility, the gay and lesbian community charges that prosecutors often fail to act against bashers. For example, in 1991, Cleveland prosecutors claimed they did not have enough evidence to prosecute a bashing suspect even though the victim had identified the suspect's car and a blood-stained shirt had been found inside.¹²⁶ Studies of the effects of racism on prosecutorial decisions have shown that "prosecutors are more rigorous in their investigation of cases involving white victims than they are of cases involving Black victims There has also been a suggestion that there may be a greater tendency among prosecutors

119. Alex Prud'homme, *Did They All Have to Die?*, TIME, Aug. 12, 1991, at 28.

120. *Id.*

121. *Id.*

122. *See id.*

123. *See* Mary T. Schmich, *A Case of Sadism, Indifference: Attacks on Atlanta Gays Raise Doubts about Police Response*, CHI. TRIB., Aug. 3, 1991, § 1, at C1; Richard Greer, *Homosexuals: Police Drag Feet When They Don't Like the Victim*, ATLANTA J. & CONST., Aug. 5, 1991, at A11. Activists also claim that police ignored for ten years attacks by the "Handcuff Man" who stalked, drugged, beat, and lit on fire gay male hustlers in Atlanta, despite many leads suggesting the identity of the man who, in 1991, was apprehended and pled guilty to the attacks. Schmich, *supra*, at 1.

124. *See, e.g.*, Delatiner, *supra* note 95, at 12 (on improved relations between police and the gay community in East Hampton, New York).

125. *Houston Police Set Trap to Catch Gay Bashers*, SEATTLE GAY NEWS, Aug. 16, 1991, at 4 (reprinted from the *New York Times*). Within the first four days of the decoy operation, two officers were sprayed with chemical mace and one was beaten with a baseball bat by groups of young men, resulting in thirteen arrests. *Id.*

126. Schmich, *supra* note 123, at 2.

to accept the decision of minority assault victims to forego prosecution rather than those of the white assault victims."¹²⁷ These results of prosecutor racism suggest that prosecutor homophobia causes similar outcomes.

Even when the police respond by arresting bashers, and even when prosecutors bring and win cases, courts do not always enforce the laws. In one case, Dallas Judge Jack Hampton sentenced a man who murdered several gay men to thirty years imprisonment instead of a life sentence.¹²⁸ The judge seemed to excuse the defendant for his actions by saying that "the victims were 'queers' looking for teenage boys."¹²⁹ According to the judge, "had the victims 'not been out there trying to spread AIDS around, they'd still be alive today.'"¹³⁰ Although the state censured the judge for his remarks, he still sits on the bench in Texas.¹³¹ One demonstrator protesting Judge Hampton's remarks was outraged by its possible consequences: "[I]n essence, by his sentence, [the judge is saying] that it is okay to grab a gun, go down and shoot a bunch of queers."¹³²

When eighteen-year-old Joshua Huff was convicted on charges of perpetrating a hate crime and assault and battery for beating his gay neighbor, a crime that carried a maximum penalty of four-and-a-half years in the custody of the California Youth Authority, Judge Thomas Edwards sentenced Huff to only ten months at a boy's ranch.¹³³ The sentencing provoked an especially strong reaction from the gay community because the bashing had been recorded by a video camera that captured the brutality of a beating that left the victim with a broken nose, neck injuries, bruises on the head and body, two black eyes, and a split lip.¹³⁴ A Boston judge sentenced three Boston teenagers who pled guilty to attacking and beating two gay men to three years probation and \$757 each in restitution and fines.¹³⁵ Another three men convicted of kicking and beating a gay man so badly that they broke most of the bones in his face were, under California law, subject to sentences of up to seven years in

127. Tanya Kater Hernández, Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence"*, 99 YALE L.J. 845, 853-54 (1990).

128. *Nightline*, *supra* note 45; *Judge is Censured Over Remark on Homosexuals*, N.Y. TIMES, Nov. 29, 1989, at A28 [hereinafter *Judge is Censured*].

129. *Judge is Censured*, *supra* note 128, at A28.

130. *Case Against Texas Judge Will Be Public*, WASH. POST, May 12, 1989, at A14.

131. *Judge is Censured*, *supra* note 128, at A28.

132. *Nightline*, *supra* note 45.

133. *Light Sentence for Video Gay Basher*, *supra* note 58, at 2.

134. See Nagle, *supra* note 58, at 10. *Id.*

135. David L. Schutz, *Two Plead Guilty in Attack on Gays: Probation, Fine Draw Victims' Ire*, BOSTON GLOBE, Apr. 22, 1991, at 71.

state prison unless the judge found that a lighter sentence was required in "the interest of justice." Citing the youth of the assailants, who were 18 and 20, and their lack of criminal records, the judge sentenced them each to one year in the local jail and five years of probation.¹³⁶ These cases indicate widespread toleration by the legal system of violent assaults against lesbians and gay men.¹³⁷

One of the most disturbing developments on the adjudication side of the criminal justice system has been the invention of the "homosexual panic" defense, invoked where a defendant claims that his assault on a gay man was an involuntary response to the victim's sexual advance toward the defendant.¹³⁸ Through this insanity defense,¹³⁹ men charged with assaulting or killing gay men have claimed that their actions are excused by a psychological disorder.¹⁴⁰ "The 'homosexual panic' defense [says] . . . that the defendant's 'responsibility for the crime was diminished by a pathological condition' (insecure sexual identity), perhaps triggered by an unwanted sexual advance from the man he attacked. Whether the victim was in fact gay, or had made an advance, is beside the point"¹⁴¹ While appellate courts have not invoked homosexual panic as a basis for acquitting any defendant, it appears that "the defense has nevertheless served as an unstated basis for acquittals in homicide cases involving gay victims."¹⁴²

Novel defenses such as homosexual panic that rely on psychological theories may not even be necessary for defendants to escape serious punishment. The centuries-old provocation defense has been invoked by defendants at trial or in sentencing to avoid or reduce culpability for assault or murder. In 1983, two college students convicted for torturing a gay man by slicing his testicles with a knife were sentenced to four hundred hours of community service.

136. Gary Gorman, *Three Former Seabees Get One Year in Beating of Gay Man*, L.A. TIMES, Oct. 26, 1991, at B1.

137. See, e.g., Doris Sue Wong, *Man Admits Theater-District Attack on Gays*, BOSTON GLOBE, Apr. 18, 1992, at 18 (a light sentence "sends the message to society that you can go out and do anything to anybody you want and get away with it").

138. *Sexual Orientation and the Law*, *supra* note 35, at 1542.

139. Mison, *supra* note 92, at 134 n.6.

140. *Id.*

141. Joseph Coates, *Bringing Clarity to an Elusive Reality*, CHICAGO TRIBUNE, May 2, 1991, at C3 (quoting Eve Kosofsky Sedgwick, *EPISTEMOLOGY OF THE CLOSET*). See also Mison, *supra* note 92 at 134 n.6 ("This psychotic reaction causes the defendant temporarily to lose the capacity to distinguish right from wrong, thereby absolving the defendant of criminal responsibility.") (citing Robert G. Bagnall, et. al, Comment, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497, 499 (1984)).

142. *Sexual Orientation and the Law*, *supra* note 35, at 1542-43.

The judge explained that the incident was a reaction to a sexual proposition by the victim.¹⁴³ In Michigan, a seventeen-year-old who had kicked a gay man in the face, gone home, then returned with a sledgehammer he used to kill the man was acquitted by a jury on the grounds that the homicide was a reaction to a sexual advance. The acquittal came despite evidence that led the judge to state that he "would have found first degree murder if it had been a bench trial."¹⁴⁴ One defendant even sought to invoke the provocation defense where he had not been the object of a sexual advance. Steven Roy Carr was convicted and sentenced to life for shooting two women at their secluded, Appalachian Trail campsite. Rebecca White was shot twice by Carr's sniper fire and died. Her lover, Claudia Brenner, was hit five times but managed to walk four miles to safety. Carr appealed his conviction, claiming that he was "provoked by seeing two lesbians having sex."¹⁴⁵

The criminal justice system and society at large generally have not recognized or addressed violence directed against the gay and lesbian community. Recent anti-gay sentiments voiced openly by political leaders, attempts to roll back legal protections, and developments such as the homosexual panic defense further fuel the perception among those in the gay and lesbian community that those in society who are supposed to protect them will not and that institutions of justice allow or excuse violence against lesbians and gay men to the point of condoning or encouraging such attacks. Given the history described above, this perception seems to accord with reality.

III. Community Response

A. Mobilization Against the Violence

In this vacuum of response, gay men and lesbians have been left to fend for ourselves, and talk of community self-arming — quite separate from community self-defense — has once again burbled up in discussions about what we can do to protect ourselves. It began with talk of bashing back, grew to community patrols and when even that clearly did not deter the at-

143. Donna Minkowitz, *Murder Will Out - But: It's Still Open Season on Gays*, NATION, Mar. 23, 1992, at 368.

144. *Id.*

145. *Nightline*, *supra* note 45; see generally Mison, *supra* note 92, at 136 (arguing that "the homosexual-advance defense is a misguided application of provocation theory and a judicial institutionalization of homophobia" and that "judges should hold, as a matter of law, that a homosexual advance is not sufficient provocation to incite a 'reasonable man' to kill").

tacks, escalated to debates about the comparative advantages of getting guns.¹⁴⁶

The increase in assaults and their brutality help measure the extent of the threat felt by those in the gay and lesbian community. A survey of 1,300 Massachusetts lesbians and gay men revealed that eighty-six percent had been victimized by anti-gay violence.¹⁴⁷ In Boston, "the fear is incredible Gay bashing has become an epidemic."¹⁴⁸ One community organizer in Boston who "witnessed more than twelve acts of gay bashing, said, 'I remember every bad beating I've ever seen in my life. It's like after a car crash. It takes something out of you.'"¹⁴⁹ Another Boston activist invoked the metaphor of siege to describe the feelings of those in the community: "We remain a community under siege, battling an epidemic of bigotry and violence."¹⁵⁰ Others echo this language when explaining the community's response.¹⁵¹

In the face of increasing violence and the failure of the criminal justice system to respond, the gay and lesbian community has mobilized to protest the violence and to protect itself. People in the community have done so self-consciously, partly due to the influence of pacifist lesbian feminists in the community and partly due to the degree to which community identity has been developed around and informed by a minority/victim's perspective of the world that is sensitive to the potential abuse of power and violence as instruments of oppression. Locally and nationally, the debate has been heated. It has been fought out in and influenced by political and social groups that were mobilized over two decades ago to fight for civil rights¹⁵² and that, for a decade, have been engaged in AIDS politics and education.¹⁵³ From rallies to self-defense classes to

146. Reyes, *supra* note 82, at 35.

147. Graham, *supra* note 25, at 27.

148. Longcope, *supra* note 49, at 24 (quoting John Goode, "who was beaten last fall while visiting San Francisco and was almost among 20 gay men attacked last month after a fund-raising event").

149. Manny Garcia, *400 Decry Antigay Violence in South End*, BOSTON GLOBE, July 19, 1990, at 32.

150. Longcope, *supra* note 49, at 19 (quoting Kevin Berrill of the National Gay and Lesbian Task Force).

151. Kay Longcope, *Boston Gay Groups Vow New Militancy Against Hate Crimes*, BOSTON GLOBE, Aug. 2, 1990, at 25 (quoting Michael Cronin, Director, Anti-Violence Project, Greater Boston Lesbian and Gay Political Alliance: "We are under siege We're not going to take it anymore.").

152. See D'Emilio, *supra* note 96, at 149-249. These groups include the National Gay and Lesbian Task Force and Human Rights Campaign Fund, Washington, D.C.; Lambda Legal Defense, New York, NY; the Lesbian Rights Project, San Francisco, CA; and numerous local community, political and social groups.

153. Particularly the Aids Coalition to Unleash Power (ACT-UP) and Queer Nation, a "radical" offshoot of the group.

community patrols to calls for terrorist-style retaliations and assassinations, the community is struggling to find ways to keep itself physically and psychologically intact.¹⁵⁴ To people in the community, the situation and their response to it are not, in the first instance, theoretical issues. The primary issue is emotional and physical safety, even survival.

While most of the responses to the violence against the community have been nonviolent¹⁵⁵ and relatively nonconfrontational, one of the more militant responses has been the formation of Queer Nation, a direct-action group formed in May of 1990 in New York City¹⁵⁶ that has since spread to cities throughout the United States¹⁵⁷ and Canada.¹⁵⁸ As the group spread, so did its message, revealed in the group's signature chant: "We're here! We're queer! . . . Get used to it!"¹⁵⁹ Organized to fight homophobia and hate crimes, the group is dedicated to direct, confrontational action. Shortly after its inception in New York, Queer Nation became a household name to many in the gay community through its actions at a march protesting the rise in hate crimes. When bystanders screamed at Queer Nation marchers and threw rocks, eggs, bottles, and punches at them, "[i]nstead of cowering, Queer Nation surrounded perpetrators and forced police to arrest them They were quite aggressive."¹⁶⁰

In Boston, a Queer Nation chapter was formed on the heels of a bashing that occurred when several gay men waiting to get into a private party were grabbed from the line and beaten, despite the presence of others.¹⁶¹ Gay men vowed that the failure to defend

154. See *infra*, notes 165, 176-84, 187-200 and accompanying text.

155. Activists have organized rallies to protest bashings. These include a protest in the Brooklyn neighborhood of three men accused of battering gays in Manhattan, Rose Marie Arce, *Gays March on Bias Suspects' Homes*, *NEWSDAY*, July 16, 1990, at 19; a march on Marine barracks in Washington, D.C. to protest light punishments given to several Marines who reportedly harassed and attacked gay men outside a gay bar, Ruben Castaneda, *Protest at Barracks Alleges Gay-Bashing*, *WASH. POST*, July 7, 1990, at F1; and a "speak-out" rally to protest the beating and stabbing of two gay men in Boston's South End, Garcia, *supra* note 149, at 32. A group in San Francisco has designed a billboard campaign to publicize the increase in bashings. Jamie Beckett, *Signs to Fight Gay-Bashing*, *S.F. CHRON.*, Jan. 6, 1992, at A13. People in the community have also started self-defense classes. See, e.g., Matt Nagle, *Self-Defense Expert Brings Free Show to Seattle*, *SEATTLE GAY NEWS*, Aug. 16, 1991, at 10.

156. See Tuller, *supra* note 65, at A4.

157. *Id.*; see also Joyce Price, *Queer Nation Decides It's Time to Bash Back*, *WASH. TIMES*, Oct. 15, 1990, at A1.

158. See Lindsay Scotton, *Gay Activists Demand Acceptance*, *TORONTO STAR*, Jan. 29, 1991, at D1.

159. Longcope, *supra* note 151, at 25.

160. *Id.* at 31.

161. *Id.*

themselves and each other would never happen again.¹⁶² In the words of community members: "The strongest community sentiment now is fighting antigay violence That's what has sparked Queer Nation,"¹⁶³ "The intent . . . is to counteract a perception among gay bashers that we are weak and won't fight back."¹⁶⁴

Gay men and lesbians are not always satisfied with limiting their preparedness to rallies or to self-defense training in open-hand techniques.¹⁶⁵ Many gay men in Indianapolis began arming themselves with guns after police reported that the murders of eleven young men in the 1980s was attributable to a single assailant who was motivated by the sexual orientation of the victims.¹⁶⁶ Despite opposition to guns by many in the gay and lesbian community, one New York community leader, who has been described as "an ardent opponent of self-arming,"¹⁶⁷ seemed to warn that the gay and lesbian community response to arm might be just the beginning of more a militant, violent response: "No other community would have endured this violence without responding in kind Tempers and patience are now worn to the breaking point."¹⁶⁸

Larry Kramer, "writer, playwright and father of the AIDS activist movement,"¹⁶⁹ expressed similar frustrations: "I don't necessarily condone or approve of violence, but at this point I don't know what else I can do I keep wishing that some group of men and women more courageous than I would start a terrorist group."¹⁷⁰ This sentiment was echoed by another activist: "I have a dream that one day I will be a menace to homophobic society I want to be an anti-anti-gay terrorist."¹⁷¹

These sentiments have been taken up by some in the community in the form of explicit exhortations to engage in such counterattacks. One of the most radical calls to action has been the anonymous production of a pamphlet describing the assassination

162. *Id.*

163. *Id.* (quoting David LaFontaine of the Lesbian and Gay Coalition for Civil Rights).

164. *Id.* (quoting Jim Brinning, who "barely survived a vicious beating in the South End two years ago").

165. These are fighting techniques using only the hands and body in lieu of guns, knives, or other objects used as weapons.

166. Thomas J. Maier, *Because He Was Gay?*, *Newsday*, Nov. 4, 1990, at 8.

167. Reyes, *supra* note 82, at 35-36 (quoting Matt Foreman, Director, New York City Gay and Lesbian Anti-Violence Project).

168. *Id.*

169. *Id.* at 35.

170. *Id.*

171. *Id.* (quoting Robert Hilferty).

of Senator Jesse Helms.¹⁷² The pamphlet ties Senator Helms' anti-homosexual crusade in Congress to increased numbers of deaths by AIDS and to a social climate in which bashings are tolerated and encouraged, arguing:

[T]he deaths of people attacked by gay bashers are political assassinations caused by Jesse Helms

He has used his position, his power, his privileges, to kill us. You and me. It is not solely a matter of him expressing his opinion Face it, Helms is in every sense a war criminal who will be brought to justice.¹⁷³

Like the creators of the Helms pamphlet, the anonymous authors of an article published in a community magazine reflect tremendous anger and a sense that those in the community must fight aggressively against their attackers if they are to survive:

We have the right to protect everything we love by any means necessary

As an army, we may not win — at least not yet. But perhaps as terrorists, guerrillas and silent, secret murderers, we will pose some debilitating threat to the forces that oppress us. Maybe we will win faster and die less if a few of us become assassins and martyrs. Maybe we can't call for riots, but we can certainly try to start them ourselves. Words don't start riots; rocks and broken bottles do We can no longer wait

This culture — our ways of helping each other love and work and dream and die — this community, which is all we know of ourselves, trembles on the edge of extinction. Those who come after us may never even know of our existence. Life under genocide demands extreme measures¹⁷⁴

One activist has stated: "At this point, while guns may not be an answer that everybody endorses, the threat of guns may be part of that answer. The fact is that we need more attention paid to anti-gay bias crimes; the question of who will provide it remains outstanding."¹⁷⁵

B. *Street Patrols*

The message is simple: queer folk are banding together and walking the streets in cities around the United States to protect their own. Their tactics and strategies differ, but the basic aim is always the same: stop the violence in gay and lesbian neighborhoods.

172. Anonymous, *Kill Jesse Helms: A Docunovella in Two Parts* (fiction publications 1990) (on file with the author).

173. *Id.* at 2-4.

174. three anonymous queers, *Should Queers Shoot Back?*, *OUTWEEK*, Oct. 17, 1990, at 38.

175. Reyes, *supra* note 82, at 39.

There's nothing new to civilian-based safety patrols, as your local police department will inform you. Nor is there anything new to the efforts of our communities to fight back against anti-gay and anti-lesbian violence; anti-violence programs have collected statistics, been advocates for victims and held self-defense classes for years in dozens of communities around the country. What makes the new phenomenon different is the recent surge in combining these two ideas.¹⁷⁶

Somewhere between anti-violence rallies and calls for assassination is the formation of "street patrols" in many communities. Street patrols are organized groups of citizens trained in self-defense and intervention techniques who patrol the streets of predominantly gay neighborhoods. The patrols were predated in many cities by community watch groups.¹⁷⁷ Queer Nation has been responsible for the formation of several street patrols trained by Guardian Angels.¹⁷⁸ Street patrols have been organized in San Francisco, Hollywood, Dallas, Kansas City, Houston, Philadelphia,¹⁷⁹ Boston, New York,¹⁸⁰ and Seattle.¹⁸¹ In New York City, community activists formed the Pink Panther Patrol in the Spring of 1990 to patrol Greenwich Village, the East Village,¹⁸² and the West Village.¹⁸³ In Dallas, community members organized a patrol, then hired off-duty police officers to serve as backups for the patrollers.¹⁸⁴

Patrols, such as the Pink Panthers,¹⁸⁵ seek to deter violence, to intervene to stop assaults, to provide support and aid to victims, and to provide information to police after a bashing occurs.¹⁸⁶ In

176. Karpf, *supra* note 1, at 1.

177. For example, in Boston, the Grass Roots Gay Rights Fund started a community watch group called Street-Safe "to prevent bashings and, when they occur, to call police." Longcope, *supra* note 151, at 25. Street-Safe later formed a foot patrol. See Karpf, *supra* note 1, at 9.

178. Price, *supra* note 157, at A1.

179. Lori Grange, *Police, Gays Patrol Violence-Prone Area*, L.A. TIMES, Apr. 5, 1990, at J1. Patrols have also formed in Philadelphia ("Center City Nite Watch"), Karpf, *supra* note 3; and Houston (Q-Patrol), Susan Hightower, *Murder Leads to Protection for Gays*, L.A. TIMES, Mar. 22, 1992, at A21.

180. Hugo Martin, *Gays Form Patrols to Battle Hate Crimes*, L.A. TIMES, Dec. 3, 1991, at B1.

181. See *infra* § 3C.

182. Jessie Mangaliman & Michael Powell, *On the Lookout for Gay Bashers: Patrols to Act as Deterrent Against Violent Incidents*, NEWSDAY, Aug. 3, 1990, at 25.

183. Hays, *supra* note 16, at 23.

184. Debbie Howlett, *Gay Patrols Taking Steps to Fight Hate Attacks*, USA TODAY, Oct. 10, 1990, at 3A.

185. Hays, *supra* note 16, at 26.

186. Karpf, *supra* note 1, at 9. See also Mangaliman & Powell, *supra* note 182, at 25 (quoting Pat Gulbis, Harvard Law student and former Pink Panther patroller: "[T]his will send a really strong message that the community of gays and lesbians will not be bashed without responding If [bashers] see an organized patrol, they will be deterred It's clear we're not getting the police protection that we need

addition, the patrols help those who patrol in them, as well as those in the community, feel safer about being out on the streets and more confident in their ability to fight back.¹⁸⁷ The patrols may also serve to channel the rage many feel at the violence directed against them, an alternative to the calls for counter-violence terrorism described above. Finally, many in the community believe the patrols will spur greater response to gaybashing by the criminal justice system because the prospect of organized, militant gay men and lesbians makes society nervous: "The Panthers' prowling through predominantly gay and lesbian neighborhoods . . . has an effect on the performance of the cops because there is always the possibility that the Panthers will reach back into their community-patrol heritage and emerge with arms."¹⁸⁸

The groups differ somewhat in their activities. Some, such as Seattle's Q-Patrol, are more interventionist; trained and prepared to intervene physically in an assault.¹⁸⁹ Others, such as New York's Pink Panthers, seem to rely more on whistle-blowing to startle attackers into fleeing and on radios to call the police.¹⁹⁰ The difference seems to be partly a matter of training. Those trained by Guardian Angels, such as Seattle's Q-Patrol,¹⁹¹ and San Francisco's Street Patrol, seem to be more interventionist and physical,¹⁹² while those such as New York's Pink Panthers, trained by a women's martial arts dojo explicitly committed to de-escalation and non-violence except in the most extreme circumstances, are less so. Groups with little training or fewer numbers are also likely to be less interventionist, performing more of a "watchdog" function.¹⁹³

The difference may also depend on access to equipment. The Pink Panthers have access to several walkie-talkies and a central dispatch radio capable of calling the police,¹⁹⁴ while groups such as

. . . . This [patrol] is a response to protect our own."); Hays, *supra* note 16; *Morning Edition: San Francisco's Street Patrol* (NPR radio broadcast, June 26, 1991) ("I would think that there are people that are thinking twice about coming into the Castro to harass someone.") [hereinafter *Morning Edition*].

187. See, e.g., Karpf, *supra* note 1, at 11.

188. Reyes, *supra* note 82, at 39.

189. See *infra* notes 214-17 and accompanying text.

190. See Paula Span, *Patrol of the Pink Panthers: In New York's Greenwich Village, Volunteers Combat a Tide of Gay-Bashing*, WASH. POST, Sept. 19, 1990, at C1.

191. Peter Lewis, *Q-Patrol Takes to the Streets to Stem Gay Bashing*, SEATTLE TIMES, Feb. 17, 1991, at B4.

192. Karpf, *supra* note 1, at 1.

193. See Karpf, *supra* note 1, at 10.

194. See Span, *supra* note 190. A patrol in Long Beach, California uses walkie-talkies, a cellular phone, and a pickup truck, and planned to stop attacks by using whistles and megaphones while alerting police rather than by apprehending anyone. This appears to be the only patrol with liability insurance for its members. It took the group a year and a half to gather the resources for its equipment and insurance

Seattle's Q-Patrol must rely on the availability of public phones to call 911. Calling through 911 often means waiting for some time to get through to a police dispatcher and, once connected, convincing the dispatcher of the need for immediate response.¹⁹⁵ Thus patrols that rely on public phones are often more prepared to face direct physical confrontation because they cannot assume that the police will arrive in time to step in.

Though the press took notice of the street patrols when they first began forming and patrolling, very little information about them is available. In the next section, through a case study of Seattle's Q-Patrol, with whom I trained and patrolled for two months in the summer of 1991, I set forth a more detailed description of the patrols on which to base analysis of the phenomenon of street-patrol formation in the gay and lesbian community.

C. Seattle's Q-Patrol

The Pacific Northwest has not been immune from the increase in hate crimes and gaybashing. At least two informational phone lines with hate messages have been established in the Northwest.¹⁹⁶ Skinheads have organized in Seattle and verbally harassed and physically assaulted gay men and lesbians.¹⁹⁷ Gaybashers are responsible for breaking one man's jaw and smashing a brick over another man's head in 1990.¹⁹⁸ In May of that year, the FBI apprehended three white supremacists on their way to carry out the bombing of a gay dance bar in Seattle.¹⁹⁹

1990 was the first year in which the Seattle Police formally reported "malicious harassment": criminal acts against an individual or institution because of their sexual orientation, skin color, national origin, or religious or political beliefs.²⁰⁰ In 1990, the police received seventy-two reports of malicious harassment, half of which

payments before it began patrolling. Michael Szymanski, *Volunteer Teams Patrol Gay Strip*, L.A. TIMES, Feb. 23, 1992, at J1.

195. In addition, due to the use of public pay phones for drug trafficking, neighborhood merchants in many areas have disabled the public phones near their businesses. Author's experience with Q-Patrol; interview with "Possum," member of Seattle Q-Patrol, (July, 1991); see Sherry Stripling, *Q-Patrol Helps Guard Against 'Queer Bashing' on Streets of Capitol Hill*, SEATTLE TIMES, Oct. 29, 1991, at C1.

196. Keene & Cal, *supra* note 23, at B1.

197. *Id.*

198. *Id.*; see also Barbara A. Serrano, *Statistics Show Apparent Rise in Hate Crimes — Many Incidents Go Unreported, Say Civil Rights Advocates*, SEATTLE TIMES, Jan. 10, 1991, at A1; Dick Lilly, *Gays See More Hate Crimes*, SEATTLE TIMES, Nov. 27, 1990, at B3.

199. Lilly, *supra* note 198, at B3.

200. Serrano, *supra* note 198, at A1.

were gay-bashing incidents.²⁰¹ This was a thirty-six percent increase over incidents informally counted by police in 1989, although police do not believe the 1989 number accurately reflected all the incidents that occurred.²⁰²

Like those in other cities, community members in Seattle decided to organize a direct-action street patrol because of a perception that the police and mayor's office were ignoring the growing violence against lesbians and gay men.²⁰³ The justifications for Q-Patrol's (for "Queer Patrol") formation and description of their mission as set forth in Q-Patrol's statement of purpose parallel those given by activists elsewhere in the country:

Q-Patrol is a group dedicated to stopping the violence against us, commonly known as Gay-bashing. To end the harassment, threats and physical assaults, we will visibly walk the streets of Capitol Hill.

Q-Patrol promotes safety without carrying weapons and without initiating violence. However, Q-Patrol is prepared to intervene to prevent bashing and malicious harassment.

Q-Patrol is not going out to enforce the law and clean up the streets, nor are we claiming Capitol Hill as 'our turf'. Rather, Q-Patrol intends to help make Capitol Hill a place where all people can live and walk in peace

We can no longer wait. While the bureaucracy collects statistics and talks about the problem, Q-Patrol takes action!²⁰⁴

Q-Patrol was organized in the summer of 1990 as a subgroup of Queer Nation, Seattle²⁰⁵ and began patrolling in early 1991.²⁰⁶ Before beginning their patrols, the founding members trained for five months²⁰⁷ under a husband-and-wife team who were chapter coordinators for the regional Guardian Angels.²⁰⁸ The couple was unfamiliar with the gay and lesbian community but agreed to train

201. *Id.*

202. *Id.*

203. Seven, *supra* note 35, at A1. A 1990 report by the Seattle Human Rights Commission regarding perceptions within minority communities exposed widespread suspicion of and hostility toward police officers. SEATTLE HUMAN RIGHTS COMMISSION, REPORT OF THE SEATTLE HUMAN RIGHTS COMMISSION REGARDING THE MONITORING AND INVESTIGATION OF CITIZEN COMPLAINTS OF POLICE HARASSMENT 4 (Nov. 8, 1990). The Seattle Gay News, which informally compiles reports of gay bashings and harassment, has reported that "homosexuals have perceived police as insensitive." Serrano, *supra* note 198, at A1.

204. Q-PATROL, Q-PATROL IS AN ORGANIZATION DEDICATED TO ENDING VIOLENCE TO LESBIANS AND GAY MEN (1991) (pamphlet describing Q-Patrol's purpose) (on file with the author).

205. Seven, *supra* note 35, at A1.

206. Peter Lewis, *Q-Patrol Takes to the Streets to Stem Gay Bashing*, SEATTLE TIMES, Feb. 17, 11, at B4.

207. See Seven, *supra* note 35, at A1 and Lewis, *supra* note 206, at B4.

208. Chinello Interview, *supra* note 62.

the group because "usually everyone wants the Angels to come in and protect them. [When Queer Nation organizers called them,] that was the first time somebody had ever called and said 'we want to do it — will you show us how?' It blew them away."²⁰⁹

Q-Patrol, like the Guardian Angels, is unarmed. The patrol leader conducts a pat search of each patroller for weapons each night before the patrol begins. The patrol second (second in command), in turn, searches the patrol leader. The physical search of patrol members is important for two reasons. First, if anything happens during the evening that involves a weapon, the patrol leader "can definitely say the weapon didn't come from someone in the group."²¹⁰ Second, patrol leaders believe enforcing the ban on weapons is important to eliminate the possibility that someone in the group would overreact to a situation and cause someone severe injuries.²¹¹ Although the group conducts interviews and observes trainees carefully before letting them become full-fledged patrollers in order to screen out those who seem unstable or overly aggressive,²¹² Q-Patrol is relatively easy to join and trainees sometimes walk along with the group after only a week of training.²¹³ Under such conditions, it is difficult for the group to know how an individual might react to a particular situation. As phrased by former Chapter Coordinator David Chinello, "a loose cannon can only do so much damage with his or her bare hands."²¹⁴ Going unarmed also allows patrollers to avoid being split over the philosophical and political debate between pacifists and gun-control proponents and those who might be willing to carry weapons. While the existence of the patrol in and of itself is problematic for many,²¹⁵ opposition is less than it would be if Q-Patrollers were armed.

As of the summer of 1991, Q-Patrol members represented a cross-section of the community, albeit one tending toward higher educational levels and pink- to white-collar occupations.²¹⁶ Patrollers' occupations included kindergarten teacher, computer programmer, dental technician, and registered nurse. Three patrol

209. *Id.*

210. *Id.*

211. *Id.*

212. Chinello stated that when he was in charge of this process, "someone with a chip on their shoulder who wants to go out and bash straight people" would not have been allowed to join the group. *Id.*

213. Such trainees are assigned to a more experienced member to be looked after and are given strict instructions to hang back out of the way if anything happens.

214. Chinello Interview, *supra* note 62.

215. See *infra* part III.

216. The descriptions and analysis in the following pages are distilled from the author's experiences with Q-Patrol.

members had until recently been in the Navy. Education levels ranged from high school diplomas to masters degrees. Several of the members had had some history of martial arts training or street fighting experience. Two had been "street kids," living on the streets of Seattle for some period of time when they were teenagers. Women comprised a third of the patrol. All of the patrol members were white except one, a Native American man.²¹⁷

The Q-Patrol always conducts a "rap" after each session of patrolling or training. Each patroller has to discuss how she felt about the evening's events, offer suggestions, and voice concerns. During the raps in the summer of 1991, we learned of the varied personalities, professions, and philosophies of Q-Patrol members. One man was unemployed and heard Q-Patrol needed people; he decided he had more time to give than many in the community and determined he had no excuse for continuing to worry about and criticize gay bashing while doing nothing to stop it. Another man, who recently moved to Seattle, had spent a period of time volunteering full-time as a Guardian Angel in New York and Portland, Oregon. When thinking about joining the Guardian Angels in Seattle, he decided instead that, as a bisexual man, he should use his skills to help protect the community. One woman talked about patrolling as her way to give something back to the community and said that "[i]t feels really good to walk by and have people thank us on the street for what we're doing."

The most common concern voiced during the raps was a sense of frustration and anger with the bashings and with the level of fear within the community. Most patrollers were gay or lesbian, but not all. I was told later that one of the most committed of the group was a straight man who joined because he became so disgusted at the violence directed against the community. Most lived in the Capitol Hill area; others lived elsewhere but identified Capitol Hill as their community neighborhood. All recognized that living, shopping, or spending social hours on the Hill made them targets of anti-gay harassment.

Q-Patrollers wear uniforms consisting of black berets, black fatigue-cut pants, and bright blue T-shirts or grey windbreakers

217. A year and a half later, when I conducted a follow-up interview, many of the people in Q-Patrol had moved on and others had stepped in but the general characteristics of the group were similar. Ethnic and racial diversity had increased slightly, women made up over half of the patrol, and the patrol was headed by a woman, Chapter Coordinator Alex Cleghorn. Interview with Alex Cleghorn, Chapter Coordinator, Seattle Q-Patrol (Mar. 1, 1993)[hereinafter *Cleghorn Interview*].

emblazoned with their logo.²¹⁸ Many of the patrollers wear black weight-lifting gloves, as well. Some within the community have criticized the "militaristic" look of the patrol,²¹⁹ but the uniforms serve the patrol's psychological and physical needs. Psychologically, the uniform reminds Q-Patrollers that they are on patrol, responsible for being alert and responsive. Like a costume, it helps the patrollers step into character. Seeing each other in uniform emphasizes that they are on duty, that they work in a group, and that they must work together and protect each other. Deterrence of gaybashings and harassment is the primary function of the group, much preferred over actual intervention, which puts everyone at risk. A uniformed, organized group puts those who might otherwise be tempted to harass community members on notice that they are being watched and that a group of people is willing to intervene. The uniform magnifies the threat of the group to potential bashers and increases the sense of relief within the community that someone is out there to help.²²⁰

Practically, the uniforms identify Q-Patrollers to each other, the police, and the community. In a chase or fight, a patroller can establish quickly, even out of the corner of her eye, who is fighting whom, who needs help, whether the moving figure off to one side is covering her back or coming after it. Police can distinguish patrollers from perpetrators when they arrive on the scene of an altercation. Community members know at a glance that Q-Patrol is intervening, rather than rival gangs fighting. Patrollers believe community members are more likely to call the police or intervene to help when they know they will be working with Q-Patrol rather than alone.²²¹

218. The Q-Patrol recently added silver, padded, nylon "flight jackets" to their uniform that, by design, mirror the black jackets of this type worn by many skinheads. While skinheads wear American flag patches on the shoulder of their jackets, Q-Patrol has substituted the rainbow-striped "Pride Flag" of the gay and lesbian community. *Id.*

219. I often heard this criticism while patrolling and when speaking with people about the patrol.

220. See Q-PATROL, *supra* note 204 ("Since Q-Patrol's first and foremost priority is to be a visual deterrent to violence, by wearing uniform clothing the visual impact of Q-Patrol will be all the more striking. Community members will see us and know us. Bashers will see us and know us.")

221. One night on patrol, our group saw three young men sprint around a corner and into a side street, with two men running after them, screaming for someone to help stop them. Not knowing what had happened, we raced after the three and chased them for several blocks, back into the parking lot where they had left their car. The police arrived almost immediately, and we wondered how they had managed to respond so quickly. Shortly after Q-Patrol left the scene, the owner of a Broadway restaurant down the block asked us what had happened and told us that as soon as he saw our patrol start running down the street, he called the police.

Like street kids and the Guardian Angels, Q-Patrollers use "street names" to protect their non-patrol identities. Because patrollers call out to each other or are engaged in conversation with people on the street, use of real names would open patrollers to invasion of their personal lives by those they meet on the street, including bashers.

While on patrol, Q-Patrol walks in a double-column formation with the patrol leader in the front left of the group and the patrol second in the rear, right. The columns are formed by sets of two "buddies" walking side by side, one set behind the other. Buddies stay together and protect each other at all times. Each set of buddies has a specific, preassigned function. For example, one set is assigned to run to a phone and call 911 on the command of the patrol leader or patrol second. One set, the fastest in the group, is responsible for chases. The last set in the group is responsible for watching the patrol's back. Each set knows precisely where it must stand on a street corner while "cornering": pausing at a street corner to observe each of the streets leading to the intersection.

The patrol leader commands the group, ordering the patrollers to move into single file formation or back again, to begin jogging in "double time," or to pause, separate, and observe a growing disturbance or questionable situation. Information is relayed to the patrol leader while the group is on patrol. In a tense situation, it is the patrol leader who decides whether the patrol will approach, how close, and the tone the group will take in responding to the situation. Most often, this involves "de-escalating" a conflict by talking to people who are harassing passers-by or asking "Is there a problem here?" to put people on notice that the patrol is there and that they are being watched.

Like its uniforms, the hierarchy, formations, and verbal commands utilized by Q-Patrol meet the group's needs, although they have drawn criticism from some in the community.²²² Broadway on Capitol Hill on a weekend night is a busy, almost chaotic place: people crowd the sidewalks, restaurants, stores, movie houses, and other establishments; homeless women and men rest in doorways; panhandlers sing, chant, and threaten; and street kids and punkers wrestle on corners. Amidst this activity, the sight of six to ten uniformed individuals moving in a double column down the street stands out. For the patrollers, the columns and commands create an oasis of calm amidst the chaos. After one is accustomed to the

222. Occasionally bystanders would shout comments such as: "You all are a bunch of brownshirts!" Such a remark suggests that these people considered Q-Patrol practices reminiscent of Nazism and/or fascism.

movements, they become routine, requiring little energy or attention, thus allowing patrollers' energy to be focused outward.

In a dangerous situation, there is little time for communication or decision-making. The group must react quickly, as a unit, without getting separated or interfering with each other. The discipline of the "buddy system" reduces the chances that any one person will be outnumbered, lost, or find herself in a situation she cannot handle. The assignment of specific functions for each set of "buddies" reduces the chances that by being unorganized, energy will be wasted in one direction while other needs are neglected.

Patrollers are required to train at least twice a week and to patrol at least four times each month.²²³ Trainings consist of repetitious practice of punches, blocks, kicks, "take down" techniques, and holding pins as well as "scenarios," role-playing sessions in which patrollers practice marching, moving together, and responding to situations the patrol is likely to encounter. In training scenarios, several patrollers play "mutants"²²⁴ and enact bashings, arguments, fights, and domestic violence scenes. After each scenario, the mutants and patrollers discuss what happened, how each responded to the situation, and how the response could be improved. Information regarding self-defense laws, such as the level of force that is appropriate in a given situation, is relayed to patrol members through scenario training. Patrol leaders seek through these scenarios to prepare the patrollers for "worst-case" situations in order to ensure that they are psychologically prepared to handle anything that might happen on the street. When less serious problems arise, patrollers then experience a sense of relief and encouragement that their training is adequate.²²⁵

Patrollers are trained to cope with encountering bashers with weapons. They learn to respect the damage that can be inflicted by knives through encountering a mutant patroller (who, in the summer of 1991, was an expert in knife-fighting) wielding a short stick. If patrollers get too close or fail to dodge or block correctly, they are

223. Patrollers who fail to do so lose their status as uniformed patrol members. *Cleghorn Interview*, *supra* note 217.

224. One critic pointed out that the use of this term might subconsciously serve the function of dehumanizing bashers and other belligerents. If she is right, this would make lines between the patrollers and their opponents more clear and promote an "us/them" dichotomy that would help form group solidarity and help patrollers overcome personal resistance to the use of force against others. In response, Chapter Coordinator Alex Cleghorn explained that the term was borrowed from the Guardian Angels, who prefer the term because it does not categorize an assailant by gender or race. Cleghorn admitted that term is useful for helping establish a "healthy us/them" dichotomy that is useful in the trainings for bringing the patrol together, but cautions against reading too much into the term. *Id.*

225. *Id.*

informed that they have been put into shock by blood loss from slices to their forearms and hands, or have been killed by stab wounds. They are trained to keep a safe distance from armed bashers and to trail and contain such bashers while the police are summoned, without directly seeking to stop or hold them. They are repeatedly told that it is better to let a basher escape than to have a patroller killed or seriously injured through rash attempts to confront an armed assailant. However, patrollers learn to use their numbers to overcome armed assailants. In a "knife circle," the patrol surrounds a basher as the Patrol Leader talks to him, tells him to put the knife down, and seeks to stall for time or to draw the attack, if there is to be one. If the assailant moves to attack someone in the circle, the patrollers standing directly behind the assailant, on the opposite side of the circle, slam the assailant to the ground. In the case of guns, the patrol does not even attempt to intervene directly. The single command any patroller may voice is "Gun!" to alert the others that an assailant or a passing motorist is carrying a firearm. At this command, patrollers immediately break formation and dive for cover on the ground, behind buildings, or behind car tires.

Trainees "earn their colors," the right to wear a uniform shirt or jacket while on patrol, only after at least two months of such training, regular patrolling, and a rigorous examination process that tests their physical capabilities, such as holding pins and martial skills, and substantive knowledge in areas such as requirements for citizen arrest.²²⁶ While trainees may begin patrolling with the group after a week of training, they are always paired with a full-fledged patroller and, depending on their level of ability, are usually instructed to stay out of the way if anything happens. They are also assigned a special uniform shirt that allows them to blend in with the patrol but permits patrol members to identify them as trainees.²²⁷

Q-Patrol concentrates primarily on being on the streets on weekend nights. During the earlier hours, the patrols watch the restaurants and shops of Broadway, the main street in Capitol Hill, and move to the parks and dance clubs later in the evening. Patrollers walk an average of eight miles during each patrol shift as they seek to maintain maximum visibility and availability to people who may be looking for help. Most evenings are relatively uneventful, with patrollers spending their time walking along busy sidewalks,

226. This formal testing procedure was instituted during the Patrol's second year. *Id.*

227. *Id.*

standing at street corners, answering questions, and handing out informational pamphlets to people who are curious about the patrol. Verbal harassment of the patrol from young people driving by in cars is common. Q-Patrol's most common form of direct confrontation is to disperse groups of young men who are harassing people in the neighborhood. This may be accomplished by simply walking past the group several times from the opposite side of the street or by "cornering" on a nearby street corner, with patrollers looking pointedly at the group. If the group persists in their harassment or shows signs of escalating their behavior, the Q-Patrol approaches them directly, with the patrol leader either asking what is going on or directly challenging the group about their behavior. If the situation threatens to escalate further, the patrol prefers to enlist the aid of police whenever possible. Patrol leaders have the rarely-used prerogative of attempting to escalate a confrontation with a group of verbal harassers in hopes of redirecting a planned attack on others toward Q-Patrol.²²⁸ In the few cases in which the patrol has done so, usually when a gang of skinheads is involved, the harassers have backed down and left the area.²²⁹

Often the patrol will hear of harassment or an assault occurring in another part of the neighborhood. When this happens, Q-Patrol moves immediately to the area of the incident, often in "double time," a steady jogging pace. They ask witnesses what happened, which way the bashers went, ask them to call the police, then pursue the bashers. Usually, such pursuit is futile, but occasionally, especially if the basher is intoxicated, the patrol finds the assailant and holds him for the police.

Because Q-Patrol spends so much time on the streets, patrollers get to know not only the shopkeepers in the neighborhood but also the homeless persons, beggars, street musicians, and street kids. While these groups originally greeted the patrol with hostility, over time a more comfortable relationship has developed. Street kids and the homeless know the patrol is there to protect them, too, if they need help.²³⁰ Q-Patrollers have encouraged this

228. Although patrollers acknowledge the possibility that Q-Patrol may invite attacks against it, they feel that they act as a lightning rod for such activity and would prefer to absorb it themselves rather than have it directed at community members who are not as physically or emotionally prepared to defend themselves: "Queer bashers may see us as saying, 'Hey, come try us.' Fine. Better they come looking for us than someone else. They may hurt us, but we'll take them to jail." *Chinello Interview*, *supra* note 62. As to the yelling from car windows that is a regular part of patrol, "Fine. They've let off steam. Maybe they won't go bash someone else." *Id.*

229. *Cleghorn Interview*, *supra* note 217.

230. Q-Patrol's comfortable relationship with these groups was complicated recently when the patrol intervened to stop two street kids who were assaulting an

relationship by making special tours through parks where the homeless congregate.²³¹

Through the trainings, group organization, and the use of street names, Q-Patrol members seek to balance their desire for personal safety and privacy with the fact that the method by which they seek to protect community members makes them particularly vulnerable to attack themselves.

D. Objections to Street Patrols

Response to the formation of street patrols has been mixed. The reaction of the general Seattle community to Q-Patrol seems to be largely positive. Capitol Hill merchants offer free coffee, soft drinks, and occasional meals to Q-Patrollers. Cab drivers have been known to pull over and donate a portion of their tips to the group. Many people wave, smile, and thank the patrollers as they pass by.

If measured by actual participation, the response to Q-Patrol is less than enthusiastic. The size of the group hovers at around sixteen active members, as people come and go, despite active recruiting.²³² This may be because of the physical requirements of training and patrolling, the time commitment involved, people's fear of becoming targets, or political reservations about the group.²³³

Careful attention to the opposition to the patrols is important because the debate over the desirability of their activities implicates important concerns, particularly the physical safety of people in society (both potential victims and those who might be hurt in the crossfire between bashers and patrols) and the degree to which levels of violence in society will be increased or decreased by what is done in response to the current situation. The debate must consider the short-term and long-term effects of the patrols. The conclusions reached in these debates also inform decisions regarding whether, as a matter of public policy, courts should interpret or leg-

elderly homeless man with clubs made of two-by-fours. The impact of this action on the sometimes shifting loyalties of the street is still unclear. *Id.*

231. Homeless persons sleeping in parks are often the victims of violent assault. See, e.g., JONATHAN KOZOL, *RACHEL AND HER CHILDREN* 178 (1988) (cataloguing incidents in which homeless men and women have been murdered, knifed, and set on fire in parks or on city streets).

232. See, e.g., Ray Calf Looking, *Q Patrol Needs You, and Thanks You*, SEATTLE GAY NEWS, June 14, 1991, at 4 (Letters to Editor); Q-PATROL PAMPHLET, *supra* note 204.

233. Chapter Coordinator Alex Cleghorn believes all of these dynamics are involved in the patrol's recruiting difficulties. *Cleghorn Interview*, *supra* note 217.

islatures should modify self-defense law in the ways suggested by this article.²³⁴

In the following section, I investigate and respond to many of the objections to street patrols.

1. Choice of Means and Effectiveness

Many in the gay and lesbian community are uncomfortable with the thought of violence being used by street patrols.²³⁵ Those who are troubled often have devoted considerable energy toward rejecting what they consider to be a violent and militaristic mainstream society.²³⁶ The Seattle organizer of a self-defense class for gay men and lesbians²³⁷ alluded to such feelings and the tensions they create at a time when failure to resist with violence may mean getting hurt or watching one's friends get hurt. The organizer billed the classes as being "especially for 'nice people' who don't really want to 'hurt' someone, but don't want to be hurt themselves" ²³⁸

Pacifists and those committed to non-violent resistance to oppression are concerned that preparing oneself physically and emotionally to harm or kill others, even one's potential attackers, diminishes one's respect for the personhood of the attacker and one's respect for the value of human life.²³⁹ Those committed to nonviolence see society degenerating into turf wars and blood feuds if people begin mobilizing, organizing, possibly arming themselves, and patrolling with the intention of intervening violently, if necessary.

Patrollers emphasize that violent intervention is always a last resort, that they are not out looking for a fight.²⁴⁰ The patrols work hard to defuse situations in order to avoid having to intervene physically.²⁴¹ Patrollers are instructed to walk in a relaxed manner, run only when necessary, approach people openly. Even if the patrols regularly engaged in more aggressive, violent responses to

234. See *infra* part IV.

235. This and the objections listed below were distilled from concerns voiced in many of the articles cited in this article and from numerous conversations I had with people in the course of researching and writing this article.

236. The uniforms and hierarchy of the patrol are anathema to at least some community members. See *supra* notes 219 & 221 and accompanying text.

237. Matt Nagle, *Crossroads Teaches "Self Defense for Sissies"*, SEATTLE GAY NEWS, July 12, 1991, at 13.

238. *Id.* (quoting Steve Wells, Director, Crossroads Learning Center).

239. An in-depth discussion of philosophies of nonviolence and pacifism are beyond the scope of this paper.

240. See Price, *supra* note 157, at A1.

241. Lewis, *supra* note 191, at B4 (quoting Patti Crooks, a Guardian Angel who helped train the Q-Patrol: "Ninety percent of the time, we defuse situations.").

harassment and assault, it is important to remember the context in which discussions about the value or harm of violent intervention take place. It is a context in which gay men and lesbians are being physically attacked and killed. For many (even those sympathetic to or worried by arguments against violent resistance), in this world, at this time, pacifism and non-violent resistance equal continued victimization for the gay and lesbian community. Patrols directly combat such continued victimization. They also do so indirectly by combatting the stereotype that gay men are weak, easy targets, an image that may fuel attacks against them. Showing a willingness to defend themselves and their place within society may actually encourage respect for gay men and lesbians. For people committed to this view, street patrols are, at worst, a necessary evil.

Studies have found that bystanders who witness crimes "tend to place the responsibility for the control of criminal activity on specific groups in the population, such as the police or politicians."²⁴² Instead of encouraging widespread community resistance to violence, there may be some tendency for bystanders to rely on the patrols rather than training themselves or coming to each other's aid. On the other hand, street patrols may encourage increased citizen involvement by helping community members regain a sense of control over their physical safety, encouraging them to train in self-defense techniques, and to watch out for each other. Individual patrol members, even when away from the patrol, carry their training and instincts with them and are more likely to intervene than untrained bystanders. Patrol members' involvement probably influences friends and family, who are thereby encouraged to train and come to the aid of others as well.²⁴³

Finally, some fear that use of violence by street patrols will legitimate a backlash of violence by those in society or by the police or other agents of the coercive power of the state.²⁴⁴ According to this argument, the same prejudices and willingness to abuse power that lead to bashings will result in overreaction by police and courts to gay and lesbian efforts at self-defense. But the community is aware that it must stay within the law in order to avoid such overreaction by police. As described in the following section, patrol

242. Wenik, *supra* note 83, at 1789.

243. See *id.* Individual behavior tends to "be influenced by the behavior and expectations of others. Bystander behavior reflects this 'social influence' in a number of ways Research has found that verbal encouragement and interpersonal influence can increase crime reporting." *Id.* (footnotes omitted).

244. See three anonymous queers, *supra* note 174, at 38.

groups have avoided activities that might be considered "vigilantism."

2. Vigilantism

Many never get to finer points of method and effectiveness when criticizing street patrols because they are so alarmed at the prospect of the gay and lesbian community mobilizing to form street patrols.²⁴⁵ Over and over again, police and community members assert that the patrols are acceptable as long as they do not "become vigilantes" or "resort to vigilantism."²⁴⁶ Similarly, people who are themselves involved in the patrols are careful to distance themselves from vigilantism: "We will defend ourselves if someone attacks us But we are not promoting vigilantism. We will break up fights and call the Police Department or make citizen arrests, if necessary."²⁴⁷ But what is a "vigilante?"

Vigilante is a pejorative word, and it is used to criticize or warn.²⁴⁸ It is a powerful word that suggests willful violence masquerading as justice. It is a delegitimizing term. "[T]he name Vigilante [is both] a reproach and a warning."²⁴⁹ Those who invoke it in the context of street patrols do so to convey their worst fears about what such a group might be or become.

The term "vigilante" has been defined in many different ways by courts and commentators. Courts have described the following as vigilantes: defendants, accused of shooting a federal undercover agent, who testified that they thought the agent was a drug dealer and they intended to take his money, warn him to stop selling drugs in the barrios, and only shot him because he pulled a gun on them;²⁵⁰ a "self-defense patrol" instituted by residents of an Atlanta housing project in response to the unsolved series of abduc-

245. My research in this area was spurred, in part, by the horrified reactions of many of those with whom I spoke about the subject. These reactions were to the thought of aggressive self-defense in the gay and lesbian community through community patrols.

246. See, e.g., *Morning Edition*, *supra* note 186.

247. Mangaliman & Powell, *supra* note 182, at 25 (quoting Gerri Wels, one of the founders of the Pink Panthers).

248. Douglas Ivor Branden, et al., Special Project, *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 893 (1974).

249. *People v. Superior Court of Marin County*, 598 P.2d 877, 890 n.11 (Cal. 1979) (Mosk, J., dissenting, citing COBLENTZ, VILLAINS AND VIGILANTES 252 (1936)).

250. *United States v. Fernandez*, 497 F.2d 730, 735-36 (9th Cir. 1974). The defendants were members of "La Casa de Carnalismo, the main goal of which was to eradicate drug traffic and addiction in the Chicano barrios. . . . [A]fter much deliberation, [the defendants] undertook their vigilante activity, because the police were not adequately dealing with the drug problem" and if they called the police, they would be labelled informers "and their safety would be jeopardized." *Id.* at 735.

tions and killings of children in the city;²⁵¹ a group of three men who knew the seven-year-old victim of a sexual assault, took the victim away from the assailant, heard what had happened to her, then followed the assailant to a local bar where they beat him up and when others called the police, reportedly said "you ain't got to put him in jail . . . we'll kill him; he don't need to go to jail";²⁵² people who fire-bombed, attacked, and severely beat the racially-mixed group of "Freedom Riders," which was attempting a bus trip through the southern states in 1961 in violation of "Jim Crow" laws;²⁵³ the actions of a mining company that "encouraged one of its foremen to form an unlawful group of so-called 'Vigilantes,' who drove the organizers of the union out of the region and intimidated those who had gone out on strike";²⁵⁴ and even a group of physicians who went on strike to gain concessions from the health organization for which they worked.²⁵⁵

The vagueness of the term "vigilante" and the difficulty of drawing clear lines between vigilante and non-vigilante actions suggests a need to move beyond the label and look more deeply into the substantive concerns underlying the vigilante objection to street patrols. One commentator has suggested that the "dangers of 'self-help justice' are especially acute at the apprehension stage, when emotions can distort rational behavior, and lead to vigilantism."²⁵⁶ In the context of street patrols, the fear seems to be that at the moment patrollers apprehend a basher, they will become carried away with rage and beat the assailant rather than hold him for the police. But if such an incident were to occur, the patrollers involved would be subject to prosecution for assault, and their self-defense plea would not prevail if the force were found to be exces-

251. *Coleman v. Balkcom*, 451 U.S. 949, 961 n.2 (1980) (Rehnquist, J., dissenting). Justice Rehnquist cites the following as an example of vigilante justice:

ATLANTA (AP) — Two gun-wielding men were arrested yesterday at the start of a housing project's self-defense patrol to protect youngsters against Atlanta's child killers Israel Green, who heads the project's tenants' association, called for national support of the patrol's right to carry arms. "We cannot stop them (killers) by consulting psychics, by having seances, by prayer vigils or by lighting little candles or forms of distracting activity that is not directly connected to the problems we face," Green said in a statement. "We have to face these killers in the real world."

Id. at 961 (citing WASH. STAR, Mar. 21, 1981, at 1).

252. *Vinson v. State*, 432 So.2d 1, 2 (Ala. Cr. App. 1983).

253. See, e.g., *Bergman v. United States*, 565 F. Supp. 1353, 1378-81 (W.D. Mich. 1983).

254. *National Labor Relations Board v. Sunshine Mining Co.*, 110 F.2d 780, 786 (9th Cir. 1940).

255. *American Medical Ass'n v. United States*, 130 F.2d 233, 249 (D.C. Cir. 1942).

256. Wenik, *supra* note 83, at 1795-96.

sive.²⁵⁷ In addition, Q-Patrol leaders and members take pride in not engaging in activities that might remotely be associated with "vigilantism" and have developed an ideology of self-control and service to the community that reduces the likelihood that they would engage in punishing or abusive behavior.²⁵⁸

Some also seem concerned by the move from individual to group self-defense that the patrols represent. But in this context, there is little reason to make distinctions between an action carried out by an individual and the same action carried out by a group:

Is it wrong to go over and help an old lady if you see her getting beat up? Wouldn't it be better if there were two of us, one to hold the guy, one to call the police? That's what the group is, an extension of the individual example. The difference is between doing it intelligently and effectively or doing it badly.²⁵⁹

For many patrollers, working in a group is also a matter of self-preservation. Prior to their Q-Patrol training, several patrol members intervened in bashings on their own and were injured in trying to stop the assaults. In addition, street patrols are unarmed but are likely to face armed assailants. The group allows better self-defense, better deterrence, and reduces the risk of violence. The group, and its discipline in barring weapons, may also help overcome impulses patrollers might otherwise have to arm themselves in response to the violence facing the community.

Similarly, some are troubled by the thought that patrols are institutionalized and trained. This suggests that patrols may be out looking to engage in violent confrontations. But for safety and effectiveness, it seems unwise to discourage people from planning and training for activities such as those of street patrols. Citizen involvement in crime prevention is generally objected to on the grounds that citizens are untrained and may expose themselves to risk or that they may violate the rights of an assailant.²⁶⁰ However, trained patrols are likely to deter assaults before they happen, unlike fortuitous intervention by a citizen after an assault has begun, and patrollers are trained to protect themselves and the rights of assailants.²⁶¹

257. See *infra* note 289 and accompanying text (summarizing the current self-defense doctrine, which excuses only a "reasonable" amount of force).

258. This attitude occasionally leads to actions by the patrol that may increase the danger to them. In several situations, patrollers have "taken down" an assailant, spoken with the person to calm him down, and allowed him to get back up before police arrive only to be swung at and forced to defend themselves again. *Cleghorn Interview*, *supra* note 217.

259. *Chinello Interview*, *supra* note 62.

260. See *infra* note 268 and accompanying text.

261. See *supra* part III.C.

An extension of the group activity concern is the fear that patrols might bring forth in patrol members the psychological dynamics of mob violence:

A secret of the transformation from group to mob: a few leaders incite the rest, knotting the rope, throwing it over the limb of a tree. The others allow themselves to be carried passively by the group purpose. Lynch mobs always armor themselves with a sense of their retributive righteousness. They also mean to exert social control by exemplary doses of terror, on the conceit that violence is the only language the victim understands.²⁶²

Street patrols may well approach having some of these characteristics. The degree to which individual patrollers are motivated purely by a desire to defend themselves and others, or by more retributive impulses, probably differs from group to group or individual to individual. Many of those involved in the patrols have been personally touched by the violence directed against the lesbian and gay community. Thus, it is not unreasonable to suppose that they may carry to some degree a sense that bashers deserve to be met on their own terms, force against force, and perhaps punished assault for assault. There is certainly a sense by many in the patrols that the violence will stop only if the community stands up to the bashers, that bashers cannot be deterred by anything but physical resistance.²⁶³ In addition, beyond the force of personality that exists as a dynamic in any group, the Guardian Angels' model of patrolling followed by some patrols insists on the strong presence and authority of a patrol leader and a patrol second. It is at least conceivable that a patrol trained to follow these leaders might be led to engage in levels of violence that exceed what they would otherwise be willing to inflict on their own.

Despite the possibility that the patrol's activities may share certain characteristics with mob violence, degeneration of the patrols into unthinking mobs following a strong leader may be less likely to occur with gay and lesbian community patrols than with other groups. Community members are accustomed to challenging authority and conformist group dynamics through their struggles to come to terms with their sexual orientation in the face of wide condemnation by mainstream society. Q-Patrol members demonstrated a greater tendency to criticize patrol leaders than to blindly follow them. Patrollers are also sensitive to the pacifist or nonviolence criticisms²⁶⁴ of many in the community. Taken together,

262. Lance Morrow, *Rough Justice*, TIME, Apr. 1, 1991, at 17 (discussing police brutality in the aftermath of the beating of Rodney King by Los Angeles police).

263. See *supra* notes 161-171 and accompanying text.

264. See *supra* notes 235-239 and accompanying text.

there are some powerful brakes against the possible degeneration of gay and lesbian street patrols.

While patrols may be unlikely to slip unthinkingly into engaging in mob-like violent behavior, some express concerns that patrols might consciously choose to embrace behavior directed at hunting down and punishing assailants, rather than reacting to imminent assaults. Comparative legal theorists and historians posit that laws and legal systems developed centralized police and judicial systems because such systems are a desirable alternative to social systems requiring private vengeance to remedy harms or punish wrongdoers.²⁶⁵ Under systems involving private remedies, the need to exact vengeance is never-ending, the cost of accidents or mistakes is high, and blood feuds may last generations. Once individuals are allowed to calculate, decide, and impose their judgment on others, we are back to a private adjudicative system. Who will take responsibility for the decisions that are made? Who will avenge decisions they believe are wrong? Beyond offending our society's most basic convictions of justice, there are many political and strategic reasons for condemning any move by patrols to adjudication and punishment of bashers. Backlash and loss of sympathy are likely to become tremendous problems. If patrols move from defending themselves and others to actions that are perceived to be those of hit squads bent on vengeance, public sympathy is likely to be lost. Such a move would invite retributive assaults. It would also invite an unleashing of the massive forces of the state against the gay and lesbian community, justified as an attempt to restore law and order.

There are rumors in the gay and lesbian community in New York that a small group of individuals identified a basher, forced their way into his apartment, and broke his arms, threatening increased violence if he was ever involved in another bashing.²⁶⁶ But no organized patrol group has yet engaged in activities that could be considered purely retributive, and to my knowledge, no patrol has even considered such involvement. Patrols repeatedly stress

265. Cf. SIMON ROBERTS, *ORDER AND DISPUTE* 59 (1979) (exploring the use in various cultures of rituals for working out conflicts in order to prevent "death or serious injury on either side . . . thus making continuous and escalating violence unlikely" and recognizing that societies with centralized state organizations accomplish the same goal by taking the right to "redressive action . . . altogether out of the hands of those who see themselves as being wronged").

266. Interview with Pat Paul, Harvard Law School student and former Pink Panthers patroller (Sept. 1991) [hereinafter *Paul Interview*].

their intention to work within the law and to turn perpetrators over to police and the criminal justice system.²⁶⁷

One final substantive concern regarding vigilantism seems to be the lack of regulation of, or accountability for, the group's activities. But patrols are subject to both internal and external checks on their actions. Patrol members control each other. If Q-Patrol is a typical example, there is no lack of discussion and criticism regarding whether a reaction to a situation or person was appropriate. A patrol leader may discipline a group member by imposing a period of suspension from patrol activities or by "stripping the colors" of a patrol member who has refused to behave according to command or training.²⁶⁸ Seattle's Q-Patrol has instituted a veteran's council composed of members with at least six months of active, continuous service. Control and discipline of patrol members is one of the express purposes of the council.²⁶⁹ The Guardian Angels have occasionally "hunted down" renegade members who have engaged in illegal or abusive activity while in uniform. One Q-Patroller insisted he would follow this example and personally find and take back the uniform of any Q-Patroller who similarly abused his affiliation with the patrol.²⁷⁰

Externally, the patrols are kept in check by community observers, many of whom are highly critical and ready to challenge the slightest hint of abuse by a patrol. Patrollers are subject to civil liability as well. Ultimately, the criminal justice system stands ready to prosecute patrollers for abuses. Until such a time as patrol abuses actually occur, fears about such abuses are speculative. In reality, the danger to public peace and safety is posed by actual violence against gay and lesbian communities. The need now is not to work against patrols based on theoretical concerns, but rather to

267. Q-Patrol, for example, explicitly declares its intention to work with the Seattle Police:

To remain true to our commitment of fostering understanding, Q-Patrol has established a working relationship with the Seattle Police Department. Q-Patrol is not an arm of the S.P.D., but we realize that we must work within the law to get the bashers off the streets.

Q-PATROL PAMPHLET, *supra* note 204. Q-Patrol Chapter Coordinator Alex Cleghorn spoke of an incident in which the patrol broke up a fight outside a bar and witnessed a man hit someone. The man then attempted to punch a patroller who intervened. Police refused to press charges against the assailant, despite the half-dozen patrollers willing to testify, because the non-patroller victim of the violence declined to make a report. The patrol came across the assailant later in the evening, and instead of "punishing" him for the earlier incident, bandaged his hand. Cleghorn explained that by then, the man had calmed down, posed no threat, and needed assistance. *Cleghorn Interview, supra* note 217.

268. Author's experience.

269. *Cleghorn Interview, supra* note 217.

270. *Poet Interview, supra* note 81.

open a space in the criminal justice system and society for patrol activity that might help counteract real violence.

3. Racism

Strong emotions concerning protecting oneself and one's community may easily become mixed together with other strong emotions, especially prejudice and hate. Legitimate fear for one's safety may become mixed with unfounded fear of "the other," regardless of the actual threat these "others" present.²⁷¹ Professor Patricia Williams talks about this phenomenon in reference to Howard Beach:

Another scenario of the distancing of the self from responsibility for racism is the inventing of some vast wilderness of others (composed, in the context of Howard Beach, of violent seventeen-year-old black males in running shoes and hooded sweat-shirts) against which the self must barricade itself. It is this fear of the overwhelming other that animates many of the more vengefully racist comments from Howard Beach: "We're a strictly white neighborhood," Michelle Napolitano said. "They had to be starting trouble."²⁷²

The danger is that in the minds of many white persons, and potentially some patrollers, the "other," the "criminal" or "basher," is connected with an African American or Latino face. "[T]he general white population seems, in the process of devaluing its image of black people, to have blinded itself to the horrors inflicted by white people."²⁷³ In order to implement the theoretical possibility of separating racism and assertive self-defense, it is necessary to erect a conscious and clear barrier between readiness to intervene physically against bashers and the probable heightened readiness on the part of white street patrollers to assume that young men of color pose a threat to community members.

The record of street patrols in dealing with the problem of manifestations of internal racism by patrollers is mixed. New York's Pink Panthers was originally formed by a racially-mixed group of people who reportedly spent a great deal of time talking about racism and the group's approach to people on the street.²⁷⁴ But as the group began to gain visibility and material support from people in the community less committed to such exploration, discus-

271. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 66; Costello, *supra* note 24, *passim*.

272. Williams, *supra* note 271, at 66 (quoting from *In Howard Beach, Pride and Fear in a "Paradise"*, N.Y. TIMES, Dec. 23, 1986, at B4).

273. *Id.* at 74. Williams also points to the strangulation death of Jennifer Levin in Central Park. "Robert Chambers, the wealthy WASP socialite who killed her, wasn't supposed to be the *type* of person who robbed, raped, or murdered." *Id.* at 75.

274. Paul Interview, *supra* note 266.

sion of racial dynamics was often criticized by newcomers or supporters as a "waste of time."²⁷⁵

Over the course of the two months I worked with Q-Patrol, several incidents on the street and in training brought up explicit discussions of internal racism. In talking through a possible scenario during training, one patroller described a scene involving hostile actions by "a young black guy." Other patrollers immediately challenged this description, asking what the race of the perpetrator added to the training and concluded that the racial modifier was inappropriate. While on patrol one evening, an African American man passing by asked, as many people do, "What are you guys?" Patrollers answered, "We're a community anti-violence patrol." The man responded, "I hope that doesn't mean a beat-up-the-black-man patrol." Patrollers immediately answered "No, way!" and everyone laughed, smiled, said goodbye, and went on their way. But at the rap at the end of the evening, the patrol spent a great deal of time discussing the dynamics of being a patrol that is predominantly white in a largely, but not exclusively, white neighborhood that many people of color visit for its stores, movie theaters, nightlife, and restaurants.

Early in the summer, the movie "Boyz 'n the Hood" played at a Capitol Hill theater. The movie attracted several African American gangs to Capitol Hill, and many fistfights and assaults among audience members broke out during the first week of the showing. Q-Patrol kept close watch on the crowds during the movie's run and had several near run-ins with gang members. During this time, patrollers repeatedly discussed the dynamics of being perceived as a rival gang, especially as a white gang in a white neighborhood keeping an eye on African American gangs. Patrollers also discussed the need to consciously resist developing a reflex assumption that any group of young African American men was a gang and posed a threat to people in the community or the patrol.

These examples show that racial hostility or acting out of racist reflexes based on internal biases are not an inevitable ingredient of street patrol activities, even street patrols that are predominantly white. But they also show that conscious attention to potentially racist responses and dynamics is necessary to overcome the inevitable internal biases of white people socialized in a racist society.

The most direct and perhaps most effective means of preventing racist abuse of patrols is through forming patrols that are of mixed racial composition. Unfortunately, in most gay and lesbian

275. *Id.*

communities this is likely to be difficult. It requires, at a minimum, outreach, communication, and cooperation with communities of color that have often been lacking in gay and lesbian community organizations, which historically have been led primarily by white activists. In addition, calling for patrols that are racially diverse as a solution to racist patrol actions suggests that the burden for preventing such activity will be put on patrol members of color rather than on white patrollers. Gay men and lesbians of color are likely to resist this burden. Those who are active in their communities already have their energy spread very thin between working on problems facing their racial community, as well as their gay and lesbian community, and for lesbians of color, their gender community, too.

Lack of mixed racial composition of a patrol is not necessarily fatal to a patrol. But patrol members must be willing to discuss and work through bias issues and must hold each other accountable for patrol behavior in this regard. In addition, those in the broader community should scrutinize carefully the patrols in their communities and should voice loud and repeated objections to behavior that seems to replicate the abuses of the dominant system. Ultimately, the existence of street patrols is justified by reference to breaking patterns of bashing and intimidation. At the point that a patrol instead becomes responsible for recreating such patterns against less powerful individuals or groups within society, it forfeits its claim to tolerance or support by the criminal justice system or society.

With this understanding of the nature of the violence facing the community and the street patrols that have been formed in response to it, I move, in the next section, to analysis of resistance to gaybashing in the context of the formal criminal justice system.

IV. Street Patrols in the Criminal Justice System

In this Section, I link efforts by those in the lesbian and gay community to defend themselves into a long tradition of citizen self-help efforts. While most of the defensive actions in which individual lesbians and gay men and organized street patrols engage should pose no unusual challenge to traditional self-defense doctrine, difficulties may arise in analyzing a "reasonable" response to an assault, because the response differs for gay men and lesbians than for members of the broader community. Factfinders need full knowledge of the type of violence gay men and lesbians face in order to judge whether the action taken in a particular case was justified. Finally, the effect that street patrols have on the relationship be-

tween police and the gay and lesbian community illustrates that, contrary to what one might expect, the patrols are likely to help improve these generally negative relationships.

A. *Self-Help*

"Self-help" has been defined as legally permissible conduct undertaken by individuals "absent the compulsion of law and without the assistance of a government official in efforts to prevent or remedy a legal wrong."²⁷⁶ Self-help has a long history in English and American common law.²⁷⁷ In its modern manifestations, it includes: 1) defense of one's self from bodily harm or reputational harm; 2) protection from coerced religious beliefs; 3) performance of actions to prevent theft of one's property or to recover stolen property; 4) defense against harm to one's property from direct physical damage and from actions of others that constitute a nuisance; and 5) recourse to procedures and institutions outside the traditional legal system such as mediators, ombudspersons, and "rent-a-judge" programs.²⁷⁸ For the purposes of this paper, I focus on issues concerning defense of self.

Many in modern society are uncomfortable with self-help doctrine. Modern critics of self-help warn of the dangers of the doctrine, arguing that it could lead to the breakdown of ordered society, anarchy, and chaos:

Ordered justice demands a semblance of consistency; consistency necessarily precludes ad hoc, individually prescribed remedies and responses. The judicial scheme survived despite its apparent contravention of American wherewithal and human nature, partly because the courts and laws provide an adequate and efficient alternative for redressing wrongs.²⁷⁹

This modern criticism of self-help echoes some political theorists' descriptions of social formation in which individuals give up to the state their right to use force against one another in exchange for the state's protection.²⁸⁰

But imbedded in these conceptions of society and of self-help are the factors that can justify self-help actions. Cession to a state

276. Douglas Ivor Brandon et al., Special Project, *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 850 (1984).

277. See *id.*, at 852-53, 878-880.

278. See generally *id.*

279. *Id.* at 849.

280. See, e.g., THOMAS HOBBES, *LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVIL* 132 (Michael Oakeshott ed., Collier Becks, Macmillan Publishing Co. 1962) (1651); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 53, 67 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690). See also ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 23-24 (1974).

of the right to use coercive power to defend oneself rests on guarantees of protection by that state. These guarantees include the promise that the state will consistently enforce the laws and that the courts and laws will provide an adequate and efficient alternative for redressing wrongs. This exchange implies that if the state systematically fails to protect a group of citizens or to redress wrongs committed against individuals within that group, those individuals may use force to protect themselves and may invoke traditional notions of self-help to justify their use of force.²⁸¹

An adequate and efficient alternative for redressing wrongs does not exist in our society with regard to harms inflicted on gay men and lesbians through gaybashing.²⁸² Gay men and lesbians are thus justified in turning to self-help to fill the gap in protection left by a state unwilling to protect them. The more difficult issue is what this justification means in daily life on the streets: How far may gay men and lesbians justifiably go to protect themselves and each other?

If people are to live in society together, a balance must be struck between allowing self-help actions when justice demands and preventing massive departures from the rule of law. According to our current criminal justice system, "[t]wo principal factors which indicate that self-help will be acceptable are that the available judicial remedies are somehow inadequate and the threat of a self-help remedy to society's interests in law and order is minimal."²⁸³ However, these factors in and of themselves provide little guidance in judging particular self-help actions because the words used in this standard are so vague. For example, when are remedies "inadequate"? What constitutes a "minimal" threat to society's interests in law and order?

Striking the balance between a right to self-help and the need for an ordered society is especially difficult because, while the inter-

281. My analysis in this section often blends the distinction between the individual and the community. While this tendency runs counter to the criminal justice system's attention to individuals, I believe it is appropriate to break down the line between individual and community in situations such as those facing the gay and lesbian community and the individuals within it. Here, individuals are at risk of attack because of their sexual and social identity, and they share this increased risk with all others within the gay and lesbian community. This empirical context may help distinguish between situations in which application of my analysis to other individuals or communities is appropriate and those where it is inappropriate. For example, my analysis and recommendations may be applied appropriately to racial or ethnic communities or, in some situations, to women as a group, but may be inappropriate for those who are subject to assault on a more random basis.

282. See *supra* part II.B (describing the inadequate response of the criminal justice system).

283. Brandon et al., *supra* note 276, at 853.

est at stake in each goal includes the safety of those in society, strategies for obtaining this end differ, and it is not entirely clear how the strategies support or undermine each other. For example, one ordinarily expects an ordered society to be better able to protect individuals and communities within it than an anarchy in which only those capable of physical resistance are free from assault or in which those who most effectively coerce others are the "lawmakers." Although in the short term, a greater willingness to allow self-help remedies may yield better protection of individuals, in the long term it may lead to a breakdown of order in society, posing a greater threat to individuals and communities. On the other hand, failure to allow aggressive self-help may contribute to a breakdown in order through increased assaults on those perceived to be vulnerable or unprotected.

Legal rules and doctrine governing different kinds of self-help actions attempt to create the balance between appropriate and inappropriate self-help. However, the existence of modern rules and limits should not obviate the ability to return to conceptual foundations and frameworks when judging the appropriateness of self-help actions in a context in which the law provides no remedy. There may be problems of fit between the situation facing members of society at a given moment and the legal doctrine developed over time to serve that society.²⁸⁴ Doctrine develops gradually since courts and legislatures address factual situations and conflicts as they arise. But as doctrine develops to meet societal needs, the society itself continues to grow and change. Thus at any given moment, legal doctrine may better address the past rather than modern problems of society. Even when legal doctrine leaves room to take such changes into account, it may do so inadequately, especially if it fails to take into account another kind of problem: differences existing among members of a society even at the same moment in history.

In the following section, I examine the application of modern self-defense doctrine to the defensive actions of gay men and lesbians. My application suggests that the current application of modern doctrine may fail to leave room for self-help actions by the gay and lesbian community that are justified by more basic theories of self-help.

284. See, e.g., *infra* part IV.

B. Self-Defense

Self-defense doctrine is a subset of the self-help doctrine. It seeks to create a balance between individual claims to self protection and societal needs for order. To accomplish this result, self-defense doctrine uses "reasonableness" as the measure by which actions are judged in specific cases. Invocation of the term "reasonableness" anchors the standard to established doctrine and precedent but allows room for juries and judges to take specific contexts into account. This kind of flexibility is important because it allows a clear, rule-based system to survive and helps order the myriad situations and conflicts that arise in real life. However, problems arise in practical application when the life experiences of jury members or judges are different than those of defendants and their assailants. In such situations, these factfinders may fail to categorize as "reasonable" a reaction justified under the conceptions of justice and justification that form the foundations of self-defense law.

There are reasons to be concerned that self-defense law might be applied unfairly to gay men, lesbians, and street patrollers in legal challenges to their actions of self-defense or intervention. Heterosexual jury members drawn from the community at large may inaccurately estimate the level of threat posed by gaybashing assaults and the "reasonable" response to particular situations.²⁸⁵ In addition, because they are engaged in defense of others as well as of self, patrollers may face self-defense doctrine which is not particularly hospitable to intervention by third parties. Self-defense doctrine in the areas of retreat, defense of others, and citizen arrest pose particularized problems of application to gay and lesbian street patrollers.²⁸⁶

1. Reasonableness

Contemporary American society reportedly accepts self-defense because of the prevalent belief that it is "necessary and beneficial to society."²⁸⁷ This acceptance reflects the general consensus that "[i]t is only just that one who is unlawfully attacked by another, and who has no opportunity to resort to the law for his defense, should be able to take reasonable steps to defend himself from physical harm."²⁸⁸ According to current self-defense doctrine,

285. See *infra* notes 371-78 and accompanying text.

286. See *infra* part IV.B.2.

287. Brandon et al., *supra* note 276, at 879.

288. WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 5.7(a) (1986).

one who is assaulted "is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger."²⁸⁹

The reasonableness analysis determines the degree of force one is justified in using to respond to an assault. Traditional self-defense doctrine distinguishes between use of "deadly force" and "nondeadly force" in response to an attack. Nondeadly force may be used in self-defense whenever a person reasonably believes she is about to suffer "unlawful bodily harm" at the hands of another.²⁹⁰ By contrast, one is justified in using deadly force²⁹¹ under traditional doctrine only if one "reasonably believes that the other is about to inflict unlawful death or serious bodily harm"²⁹² and reasonably believes that the use of such force is necessary to prevent the harm.²⁹³

Questions concerning what can be called a "reasonable belief" or "reasonable response" plague the application of self-defense doctrine.²⁹⁴ Problems arising from applying an "objective" standard of reasonableness where "objective" is determined by what an average male in the community might have believed in the situation have been discussed extensively with regard to women's self-defense, particularly in the context of domestic violence.²⁹⁵ Similar problems arise in the context of gaybashing.²⁹⁶ Because the partic-

289. *Id.* § 5.7.

290. *Id.* § 5.7(b).

291. Deadly force is force by which the user intends to cause death or serious injury or which the user knows creates a substantial risk of such outcome. *Id.* § 5.7(a).

292. *Id.* § 5.7(b).

293. *Id.*

294. The Model Penal Code formulation of the reasonableness of belief avoids many of the problems of traditional doctrine in this regard, requiring only that a defender "believes" that the use of force is necessary. See MODEL PENAL CODE § 3.04(1) (Official Draft and Revised Comments 1985). This approach has been defended on the grounds that when an actor believes that the use of force was necessary, the intent requisite for a conviction of murder or manslaughter is absent. See LAFAYE & SCOTT, *supra* note 288, at § 5.7(c); MODEL PENAL CODE § 3.04 at 36 (Official Draft and Revised Comments 1985).

295. See generally, Phyllis L. Crocker, *The Meaning Of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 127 (1985); Finley, *supra* note 7, at 893; Cathryn J. Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 35-36 (1986); Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 623 (1980) ("sexual stereotypes of women and the male orientation built into the law prevent judges and jurors from appreciating the circumstances of battered women's acts of self-defense and their perceptions.").

296. Of course, to the degree that women are treated unfairly under a system of self-defense law designed to accommodate the situations in which men most likely find

ular patterns common to gaybashings differ from those of muggings or other assaults likely to be faced by those in the broader community, the reasonable gay man or lesbian²⁹⁷ is likely to see things very differently than a jury member not familiar with the violence threatening the gay and lesbian community. If the reasonableness analysis central to self-defense law is to be applied justly in the context of defense against gaybashings, it must be inclusive of the perspective of the gay and lesbian community and of the perspective of a gay man or lesbian who was attacked.²⁹⁸

In general, a defender's use of a deadly weapon against an unarmed assailant is likely to be considered unreasonable use of deadly force.²⁹⁹ But "this is not inevitably the case; account must be taken of the respective sizes and sex of the assailant and defendant, of the presence of multiple assailants, and of the especially violent nature of the unarmed attack."³⁰⁰ Traditional application of self-defense doctrine thus might justify force in cases where there are multiple assailants, as is often the case in gaybashings,³⁰¹ or where the attack itself is clearly brutal, as many gaybashings are.³⁰²

themselves, lesbians will be affected, as are all women, in a manner very different than are gay men. For the purposes of this article, I concentrate on concerns particular and common to gay men and lesbians as minorities of sexual orientation. However, it is worth noting that for purposes of self-defense law, lesbians stand at an intersection of oppression as women and as sexual-orientation minorities. Lesbians of color face, in addition, being targeted in assaults and facing problems from juries and other players in the criminal justice system because of their race. See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) (contrasting "the multidimensionality of Black women's experience" with "single-axis analysis that distorts these experiences.").

297. See *supra* note 7 for a discussion of the dangers of essentialism and an explanation of what I mean by a "gay or lesbian perspective."

298. This is different from arguments concerning whether an "objective" or "subjective" standard should be applied. See, e.g., Crocker, *supra* note 295, at 125. I am not concerned here with the subjective particulars of an individual's own experiences with a particular assailant or with that individual's past history of personal abuse, but rather with the differences between communities that result in very different "objective" standards of reasonableness for members of those communities.

299. LAFAYE & SCOTT, *supra* note 288, at § 5.7(b).

300. *Id.* See also Rosen, *supra* note 295, at 35-36. (citing *State v. Wanrow*, 559 P.2d 548 (Wash. 1977) (reversal of second degree murder conviction where a "five-foot-four" woman with a broken leg and a crutch "shot an intoxicated, unarmed man whom she knew had a reputation for violence when he approached her in a threatening manner").

301. See *supra* note 11 and accompanying text (stating that assailants tend to attack in groups). See *supra* note 20 and accompanying text (describing the trend of young men in gangs engaging in gaybashing).

302. See *supra* notes 39-50 and accompanying text.

The more difficult situations arise in cases where the attack is such that the seriousness of the threat is clear to a gay or lesbian defendant in a manner unlikely to be clear to a jury member outside the gay and lesbian community. For example, baseball bats have been widely used in gaybashings.³⁰³ Walking through a gay neighborhood with a bat, stick, or cane is, to those who live in the neighborhood, tantamount to walking down Mainstreet, USA, with a machete in one's hand or a rifle over one's shoulder.³⁰⁴ What of the assailant who claims he was on his way to the park and stopped to hassle a gay man but had no intention of using the bat against him? Is a bat to be considered a deadly weapon, absent the fact that it was actually raised over the head of a gay man?³⁰⁵ Even less clear would be the case of an assailant in work boots or combat boots: "stomping" is a method of assault used primarily in hate crimes,³⁰⁶ not ordinary muggings. Can we expect jury members drawn from the general public to agree with the views of gay men or lesbians as to the reasonable response to shod feet?

In addition to the presence of weapons, knowledge of past violent conduct by the assailant may be relevant under traditional self-defense doctrine to deciding whether use of deadly force was reasonable or not.³⁰⁷ One who recognizes a basher's face from past assaults would likely have little trouble under this doctrine. But what about knowledge of past violent conduct by people like the defendant? In particular, what if the assailant is dressed as a skinhead? Skinheads are known for particularly targeting gay men and lesbians in brutal, sometimes deadly, attacks.³⁰⁸ The reasonable gay man or lesbian is likely to assess the risk of death or seri-

303. See, e.g., *supra* note 40 and accompanying text.

304. Several gay men and lesbians with whom I have spoken tell of feeling their hair raising and pulse quickening upon seeing baseball bats, even in otherwise non-threatening situations.

305. In at least one case, police officers have not treated baseball bats as weapons, even when explicitly carried as such. In 1981, at a rally held by an Atlanta housing project to protest the failure to find the "child killer" stalking the neighborhood and to announce the formation of a self-defense patrol, "[y]ounger members of the patrol, who carried baseball bats, were not stopped but those carrying weapons were questioned by police." Those carrying guns were arrested and charged with "possession of deadly weapons at a public gathering." *Coleman v. Balkcom*, 451 U.S. 949, 961 n.2 (1980) (Rehnquist, J., dissenting) (citing WASH. STAR, Mar. 21, 1981, at 1) (emphasis added).

306. See, e.g., Debbie Howlett, *Guilty Plea Offer Made in Death of Gay Sailor*, USA TODAY, May 4, 1993, at 3A; Reg Alexander, *Thugs Bring Vengeful Dreams*, VANCOUVER SUN, May 22, 1993, at A3; Jack Lakey, *Two Sides Battle on College Street After House Trashed*, TORONTO STAR, June 13, 1993, at A2; *Gay Basher Convicted of Assault*, UPI, Mar. 10, 1993, available in LEXIS, Nexis Library, UPI File.

307. LAFAYE & SCOTT, *supra* note 288, § 5.7(b); see also Rosen, *supra* note 295.

308. See, e.g., Gabe Martinez, *Three Attackers Shoot, Beat Laguna Man in Hate Crime Assault*, L.A. TIMES, Jan. 17, 1991, at 1; Keene & Cal, *supra* note 23, at B1.

ous bodily harm from an assailant dressed as a skinhead as being extremely high, even though they may know nothing about the particular tendencies of the individual assailant.

Similarly, knowing that hate-motivated violence tends to be particularly brutal, a gay man or lesbian confronted with an assailant who utters anti-gay epithets may make the determination that they are confronted with the probability of an assault which is likely to result in severe bodily harm, or even death.³⁰⁹ From the perspective of a lesbian or gay man, anti-gay epithets might reasonably be used as part of a calculation that deadly force is justified to defend oneself from the assault.³¹⁰ But juries made up of individuals unfamiliar with the violence facing the gay community might dismiss such fears, finding no particularly grave threat in the use of such epithets.

In situations such as those described above, anything less than incorporation of the perspective of the gay and lesbian community into the conception of reasonableness as applied in self-defense cases denies those in the community the chance to defend themselves against the assaults that they are most likely to face.

This argument may make some nervous because it suggests that sometimes appearance may be reasonably used as a proxy for intention. Some might argue that application of self-defense doctrine in this manner in effect would make carrying a bat, wearing boots, or walking around with a shaved head³¹¹ in a gay and lesbian neighborhood tantamount to a crime punishable by death or serious bodily injury.³¹² But because the area of application is self-

309. In nearly all of the incidents cited in this article, verbal harassment preceded and accompanied actual physical attack. See, e.g., *supra* notes 1-2, 53 and accompanying text. Cf. Comitz, *supra* note 93, at 376 (Acts such as cross-burning are not "expressive conduct," that is, speech that should be protected. Rather, because of the historical tendency of cross-burnings to accompany actual, murderous violence, such acts are "merely threats of violence that can be freely regulated by the government.").

310. Here courts might turn to the experience of battered women confronted with verbal threats. Courts' responses have been mixed in such cases. See Rosen, *supra* note 295, at 14 n.14 (listing cases where verbal threats by a batterer have both justified and failed to justify responsive use of deadly force).

311. Skinheads tend to groom themselves in this manner. See, e.g., Mark Platte and Chris Kraul, *Dozens Sign Up for Patrols in Wake of Hillcrest Death*, L.A. TIMES, Dec. 18, 1991, at A1.

312. The practical implications of this argument are not idle speculation. While I was out with Q-Patrol one evening, the patrol spent some time following a group of young men dressed in combat boots, one of whom twirled a cane as he walked. In the course of deciding whether to move on or to concentrate on keeping an eye on the group, patrol members argued over whether the patrol should pay attention to or follow the young men, with many members arguing that they could not ignore the likelihood that the cane might, at any time, come down on the heads of people on the sidewalk. Others argued that the patrol could not take it upon itself to dictate ac-

defense doctrine, persons presenting themselves in this manner would be subject to an appearance standard only if they actually threatened or assaulted a gay man or lesbian.³¹³ In this context, objections to allowing victims of violence to take appearance into account deny the reality of the characteristics of the violence facing these communities.

Another objection to using appearance and group membership as a proxy for intention in the case of skinheads is that this is no different from the use some make of race as a proxy for dangerousness.³¹⁴ But the crucial distinction between race and clothing or behavior is that one's clothing or decision to utter epithets or assault others are a matter of choice, whereas race is not. Membership in a group such as the skinheads is a membership of affinity. It is a membership chosen by an individual. Connection with a racial group, on the other hand, generally is not a membership of choice.³¹⁵ Furthermore, no racial group can fairly or accurately be described by the generalization that they, as a group, are dangerous. By contrast, an activity central to skinhead organization and existence is the acting out of hatred of gay and lesbian people, people of color, and Jewish people.³¹⁶ Inclusion of a gay and lesbian perspective in the reasonableness analysis would not justify forceful reactions to someone who "looks dangerous" because of his race.

These changes in the interpretation of reasonableness, when looked at in terms of the foundations of self-help law, reflect appropriate application of traditional doctrine. As explored earlier, the state has failed to protect the gay and lesbian community from harm.³¹⁷ The state thus has a weak basis upon which to prevent the community's efforts to protect itself by taking back the right to use force against their assailants. At the least, the state ought not

ceptable clothing or "accessories" and, in effect, harass those who choose to wear boots or carry canes.

313. See *supra* notes 282-83 and accompanying text (summarizing the current self-defense doctrine).

314. See *supra* note 273 and accompanying text.

315. Political theorist Iris Marion Young has also differentiated between "social groups" and "ideological groups." Iris Marion Young, *Justice and Communicative Democracy*, in *RADICAL PHILOSOPHY: TRADITION, COUNTER-TRADITION, POLITICS* (Roger Gottlieb ed.) (forthcoming 1993) (manuscript at 16-18, on file with author).

316. Cf. Doreen E. Iudica, *Police Fear Skinheads Gaining Foothold*, BOSTON GLOBE, Aug. 11, 1991, at 25 (According to Boston Police Lieutenant William Johnston, Commander of the Community Disorders Unit, skinheads "commonly congregate in the suburbs and travel to cities 'where they can find in large number those they hate, and then return to the lily-white suburbs to live when they're done. They seek out their enemies.'")

317. See *supra* part II.B.

to prosecute and punish gay men and lesbians who use force to defend themselves from the harms inflicted by bashers.

Gay men and lesbians are facing focused, repeated threats to their physical safety and freedom of movement and association. Traditional self-defense doctrine is not designed for situations like those facing the lesbian and gay community. The gay and lesbian community has seen a phenomenal increase in violence directed against it.³¹⁸ Given this reality, doctrine that counsels restraint may succeed only in keeping gay men and lesbians isolated from each other and from daily life in society or in putting them in a position where, by the time the bat comes down on their heads, it is too late for them to protect themselves.

2. Defense of Other, Retreat, and Citizen Crime Prevention

Even if conceptions of reasonableness are transformed to meet the context of the gay and lesbian community, other aspects of self-defense doctrine may prove problematic for street patrols. Doctrine concerning the defense of others is of particular concern to patrolers, since they are expressly interested in intervening on behalf of assault victims.

The elements of justifiable defense of others correspond to the requirements for defense of self. One may use reasonable force to defend another when one "reasonably believes that the other is in immediate danger of unlawful bodily harm from his adversary and that the use of such force is necessary to avoid this danger. Deadly force is reasonable force only when the attack of the adversary upon the other person reasonably appears to the defender to be a deadly attack."³¹⁹ The modern rule justifies defense of complete strangers as well as one's family members and friends.³²⁰

When an intervenor makes a mistake in defending a third party, different views of the doctrine may have very different implications for community patrollers. The "alter ego"³²¹ form of the rule holds that the defender's actions are justifiable only to the degree to which the person to whose aid she has come would have been justified in defending herself.³²² Thus, for example, if a patrol were to come across a plainclothes police officer in the process of arresting a basher and intervened to protect the basher in the belief

318. See *supra* notes 12-38 and accompanying text.

319. LAFAYE & SCOTT, *supra* note 288, § 5.8.

320. *Id.* § 5.8(a).

321. *Id.* § 5.8(b).

322. *Id.*

that the basher was actually the victim of an assault, the actions of the patrol would not be justified under the alter-ego rule because the basher himself would not have been justified in resisting the arrest. Similarly, under this interpretation, intervention in a play fight would subject patrollers to criminal blame. The alternative view is that "so long as the defendant reasonably believes that the other is being unlawfully attacked, [the defendant] is justified in using reasonable force to defend [the other]."³²³

As a matter of justice and encouraging bystanders to aid others,³²⁴ the latter formulation "is surely the preferable view."³²⁵ Liability for assault, manslaughter, or murder for one who has in good faith come to the aid of another "imposes liability without fault; and yet the assault and homicide crimes are crimes which require fault."³²⁶

Given the explosion of violence against the gay and lesbian community, the threat to public peace comes not from patrol members mistakenly attacking nonaggressors. It comes, instead, from the lack of response to or intervention in assaults.³²⁷ Intervenor, be they individuals or community patrols, should be encouraged to help others who are assaulted. Fear of suffering personal injury makes intervention difficult enough for many. Imposing criminal liability on those who mistakenly defend others against assault³²⁸ will only further discourage intervention and do nothing to reduce violence.

Some argue against encouraging bystander intervention as a matter of public policy and social utility.³²⁹ The factors invoked to support this argument, such as a lack of training and the possibility that an intervenor will destroy evidence or violate a suspect's rights,³³⁰ are not inevitable characteristics of intervention by citizen bystanders, but rather are encouraged by a system that frowns on citizen intervention and thus discourages citizens from learning how to intervene properly. Street patrols are specifically trained to avoid these problems. Another factor supposedly increasing the "costs of intervention," that is that intervenors endanger themselves as well as other bystanders,³³¹ ignores the reality that in an assault, the assailant is endangering someone. Some injury to an

323. *Id.*

324. *Id.* (citing *State v. Fair*, 211 A.2d 359, 368 (N.J. 1965)).

325. *Id.*

326. *Id.*

327. See *supra* notes 84, 94-123 and accompanying text.

328. LAFAYE & SCOTT, *supra* note 288, § 5.8(b) n.7.

329. See, e.g., Wenik, *supra* note 83, at 1796.

330. *Id.*

331. *Id.* at 1796.

intervenor may prevent greater injury to an assailant's victim, and over time, may prevent injury to others in the community.

It has also been suggested that the only proper response by citizens witnessing an assault is to call the police, that other forms of intervention lead quickly down the slippery slope of vigilantism.³³² But the point of self-defense law is to provide standards by which to judge situations in which a person is attacked and police are not there to prevent it.³³³ This suggestion also fails to address situations in which the police refuse to respond or where bystanders fear the police as much as they fear their assailants.³³⁴ While efforts should be made to increase responsiveness and combat police abuse, those in gay and lesbian communities should be able to respond to protect themselves in the meantime. The suggestion also fails to recognize the degree to which self-defense doctrine can and does draw lines somewhere on the slope of individual reaction to an assault situation.³³⁵ Drawing the line somewhere farther along the spectrum does not declare that the field of permissible responses is wide open.

Like defense-of-other doctrine, modern doctrine concerning the duty to retreat³³⁶ may pose problems for gay men and lesbians who seek to defend themselves and others. "It seems everywhere agreed that one who can safely retreat need not do so before using nondeadly force."³³⁷ In the case of use of deadly force against an assault that threatens to result in death or serious bodily harm, a majority of jurisdictions do not require retreat, even if the defender can retreat in complete safety.³³⁸ Some have called the minority position, that retreat is necessary where possible to do so with complete safety, "the more civilized view."³³⁹ But the argument that this is more civilized assumes that by retreating, a death or serious injury will be avoided. This ignores situations where one potential victim escapes, and the assailant simply assaults someone else. Assuming that retreat averts injury may be safe in the case of a fistfight between two rivals who know each other or who have picked a fight with each other. But gaybashers enter gay and lesbian neighborhoods for the express purpose of assaulting gay men or lesbians.³⁴⁰ If one potential victim manages to escape, or if a

332. See *id.* at 1794-96.

333. See *supra* part IV.B.

334. See *supra* part II.B.

335. See *supra* note 294 and accompanying text.

336. See LAFAYE & SCOTT, *supra* note 288, §§ 5.7(f) and 5.8(c).

337. *Id.* § 5.7(f).

338. *Id.*

339. *Id.*

340. See *supra* notes 17-18 and accompanying text.

patrol confronts a basher and then retreats in order to avoid using deadly force against him, the basher may well assault someone else. In terms of protecting community safety and keeping the peace, encouraging street patrols to intervene forcefully to end an attack seems far more likely to confine the number of incidents of assault than does requiring them to back away if possible. This is especially true if, as is the case in the gay and lesbian community, the police are unlikely to respond to calls alerting them to the presence of an assailant from whom a victim has escaped.³⁴¹

The necessity for retreat when defending others potentially disadvantages patrol members in jurisdictions applying the same standards of retreat to defense of others as to defense of self.³⁴² On this model, if a third party can retreat safely in a jurisdiction that requires a victim to retreat, she must do so rather than intervene. Jurisdictions requiring retreat on this model frustrate attempts by patrols to come to the aid of others, for in nearly all cases the patrollers would be able to retreat with complete safety — but only at the cost of leaving the victim at the mercy of the assailant. The Model Penal Code (MPC) addresses this dilemma by requiring that a defender need not retreat “unless he knows he can thereby secure the complete safety of the person being defended.”³⁴³ The MPC qualifies this only by requiring that the defender encourage the person being defended to retreat if the retreat can be accomplished safely.³⁴⁴ As a practical matter, street patrols are likely to do just that. Standard operating procedures include patrol members placing themselves between an assailant and the victim, encouraging the victim to retreat, thereby either stopping the assault or drawing the assault toward the patrol members, who are probably better prepared to defend themselves than the intended victim. If the assailant attacks patrol members directly, they are entitled to defend themselves appropriately.³⁴⁵

When assailants flee from patrols, other aspects of self-defense doctrine come into play, those of law enforcement and crime prevention through citizen arrest. Doctrine regarding the use of force by citizens for crime prevention has a long history. In early England, both police officers and private citizens were required to participate in what was known as the *posse comitatus* to find a

341. See, e.g., *supra* notes 119-123 and accompanying text.

342. See LAFAYE & SCOTT, *supra* note 288, § 5.8(c).

343. *Id.* (quoting MODEL PENAL CODE § 3.05(2)(Official Draft and Revised Comments 1985)).

344. *Id.* § 5.8(c).

345. See *supra* part IV.B. (describing the self-defense doctrine).

felon who was at large in the community.³⁴⁶ A citizen who thereby killed an escaping felon was excused of liability.³⁴⁷

The modern form of this doctrine allows a private citizen to undertake what is known as a "citizen arrest" in which the citizen "is justified in using reasonable force to prevent or terminate what he reasonably believes to be the commission of a misdemeanor amounting to a breach of the peace or of a felony."³⁴⁸ Deadly force may be used only to prevent or terminate "dangerous"³⁴⁹ felonies: "[T]hose felonies of the type which involve a substantial risk of death or serious bodily harm."³⁵⁰ "[T]he commission of the felony must appear to be imminent, rather than in the more distant future, to justify the use of [deadly] force."³⁵¹

The common law rule of arrests by private persons provided that a citizen could arrest "for a felony or breach of the peace committed in his presence."³⁵² Mistake did not justify an arrest if the crime had not, in fact, occurred.³⁵³ Not all modern criminal statutes address the issue of citizens' arrests. Of those that do, most provide that the crime must be committed in the presence of the private person, although a few allow arrest "on reasonable belief of a felony in fact committed"³⁵⁴ A private person who attempts to arrest another "acts at his peril in using deadly force. He is not privileged if it turns out that the person against whom the deadly force was used actually did not commit a dangerous felony."³⁵⁵

While community patrols often intervene when they witness an assault, they are also summoned after assaults have occurred to help chase and hold assailants. Jurisdictions applying a strict rule requiring the assault to take place in the patrollers' presence frustrate the prevention of crime and apprehension of assailants. While patrols in such jurisdictions may deter assaults within their eyesight, and perhaps within earshot, they will be discouraged from intervening in situations when called by witnesses who ran for help and found the patrol or when patrols pass an area where an assault has recently occurred and are informed of the direction in which the

346. Edward J. Littlejohn, *Deadly Force and its Effects on Police-Community Relations*, 27 HOWARD L.J. 1131, 1136 (1984).

347. *Id.*

348. LAFAYE & SCOTT, *supra* note 288, § 5.10(c). Again, the Model Penal Code requires only an honest belief. MODEL PENAL CODE § 3.07(5) (Official Draft and Revised Comments 1985).

349. LAFAYE & SCOTT, *supra* note 288, § 5.10(c).

350. *Id.*

351. *Id.*

352. *Id.* § 5.10(a).

353. *Id.*

354. *Id.* § 5.10(a) n.10.

355. *Id.* § 5.10 (a).

assailants fled. Such a result frustrates the purpose of the citizen arrest, which is to prevent crime. While laws requiring the felony to be committed in the private person's presence have sometimes been interpreted more loosely, allowing the arrest as long as "the offense . . . in fact occurred,"³⁵⁶ this is not sufficient to allow the patrols to function effectively. The disallowance of mistake still poses a high risk to patrollers of criminal liability in such situations and will likely deter intervention.³⁵⁷

A more liberal extension of the power of private persons to arrest arguably might be dangerous because it may harm persons who did not actually assault anyone. It is arguably better to err on the side of preventing harm to those mistakenly identified as assailants. But such an argument ignores the reality of street patrol practice. First, since community patrols are unarmed, the risk of use of deadly force is slight. While armed police officers have shot fleeing suspects, resulting in death or other serious, irreparable harm,³⁵⁸ the harm likely to befall someone fleeing the scene of a gaybashing, at least at the hands of unarmed community patrol members, is less than deadly.

Patrols chase and hold assailants until police arrive, with the least amount of force possible. Standard procedure is to pursue, identify oneself as a community patroller, and order the suspect to stop. Only if the suspect fails to stop or turns and attacks a patroller is force used to "take down" a suspect. Once on the ground, a suspect is subdued and held until police arrive, usually through holding pins. During this process, the suspect is repeatedly informed that the patrollers are a community patrol, that police are on the way, and that the suspect should hold still and calm down. Once police arrive, standard procedures designed to minimize risk of harm to suspects and to avoid mistakes of identity come into play. If a mistake as to the commission of a felony or identity of the assailant has been made, standard criminal process will prevent any further harm to the suspect. It is possible that by the time po-

356. *Id.* § 5.10(a) n.10.

357. See *id.* (citing Note, *The Law of Citizen's Arrest*, 65 COLUM. L. REV. 502, 511 (1965), "criticizing the rule as 'inconsistent with the theory that citizen's arrests are a desirable and necessary adjunct to official law enforcement.'")

358. Littlejohn, *supra* note 346, at 1143 (citing *Garner v. Memphis Police Dept.*, 710 F.2d 240 (6th Cir. 1983) (fifteen-year-old shot by police while fleeing from unoccupied suburban home after stealing ten dollars in cash and jewelry)); *id.* at 1144-45 (citing *Suspected Steak Thief Shot Dead After Chase*, DET. FREE PRESS, Mar. 17, 1981 and Detroit Police Department Homicide File No. 81-115 (Unarmed man shot by police and killed after the man left a store where he had attempted to steal steaks, fled in a stolen vehicle, led police in a chase, crashed his car, and attempted to flee from the officers on foot. None of the officers claimed that the suspect had threatened or otherwise startled them.))

lice officers arrive to sort out the situation, some harm may have been inflicted on a suspect. Also, realistically, someone might panic and run or fight back if approached by a patrol because they are simply afraid of the patrol. These concerns, however, do not outweigh the need to deter assaults, given the current context of violence.

Violence is a reality for the gay and lesbian community; the question is what to do about it. Currently gay men and lesbians, not bashers, are the ones threatened by violence. Only when the balance shifts and abuses by street patrols become regular occurrences, would it be appropriate to resolve these competing policy issues in favor of potential victims of street-patrol violence.

3. Objections to Recognition of a Lesbian and Gay Perspective

Some might object to modifying self-defense doctrine as advocated above because they fear it would complicate self-defense doctrine to the point of reducing deterrence and making application of the doctrine extremely cumbersome. According to this criticism, people cannot be deterred by laws they do not understand.³⁵⁹ But "[i]f general principles consistent with our collective sense of justice shape a doctrine, the doctrine will likely be understood and viewed as just."³⁶⁰ Extension of self-defense doctrine to include the perspective of gay men and lesbians in the conception of reasonableness and to allow for and encourage citizen patrollers to come to the aid of assault victims comports with the basic premise of self-defense law that one who is attacked may defend herself. Such an extension also comports with the desirable public policy objective of encouraging a sense of community responsibility for the safety of others. It is not difficult to understand a basic command that people must not assault others, and anyone who does may meet with an aggressive response.

Recognition of a gay and lesbian perspective may be criticized by some as an example of what critics of a "battered woman's defense" feared would happen if such a defense were allowed: "[T]hat the defense cannot be confined to battered women and will lead to an undesirable extension of the justification of self-defense to anyone who has a subjective belief that use of deadly defensive force is

359. Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 56 (1985).

360. *Id.* at 57.

necessary.”³⁶¹ But to the degree that groups of people or individuals within society face particular circumstances that explain their perspective and response when faced with assaults, self-defense doctrine ought to recognize these perspectives. Just because standard measures of “reasonableness” may need to be expanded to include the perspectives of more groups than women or gay men and lesbians does not mean that the concept is indefinitely expandable or that it will cease to provide a meaningful standard for analyzing self-defense claims.

Critics of self-help that challenge the social desirability of extending self-defense doctrine make questionable empirical and sociological assertions. For example, one critic of the battered women’s defense as a justification for killing a batterer argues that:

self-help is contrary to the interests of modern society. Reliance on self-help tends to diminish respect for the rule of law. Self-help in the form of self-defense carries the additional problem of increasing the quantum of violence in an already violent society. More troublesome is the possibility that the more widespread resort to self-help becomes, the more often innocent people may be killed erroneously.³⁶²

These assumptions are not supported by facts in the case of street patrols in the gay and lesbian community, which seem to have deterred greater levels of violence.³⁶³ Experts on hate violence argue that failure to meet hate violence with broadly expressed, firm disapproval leads to increased levels of such violence.³⁶⁴ This suggests that the willingness and ability of gay men and lesbians to react forcefully to attacks, and state approval of such action, may in fact result in reduced levels of violence in

361. Rosen, *supra* note 295, at 15 (citing Rittenmeyer, *Of Battered Wives, Self-Defense and Double Standards of Justice*, 9 J. CRIM. JUSTICE 389, 390 (1981) (asserting that battered woman’s defense exploits stereotypes and provides license to kill)).

362. *Id.* at 52.

363. Crime statistics in Philadelphia showed a 41% drop after street patrols began patrolling there. According to activists, this drop in crime rates actually coincided with an increase in the reporting of crimes after the patrol mobilized. Delicatessens in New York reported a rise in business during the evening hours after the Pink Panthers began patrolling, and patrol leaders report being told of similar increases in volume of nighttime business from business owners. Karpf, *supra* note 1, at 1. In addition, “[a]necdotal evidence of violent situations defused, fights stopped and possible gay-bashing groups frightened off . . . shows that patrol groups are clearly successful in handling those violent circumstances that they do come across.” *Id.* at 11. One reporter on a walk-along with the Pink Panthers witnessed a group of teenagers dispersed by the presence of the patrol: “Don’t mess with them,” yelled one of the youths to his companions. “They got the walkie-talkies with them, they got the walkie-talkies.” Michael Graham, *Gay ‘Pink Panthers’ Patrol in New York*, SUNDAY TIMES, Sept. 30, 1990.

364. See, e.g., Tom Coakley, *Public Action Seen as Key in Hate Crime: Called Essential to Stem Spread*, BOSTON GLOBE, Aug. 25, 1991, at 32.

society. Finally, rather than a contextless, lawless expression of hostility or aggressiveness, the actions of gay and lesbian patrollers are, in fact, a call to the community to uphold the laws, to stop the rampant unlawfulness of bashers who, knowing they are unlikely to be stopped by law enforcement officers,³⁶⁵ are assaulting people in the community at will.

Implementation of any of these suggestions at the trial level will be complicated by the potential hostility of juries and judges to gay and lesbian defendants. The introduction of evidence that an assailant's victim was a gay man has resulted in the acquittal of defendants in several prosecutions of gaybashers.³⁶⁶ Where a criminal defendant is a gay man or lesbian, efforts are usually directed toward insuring that the sexual orientation of the defendant does not become known to the judge or jury, and appellate courts have been criticized for holding that admission of evidence as to the defendant's sexual orientation is nonprejudicial.³⁶⁷ "[C]ourts generally prohibit [remarks regarding the sexual orientation of a defendant in opening or closing arguments] due to their propensity to disparage the defendant in the eyes of the jury"³⁶⁸

Of course, my arguments rely on the jury knowing that a defendant claiming self-defense is a gay man or lesbian. Such knowledge is critical to explaining the reasonableness of his or her response to an assault. One way around this dilemma might be to conduct voir dire to eliminate jurors so biased against lesbians or gay men that they could not judge the actions of the individual before them fairly and impartially.³⁶⁹ While "courts have held that the mere presence of issues related to homosexuality does not automatically warrant an investigation into potential anti-gay prejudice,"³⁷⁰ where the defendant's sexual orientation is central to her affirmative defense, elimination of jurors biased against gay men or

365. Rosen acknowledges in a footnote that self-help is often a response to lack of effective law enforcement. See Rosen, *supra* note 295, at 52 n.218.

366. See *Sexual Orientation and the Law*, *supra* note 35, at 1546 (1989). See also Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 882 (1979) (revelation of homosexuality in court met with extreme reactions and prejudice); Minkowitz, *supra* note 143, at 368 ("It's customary for defense lawyers in gay-bashing cases to use homophobia as their main trial strategy.").

367. See *Sexual Orientation and the Law*, *supra* note 35, at 1551-52.

368. See *id.* at 1552. Recent increases in attention to and prosecution of gaybashing have added a new twist to this issue. Defense lawyers in one gaybashing case unsuccessfully fought to *exclude* evidence showing that the man the defendants allegedly murdered was gay. Joseph P. Fried, *Lawyer Seeks to Screen Gay Jurors in '90 Murder*, N.Y. TIMES, Oct. 24, 1991, at B3.

369. *Sexual Orientation and the Law*, *supra* note 35, at 1552-53.

370. *Id.* at 1553.

lesbians will be essential to the defendant's chances of receiving a fair trial.

Even where attorneys manage to screen jurors who are openly hostile to lesbians and gay men, jurors completely unaware of the violence facing the gay and lesbian community are unlikely to be able to ascertain fairly the reasonableness of a defendant's response. Lack of knowledge about the degree and types of violence facing the gay and lesbian community will inevitably harm gay and lesbian defendants as they seek to explain their actions and as juries seek to apply the reasonableness standard.³⁷¹ Moreover, bias against homosexuals will significantly affect a jury's application of the reasonableness standard.³⁷² "An individual juror brings not only his world knowledge into the jury box but also his individual biases and prejudices — even those the juror is not conscious he possesses."³⁷³ The requirement that a jury be composed of a "representative cross section of the community" may not be enough to overcome anti-gay prejudice:

This requirement is designed to counteract individual biases by ensuring that the jury represents a wide range of views. For the most part jurors are able to set aside their individual biases when they sit together as a group. In certain types of cases, however, most notably in those involving rape, the death penalty, and racial prejudice, "the subject matter awakens deep-seated personal values over which people adamantly disagree." Homosexuality is no less a matter that implicates deep-seated prejudices than these other categories. Individual jurors' biases will thus inevitably affect juries in cases involving homosexuality and improperly skew the results. These biases are so widespread that selection from a cross section of the community is likely to produce a homophobic jury despite the safeguards of the *voir dire*.³⁷⁴

Because of such problems, Robert Mison argues that judges should find, as a matter of law, that a homosexual advance is insufficient provocation to excuse homicide.³⁷⁵ Such a solution is not possible in prosecutions where self-defense is advanced by a gay or lesbian target of violence because self-defense doctrine requires application by a jury of the reasonableness calculation.³⁷⁶ Even though a jury must ultimately decide such cases, some steps could be taken to help counterbalance probable jury bias. Jury instructions acknowl-

371. Cf. Mison, *supra* note 92, at 161 (jurors bring their "world knowledge," including lack thereof, into the jury box).

372. *Id.* at 161-163.

373. *Id.* at 161.

374. *Id.* at 162 (footnotes omitted).

375. *Id.* at 176-77.

376. See *supra* part II.B.1.

edging such feelings might help counteract the problem.³⁷⁷ In addition, information regarding the degree of violence, patterns of bashing, and the lack of police response should be introduced and allowed as evidence of the defendant's state of mind at the time of the response. Such information could easily be introduced through expert testimony.³⁷⁸

Although anti-gay bias in courts and on juries may make recognition of a gay and lesbian perspective problematic, a gay man or lesbian prosecuted for use of force ought to have the option of seeking recognition of the reasonableness of his or her response, given the context in which it occurred. Ultimately, open discussion and recognition of the violence facing the lesbian and gay community and the broad range of forceful response justified in the face of such violence may help reduce societal ignorance and stereotyping of the gay and lesbian community, and the hostility these tendencies engender.

C. *Effect on Police/Community Relations*

Somewhat ironically, the patrols seem to be bringing police and gay and lesbian activists together. Police who see patrols working on their side are challenged to reconsider their tendency to assume that the gay and lesbian community is anti-police. The identity of function between patrols and police, as well as the regular contact resulting from exchanges of information and police response to incidents called in by patrols, helps bring patrollers inside the police officer's world. Through feeling the dangers of being on the street deterring crime and acting against those who cause violence, community patrollers seem to gain sympathy for the stresses involved in police work. In the cities where street patrols have organized, the regular contact between police officers and street patrollers seems likely to improve relations between the police and the gay and lesbian community.

The homophobia of police officers is a well-known phenomenon³⁷⁹ explained in part by the conformist, conservative tendencies

377. But see Mison, *supra* note 92, at 166 (questioning the effectiveness of such instructions).

378. Expert testimony regarding the motivation of assailants is already considered an important component of hate crimes prosecutions. A California judge dismissed one case alleging bias assault on a racially-mixed couple where the prosecutor "failed to provide an expert witness to explain the meaning of Nazi paraphernalia worn by the attackers, who allegedly beat the man unconscious with steel-tipped boots." Miriam Rozen, *Bashing Back*, AMER. LAWYER, June, 1992, at 58.

379. HARLAN HAHN, A PROFILE OF URBAN POLICE 461 (1971).

of many who choose police work³⁸⁰ and by their "occupational solidarity" (the tendency of police officers to socialize primarily with police officers).³⁸¹ Since there are few openly gay or lesbian police officers,³⁸² the police community can be expected to have little or no social contact with gay men or lesbians. This lack of contact means that police officers may have no real information to counter negative stereotypes of gay men and lesbians. The lack of contact may also allow officers to ignore more easily the violence facing the gay and lesbian community. Since police officers have tremendous discretion in directing the use of crime control resources and in how they choose to respond to situations on the street,³⁸³ personal unfamiliarity or hostility to the gay and lesbian community is easily transferrable to a reduced level of resources spent on addressing gaybashing.

Police discretion is also particularly noticeable in the manner in which police officers treat crime victims. Police officers' "[d]oubt as to the 'legitimacy' of the victim"³⁸⁴ of a crime may be reflected in treatment reflecting an officer's suspicion or feeling that a victim is "illegitimate."³⁸⁵ Because of the history of raids on gay bars, the sodomy laws that remain in force in many states, and the practice of "cruising" (anonymous sex in public or semi-public places, in which some gay men engage), police may tend to view lesbians and gay men as lawbreakers. Because of the history of hostility between the gay and lesbian community and police,³⁸⁶ gay and lesbian opposition to enforcement of laws against sodomy, and their knowledge of the poor treatment received by others in the community, gay men and lesbians who come into contact with law officers may reveal their contempt for the police through defiant, challenging, or disrespectful attitudes. But "[f]ailing the 'attitude test' and being labeled 'an asshole' (someone who fails to treat the cop with the proper measure of respect, or who is truculent, defiant or chal-

380. See HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 282-286 (1968), reprinted in ALLEN & KUHN, *CONSTITUTIONAL CRIMINAL PROCEDURE* 5 (1985); Jerome Skolnick, *Justice Without Trial* (2d ed. 1975), reprinted in ALLEN & KUHN, *supra*, at 38.

381. See Skolnick, *supra* note 380; HAHN, *supra* note 379, at 453-54.

382. See Mangels, *supra* note 98, at 35; Mary Schmich, *One Cop's Coverage Risks a Way of Life*, CHI. TRIB., June 26, 1991, at C1; Pete Slover & Christine Lowrence, *Dallas Officers Split on Hiring Gays, Lesbians: Some Say It Will Hurt Morale; Others Accepting of Change*, DALLAS MORNING NEWS, May 23, 1993, at 23A.

383. ALLEN & KUHN, *supra* note 380, at 5; NORVAL MORRIS & GORDON HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 91 (1970), reprinted in ALLEN & KUHN, *supra* note 380, at 24.

384. JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR*, reprinted in ALLEN & KUHN, *supra* note 380, at 41-42.

385. *Id.*

386. See *supra* notes 94-104 and accompanying text.

lenging) usually leads to problems. Cops don't take real or imagined assaults on their authority lightly."³⁸⁷ Gay men and lesbians widely report feeling degraded by the treatment they receive when making a complaint.³⁸⁸

In their opposition to sodomy laws, to overly-zealous enforcement of public indecency statutes, and to lack of response to gay bashings, the gay and lesbian community has been highly critical of the police.³⁸⁹ The clothing that many in the community wear, particularly the leather jackets of the younger Queer-Nation crowd, may fit into the stereotypes police officers carry about potentially violent assailants. These two dynamics together may cause police to fear that gay men and lesbians pose a potential threat to their physical safety:

The policeman, because his work requires him to be occupied continually with potential violence, develops a perpetual shorthand to identify certain kinds of people as symbolic assailants, that is, as persons who use gesture, language, and attire that the policeman has come to recognize as a prelude to violence [A] young man may suggest the threat of violence to the policeman by his manner of walking or 'strutting,' the insolence in the demeanor being registered by the policeman as a possible preamble to later attack. Signs vary from area to area, but a youth dressed in a black leather jacket and motorcycle boots is sure to draw at least a suspicious glance from a policeman.³⁹⁰

While this shorthand manner of identifying threats may be a necessary part of a police officer's repertoire for coping with a dangerous job, it is likely to cause unnecessary tension around interactions with gay men and lesbians. This tension may be heightened for police officers who carry with them stereotypes of gay men and lesbians as being dangerous and perverse.³⁹¹

Seeing street patrols in action and working regularly with them may help break down all of the above dynamics and stereotypes. Police officers reportedly believe and are at base committed to the idea that their "real mission . . . is to preserve the peace;

387. ANTHONY V. BOUZA, *THE POLICE MYSTIQUE: AN INSIDER'S LOOK AT COPS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM* 3 (1990).

388. See *supra* part II.B.

389. See Rene Sanchez, *D.C. Captains Faulted for Halloween Melee*, WASH. POST, Mar. 11, 1992, at C4.

390. Skolnick, *supra* note 380, at 35-36.

391. These stereotypes were clearly expressed and linked with gay-male sodomy in the arguments made by the state of Georgia in defense of its anti-sodomy law in *Bowers v. Hardwick*. The state's brief claimed that homosexual sodomy "leads to other deviate practices such as sado-masochism, group orgies, or transvestism . . . and is marked by . . . a disproportionate involvement with adolescents, and, indeed, a possible relationship to crimes of violence." Brief for Petitioner at 36-37, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140) (footnotes omitted).

protect life and property; detect and arrest offenders; prevent crime; and most important, to accomplish the task that gives the profession its name: enforce the law."³⁹² It is likely that they will respond positively to a group that proclaims an identical purpose and declares its commitment to helping the police to perform their job. Police officers watching street patrol members work, giving information and descriptions, and appearing in court to testify against perpetrators, are likely to perceive patrol members as being on their side. This view of patrollers will also challenge their stereotypes of gay men and lesbians as weak, anti-police, hostile, and unworthy of protection.

For their part, street patrollers who may have been hostile to the police are challenged to rework their stereotypes of police officers as they come into contact with them on a more regular basis. They begin to understand the pressures and difficulties of police work as they, too, experience the intermittent boredom and danger of law enforcement work, witness the degree to which they begin to develop stereotypes of "dangerous" kinds of people themselves, and experience the frustration of being unable to be everywhere at once with community members ready to criticize them for not being in the right place at the right time to stop an assault.

These theories regarding the possibility for an improvement in relations between police officers and patrollers seem to be born out in the reality of police/patrol contact in the cities where patrols have organized. Police in New York claim to "welcome the additional help from the [Pink Panthers]."³⁹³ The San Francisco Police support Street Patrol, calling it a "community or citizen action protection group."³⁹⁴ In some cases, the groups have even begun to patrol together. For example, the Silverlake Neighborhood Action Patrol (SNAP), a Los Angeles street patrol, requested that several police officers accompany them on their patrols after patrollers were shot at with air guns and suffered harassment by gang members. While stopping short of agreeing to patrol with SNAP on a regular basis, police have accompanied the group since the request.³⁹⁵ Of course, even efforts such as this are likely to require time and continuing success to overcome the history of antagonism. As one SNAP patroller said after the first joint patrol: "It was un-

392. BOUZA, *supra* note 387, at 1.

393. Curtis Rist, *Pink Panthers: Pride on Patrol*, *NEWSDAY*, Aug. 6, 1990, at 6.

394. *Morning Edition*, *supra* note 186. See also Hightower, *supra* note 179, [Assistant Police Chief Frank Yorek cited community patrol "as a good example of 'police-citizen crime fighting'"].

395. Lori Grange, *Police, Gays Patrol Violence-Prone Area*, *L.A. TIMES*, Apr. 5, 1990, at J1.

comfortable to a certain extent When I see a police officer around the area I don't know what their attitude is. I feel endangered from both ends."³⁹⁶ Even so, the fact that police officers and gay and lesbian community members would agree to work together in this way would have been unthinkable a few years ago, given the level of hostility existing then.³⁹⁷

When Seattle police learned of the formation of Q-Patrol in October, 1990, they were "wary; who will this group be? Straight bashers? Untrained Yahoos?"³⁹⁸ Police Major Ed Joiner, a patrol commander, reacted negatively:

"I couldn't support something like this There's a real question of what kind of training they would have and whether they would be able to handle the potentially serious confrontations they could face. I'd worry they could be targets themselves. If they are concerned we're not doing our job, they need to come to us and communicate as in the past."³⁹⁹

But by February, when the patrols began, the tone of the response had changed. "When they saw that [patrollers] were intelligent, trained, and well-directed, the police figured out [they] weren't a threat to them."⁴⁰⁰ Now relations with the police are "ostensibly, excellent. They smile and wave, and haven't said anything bad about the group."⁴⁰¹ Although still concerned about the Q-Patrol becoming a target and the possibility that members might "misconstruct a situation and end up infringing on others' rights," police officers have welcomed the patrol as a "concerned community group [that] has the department's support as 'another set of eyes and ears.'"⁴⁰² Police also hoped Q-Patrol members might serve as witnesses in some situations and that the existence of the group might encourage more gay men and lesbians to report incidents.⁴⁰³

In my patrols with the group, a fairly easy-going, but distanced relationship appeared to have been established between the police and the Q-Patrol. After Q-Patrol ran down shoplifters, called police, and stayed to provide descriptions and a car identification complete with license plate noted down on paper, police were visibly impressed and thanked the group. On a swing through Volunteer Park, police pulled up to ask if the patrollers had seen any skinheads in the area. After the patrol followed and held a man

396. *Id.* (quoting 28-year-old activist Gerald Caponi).

397. *See supra* notes 94-104 and accompanying text.

398. *Chinello Interview*, *supra* note 62.

399. *Seven*, *supra* note 35, at A1.

400. *Chinello Interview*, *supra* note 62.

401. *Id.*

402. *Lewis*, *supra* note 191, at B4 (quoting Police Sergeant Sim Tamayo).

403. *See id.*

who had harassed and punched a young gay man, the lieutenant in charge of the Capitol Hill division found the patrol to thank them personally for their help in apprehending the man, who was wanted in California for attempted murder.⁴⁰⁴ Patrollers have also come to respect police officers who work in the area. Q-Patrol Chapter Coordinator Alex Cleghorn admitted: "I wouldn't have said this two years ago, but I truly believe the cops on the hill are kind, decent people They're not here because of power trips. They're here because they want to help people."⁴⁰⁵

Cooperative attitudes that have developed between street patrols and police have actually resulted in a split in some communities. For example, patrollers in San Francisco's Street Patrol have been accused by some of "collaborating with cops."⁴⁰⁶ This comment, voiced even in response to a situation where the point of the "collaboration" is to stop gaybashings, shows the degree of hostility that still remains between the police and the gay and lesbian community. It also suggests that, given the history of police abuse, many community members do not put increased cooperation with the police high on their list of goals in forming the patrols and may even prefer that the patrols remain completely separate from the formal criminal justice system. Whether relations will continue to improve or will influence relations between the police and the broader gay and lesbian community remains to be seen. But there is reason for optimism.

V. Conclusion

Confronted with the violence directed against it and the failure of the state to come to its aid, the gay and lesbian community has organized itself to come to its own defense. In organizing street patrols, community members have channelled their rage at society's willingness to tolerate anti-homosexual violence into positive actions that assert the value of their own lives and bodies. They have transformed feelings of helplessness and isolation into self-confidence and community solidarity by patrollers' willingness to confront directly those who act out their hatred of homosexuality on the bodies of gay men and lesbians. While the street-patrol form is not unproblematic, the patrols appear to have reduced the level of violent assaults in the areas they patrol. This success has occurred, by all indications, without the abuses many feared inevitably must accompany the civilian patrol form.

404. Author's experience.

405. Stripling, *supra* note 195, at C1.

406. Karpf, *supra* note 1, at 11.

The ultimate goal, of course, is to eliminate the need for street patrols by eliminating hatred of others in society or at least the willingness to act on that hatred. But street patrols are a desirable and perhaps necessary development along the way to accomplishing this goal. The patrols have caught the attention of the broader public and thereby called attention to the violence threatening the community. They have also facilitated the development of a working relationship between community members and law enforcement officers and institutions that may help break down some of the dynamics and stereotypes that contribute to the criminal justice system's failure to move aggressively against bashers.

In applying the law of self-defense, we must be aware of the power of the law to affect our lives by shaping the reality of our world:

Law is, among other things, a language, a form of discourse, and a system through which meanings are reflected and constructed and cultural practices organized. Law is a language of power, a particularly authoritative discourse. Law can pronounce definitively what something is or is not and how a situation or event is to be understood. The concepts, categories, and terms that law uses, and the reasoning structure by which it expresses itself, organizes its practices, and constructs its meanings, has a particularly potent ability to shape popular and authoritative understandings of situations. Legal language does more than express events. Its terms and its reasoning structure are the procrustean bed into which supplicants before the law must express their needs. Through its definitions and the way it talks about events, law has the power to silence alternative meanings — to suppress other stories.⁴⁰⁷

It is with a healthy respect for this power of the law that this article should be considered. Feminist jurisprudence and other critical theories have demonstrated the ways in which favoring neutral, contextless, or "aperspectived"⁴⁰⁸ laws is in fact a choice to favor the perspectives of some over those of others. Gay men and lesbians face problems of fit, of translating the situations they face in their daily lives into existing legal language, categories, and doctrine.⁴⁰⁹ Failure to apply self-defense law in a manner that takes into account the perspective of the gay and lesbian community will contribute to common understandings that the violence facing the lesbian and gay community deserves less than an aggressive response, that the lives and safety of gay men and lesbians are unworthy of legal protection.

407. Finley, *supra* note 7, at 888.

408. *Id.* at 904.

409. *See id.* (discussing fit and translation problems in transferring issues facing women into the language of the law).

The gay and lesbian community is confronted with threats to its safety and well-being unlike those facing the larger community. The violence directed against the gay and lesbian community is focused on members of the group because of who they are: it is meant to challenge the continued physical existence of lesbians and gay men. This situation, combined with and amplified by state officials' unwillingness to take the violence against the community seriously, justifies strong actions by lesbians and gay men in their own defense, even actions that may fall outside of traditional applications of self-defense law.

The criminal justice system should accommodate direct resistance to anti-gay violence by individuals and by street patrols. The state must not fail to protect the gay and lesbian community and then disable the community from protecting itself by an overly narrow application of self-defense law. Street patrols and individual community members ought to be allowed and encouraged to organize and to be present on the streets of their communities, to challenge those assaulting people in the community, and to intervene to stop the violence.