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Queer Justice: Equal Protection For Victims Of Same-Sex Domestic Violence

I. INTRODUCTION

"He's buck naked. He has been beaten up . . . he is really hurt . . . he needs some help," said concerned neighbors in a telephone call to 911 emergency services, reporting the alarming presence of a young man on the street.¹ Police officers responding to the call dismissed emergency services personnel from the scene and forcibly returned the young man to the apartment of an older male, who persuaded them that the incident was nothing more than "a homosexual tiff."² In a radio report from the scene, the officers laughingly described the result of their cursory investigation of the home: "Intoxicated Asian, naked male, was returned to his sober boyfriend."³ When one local woman called the police station to protest this casual disregard for the younger man's safety and offered additional information, she was told by another officer, "I can't do anything about somebody's sexual preferences in life."⁴ Thirty minutes later, fourteen-year-old Konerak Sinthasomphone became the thirteenth of seventeen young men tortured, killed, mutilated, and sometimes eaten by his supposed companion, Jeffrey Dahmer.⁵

During the two years Laura Venable lived with Rosanne Peterson, Laura's mother urged her to leave an obviously abusive relationship: "I can't understand why Laura didn't get away from that situation. You can see it with men fighting each other. I can't fathom this."⁶ Friends recall that Venable was often a victim of emotional and physical abuse plagued by black eyes, a broken nose, and a broken finger.⁷ After a 1992 Christmas visit with her family,

1. Annetta Miller et. al., *Serial-Murder Aftershocks*, NEWSWEEK, Aug. 12, 1991, at 28.

2. Charles Laurence, *Victims of the Milwaukee Butcher*, THE DAILY TELEGRAPH, July 29, 1991, at 9. See also *Estate of Sinthasomphone v. City of Milwaukee*, 838 F. Supp. 1320, 1325 (E.D. Wis. 1993) (finding that the officers involved were entitled to a qualified immunity and dismissing the due process claims against them).

3. See Miller, *supra* note 1, at 28. The body of a previous victim lay in an adjoining room while police were inside the apartment. See *Estate of Sinthasomphone v. City of Milwaukee*, No. 91-C-1121, slip op. at 2 (E.D. Wis. Mar. 2, 1995).

4. See Miller, *supra* note 1, at 29.

5. *Id.* at 28.

6. Patricia King, *Not So Different, After All*, NEWSWEEK, Oct. 4, 1993, at 75.

7. Maria E. Camposeco, *Domestic Abuse Now Recognized Among Gays*, SACRAMENTO BEE, Aug. 24, 1994, at B1.

Venable returned to the home she shared with Peterson, but disappeared a few months later; police discovered her body in a nearby field, decapitated, dismembered, and decaying in a wicker basket.⁸

These two cases are dramatic and their tragic endings extreme. They accurately reflect, however, the significant disparity in legal and social responses to domestic abuse involving same sex couples and similar cases involving heterosexual couples. If Konerak Sinthasomphone had been a young woman, the Milwaukee police would have responded very differently, and five of Jeffrey Dahmer's victims might have been spared.⁹ If Laura Venable's abusive partner had been male, programs for assistance to battered women would have granted her readier access, and she might have survived.¹⁰ As this Note will show, victims of same-sex domestic violence do not receive equal protection under the laws.¹¹

8. See King, *supra* note 6, at 75.

9. The Sinthasomphone family filed suit against the city of Milwaukee and two Milwaukee police officers, claiming a violation of Konerak Sinthasomphone's right to the equal protection of the laws. Attorneys for the family planned to show that the Milwaukee Police Department has a thirty-year history and tradition of homophobia, sexism, and racism. The attorneys compiled abundant evidence attesting to the Department's policy or custom of non-reponse to the needs of the homosexual community in particular and minority groups in general. Interview with Lawrence G. Albrecht, Partner in the firm of First, Blondis, Albrecht, Bangert & Novotnak, S.C., in Valparaiso, Ind. (Feb. 2, 1995).

See also *Estate of Sinthasomphone v. City of Milwaukee*, No. 91-C-1121, slip op. at 1 (E.D. Wis. Mar. 2, 1995). The district court dismissed the city's motion for summary judgment on the equal protection claim, finding that although many facts are not in dispute, there is a dispute over the relevancy of certain facts and the proper inferences to be drawn from these facts. *Id.* at 2. The court found that the inferences to be drawn must be decided by a jury. *Id.* at 4. Further, the issues must be resolved in light of the customs and policies that have evolved in the Police Department over the years. *Id.* at 3.

Barely one month into the trial, the city's Common Council approved an \$850,000 payment to settle the suit. *Council Approves Dahmer Settlement*, WASH. POST, Apr. 26, 1995, at A6. Deputy City Attorney Rudolph Konrad stated that the settlement "is not an admission of guilt but a way to avoid the trauma of replaying Dahmer's crimes." *Dahmer Victim Settlement OK'D*, CHI. TRIB., Apr. 26, 1995, at M3.

10. GINNY NICARTHY & SUE DAVIDSON, YOU CAN BE FREE: AN EASY-TO-READ HANDBOOK FOR ABUSED WOMEN 103-108 (1989) (discussing the difficulties and limitations that battered lesbians face in obtaining help from police and prosecutors, shelters and safe houses, and community support).

11. See *infra* notes 51-62, 69-84 and accompanying text.

Domestic violence involves both cultural and legal concerns.¹² Abuse that occurs between intimate partners not only affects the individuals involved, but has adverse effects on society as a whole.¹³ Domestic violence can occur within households of any racial, religious, ethnic, or socio-economic composition.¹⁴ Although public awareness of domestic violence has increased dramatically since the 1960s, it remains an often-misunderstood phenomenon.¹⁵

12. *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1501 (1993) [hereinafter *Legal Responses*]. Domestic violence occurs with sufficient frequency to have a broad social impact and to strain the resources of the entire legal system. *Id.* Domestic disturbances may account for as many as 40 percent of the calls to which law enforcement agencies respond. *Id.* The courts, too, are overburdened in trying to deal with the problem. *Id.* at 1502. In addition, domestic violence has an economic impact on communities in the form of employee absenteeism, lost productivity, and increased health care costs. *Id.* Only a comprehensive long-term solution would alleviate the problem. *Id.* at 1505. Among the traditional mechanisms available, prosecution and punishment are the best means of controlling abusers, modifying their behavior, and promoting public awareness of the problem. *Id.* at 1518.

13. Marti T. Loring & Roger W. Smith, *Health Care Barriers and Interventions for Battered Women*, 109 PUB. HEALTH REP. 328 (U.S. Dept. of Health and Hum. Serv., May, 1994) [hereinafter PUBLIC HEALTH REPORTS] (estimating that domestic violence injuries involve medical costs of \$44,393,700 annually).

14. N. ZOE HILTON, LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 10-18 (1993). While there is great diversity in the backgrounds and the psychological traits of abusive partners, empirical data reveal common risk factors. *Id.* at 10. Childhood or intergenerational family violence, low income, and alcohol use are background factors appearing consistently across the population of abusers. *Id.* at 11-13. Psychological traits common among abusers include depression, low self-esteem, communication skill deficits, and inability to cope with stress. *Id.* at 14-18. Individuals who are characterized as extremely jealous, easily prone to anger, and emotionally volatile are also more likely to be abusive toward their partners. *Id.* at 22.

See also DEL MARTIN, BATTERED WIVES 44 (1976). Discussing the fact that abusers come from all walks of life, Martin describes her interviews with a farm woman, the wife of a professional man, and the wife of a general practitioner, all of whom experienced severe abuse. *Id.* at 44-45. Another example is Eisaku Sato, former prime minister of Japan and winner of the 1974 Nobel Peace Prize, whose wife proudly reported that he beat her only once a week. *Id.* at 45. Martin points out that victims often describe their abusive partners as angry, resentful, and suspicious, yet surrounded with an aura of inadequacy and insecurity. *Id.*

15. Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 979-80 (1991). Schneider points out that the women's movement of the 1960s spawned the battered women's movement, which revealed and discussed the problem of domestic violence openly for the first time in the nation's history. *Id.* at 979-80. During the past twenty years, the battered women's movement has endeavored to create legal remedies to deal effectively with the problem of abuse, to provide adequate services for battered women, and to educate the public about the prevalence of battering. *Id.* at 979-80. Despite this increase in public awareness, many inaccurate perceptions about battered women persist. *Id.* at 983. Perpetuating this trend is the fact that much attention remains focussed on the battered woman rather than focusing on the batterer. *Id.* Studies often center on the woman's pathology and level criticism at the victim for choosing to remain in the relationship. *Id.* Schneider argues that by focusing on the woman, society tends to perpetuate the power of patriarchy and to legitimize male power. *Id.* Schneider also condemns the trend toward resolving domestic disputes through informal processes such as mediation. *Id.* at 988. She argues that the use of mediation is a reflection of the attitude that battering is a woman's problem "that

Legislatures have only recently begun to act on the problem of domestic violence in our society.¹⁶ However, legislative attempts to provide protection to victims of domestic abuse have failed to the extent that they deny protection to certain segments of our society, especially victims of abuse at the hands of a same-sex partner.¹⁷

The form of domestic violence that most readily comes to mind is that which occurs in an opposite-sex relationship where the male is the abuser and the female is the victim.¹⁸ Because of the prevailing patterns of sexual power in our society,¹⁹ this relationship is in fact the one in which abuse most frequently occurs.²⁰ In the United States each year, the number of women abused by past or present male partners has been estimated to range from 1.8 million²¹ to four million.²² Several explanations for the disparity in these figures have been offered: the use of varying definitions of domestic violence,²³ a general pattern of underreporting,²⁴ surveys that inadequately represent the

should be worked out, and that the state has no role." *Id.* at 988-89. Schneider stresses the importance of utilizing criminal remedies for battering that focus on punishing the abuser instead of blaming the victim. *Id.* at 987-89.

16. *See infra* note 51.

17. *See infra* notes 51-62 and accompanying text.

18. RICHARD J. GELLES, *FAMILY VIOLENCE* 91 (1979). In his discussion of the history of wife abuse, Gelles reports that wives have been "raped, choked, stabbed, shot, beaten, had their jaws broken and have been struck with whips, pokers, bats and bicycle chains for as long as we have records of family life." *Id.* *See also* MURRAY A. STRAUS ET. AL., *BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY* 11 (1980) (describing women as the "traditional underdogs in family life").

19. CAROLYN F. WILSON & KATHRYN F. CLARENBACH, *NATIONAL CLEARINGHOUSE ON DOMESTIC VIOLENCE, VIOLENCE AGAINST WOMEN: CAUSES AND PREVENTION* 3 (1980) (stating that sex-role socialization, which has a pervasive influence on society, is the main impetus behind male violence against women and women's submission to it). Wilson and Clarenbach suggest that sex-role socialization is resistant to change because it has such a strong hold in Western society. *Id.* at 7.

20. Hon. Mac D. Hunter, J.S.C., *Homosexuals as a New Class of Domestic Violence Subjects Under the New Jersey Prevention of Domestic Violence Act of 1991*, 31 U. LOUISVILLE J. FAM. L. 557, 562-63 (1992/1993) (discussing the incidence of male to female domestic violence).

21. Michael A. Rodriguez, *Domestic Violence*, 161 THE W.J. OF MED. 60 (July 1994).

22. *See Legal Responses, supra* note 12, at 1501.

23. Domestic violence is most broadly defined as "controlling behaviors between people in past or present intimate relationships." Rodriguez, *supra* note 21, at 60. On the other hand, domestic violence can be narrowly defined by enumeration as the "commission of offenses of battery, simple battery, simple assault, assault, stalking, criminal damage to property, unlawful restraint, or criminal trespass." GA. CODE ANN. § 19-13-1 (1994).

24. Susan E. Bernstein, Note, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?*, 15 CARDOZO L. REV. 525, 527 (1993). Bernstein points out that underreporting is due in part to the historical reluctance of police departments to respond to complaints of domestic violence. *Id.* at 526 n.8. *See also Legal Responses, supra* note 12, at 1503 (discussing the tendency of police departments to regard domestic violence as a "private matter").

experience of disadvantaged women,²⁵ and the failure of medical personnel to identify domestic violence as the cause of injuries.²⁶ Studies show that gay men and lesbians are victimized by abusive partners at rates proportionately comparable to those found among opposite-sex couples.²⁷

This Note will demonstrate that domestic violence between same-sex couples is as serious a problem as domestic violence between opposite-sex couples, but that present statutes provide victims of same-sex violence with less legal protection, thus raising significant equal protection concerns. Legitimate grounds exist for extending protection to victims of same-sex domestic violence and this Note will propose model legislation that does so. Section II discusses the problem of domestic violence within same-sex relationships.²⁸ Section III argues that current domestic violence legislation violates the Equal Protection Clause of the Fourteenth Amendment.²⁹ Section IV explains the policy considerations behind domestic violence legislation which distinguish it from statutes regarding homosexual sodomy.³⁰ Finally, Section V contains model legislation that would provide equal protection to all victims of domestic violence regardless of sexual orientation.³¹

25. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 809 (1993). See also Denise Bricker, Note, *Fatal Defense: An Analysis of Battered Woman's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners*, 58 BROOK. L. REV. 1379, 1382 n.16 (1993) (stating that the exclusion of poor or non-English-speaking women from surveys on domestic violence could mean that violence among heterosexual partners is twice as common as currently estimated).

26. See PUBLIC HEALTH REPORTS, *supra* note 13, at 328 (stating that emergency room staff members correctly identify the cause of injuries in only five to 10 percent of domestic violence cases).

27. See Hunter, *supra* note 20, at 576. Although research rarely focuses on gay and lesbian domestic violence, some studies show that gay and lesbian victims and abusers report growing up in households where one parent was physically abused. *Id.* at 576. Like heterosexual victims and abusers, gay men and lesbians who are involved in abusive relationships are likely to have a background of family violence. *Id.* Also, like heterosexuals involved in abusive relationships, these gay men and lesbians gravitate to a familiar situation where the patterns of familial domestic violence are repeated. *Id.* at 577-578. The studies also disclose that the abuse that occurs in both opposite-sex and same-sex relationships involves the issue of control by one partner over the other. *Id.* at 580. Reports of the occurrence of domestic violence in same-sex relationships show similarities, in both the figures and patterns, to the occurrence of domestic violence in opposite-sex relationships. *Id.* at 585.

28. See *infra* notes 32-62 and accompanying text.

29. See *infra* notes 63-201 and accompanying text.

30. See *infra* notes 202-18 and accompanying text.

31. See *infra* notes 219-49 and accompanying text.

II. THE SECOND CLOSET: SAME-SEX DOMESTIC VIOLENCE

Because relationships between same-sex couples do not differ in character from those of opposite-sex couples,³² same-sex couples also experience domestic violence.³³ Research suggests that domestic violence occurs in same-sex relationships with the same statistical frequency as in opposite-sex relationships.³⁴ While few studies and little research have been done in the area of gay and lesbian domestic violence, estimates conclude that each year between fifty and one hundred thousand lesbians are the victims of abuse and that as many as half a million gay men are battered.³⁵ Studies also find that the abuse that occurs between same-sex partners has the same elements as abuse in opposite-sex relationships, including dependency, jealousy, and the assertion of control by the abuser over the abused.³⁶

32. Letitia Anne Peplau, *Lesbian and Gay Relationships*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 179 (John C. Gonsiorek & James D. Weinrich eds., 1991). The relationships between same-sex and opposite-sex couples are similar in that both want enduring, stable, long-term relationships. *Id.* at 179. Studies of older gay men and lesbians often reveal how commonly they have remained in stable relationships for periods of 20 years or more. *Id.* at 180. See also *In re Guardianship of Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1992) (granting a lesbian woman's request for guardianship of her incapacitated lover, after a seven-year legal battle).

33. Sandra E. Lundy, *Abuse that Dare Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts*, 28 *NEW ENG. L. REV.* 273, 277 (1993). The domestic violence that same-sex victims experience is as prevalent and serious as opposite-sex violence. *Id.* at 277. Both same-sex and opposite-sex batterers use physical and psychological terror to control their victims. *Id.* at 282. The difference between same-sex and opposite-sex abuse has nothing to do with the behavior of the parties. *Id.* Instead, the difference is due to cultural and institutional homophobia which isolates the same-sex victim from needed psychological, social, and legal support. *Id.* at 283.

34. CLAIRE M. RENZETTI, *VIOLENT BETRAYAL: PARTNER ABUSE IN LESBIAN RELATIONSHIPS* 18 (1992). The prevalence of abuse between both same-sex and opposite-sex partners is estimated to be approximately 25 to 30 percent of all couples. *Id.* at 18. Studies report: first, that 25 percent of lesbians and 27 percent of heterosexual women admit being physically abused by their partners in committed relationships; and second, that seven percent of lesbians and nine percent of heterosexual women report having been raped by dates. *Id.* See also Jane Furse, *Calls for Help Are Ignored in Gay's Domestic Violence*, *THE TIMES-PICAYUNE*, Dec. 12, 1993, at A10. According to experts, the level of domestic violence in the gay community is the same as in society at large. *Id.* Unlike battered opposite-sex victims, however, same-sex victims are often not taken seriously by the police until the injuries are nearly fatal. *Id.*

35. DAVID ISLAND & PATRICK LETELLIER, *MEN WHO BEAT THE MEN WHO LOVE THEM: BATTERED GAY MEN AND DOMESTIC VIOLENCE* 14 (1991). Despite certain misconceptions about the effeminate nature of gay men, there is no evidence that gay men are any more or less violent than straight men. *Id.* The domestic violence that occurs in same-sex relationships, like that in opposite-sex relationships, is the result of a number of complex psychological and environmental factors. *Id.* at 64-68.

36. RENZETTI, *supra* note 34, at 27-58. The dependency in an abusive relationship can occur in either the batterer or the victim. *Id.* 29. In lesbian relationships the dependency is particularly intense because of the lack of social support outside the gay and lesbian communities. *Id.* The couple may feel isolated and look more to one another as allies against a "hostile world." *Id.* at 31.

Despite similarities which exist between domestic violence occurring in same-sex and opposite-sex relationships, a number of differences compound the severity of domestic violence experienced by same-sex partners. Initially, same-sex partners seeking protection may encounter a police department that is unwilling to take same-sex abuse seriously.³⁷ When handling same-sex domestic violence cases, police departments and courts, rather than acknowledge or understand that abuse can and does occur between members of the same sex, often believe that a situation of mutual combat is taking place in which the same-sex partners are just fighting.³⁸ In addition, while all victims of domestic violence experience feelings of isolation and helplessness, abused same-sex partners are even further isolated.³⁹ Same-sex abusers often use the threat of exposure, or "outing," as a means of repression and control against the victim.⁴⁰ Even in the absence of such extortion, victims themselves may be reluctant to seek help because they fear the unpleasant consequences of public

In an abusive lesbian relationship, however, this dependency can become a mechanism of control to further isolate the victim. *Id.* at 38-39. Renzetti reports the suggestion that jealousy is the most common source of conflict in same-sex relationships. *Id.* at 39. Because gay men and lesbians do not have access to "the legal ties that bind," some argue, same-sex relationships are more fragile. *Id.* In addition, a heterosexual woman, jealous of another woman flirting with her partner, has no reason to be envious of her partner, but a lesbian woman may. *Id.* at 40. The balance of power in same-sex and opposite-sex relationships is established and maintained in the same ways. *Id.* at 54. An unequal contribution of financial resources often results in one partner's exertion of control over the other. *Id.* The education levels and employment status of the partners may also structure the power in the relationship. *Id.* at 50. Thus, dependency, jealousy, and balance of power contribute simultaneously to the evolution of partner abuse. *Id.* at 55. See also Jane Garcia, *The Cost of Escaping Domestic Violence Relationships: Fear of Treatment in a Largely Homophobic Society May Keep Lesbian Abuse Victims From Calling For Help*, L. A. TIMES, May 6, 1991, at E2.

37. See Furse, *supra* note 34, at A10 (describing the belief among police that in a dispute between two men, each man can defend himself). See also *supra* notes 1-5 and accompanying text.

38. Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law, and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567, 578-79 (1990) (explaining that the emphasis in our culture on the "dominant/submissive patriarchal arrangement" leads to difficulty in understanding the dynamics of same-sex abuse). See also Bricker, *supra* note 25, at 1388 (stating that homophobia permeates all aspects of response to same-sex abuse, including the response from victim services, the police, and the court's treatment of the abuser).

39. Ruthann Robson, *Incendiary Categories: Lesbians/Violence/Law*, 2 TEX. J. WOMEN & L. 1, 2 (1993). Robson suggests that the isolation that same-sex victims experience is due to the law's violence towards them. *Id.* The legal system expresses violence towards homosexuals by criminalizing their sexual activities, excluding them from certain areas of employment, and denying them legal protection. *Id.* Robson states that the "lack of sexual orientation in a state statute is a violent denial of the violence against us." *Id.* at 16. The law is considered the instrument of the state that maintains state power, but the law itself is based upon force and coercion. *Id.* at 22.

40. See Furse, *supra* note 34, at A10. See also Garcia, *supra* note 36, at E2 (discussing the use by same-sex abusers of threats of "outing" the abused partner to employers, family, and friends).

revelation of their sexual orientation.⁴¹ Finally, victims of same-sex domestic violence often do not have access to the protective services available to victims of abuse in opposite-sex relationships, since few shelters are dedicated to offering sanctuary to victims of same-sex domestic violence.⁴² Although shelters for battered women did not exist in the United States until thirty years ago, by 1994 there were over fifteen hundred shelters or safe homes for victims fleeing the violence of an abusive opposite-sex partner.⁴³ These shelters, however, routinely deny their services to female same-sex abuse victims, and fewer than ten cities offer any sort of support services for gay men.⁴⁴ Thus, internal and external forces combine to push gay and lesbian victims of domestic

41. See PUBLIC HEALTH REPORTS, *supra* note 13, at 331 (explaining that a victim of same-sex domestic violence may decline to seek medical treatment because his or her sexual orientation would then become part of a permanent medical record, which might later become available to insurers and prospective employers).

42. Patricia Nelson, *Gays, Lesbians Also Feel Domestic Violence*, THE BOSTON GLOBE, June 1, 1992, at C14. Gay men and lesbians trying to flee an abusive relationship are confronted with a cold reality: "there is no safe harbor for them." *Id.* Nelson quotes Jay Reed, the Director of Victim Services in the civil rights unit of the Norfolk, Mass. District Attorney's Office. *Id.* About gays and lesbian victims of domestic violence, Reed says, "[W]e're where the battered women's movement was 25 years ago." *Id.* Gay men and lesbians face existing legal and support systems that are hostile toward them; they are therefore much less likely to call the police for help or go into court to obtain a protective order. *Id.* See also GINNY NICARTHY, GETTING FREE: YOU CAN END ABUSE AND TAKE BACK YOUR LIFE 277-284 (2d ed. 1986). NiCarthy devotes a chapter to the unique disabilities faced by lesbian victims of domestic violence. *Id.* In most cities lesbian victims find that there is little or no safe shelter for them. *Id.* at 281. Even if certain staff members at a shelter are sympathetic to the lesbian woman's needs, the shelter administrator or board of directors may prohibit the staff from even discussing lesbian issues. *Id.* at 281-282.

In some states, the failure to reach out to lesbian victims is mandated by statute. See, e.g., IND. CODE ANN. § 12-7-2-70 (Burns 1994):

"Domestic violence prevention and treatment center," for purposes of IC 12-18-3 and IC 12-18-4, means an organized entity:

(1) Established by:

(A) A city, town, county, or township; or

(B) An entity exempted from the Indiana gross income tax under IC 6.2-1-3-20; and

(2) Created to provide services to prevent and treat domestic violence between spouses and former spouses.

43. Laurie Lico Albanese, *Breaking Taboo: Helping Domestic Violence Victims*, MOTHERING, Mar. 22, 1994, at 96. Despite a dramatic increase in the number of shelters, many communities still lack basic services for battered women. *Id.* See also SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM 16 (1988). Since the establishment of battered women's shelters across the country, thousands of women have found refuge from their abusers. *Id.* The women's movement of the 1960s helped women to understand that male violence against them is inappropriate and that it is possible to live without being controlled by fear. *Id.*

44. David Tuller, *Law Doesn't Take Problem Seriously When Gays Batter Their Partners*, THE SAN FRANCISCO CHRON., Jan. 3, 1994, at A1. Tuller discusses reluctance within the gay and lesbian communities to acknowledge the problem, adding further to the isolation felt by victims. *Id.*

violence into what has been called "the second closet."⁴⁵

It is important to afford same-sex partners protection from abuse under domestic violence statutes because these statutes provide far more comprehensive legal protection and social services to victims than general criminal assault and battery statutes.⁴⁶ For those individuals who qualify, the protection afforded under domestic violence statutes is also far easier to obtain, as thirty-seven states provide some type of *ex parte*⁴⁷ relief for victims upon filing of a complaint of domestic abuse.⁴⁸ Further, domestic violence statutes circumvent the ordinary probable cause requirements in order for police to arrest the abuser.⁴⁹ Finally, states and municipalities commonly offer victims prosecuting their abusers under domestic violence statutes a network of public services and personal protections, helping to prevent additional abuse effectively without their having to press new charges for each isolated incident of assault or battery.⁵⁰ It is, therefore,

45. See Furse, *supra* note 34, at A10. Gay and lesbian batterers keep their victims silent with threats of public exposure. *Id.* The heterosexual population often does not even recognize the problem of same-sex abuse because of the notion that same-sex partners share power equally in their relationships. *Id.* In addition, gay men and lesbians may be hesitant about "airing the community's dirty laundry" for fear that it would result in more homophobia. *Id.* Finally, the legal system silences gay and lesbian victims by failing to recognize the problem as domestic violence. *Id.*

46. See *infra* note 51. See also SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 642-44 (5th ed. 1989).

47. *Ex parte* proceedings are "taken for granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested." BLACK'S LAW DICTIONARY 576 (6th ed. 1990).

48. Note, *Ex Parte Protection Orders: Is Due Process Locked Out?* 58 Temp. L.Q. 841 (1985) (discussing the need, in cases of domestic abuse, for relief to be granted as quickly as possible).

49. Interview with Brian T. Gensel, Deputy Prosecuting Attorney for the Porter County Prosecutor's Office, in Valparaiso, Ind. (September 22, 1994) (discussing the fact that, under Indiana law (IND. CODE ANN. § 35-33-1-1 (Burns 1994)), police may make an arrest on a domestic violence call without a warrant and without having witnessed any acts of violence). See also *infra* note 51.

50. NICARTHY, *supra* note 42, at 72. Nicarity's book provides domestic abuse victims with a comprehensive guide to the legal and social services that may be available to them. *Id.* at 72. In general, when the police are called to a domestic dispute, this sets off a series of events. *Id.* at 80. The police may arrest the batterer at the scene and provide the victim with information about pressing charges, obtaining protective orders, and the availability of community services. *Id.* If the victim already has a protective order against the abuser, or if an abuse case is pending at the time, the police are more likely to arrest the abuser. *Id.* The Prosecutor's office will present what is "technically the state's case" against the abuser, which can help to shift the abuser's focus off the victim. *Id.* at 82. In addition, if there is a safe house in the community, the victim may obtain additional protection, emotional support, and counseling. *Id.* at 161. Many shelters also have public assistance workers available to inform victims, depending on their needs, of the possibility of obtaining welfare, food stamps, old age assistance, aid to the blind, aid to the permanently and totally disabled, and aid to families with dependent children. *Id.* at 185.

See also JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 27.02 330-34 (1987). The term "assault" is frequently used in state statutes to describe any physical attack. *Id.* at 332. There are also various categories of assault, such as "assault with the intent to kill," "assault with the

essential that victims of same-sex domestic violence have access to the full range of protections and services provided to other victims of domestic violence.

All fifty states and the District of Columbia have legislation that specifically defines the persons to whom statutory provisions regarding domestic violence shall extend.⁵¹ All fifty-one jurisdictions guarantee the full range of protections and services to adult victims who are abused by their present spouses;⁵² forty-nine jurisdictions also grant protection to former spouses.⁵³ Thirty-eight jurisdictions protect persons who are related by blood,⁵⁴ and thirty-three also

intent to rape," "attempted assault," and "assault and battery." *Id.* at 333.

51. ALA. CODE § 30-5-2 (1994); ALASKA STAT. § 25.35.200 (1993); ARIZ. REV. STAT. ANN. § 13-3601 (1993); ARK. CODE ANN. § 9-15-103 (Michie 1993); CAL. PENAL CODE § 1000.6 (West 1994); COLO. REV. STAT. ANN. § 14-4-101 (West 1994); CONN. GEN. STAT. ANN. § 46b-38a (West 1994); DEL. CODE ANN. tit. 10, § 901 (1993); D.C. CODE ANN. § 16-1001 (1994); 1994 Fla. Sess. Law Serv. 94-134 (C.S.B. 525) (West); GA. CODE ANN. § 19-31-1 (1994); HAW. REV. STAT. § 586-1 (1994); IDAHO CODE § 39-6303 (1994); 750 ILL. COMP. STAT. ANN. § 60/103 (West 1993); IND. CODE ANN. § 12-18-4-12 (Burns 1994); IOWA CODE § 236.2 (1993); 1994 Kan. Sess. Laws 335; KY. REV. STAT. ANN. § 403.720 (Michie/Bobbs-Merrill 1993); LA. REV. STAT. ANN. § 46:2132 (West 1994); ME. REV. STAT. ANN. tit. 19, § 762 (West 1993); MD. CODE ANN., FAM. LAW § 4-501 (1994); MASS. GEN. L. ch. 209A, § 1 (1994); 1994 Mich. Legis. Serv. P.A. 66 (West); MINN. STAT. ANN. § 518B.01 (West 1994); MISS. CODE ANN. § 93-21-3 (1993); MO. ANN. STAT. § 455.010 (Vernon 1994); MONT. CODE ANN. § 45-5-206 (1994); NEB. REV. STAT. § 42-903 (1993); NEV. REV. STAT. § 33.018 (1993); N.H. REV. STAT. ANN. § 173-B: 1 (1993); 1994 N.J. Sess. Law Serv. § 93 (West); N.M. STAT. ANN. § 40-13-2 (Michie 1994); N.Y. SOC. SERV. LAW § 459-a (McKinney 1994); N.C. GEN. STAT. § 50B-1 (1993); N.D. CENT. CODE § 14-07.1-01 (1993); OHIO REV. CODE ANN. § 3113.33 (Anderson 1993); OKLA. STAT. ANN. tit. 22, § 60.1 (West 1994); OR. REV. STAT. § 107.705 (1993); 23 PA. CONS. STAT. ANN. § 6102 (1994); 1994 R.I. Pub. Laws 94-315; S.C. CODE ANN. § 20-4-20 (Law. Co-op. 1993); S.D. CODIFIED LAWS ANN. § 25-10-1 (1994); TENN. CODE ANN. § 36-3-601 (1994); TEX. FAM. CODE ANN. § 71.01 (West 1994); UTAH CODE ANN. § 30-6-1 (1994); VT. STAT. ANN. tit. 15, § 1101 (1993); VA. CODE ANN. § 16.1-228 (Michie 1994); 1994 Wash. Legis. Serv. ch. 121 (West); W. VA. CODE § 48-2A-2 (1994); WIS. STAT. ANN. § 46.95 (West 1994); WYO. STAT. § 65-21-102 (1994).

52. *See supra* note 51. Of course, juvenile victims of abuse are also protected, sometimes under the same statutes, but the survey of statutory protections in notes 52-62 and accompanying text focuses exclusively on adult abuser-victim relationships.

53. *See supra* note 51. The exceptions are Alabama (ALA. CODE § 30-5-2 (1994)) and Delaware (DEL. CODE ANN. tit. 10, § 901 (1993)).

54. *See supra* note 51. The 13 states which make no direct provision for protection for consanguine adults are Alaska (ALASKA STAT. § 25.35.200 (1993)), Georgia (GA. CODE ANN. § 19-31-1 (1994)), Indiana (IND. CODE ANN. § 12-18-4-12 (Burns 1994)), Kansas (1994 Kan. Sess. Laws 335), Louisiana (LA. REV. STAT. ANN. § 46:2132 (West 1994)), Michigan (1994 Mich. Legis. Serv. 66 (West)), Montana (MONT. CODE ANN. § 45-5-206 (1994)), New Jersey (1994 N.J. Sess. Law Serv. § 93 (West)), North Carolina (N.C. GEN. STAT. § 50B-1 (1993)), Rhode Island (1994 R.I. Pub. Laws 94-315), Virginia (VA. CODE ANN. § 16.1-228 (Michie 1994)), Wisconsin (WIS. STAT. ANN. § 46.95 (West 1994)), and Wyoming (WYO. STAT. § 65-21-102 (1994)).

cover persons who are related by marriage or affinity.⁵⁵ In addition, thirty-four jurisdictions protect victims against abusers with whom they have a child in common, whether or not they have ever lived together.⁵⁶ Members of same-sex couples are not protected against abuse by their partners under any of these provisions.

Most domestic violence statutes extend protection to victims whose relationship to the abuser is less formal than legal or familial relations. Some of these statutes, however, restrict the extended protection to opposite-sex couples. Forty-eight jurisdictions provide protection for cases where the victim and abuser presently cohabit,⁵⁷ but six of these explicitly state the conditions in such a way as to exclude same-sex couples.⁵⁸ Forty-four jurisdictions also extend protection to persons who formerly cohabited,⁵⁹ but four of these

55. See *supra* notes 51 and 54. The additional five exceptions are Arkansas (ARK. CODE ANN. § 9-15-103 (Michie 1993)), California (CAL. PENAL CODE § 1000.6 (West 1994)), Hawaii (HAW. REV. STAT. § 586-1 (1994)), Minnesota (MINN. STAT. ANN. § 518B.01 (West 1994)), and New Mexico (N.M. STAT. ANN. § 40-13-2 (Michie 1994)).

56. See *supra* note 51. The states that do not explicitly cover persons who have a child in common are Alabama (ALA. CODE § 30-5-2 (1994)), Alaska (ALASKA STAT. § 25.35.200 (1993)), Arkansas (ARK. CODE ANN. § 9-15-103 (Michie 1993)), California (CAL. PENAL CODE § 1000.6 (West 1994)), Colorado (COLO. REV. STAT. ANN. § 14-4-101 (West 1994)), Hawaii (HAW. REV. STAT. § 586-1 (1994)), Indiana (IND. CODE ANN. § 12-18-4-12 (Burns 1994)), Kansas (1994 Kan. Sess. Laws § 335), Louisiana (LA. REV. STAT. ANN. § 46: 2132 (West 1994)), Mississippi (MISS. CODE ANN. § 93-21-3 (1993)), Montana (MONT. CODE ANN. § 45-5-206 (1994)), New Hampshire (N.H. REV. STAT. ANN. § 173-B: 1 (1993)), North Carolina (N.C. GEN. STAT. § 50B-1 (1993)), Ohio (OHIO REV. CODE ANN. § 3113.33 (Anderson 1993)), South Carolina (S.C. CODE ANN. § 20-4-20 (Law. Co-op. 1993)), Utah (UTAH CODE ANN. § 30-6-1 (1994)), and Wisconsin (WIS. STAT. ANN. § 46.95 (West 1994)).

57. See *supra* note 51. The only exceptions are Delaware (DEL. CODE ANN. tit. 10, § 901 (1993)), Indiana (IND. CODE ANN. § 12-18-4-12 (Burns 1994)), and South Carolina (S.C. CODE ANN. § 20-4-20 (Law. Co-op. 1993)).

58. The state statutes limiting protection for cohabiting couples to opposite-sex couples only are: ALA. CODE § 30-5-2 (1994) (offering protection only to "persons living in common-law marriage relationship"); ARIZ. REV. STAT. ANN. § 13-3601 (1993) (offering protection only to "persons of the opposite sex"); LA. REV. STAT. ANN. § 46: 2132 (West 1994) (offering protection only to someone "living . . . as a spouse"); MISS. CODE ANN. § 93-21-3 (1993) (offering protection only to "persons living as spouses"); MONT. CODE ANN. § 45-5-206 (1994) (offering protection only to "a person of the opposite sex"); and N.C. GEN. STAT. § 50B-1 (1993) (offering protection only to "a person of the opposite sex").

59. See *supra* note 51. The exceptions are Alabama (ALA. CODE § 30-5-2 (1994)), Delaware (DEL. CODE ANN. tit. 10, § 901 (1993)), Indiana (IND. CODE ANN. § 12-18-4-12 (Burns 1994)), Louisiana (LA. REV. STAT. ANN. § 46: 2132 (West 1994)), Mississippi (MISS. CODE ANN. § 93-21-3 (1993)), South Carolina (S.C. CODE ANN. § 20-4-20 (Law. Co-op. 1993)), and Tennessee (TENN. CODE ANN. § 36-3-601 (1994)).

statutes are worded in such a way as to exclude same-sex couples.⁶⁰ Only fourteen jurisdictions provide coverage to persons who have never lived together, but who are or have previously been involved in an intimate, sexual, or dating relationship with their abusive partners,⁶¹ but two of them are states that exclude same-sex couples.⁶² Thus, present domestic violence statutes offer significantly less comprehensive coverage for victims of same-sex domestic violence than for victims of opposite-sex domestic violence.

III. THE EQUAL PROTECTION CHALLENGE

*The equal protection of the laws is a pledge of the protection of equal laws.*⁶³

This Section raises an equal protection challenge to domestic violence statutes that discriminate against same-sex couples. The Section begins by showing that de jure and de facto discrimination against gay men and lesbians makes this type of legislation inherently suspect under the Equal Protection Clause.⁶⁴ Then the Section analyzes the constitutionality of state domestic violence statutes under each of the three standards of review that have developed in traditional judicial interpretation of the Constitution. Part A evaluates the argument for applying strict scrutiny to domestic violence legislation that discriminates against gay men and lesbians, but acknowledges the unlikelihood that the Supreme Court will adopt this line of reasoning.⁶⁵ Part B argues that intermediate scrutiny should be applied to this legislation: first, because gay men and lesbians satisfy all the factors used to determine quasi-suspect

60. The state statutes excluding same-sex couples are: ALASKA STAT. § 25.35.200 (1993) (offering protection only to those “who previously lived in a spousal relationship”); ARIZ. REV. STAT. ANN. § 13-3601 (1993) (offering protection only to “persons of the opposite sex”); MONT. CODE ANN. § 45-5-206 (1994) (offering protection only to “a person of the opposite sex”); and N. C. GEN. STAT. § 50B-1 (1993) (offering protection only to “a person of the opposite sex”).

61. See *supra* note 51. The jurisdictions which provide such protection are Alaska (ALASKA STAT. § 25.35.200 (1993)), Colorado (COLO. REV. STAT. ANN. § 14-4-101 (West 1994)), the District of Columbia (D.C. CODE ANN. § 16-1001 (1994)), Illinois (750 ILL. COMP. STAT. ANN. § 60/103 (West 1993)), Maine (ME. REV. STAT. ANN. tit. 19, § 762 (West 1993)), Massachusetts (MASS. GEN. L. ch. 209A, § 1 (1994)), Montana (MONT. CODE ANN. § 45-5-206 (1994)), New Jersey (1994 N.J. Sess. Law Serv. § 93 (West)), New Mexico (N.M. STAT. ANN. § 40-13-2 (1994)), North Dakota (N.D. CENT. CODE § 14-07.1-01 (1993)), Oregon (OR. REV. STAT. § 107.705 (1993)), Pennsylvania (23 PA. CONS. STAT. ANN. § 6102 (1994)), Rhode Island (1994 R. I. Pub. Laws ch. 94-315), and West Virginia (W. VA. CODE § 48-2A-2 (1994)).

62. The two state statutes excluding same-sex couples are: ALASKA STAT. § 25.35.200 (1993) (offering protection only in cases of “a dating, courtship, or engagement relationship”) and MONT. CODE ANN. § 45-5-206 (1994) (offering protection only to “a person of the opposite sex”).

63. *Yick Wo v. Hopkins*, 118 U.S. 356, 368 (1886).

64. See *infra* notes 69-90 and accompanying text.

65. See *infra* notes 91-134 and accompanying text.

classification,⁶⁶ and second, because discrimination against gay men and lesbians constitutes gender-based discrimination which is already subject to heightened judicial scrutiny.⁶⁷ Finally, Part C shows that even under a rational basis analysis, states may be unable to put forth a legitimate interest in refusing to provide protection to certain victims of domestic violence.⁶⁸

Legislation challenged under the Equal Protection Clause of the Fourteenth Amendment⁶⁹ may be analyzed with reference to either the de jure or the de facto discrimination alleged to be at work in the statute.⁷⁰ The de jure discrimination against gay men and lesbians in domestic violence statutes occurs in two distinct ways. First, three state domestic violence statutes violate the Equal Protection Clause directly with the explicit language that specifically excludes same-sex couples by affording protection solely for persons abused by members of the "opposite sex."⁷¹ Second, seven additional state domestic violence statutes exclude same-sex couples by implication,⁷² through a definitional use of the term "spouse."⁷³ The legal restrictions imposed by these facially discriminatory statutes renders them inherently suspect as violative of the Equal Protection Clause.⁷⁴

66. See *infra* notes 135-49 and accompanying text.

67. See *infra* notes 150-80 and accompanying text.

68. See *infra* notes 181-201 and accompanying text.

69. The Equal Protection Clause reads, in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

70. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 634-35 (4th ed. 1991). De jure discrimination is the product of purposeful acts by government authorities, while de facto discrimination occurs as the result of the unequal application of government mandates. *Id.*

71. Domestic violence statutes whose language explicitly restricts protection to opposite-sex couples include: ARIZ. REV. STAT. ANN. § 13-3601 (1993); MONT. CODE ANN. § 45-5-206 (1994); and N.C. GEN. STAT. § 50B-1 (1993).

72. Domestic violence statutes whose language implicitly excludes same-sex couples from some form of protection include: ALA. CODE § 30-5-2 (1994); ALASKA STAT. § 25.35.200 (1993); DEL. CODE ANN. tit. 10, § 901 (1993); IND CODE ANN. § 12-18-4-12 (Burns 1994); LA. REV. STAT. ANN. § 46: 2132 (West 1994); MISS. CODE ANN. § 93-21-3 (1993); and S.C. CODE ANN. § 20-4-20 (Law. Co-op. 1993).

73. See *infra* notes 132-34 and accompanying text (discussing the legal barriers to same-sex marriage). Because gay men and lesbians are not allowed to marry, statutory protections afforded to spouses are unavailable to them. The South Carolina statute is constructed so narrowly that unmarried opposite-sex couples are denied protection as well. S.C. CODE ANN. § 20-4-20 (Law. Co-op. 1993).

74. *Korematsu v. United States*, 323 U.S. 214, 216 (1944). The Supreme Court stated that, "all legal restrictions which curtail the . . . rights of a single . . . group are immediately suspect." *Id.* This case concerned the constitutionality of Exclusion Order No. 34, which specifically excluded all persons of Japanese ancestry from certain areas of the United States. *Id.* at 215-16. The order

De facto discrimination against gay men and lesbians occurs in states where domestic violence statutes appear facially neutral in their language,⁷⁵ but are applied only to opposite-sex couples.⁷⁶ These statutes fall under the rule set forth over a century ago in *Yick Wo v. Hopkins*:⁷⁷ a statute which is neutral on its face violates the Constitution if it is "applied and administered by public authority with an evil eye and an unequal hand."⁷⁸ The equal protection challenge to these facially neutral domestic violence statutes can be distinguished from cases requiring proof of discriminatory intent or purpose because the arbitrary application of these statutes is at issue, not merely a disparate impact that results from the equal application of the laws.⁷⁹ The two leading cases

was upheld based on national security concerns. *Id.* at 219. The Court was careful to explain that the extraordinary circumstances of the time, those of "direst emergency and peril," *Id.* at 220, justified the compelling government interests at stake during World War II. *Id.* It can hardly be argued that the domestic violence legislation at issue here could be justified on the same grounds. Challenges to legislation of this type are rare because, since the passage of the Civil War Amendments, few states have attempted to draft legislation that is facially discriminatory.

75. Domestic violence statutes whose language is facially neutral with respect to same-sex couples include: ARK. CODE ANN. § 9-15-103 (Michie 1993); CAL. PENAL CODE § 1000.6 (West 1994); COLO. REV. STAT. ANN. § 14-4-101 (West 1994); CONN. GEN. STAT. ANN. § 46b-38a (West 1994); D.C. CODE ANN. § 16-1001 (1994); 1994 Fla. Sess. Law Serv. 94-134 (West); GA. CODE ANN. § 19-31-1 (Harrison 1994); HAW. REV. STAT. § 586-1 (1994); IDAHO CODE § 39-6303 (1994); 750 ILL. COMP. STAT. ANN. § 60/103 (Smith-Hurd 1993); IOWA CODE § 236.2 (1993); 1994 Kan. Sess. Laws 335; KY. REV. STAT. ANN. § 403.720 (Michie/Bobbs-Merrill 1993); ME. REV. STAT. ANN. tit. 19, § 762 (West 1993); MD. CODE ANN., FAM. LAW § 4-501 (1994); MASS. GEN. L. ch. 209A, § 1 (1994); 1994 Mich. Legis. Serv. P.A. 66 (S.B. 813) (West); MINN. STAT. ANN. § 518B.01 (1994); MO. ANN. STAT. § 455.010 (Vernon 1994); NEB. REV. STAT. § 42-903 (1993); NEV. REV. STAT. § 33.018 (1993); N.H. REV. STAT. ANN. § 173-B: 1 (1993); 1994 N.J. Sess. Law Serv. 93 (West); N.M. STAT. ANN. § 40-13-2 (Michie 1994); N.Y. SOC. SERV. LAW § 459-a (McKinney 1994); N.D. CENT. CODE § 14-07.1-01 (1993); OHIO REV. CODE ANN. § 3113.33 (Anderson 1993); OKLA. STAT. ANN. tit. 22, § 60.1 (West 1994); OR. REV. STAT. § 107.705 (1993); 23 PA. CONS. STAT. ANN. § 6102 (1994); 1994 R.I. Pub. Laws 94-315 (1994); S.D. CODIFIED LAWS ANN. § 25-10-1 (1994); TENN. CODE ANN. § 36-3-601 (1994); TEX. FAM. CODE ANN. § 71.01 (West 1994); UTAH CODE ANN. § 30-6-1 (1994); VT. STAT. ANN. tit. 15, § 1101 (1993); VA. CODE ANN. § 16.1-228 (Michie 1994); 1994 Wash. Legis. Serv. 121 (West); W. VA. CODE § 48-2A-2 (1994); WIS. STAT. ANN. § 46.95 (West 1994); WYO. STAT. § 65-21-102 (1994).

76. See *supra* notes 1-5, 9, 37-38, and 42-45 and accompanying text.

77. 118 U.S. 356 (1886). This case involved a successful equal protection challenge to a San Francisco city ordinance requiring laundries to be located only in buildings constructed of brick or stone. *Id.* The facts showed that of the 320 laundries in the city, 310 were constructed of wood, and of these, 240 were owned by Chinese immigrants. *Id.* Findings revealed that the remaining 80 laundry owners were Caucasians who were "left unmolested" under the ordinance. *Id.*

78. *Id.* at 373.

79. See *Washington v. Davis*, 426 U.S. 229, 232 (1976). At issue here was the disparate impact of qualifying tests administered to applicants for positions as police officers in the District of Columbia. *Id.* The tests were administered equally to all applicants, but the respondents alleged that a disproportionately high number of African-American applicants were excluded from the police department due to poor performance on the tests, which were alleged to be structured in a way that favored white applicants. *Id.* at 235-37. The Supreme Court held that to invalidate a law which has

propounding the doctrine of discriminatory purpose,⁸⁰ *Washington v. Davis*⁸¹ and *Arlington Heights v. Metropolitan Housing Development Corporation*,⁸² are inapposite to the equal protection challenge being made here, since those cases dealt with laws that were applied equally to all but had an adverse impact on certain individuals or groups.⁸³ When domestic violence statutes are not applied or administered with an even hand to both same-sex and opposite-sex couples, states draw the kind of intolerable, arbitrary distinctions that the Court struck down in *Yick Wo*.⁸⁴

Domestic violence statutes that discriminate between opposite-sex and same-sex couples, either de jure by their language or de facto in their application, may not withstand an equal protection challenge under any of the three standards of review that the Supreme Court has developed. The Court, in interpreting the constitutionality of state statutes, applies either strict scrutiny,⁸⁵ intermediate

a disparate impact on a group, it must also be shown to have a discriminatory purpose. *Id.* at 240.

See also *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 254 (1977). Respondent's equal protection challenge concerned a refusal by the village to rezone a 15-acre parcel from single-family to multiple-family classification. *Id.* Here, as in *Washington*, the application of the governmental mandate was equal; at issue was the disparate impact that application had on certain groups. *Id.* at 265. The Supreme Court again articulated the rule that facially neutral legislation which is administered equally but is alleged to result in a disparate impact requires proof of discriminatory intent or purpose. *Id.*

80. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-20, at 1512-13 (2d ed. 1988). Tribe criticizes the Supreme Court's use of the doctrine of discriminatory purpose by arguing that the Court has elided the problem of disparate impact rather than dealing with it. *Id.* at 1512. He suggests that the Court should have either confronted the problem and taken action to remedy the inequality caused by disparate impact of a law or simply acknowledged that the problem cannot be fixed by the judiciary. *Id.* Tribe points out that there is a very real difference between the Court saying "[t]here is no violation here but institutional considerations prevent us from providing a remedy," and saying, "[t]here is no violation." *Id.* at 1513. If the Supreme Court believes itself to be ill-equipped to remedy the problems caused by the disparate impact of government action, the other branches of government should not be discouraged from vindicating the rights of those affected by being told that there has been no violation. *Id.*

81. 426 U.S. 229 (1976).

82. 429 U.S. 252 (1977).

83. *See supra* note 79.

84. 118 U.S. 356 (1886). The facts of the case revealed that all of the Chinese applicants were denied variances to the ordinance while all of the petitions made by Caucasians, with one exception, were granted. *Id.* at 356. The Court discussed the arbitrary line drawn by the unequal application of the ordinance, stating that it divided those affected into two groups: those "who are permitted to pursue their industry by the mere will and consent of the [city] supervisors, and . . . those from whom that consent is withheld, at their mere will and pleasure." *Id.* at 368. The Court went on to state that the nature of our governmental institutions and the principles upon which they are founded "do not mean to leave room for the play and action of purely personal and arbitrary power." *Id.* at 369-70.

85. *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (subjecting suspect classification to the "most rigid scrutiny").

scrutiny,⁸⁶ or rational basis analysis.⁸⁷ Under strict scrutiny analysis, the government must show that it is pursuing a compelling or overriding interest and that the legislation is narrowly tailored to promote that interest.⁸⁸ The intermediate scrutiny standard requires that the government action must bear a substantial relationship to an important government interest in order to be upheld.⁸⁹ The third standard of review analyzes government action under the rational relationship test, requiring only that the government interest bear a reasonable or rational relationship to the challenged government action.⁹⁰ The remainder of this Section analyzes existing domestic violence statutes under each of the three standards of review.

A. *Strict Scrutiny Analysis*

If gay men and lesbians were determined to be members of a suspect class, then domestic violence legislation that discriminates against them would be subject to a strict scrutiny analysis.⁹¹ Strict scrutiny is applied whenever a law

86. *Craig v. Boren*, 429 U.S. 190, 203 (1976) (holding that quasi-suspect classifications trigger intermediate scrutiny which requires a substantial relationship to an important state interest).

87. *Pennell v. City of San Jose*, 485 U.S. 1, 4 (1988) (upholding legislation that involves neither suspect nor quasi-suspect classifications nor a fundamental right, so long as the legislation was not "arbitrary, discriminatory, or demonstrably irrelevant" to the policy being forwarded by the legislature).

88. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969). Government action to which strict scrutiny is applied must bear a high degree of relevance to the asserted interest, and the burden of justifying that interest is placed on the state rather than on the challenging party. *Id.* at 1101. In requiring legislation to be narrowly tailored, the Court requires a state to show that its objective could not be met by less restrictive means, and that the public interest involved outweighs the detriment that will be incurred by those who are adversely affected by the action. *Id.* at 1103.

89. NOWAK & ROTUNDA, *supra* note 70, at 576. *See also infra* notes 135-38 and accompanying text (discussing the development of the intermediate scrutiny standard of review).

90. NOWAK & ROTUNDA, *supra* note 70, at 369. Prior to 1937, the Supreme Court relied primarily on substantive due process analysis to invalidate social welfare and economic legislation. *Id.* Faced with Franklin Roosevelt's "Court packing" plan, which was proposed in an attempt to have much-needed economic and labor legislation upheld by the Court, the justices began to sustain much of the legislation and the Court began to abandon its substantive due process review of social welfare and economic legislation. *Id.* at 368. The rational basis standard of review was developed in the post-1937 decisions of the Court for use in both equal protection and substantive due process cases. *Id.* at 574. Under this standard, the Court gives great deference to the decisions made by other branches of government, and asks only whether it is conceivable that the legislation bears a rational relationship to the asserted government interest. *Id.* at 574-75.

91. The Supreme Court has never addressed the question of whether homosexuals constitute a suspect or quasi-suspect class, although the Court held that there is no fundamental right to engage in homosexual sodomy. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986). Here, the Court stated "[t]he issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy" *Id.*

affects a fundamental right or discriminates against a suspect class.⁹² The Supreme Court has identified three factors that aid in determining whether a class qualifies as suspect.

1. History of Purposeful Discrimination

First, the Supreme Court considers whether the group in question has suffered a history of purposeful discrimination.⁹³ Although race has clearly been interpreted as the primary motive behind adoption of the Equal Protection Clause,⁹⁴ the Court has found that other groups experiencing discrimination are deserving of heightened scrutiny as well.⁹⁵ The gay and lesbian communities have been consciously, consistently, and vigorously discriminated against in America since colonial times.⁹⁶ In contemporary times, the AIDS crisis has

92. In determining whether a right that is not enumerated in the text of the Constitution is a fundamental right, the Supreme Court considers whether the right is "implicit in the concept of ordered liberty" or is deeply rooted in our nation's history and tradition. *Roe v. Wade*, 410 U.S. 113, 152 (1973). See also *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding that marriage is a fundamental right); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (finding travel and voting to be fundamental rights); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) (finding that voting is a fundamental right); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (finding a fundamental right to interstate travel). For a detailed discussion of the criteria governing designation of a suspect classification, see *infra* notes 93-130 and accompanying text.

93. *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (holding that because race is an irrelevant characteristic, statutory distinctions based explicitly on racial grounds cannot be regarded as having a constitutionally acceptable legislative purpose); *Graham v. Richardson*, 403 U.S. 365, 368 (1971) (finding that aliens are clearly a suspect class). The Supreme Court has refused to find that characteristics such as age or wealth warrant suspect classification. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (age); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6 (1973) (wealth).

94. See *Strauder v. West Virginia*, 100 U.S. 303, 304 (1880) (holding that the Fourteenth Amendment was designed to ensure protection for the recently emancipated slaves).

95. See *Graham v. Richardson*, 403 U.S. 365, 372-74 (1971) (stating that classifications based on alienage are subject to strict scrutiny and that a state's desire to preserve limited welfare benefits for its own citizens violates the Equal Protection Clause).

96. JONATHAN KATZ, *GAY AMERICAN HISTORY 17-195* (1976). As early as 1566, Spanish colonists at St. Augustine, Fla. executed a Frenchman because he was "a great Sodomite" and "a Lutheran." *Id.* at 14. An eighteenth-century visitor to Philadelphia wrote negatively of women who "seek unnatural pleasures with persons of their own sex." *Id.* at 26. During the early 1950s, Senator Joseph McCarthy often used unsupported charges of homosexuality as a rhetorical device in his attacks on government agencies. *Id.* at 103-05. As recently as 1964, a former head of the Miami, Fla. vice squad recommended imprisonment for all homosexuals: "Being a homosexual is bad enough, but the fact that he might make someone else that way—this is the most horrible thing he can do. So you're really doing him a favor by taking him out of circulation." *Id.* at 124.

See also JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-1970*, at 40-53 (1983). D'Emilio provides a detailed account of discrimination in federal employment against homosexuals during the McCarthy era. *Id.* at 41-43. D'Emilio also discusses the effect of wide-spread discrimination upon its victims: "The condemnations that did occur burdened homosexuals and lesbians with a corrosive self-image."

resulted in an increased stigmatization of homosexuals.⁹⁷ The discrimination that gay men and lesbians have experienced throughout history has a pervasive influence on all aspects of their lives.

Gay men and lesbians are often discriminated against in housing.⁹⁸ This discrimination takes the form of zoning ordinances which exclude gay men and lesbians through the use of narrow definitions for the purpose of zoning single-family residential areas.⁹⁹ Gay men and lesbians are also discriminated against in employment, in both the public and the private sectors.¹⁰⁰ Further, the long struggle against exclusion of gay men and lesbians from the military has culminated in what is commonly referred to as the "Don't ask; don't tell" policy.¹⁰¹ In addition, gay men and lesbians face discrimination in the receipt

The dominant view of them—as perverts, psychopaths, deviates, and the like—seeped into their consciousness." *Id.* at 53.

97. RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 261-66 (1988). Mohr argues that mandatory testing for AIDS antibodies cannot be justified by reference to its negligible utility for public health purposes. *Id.* at 249-50.

Mandatory AIDS antibody testing laws are social purification rituals through which, by calling for sacrifices of and by the dominant culture, that culture reaffirms the sanctity of compulsory heterosexuality and rededicates heterosexuality's central and controlling place in society. The imprecatory counterpoint of such sanctification is the degradation of gay men, even though in part for social convenience and moral salve the laws make no mention of them.

Id. at 251.

98. *City of Ladue v. Horn*, 720 S.W.2d 745, 748 (Mo. Ct. App. 1986)(upholding a zoning ordinance that excluded same-sex couples).

99. *Id.* The ordinance in this case defined family as persons related by blood, marriage, or adoption. *Id.* at 747.

100. *Gaylord v. Tacoma Sch. Dist. No. 10*, 559 P.2d 1340, 1346 (Wash. 1977) (upholding a teacher's discharge on the grounds that sexual orientation would impair his ability to teach), *cert. denied*, 434 U.S. 879 (1977)).

101. The "Don't ask; don't tell" policy did not remove existing regulations concerning homosexuals' service in the military. 10 U.S.C. § 654 (1994) provides the following:

(a) Findings.

(13) The prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

While leaving these regulations in place, the new policy first provides for the "Don't ask" component:

(d) Sense of Congress.

(1) The suspension of questioning concerning homosexuality as part of the processing of individuals for accession into the Armed Forces . . . should be continued, but the Secretary of Defense may reinstate that questioning . . . [as] he considers

of economic benefits¹⁰² and government services.¹⁰³ Perhaps the most egregious form of discrimination occurs when gay men and lesbians are denied custody of or visitation with their children.¹⁰⁴ As Justice Brennan stated, "homosexuals have historically been the object of pernicious and sustained

appropriate

10 USC § 654 commentary on implementation of section; sense of Congress (quoting § 571(d) Pub. L. 103-160) (1994).

The "Don't tell" portion of the policy warns servicemembers of the risk involved in revealing their sexual orientation:

(2) The Secretary of Defense should consider issuing guidance governing the circumstances under which members of the Armed Forces questioned about homosexuality for administrative purposes should be afforded warnings

Thus, the effect of the new policy is that when homosexual servicemembers reveal their sexual identity, they will be subjected to the same disciplinary proceedings as if there had been no new policy. Prior to implementation of the "Don't ask; don't tell" policy, homosexual servicemembers who did not reveal their sexual orientation might remain in the Armed Forces but be discharged if their orientation were revealed; under the new policy, homosexual servicemembers face the same situation. *Id.*

102. *Weeks v. Gay*, 256 S.E.2d 901 (Ga. 1979) (refusing to find an implied trust imposed on property shared by same-sex couple for six years); *In re Estate of Cooper*, 564 N.Y.S.2d 684, 687 (N.Y. Sup. Ct. 1990) (denying rights against decedent's will by same-sex partner).

103. The lack of equal protection under spousal abuse legislation is an additional form of discrimination. See *People v. Silva*, No. FO 19909, 1994 Cal. App. LEXIS 869 (August 26, 1994) (holding that the California Penal Code's prohibition of spousal abuse and rape permissibly excludes same-sex couples). See also *Developments in the Law—Sexual Orientation and the Law, V. Same-Sex Couples and the Law*, 102 HARV. L. REV. 617 (1989).

104. SEXUAL ORIENTATION AND THE LAW § 1.03 (Roberta Achtenberg & Karen B. Moulding eds., 1994). Some states consider a parent's sexual orientation as a factor in determining custody but also require some nexus between the sexual orientation of the parent and the actual harm to the children. *Id.* § 1.03, at 10-11. However, in other cases a decision to terminate the custody of a homosexual parent has been based on the perceptions of possible potential harm to the children. *Id.* Gay men and lesbians are often granted visitation rights which are accompanied by significant limitations. *Id.* § 1.03, at 1-16. These limitations include requirements that the gay or lesbian parent's partner either not live with the parent or not be present during the children's visits. *Id.* There may also be prohibitions on overnight visitation by the children. *Id.*

See also Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617 (1989). Here denial of custody to gay and lesbian parents is explicitly treated as an instance of gender discrimination:

In most states that deny custody based on same-sex relationships, opposite-sex relationships outside of marriage are less of a bar to custody or visitation than are same-sex relationships. Based on the gender of their companions, parents with same-sex cohabitants are treated differently from parents with opposite-sex companions. Presumptions against custody awards to parents in same-sex relationships thus employ a gender classification. The fact that these presumptions equally affect men and women does not negate the gender-based nature of the classification, because a disproportionate effect on a protected group is not necessary to trigger heightened scrutiny when state action employs a suspect or quasi-suspect classification.

Id. at 626.

hostility."¹⁰⁵ Lower courts, too, have taken notice of the fact that gay men and lesbians have been the object of deep prejudice and hatred.¹⁰⁶ Unfortunately, many of the lower courts continue to find that, despite the discrimination against gay men and lesbians, the government's justifications for the discrimination are either compelling or substantial enough to warrant its continuation.¹⁰⁷ In short, gay men and lesbians have been subjected to a history of purposeful discrimination similar in many respects to that experienced by any of the groups to which the Supreme Court has already afforded suspect classification.

2. Invidious discrimination

Second, the Supreme Court considers whether the discrimination against the group is invidious. This analysis involves asking several questions: whether the trait has bearing on the group's ability to contribute to society; whether the group experiences unique disabilities due to inaccurate stereotypes; and whether the trait is immutable.¹⁰⁸ A number of lower court decisions have found that a person's sexual orientation has no bearing on that person's ability to contribute to society.¹⁰⁹ Nonetheless, gay men and lesbians continue to be discriminated

105. *Rowland v. Mad River Loc. Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of *cert.*). This case involved upholding the suspension of a high school guidance counselor solely because she was bisexual. *Id.* at 1010. Brennan expressed his doubt that the result should be upheld under any standard of review. *Id.* at 1017.

106. *See, e.g., Watkins v. United States Army*, 875 F.2d 699, 724 (9th Cir. 1989); *High Tech Gays v. Defense Industrial Security Clearance Office*, 909 F.2d 375, 376 (9th Cir. 1990); *BenShalom v. Secretary of the Army*, 703 F. Supp. 1372, 1379 (E.D. Wis. 1989).

107. *See High Tech Gays*, 909 F.2d at 376 (Norris, J., dissenting from denial of rehearing *en banc*). This case involved a challenge to the Department of Defense's practice of denying security clearances to gay men and lesbians. *Id.* Criticizing the majority's decision to deny a rehearing, Judge Norris stated that the Ninth Circuit made "a grave error" and that the decision will have tragic results. *Id.* Norris stated that the "court has held that our government may discriminate against homosexuals whenever it is able to put forth a rational basis for doing so." *Id.*

108. *Watkins*, 875 F.2d at 724 (Norris, J., concurring). The determination of whether the discrimination is invidious is important because the discrimination experienced by some groups is warranted. *Id.* The court offers burglars as an example of a group toward which animus is warranted, but suspect classification is not. *Id.* It is therefore crucial to this inquiry to establish that the discrimination experienced by groups deserving of suspect classification is of a kind which exhibits a gross unfairness. *Id.*

109. *See, e.g., Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969) (finding that courts should enjoin the military from discharging a gay man unless the government can demonstrate a nexus between homosexuality and unsuitability for service); *Able v. Perry*, 847 F. Supp. 1038 (E.D. N.Y. 1994) (granting an injunction barring a servicemember's discharge for homosexuality); *Meinhold v. U.S. Dept. of Defense*, 1994 WL 467311 (9th Cir. Aug. 31, 1994) (issuing a permanent injunction against the Navy's discharge of a homosexual servicemember). *See also, Rhonda R. Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 798 (1979). Rivera discusses both public and private employment litigation by gay men and lesbians in which lower courts have found that sexual orientation alone may not serve

against due to inaccurate stereotypes.¹¹⁰ Gay men and lesbians in the teaching profession are the most common victims of unfounded prejudice¹¹¹ because of the supposition that all homosexuals are pedophiles.¹¹² In considering whether the discrimination directed towards a particular group may be deemed invidious, the Court often looks to the immutability of the characteristic, although the Court has never held that immutability is a prerequisite for suspect classification.¹¹³ Despite continuing social and scientific debate concerning the origin of an individual's sexual orientation, there is both scientific and legal support for the opinion that sexual orientation is not a product of mature choice, but develops early in life.¹¹⁴ In addition to scientific study of homosexuality, one court suggested that it would be equally appropriate to investigate the

as the grounds for a determination of unsuitability for employment. *Id.* at 805-60.

110. SEXUAL ORIENTATION AND THE LAW § 5.04 (Roberta Achtenberg & Karen B. Moulding eds., 1994). Discrimination against gay men and lesbians based on inaccurate stereotypes results in their being denied insurance coverage, *Id.* § 5.04, at 5-50.1-2, and being denied security clearances for military and civil service employment. *Id.* § 5.04, at 5-50.3-4. State licensing and certification procedures have also been used, on the grounds of moral unfitness, to exclude gay men and lesbians from various occupations. *Id.* § 5.04, at 5-50.5-6.

111. *See Gaylord v. Tacoma Sch. Dist.* No. 10, 559 P.2d 1340, 1346 (Wash. 1977). *See also* National Gay Task Force v. Board of Educ., 33 Fair Empl. Prac. Cas. (BNA) 1009 (W.D. Okla. 1982). An Oklahoma statute refusing to employ, suspend, or dismiss any teacher, teacher's aide, or student teacher who was found to be a homosexual was upheld on the grounds that homosexual activity may adversely affect students. *Id.* at 1342-43. Further, the statute was found to be legitimate because its aim was to preserve harmony and maintain loyalty and confidence. *Id.* at 1347.

112. *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994). A campaign to enact a city charter amendment which would prohibit any policy providing protection for sexual orientation was based in part upon the misguided notion that homosexuals are pedophiles. *Id.* at 421. The court's finding of facts included the statement that "[t]here is no correlation between homosexuality and pedophilia." *Id.* at 426.

113. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-43 n.10 (1985) (questioning the relevancy of considering immutability among the factors used in making a suspect classification determination). In stating the characteristics which are defined to assign suspect classification, the Court does not mention immutability. *Id.* at 440-41.

114. *See Brian A. Gladue, et. al., Neuroendocrine Response to Estrogen and Sexual Orientation*, 225 SCI. 1496 (1984). In a study of neuroendocrinal reactions to administration of estrogen to heterosexual men and women and homosexual men, the results support the conclusion that physiological developmental components are responsible for sexual orientation. *Id.* at 1498. *See also* MOHR, *supra* note 97, at 39-42. Mohr points out that numerous studies have been conducted on twins, early childhood development, genes, and hormones in an effort to ascertain the origins of homosexuality. *Id.* at 39. The results of these studies, while not yet conclusive, do point toward "the conclusion that homosexuality is either genetically determined or a permanent result of early childhood familial configurations." *Id.* *See also* *Acanfora v. Board of Educ.*, 359 F. Supp. 843, 848-49 (D. Md. 1973) (finding sexual orientation determined by age six at the latest), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974); *Baker v. Wade*, 553 F. Supp. 1121, 1132 n.19 (N.D. Tex. 1982) (accepting as credible expert testimony that a person's sexual orientation was fixed by age six).

immutability of heterosexual orientation, asking "whether heterosexuals feel capable of changing their sexual orientation."¹¹⁵

3. Political Powerlessness

Third, in determining whether a group should be a suspect class, the Supreme Court considers whether the group in question is politically powerless. The Court has maintained that those excluded from the democratic process are in need of special judicial protection because they cannot expect to receive help elsewhere.¹¹⁶ Gay men and lesbians comprise a numerical minority, with most estimates putting them at approximately ten percent of the population.¹¹⁷ The political power of a group is measured not only by the extent to which they are represented in the legislative branch,¹¹⁸ but also by the extent to which prejudice inhibits their participation in the political process.¹¹⁹ Gay men and lesbians are often excluded from the democratic process because of the severe opprobrium manifested against them.¹²⁰ In addition, minority groups find it crucial to form coalitions in order to gain legislative recognition, but societal disdain for gay men and lesbians often discourages other minority groups from

115. *Watkins v. United States Army*, 875 F.2d 699, 724 (9th Cir. 1989) (Norris, J., concurring). Judge Norris wonders whether heterosexuals, faced with legislation prohibiting their sexual activity, would find it easy to either abstain from heterosexual activity or to shift their sexual desires to persons of the same sex. *Id.* He also states that it is abhorrent for the government to punish persons for failing to change a central aspect of their individual and group identity. *Id.*

116. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938) (stating that "prejudice against discrete and insular minorities," which inhibits their protection by the political process calls for heightened judicial scrutiny).

117. John C. Gonsiorek & James D. Weinrich, *The Definition and Scope of Sexual Orientation, in HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 1-12* (John C. Gonsiorek & James D. Weinrich eds., 1991).

118. Jessea Greenman, *Queer Elected and Appointed Officials in the U.S.A.*, available in QUEER RESOURCES DIRECTORY, Internet at gopher.qrd.org. At the national level, Greenman's list includes only three openly gay members of the House of Representatives: Barney Frank, Steve Gunderson, and Gerry Studds. *Id.*

119. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). The Court explained that some classifications are likely to reflect "deep-seated prejudice rather than legislative rationality" in purported legitimate objectives. *Id.* at 216-17 n.14. Legislation which is based in part on such prejudice is incompatible with the Constitution and irrelevant to any asserted legislative goal. *Id.*

120. *Rowland v. Mad River Loc. Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of *cert.*). Justice Brennan argues that gay men and lesbians constitute a "significant and insular minority" deserving of suspect classification. *Id.* See also *High Tech Gays v. Defense Industrial Security Clearance Office*, 909 F.2d 375, 376 (9th Cir. 1990) (Norris, J., dissenting from denial of rehearing *en banc*). Judge Norris found that "homosexuals are regarded by the national parties as political pariahs." *Id.* Judge Norris also compares blacks, who are protected by the three Civil War constitutional amendments, by the Civil Rights Acts of 1866, 1870, 1871, 1957, 1960, 1964, 1965, and 1968, and by 48 state antidiscrimination laws, to homosexuals, who have no comprehensive federal or state protection. *Id.*

joining with them.¹²¹ The problem is further compounded by the stigma associated with homosexuality,¹²² which causes many gay men and lesbians to conceal their sexual orientation.¹²³ While the political power of gay men and lesbians has grown in recent years, most of this growth has been at the local level and has been met by vigorous resistance.¹²⁴ Theoretically, gay men and lesbians could even face the possibility of losing the fundamental right to vote.¹²⁵ Therefore, gay men and lesbians remain a politically powerless group.¹²⁶

In summary, the sexual orientation of gay men and lesbians has resulted in

121. *High Tech Gays*, 909 F.2d at 376.

122. *Id.* at 378 (Norris, J., dissenting from denial of rehearing *en banc*) (noting that estimates that homosexuals make up only about 10 percent of the population, together with the desire of some to keep their status secret, contributes to their inability to wield political power).

123. John C. Hayes, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny after Bowers v. Hardwick*, 31 B. C. L. REV. 375, 461 (1990). Hayes argues that prejudice against homosexuals in effect silences them, rendering them unable to remedy the discrimination against them. *Id.* Public officials who may be sympathetic to the homosexual cause may also be silenced by the fear of damage to their political careers. *Id.* See also Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 730 (1985). Comparing the problems faced by black political organizers with those of gay men and lesbians, Ackerman points out that no other discrete group has to convince their constituents to "come out of the closet before they can engage in effective political activity." *Id.* at 730-31.

124. Equality Foundation of Greater Cincinnati v. City of Cincinnati, 860 F. Supp. 417, 438 (S.D. Ohio 1994). The court states that whatever legislative victories gay men and lesbians appeared to have won in recent years, "those victories are being 'rolled back' at an unprecedented rate and in an unprecedented manner." *Id.* Thirty-four communities have passed initiatives that prohibit designating gay men and lesbians as a group deserving protection from discrimination. *Id.* But see Jan Crawford Greenburg, *Court to Review Gay Rights Law*, CHI. TRIB., Feb. 22, 1995, §1, at 3. The Supreme Court will hear arguments in the fall of 1995 concerning the constitutionality of Colorado's anti-gay-rights amendment. *Id.* In 1992, Colorado voters amended the state constitution to prohibit laws that could protect gay men and lesbians from discrimination. *Id.* The Colorado Supreme Court held that the amendment was unconstitutional, finding that it "infringed upon a fundamental right to participate equally in the political process." *Id.* The Court is not being asked to decide the issue of discriminatory treatment in housing and employment, but only whether or not voters can prohibit laws providing protection from discrimination based on sexual orientation. *Id.*

125. Although the prospect seems highly unlikely, states apparently could deny voting rights to active homosexuals, along with other citizens, under standing opinions of the Supreme Court. States may deny the right to vote to all persons who have ever been convicted of a felony, even after their prison terms have been served. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). Further, states are currently permitted to criminalize private homosexual sodomy as a felony offense. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986). Hence, in principle, a state that chose to enforce both laws vigorously could present gay men and lesbians with a stark choice between celibacy and permanent disenfranchisement.

126. *Dean v. District of Columbia*, 653 A. 2d 307 (D.C. App. 1995) (Ferren, J., dissenting). Judge Ferren argues that political power must be evaluated at a national level in order to prevent the variation of constitutional rights from city to city. *Id.* at 114-16. By this standard, gay men and lesbians do not have the kind of political power that negates their characterization as a suspect or quasi-suspect class. *Id.*

a history of purposeful discrimination against them.¹²⁷ Gay men and lesbians have experienced invidious discrimination in all areas of their lives.¹²⁸ Gay men and lesbians also lack the political power to remedy their situation without judicial intervention.¹²⁹ It would, therefore, comport with the standards set forth by the Court to designate gay men and lesbians as a suspect class, thereby requiring strict scrutiny of legislation that discriminates against them. Should this occur, the burden would shift to the government to demonstrate that the legislation at issue serves a compelling interest and utilizes the least restrictive means available to forward that interest.¹³⁰

Because the current Court is reluctant to extend suspect classification beyond race and alienage, it is unlikely that this reasoning regarding the classification of gay men and lesbians will soon be adopted.¹³¹ One implication of granting suspect classification to gay men and lesbians would be guaranteed access to the fundamental right to marry.¹³² Except for a single short-lived exception,¹³³ courts across the country have consistently refused to grant gay men and lesbians this right.¹³⁴ Thus, the provision of equal

127. See *supra* notes 93-107 and accompanying text.

128. See *supra* notes 108-15 and accompanying text.

129. See *supra* notes 116-26 and accompanying text.

130. TRIBE, *supra* note 80, § 16-7, at 1454.

131. Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 810 (1984) (stating that it is unlikely that homosexuals will be declared a suspect class). See also Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV L. REV. 1285, 1299-1305 (1985) (arguing that homosexuality should be recognized as a suspect classification because sexual orientation is a determinative feature of personhood and because of the stigma and opprobrium attached to group membership).

132. *Meyer v. Nebraska*, 262 U.S. 390, 392 (1923) (characterizing marriage as a fundamental right); *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942) (finding that marriage and procreation are fundamental rights). See also *infra* note 134.

133. *Baehr v. Lewin*, 852 P.2d 44, 69 (Haw. 1993) (holding that same-sex couples have a right to marry under the Hawaii Constitution). The *Baehr* decision was delivered May 5, 1993, and on June 22, 1994, the governor of Hawaii signed Act No. 217, amending the state marriage statute to explicitly "apply only to male-female couples, not same-sex couples." HAW. REV. STAT. § 572-1 (1994). The Hawaii legislature went on to state that "[a]ny change in these laws must come from either the legislature or a constitutional convention, not the judiciary." 20 FAM. L. REP. 2013, (Aug. 2, 1994).

134. See *Dean v. District of Columbia*, No. 92-CV-737, 1995 WL 21117 (D.C. App. Jan. 19, 1995) (holding that the District's statute does not authorize same-sex marriages); *Jones v. Hallahan*, 501 S.W.2d 589 (Ky. 1973) (holding that the state statute does not authorize same-sex marriages); *Jennings v. Jennings*, 315 A.2d 816 (Md. Ct. Spec. App. 1974) (holding that state statute does not authorize same-sex marriages); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (holding that state statute does not authorize same-sex marriages), *appeal dismissed*, 409 U.S. 810 (1972); *DeSanto v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984) (holding that same-sex partners cannot contract a common-law marriage); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974) (denying the right to marry to same-sex couples); *Burkett v. Zablocki*, 54 F.R.D. 626 (E.D. Wis. 1972) (holding that

protection in cases of same-sex domestic violence is better approached through another means.

B. *Intermediate Scrutiny Analysis*

Within the past twenty-five years, the Supreme Court has adopted an intermediate standard of review for certain classifications.¹³⁵ This standard is not as difficult for government to meet as is the strict scrutiny analysis, but intermediate scrutiny does not give the broad deference to legislation found under the rationality test.¹³⁶ To date, the Court has only applied intermediate scrutiny to classifications based upon gender¹³⁷ and illegitimacy.¹³⁸ Domestic violence legislation which does not apply equally to opposite-sex and same-sex couples violates the Equal Protection Clause and triggers intermediate scrutiny for two reasons: first, gay men and lesbians should be afforded quasi-suspect classification based on the traditional analysis used by the Court to determine such classifications,¹³⁹ and second, the exclusion of same-sex couples is a form of gender-based discrimination, already subject to intermediate scrutiny.¹⁴⁰

1. Quasi-suspect Classification

Under intermediate scrutiny, the Court utilizes many of the same criteria used in strict scrutiny analysis and has not drawn bright-line distinctions between

state statute does not authorize same-sex marriages).

See also Otis R. Damslet, Note, *Same-Sex Marriage*, 10 N. Y. L. SCH. J. HUM. RTS. 555 (1993); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993); Adrienne K. Wilson, *Same-Sex Marriage: A Review*, 17 WM. MITCHELL L. REV. 539 (1991).

135. See *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-131 (1969) (discussing the [then-used] two-tiered approach to judicial review of challenged legislation, i.e. strict scrutiny or rational basis analysis).

136. NOWAK & ROTUNDA, *supra* note 70, at 576.

137. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (stating that the government has the “burden of showing exceedingly persuasive justification for the [gender] classification” and that the government’s interest must be “substantially related to the achievement of those objectives”); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (finding that gender-based classifications are inherently suspect, thus triggering heightened judicial scrutiny, and pointing out that heightened scrutiny was required due to our nation’s “long and unfortunate history of sex discrimination”); *Reed v. Reed*, 404 U.S. 71, 76 (1971) (holding that “a [gender] classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the law”).

138. *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) (reasoning that although illegitimacy is not subject to strict scrutiny, legislation which discriminates upon that basis is nevertheless invalid if it is not substantially related to permissible state interests).

139. See *infra* notes 141-49 and accompanying text.

140. See *infra* notes 150-80 and accompanying text.

what qualifies one group as suspect and another as quasi-suspect.¹⁴¹ The quasi-suspect classifications of gender and illegitimacy share with the suspect classifications of race and alienage certain immutable characteristics which have been the occasion of irrational stereotyping and prejudice, resulting in historically unjust treatment of the groups in question.¹⁴² In *Equality Foundation of Greater Cincinnati v. City of Cincinnati*,¹⁴³ the U.S. District Court for the Southern District of Ohio held that sexual orientation is a quasi-suspect classification.¹⁴⁴ In making this determination, the court found that gay men and lesbians "have been stigmatized throughout history based on erroneous stereotypes and mischaracterizations regarding their sexual orientation."¹⁴⁵ The court also found that sexual orientation in no way affects a person's ability to contribute to society.¹⁴⁶ The court recognized, however, that as a result of these inaccurate stereotypes, gay men and lesbians experience unique disabilities, including vicious physical attacks.¹⁴⁷ In addition, the court recognized the immutability of sexual orientation.¹⁴⁸ Finally, in determining

141. The term "quasi-suspect" was used by Chief Justice Burger in his dissent in *Plyler v. Doe*, 457 U.S. 202, 244 (1982). Although no majority opinion employs this terminology directly, various lower courts and commentators have used it frequently. See Miller, *supra* note 131, at 836 n.77.

142. See *supra* notes 93 and 96 and accompanying text. See also *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1127 (1969).

143. 860 F. Supp. 417 (S.D. Ohio, 1994).

144. *Id.* at 436.

145. *Id.* See also *supra* notes 96-106 and accompanying text.

146. *Equality Foundation*, 860 F. Supp. at 437. See also Gary B. Melton, *Public Policy and Private Prejudice*, AMERICAN PSYCHOLOGIST, June 1989, at 936. In 1975, the American Psychiatric Association (APA) adopted a resolution urging all mental health professionals to oppose discrimination based on homosexuality. *Id.* The APA further resolved that homosexuals' overall potential to contribute to society does not differ from that of heterosexuals and that homosexuality does not negatively affect an individual's job performance. *Id.* at 936-37.

147. *Equality Foundation*, 860 F. Supp. at 437. See also *supra* notes 110-12 and accompanying text. See also *People v. Clanton*, 261 Cal. Rptr. 748, 748 (Cal. Ct. App. 1989) (convicting a homophobe of involuntary manslaughter for the beating death of a gay man). In *Clanton*, the defendant travelled to San Francisco one evening indicating that "the purpose of the trip was gay bashing." *Id.* The defendant encountered a stranger on the street, shouted "insulting anti-gay epithets" at the victim, and then beat him to death. *Id.* at 748-49.

See also Michael Ollove, *Violent Act, Lifetime of Contrition*, THE SUN (Baltimore), Dec. 25, 1994, at 1A (recounting the death of a gay man who, after fleeing a gang of "gay-bashers," was caught, punched, kicked, and thrown from a bridge to his death). But see *Gingrich Supports Toleration of Gays*, CHI. TRIB., Nov. 24, 1994, at N3 (quoting Speaker of the House Newt Gingrich—urging that the Republican party adopt a position of toleration toward homosexuality—as stating, "It should not be promotion and it should not be condemnation.").

148. *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, 860 F. Supp. 417, 437 (S.D. Ohio 1994). The court relied on "credible and un rebutted" testimony in concluding that sexual orientation is a characteristic which is set at an early age and is therefore beyond the control of the individual. *Id.* In discussing the distinction between sexual orientation and sexual conduct, the court found that the latter is a matter of volition, while the former is not. *Id.* See also *supra* notes 113-15 and accompanying text.

that gay men and lesbians are a quasi-suspect class, the court considered the significant political impediments that gay men and lesbians face.¹⁴⁹ For all of the reasons set forth by the court in *Equality Foundation of Greater Cincinnati*, gay men and lesbians meet the criteria for quasi-suspect classification.

2. Gender-based Discrimination

Gender-based classifications are already subject to intermediate scrutiny, as declared by the Supreme Court in *Reed v. Reed*¹⁵⁰ and *Frontiero v. Richardson*¹⁵¹ because these classifications are inherently suspect.¹⁵² In order for legislation which discriminates upon the basis of gender to be declared valid, the state must show a fair and substantial relationship between the discrimination and the interest being forwarded.¹⁵³ All legislation that discriminates against gay men and lesbians rests upon a gender-based classification, since the applicability of such legislation depends upon the gender of the parties.¹⁵⁴ The domestic violence statutes being analyzed here are therefore inherently suspect, since they discriminate against gay men and lesbians.¹⁵⁵ Although the gender argument may initially appear to be abstract

149. *Equality Foundation*, 860 F. Supp. at 437-38. The consideration of a group's political powerlessness, although noted, was described by the court as an "ill-defined" test because there is a danger that political gains by suspect and quasi-suspect classes "could threaten their protected status." *Id.* at 438 n.17.

150. 404 U.S. 71 (1971).

151. 411 U.S. 677 (1973).

152. *Frontiero*, 411 U.S. at 682.

153. *Id.* See also *Reed*, 404 U.S. at 76.

154. Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 634 (1992). Fajer states that classifications based on sexual orientation are "literally gender discrimination." *Id.* Requiring the decision-maker to take the gender of the parties into account amounts to gender discrimination. *Id.* Because similar behavior is being treated differently, an equal protection approach is warranted. *Id.* Fajer offers the following example:

[A] manager fires Gregg for openly discussing his weekend at Key West with "Bill." Because the manager almost certainly would not fire Mary or Joanne for precisely the same behavior—discussing a weekend away with "Bill"—the manager is discriminating against Gregg because he is male.

Id.

155. See *supra* notes 69-84 and accompanying text.

and difficult,¹⁵⁶ one state supreme court has already adopted and employed this argument.¹⁵⁷

The clearest way to demonstrate that discrimination against gay and lesbian couples is based on a gender classification is by analogy to the use of race-based classifications in discrimination against interracial couples.¹⁵⁸ In *Loving v. Virginia*,¹⁵⁹ the Supreme Court held that Virginia's miscegenation statute was unconstitutional because it rested "solely upon distinctions drawn according to race."¹⁶⁰ Although Virginia argued that there was no violation of the Equal Protection Clause because whites were allowed to marry whites and blacks were allowed to marry blacks, the Court found that this argument could not override the racial discrimination at work in the statute.¹⁶¹ By analogy, domestic violence statutes that provide protection only in the restricted case of couples comprising one male and one female are discriminatory because they rest solely upon a distinction drawn according to gender.¹⁶² The application of such

156. Eskridge, *supra* note 134, at 1509. Professor Eskridge acknowledges the initial difficulty some may have with the argument that discrimination against homosexuals is a form of gender discrimination. *Id.* He explains that discrimination against homosexuals has its foundation in an "ideology of heterosexism," which views women as wives and mothers, thus reinforcing traditional gender roles. *Id.* at 1510. Eskridge suggests that there is a "direct link between tying women to the kitchen and ostracizing same-sex couples from the bedroom." *Id.*

157. *Baehr v. Lewin*, 852 P.2d 44, 64-67 (Haw. 1993). The Hawaii Supreme Court held that sex is a suspect classification under the Hawaii Constitution. *Id.* at 67. The court further held that the state marriage statute is unconstitutional because it prohibits same-sex marriages. *Id.* at 48-49. The court based its decision on the conclusion that a prohibition of same-sex marriage is gender discrimination. *Id.* at 64-67. The *Baehr* decision is the first in the United States to base its holding on the finding that discrimination against gay and lesbian couples is sex discrimination. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 201-02 (1994). Koppelman states that the gender argument will seem "odd and even tortured" to some, but that this argument provides a more complete understanding of the problem than the privacy or suspect classification arguments. *Id.*

158. Koppelman, *supra* note 157, at 200. By drawing an analogy between discrimination against interracial couples and same-sex couples, the argument recognizes many similarities between the two cases. *Id.* Legislation prohibiting interracial marriage and legislation prohibiting same-sex marriage both claim to be grounded on long-standing tradition, legal precedent, passionate conviction, and religious justification. *Id.*

159. 388 U.S. 1 (1967)

160. *Loving*, 388 U.S. at 11.

161. *Id.* The state argued that because the miscegenation statute equally punished whites and blacks who entered into an interracial marriage, it did not discriminate on the basis of race. *Id.* at 8. The Supreme Court rejected the notion that the State's alleged equal application of the statute was enough to prevent its invalidation under the Fourteenth Amendment. *Id.*

162. See Eskridge, *supra* note 134, at 1504-08 (analogizing *Loving* with an equal protection challenge to same-sex marriage); Jennifer L. Heeb, Comment: *Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy*, 24 SETON HALL L. REV. 347 (1993) (arguing that the *Loving* decision should be read as triggering strict scrutiny for same-sex marriage challenges). See also Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA.

statutes equally to men with female partners and to women with male partners does not override the fact that protection is denied to men with male partners and to women with female partners because of a gender classification.¹⁶³

Just as there is a connection between miscegenation and racism,¹⁶⁴ there is also a connection between discrimination against homosexuals and sexism.¹⁶⁵ The racism underlying the miscegenation statutes was based on the status of whites, as defined by the alleged inferiority of blacks.¹⁶⁶ These statutes were designed to maintain and enforce the racial divisions present in society.¹⁶⁷ Similarly, the sexism underlying the discrimination against gay men and lesbians is based on the status of men, as defined by the inferiority of women.¹⁶⁸ The discrimination against gay men and lesbians results from and supports traditional

L. REV. 1535, 1541 (1993) (stating that it is harmful for gay men and lesbians to "emulate" heterosexual relationships). Polikoff makes the point that marriage, for many gay men and lesbians, is viewed as an oppressive, hierarchical institution which is manifested through dominant and submissive roles abhorrent to the gay and lesbian communities. *Id.*

163. *See supra* notes 51-62 and 69-84 and accompanying text.

164. Koppelman, *supra* note 157, at 221. Koppelman details the connection between miscegenation and racism by showing, first, "how one group's oppression can be rooted in another's," and, second, how the discrimination against interracial couples fits into the pattern of whites' discrimination against blacks. *Id.*

165. *Id.* at 234. In making the connection between sexism and discrimination against gay men and lesbians, Koppelman relies on evidence from anthropology, experimental social psychology, and cultural history. *Id.* Social psychologists link strong hostility toward homosexuals with "restrictive attitudes about sex roles." *Id.* at 237. Studies show that there is a correlation between firmly held notions of appropriate gender roles and homophobia. *Id.* at 238. Koppelman traces the connection between sexism and homophobia back to the eighteenth century, stating that "male hostility toward effeminate men has been a psychological defense against gender-identity conflict." *Id.* at 244.

166. SUZANNE PHARR, *HOMOPHOBIA: A WEAPON OF SEXISM* 26 (1988). The need for one group to feel superior to another is evinced in ageism, classism, anti-Semitism, sexism, racism, and homophobia, which are all connected. *Id.* Pharr points out that sexism permeates religious and psychiatric history and that "without the existence of sexism, there would be no homophobia." *Id.*

167. Fajer, *supra* note 154, at 635. Homophobia and fear of miscegenation serve to normalize societal differentiations, to reinforce the subjugation of "inferior" groups by "superior" groups, and to control rigidly all relations between them. *Id.*

168. SARAH LUCIA HOAGLAND, *LESBIAN ETHICS: TOWARD NEW VALUE* 28-29 (1988). Hoagland writes that:

Understanding heterosexualism, as well as homophobia, involves analyzing, not just women's victimization, but also how women are defined in terms of men or not at all, how lesbians and gay men are treated—indeed scapegoated—as deviants, how choices of intimate partners for both women and men are restricted or denied through taboos to maintain a certain social order.

Id. at 28. Hoagland goes on to explain that heterosexualism is an entire way of living that involves the economic, political, and intimate relationships between the sexes. *Id.* at 29.

gender-role stereotypes.¹⁶⁹ In *Mississippi University for Women v. Hogan*, the Supreme Court rejected the state's use of gender-based classifications explicitly because the justification offered for the classification perpetuated gender-role stereotypes.¹⁷⁰ Gay men and lesbians challenge the patriarchal norm because they do not conform to traditional gender roles.¹⁷¹ In this context, society views lesbians as a threat to male dominance and control because they are not submissive, and society regards gay men as traitors to their gender.¹⁷² The

169. Fajer, *supra* note 154, at 636. The gender argument requires recognition that homophobia is caused by gender-role stereotypes and "always has the effect of perpetuating the stereotypes and the subordinate position of women." *Id.* Gender-role stereotyping results in a society that is structured to believe that certain activities are appropriate only for women and others only for men. *Id.* Discrimination based on sexual orientation perpetuates male supremacy because discriminatory treatment of gay men and lesbians is not gender-neutral. *Id.*

170. 458 U.S. 718, 724 (1982). The Court struck down the limited enrollment policy of a state-supported university because the policy reflected archaic notions of the proper roles for men and women. *Id.* The Court stated that a statutory objective is illegitimate if it is aimed at the exclusion or protection of one gender because that gender is presumed to be innately inferior. *Id.* at 725. *See also* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (finding that conduct premised on gender stereotyping constitutes actionable gender discrimination).

171. Koppelman, *supra* note 157, at 234. Stigmatization of homosexuals has to do, in part, with the homosexual's supposed deviation from traditional gender roles. *Id.* Children in our culture are taught early in life that they will suffer if they exhibit behavior that is deemed inappropriate for their sex. *Id.* at 235. The stigma associated with sex-inappropriateness and the stigma attached to homosexuality are therefore virtually interchangeable. *Id.* In our society, being gay or lesbian is often understood as a metaphor for failing to conform to the traditional norms of one's gender. *Id.*

See also Eskridge, *supra* note 134, at 1473. In the nineteenth century, the medical profession furthered persecution of homosexuality by categorizing homosexuality as a disease. *Id.* Because a "normal" sexual orientation was heterosexual, any attraction to persons of the same sex was a deviance from the norm and therefore a treatable medical malady. *Id.* The designation of homosexuality as a disease contributed to hysteria and persecution against gay men and lesbians that was particularly vehement in the United States. *Id.* Despite a concerted effort to "cure" homosexuals and rid society of this evil, same-sex relationships "have flourished at the fringes of society" throughout modern history. *Id.* at 1474.

172. Pharr, *supra* note 166, at 18. Lesbians are perceived as women who have "stepped out of line" and are not sexually or economically dependent on men. *Id.* As such, lesbians are assumed to be against men, threatening to the nuclear family, and to male domination in general. *Id.* In addition, many heterosexual women view lesbians as standing "in contradiction to the sacrifices they have made to conform to compulsory heterosexuality." *Id.* Gay men also threaten the social structure of male domination by breaking ranks with the "real men." *Id.* at 19. Gay men are identified with women, the weaker sex, and must therefore be dominated. *Id.* "Misogyny gets transferred to gay men with a vengeance and is increased by the fear that their sexual identity and behavior will bring down the entire system of male dominance and compulsory heterosexuality." *Id.*

See also Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617, 628 (1989). Prejudice against gay men and lesbians reflects the fear that traditional gender roles are not innate. *Id.* at 629. Many gay and lesbian couples do not conform to the dominant-male/submissive-female model, thereby showing that these gender roles are not necessary in order to maintain an intimate relationships. *Id.* at 628. Gay and lesbian couples provide a model for a different, and therefore threatening, alternative. *Id.*

preservation of a sexist society requires a pattern of male domination maintained through the selective application of physical force.¹⁷³

In *Palmore v. Sidoti*¹⁷⁴ the Supreme Court reversed a district court decision that awarded a white father custody of his child in anticipation of the white mother's marriage to a black man. The district court's finding made it clear that had the mother been marrying a white man, she would have retained custody of the child.¹⁷⁵ In other words, but for the race of the mother's partner, the court would have ruled in her favor.¹⁷⁶ By analogy, in cases of same-sex domestic violence, a gay victim would be afforded protection but for the gender of his abuser, and a lesbian victim would be afforded protection but for the gender of her abuser.¹⁷⁷ The *Palmore* Court also admonished the district court for bowing to private prejudice.¹⁷⁸ The Court stated that the law cannot, by legislation or judicial decision, give effect to biases or prejudices without violating the Equal Protection Clause.¹⁷⁹

A domestic violence statute that provides or denies protection based upon the genders of the parties likewise violates the Equal Protection Clause. For example, if John and Barbara, an opposite-sex couple, and Jill and Julie, a same-sex couple, are experiencing domestic violence of exactly the same sort,

173. In order to understand the prohibitions against both miscegenation and homosexuality, one must look not at the interference with individual liberty, but at the reasons for that interference.

The equal respect that the state owes its citizens, and that the citizens owe one another, is incompatible with the idea that sexual penetration is a nasty, degrading violation of the self, and that there are some people (black women, or women simpliciter) to whom, because of their inferior social status, it is acceptable to do it, and others (white women, or men) who, because of their superior social status, must be rescued (or, if necessary, forcibly prevented) from having it done to them.

Koppelman, *supra* note 157, at 284.

174. 466 U.S. 429 (1984).

175. *Id.* at 432.

176. *Id.* The district court did not question the couple's parental qualifications, but recognized that both parents were devoted to the child and both were capable of providing for the child. *Id.* at 432. Instead, the district court was candid about the fact that its holding was based solely on the race of the mother's spouse. *Id.*

177. Fajer, *supra* note 154, at 649. The argument that discrimination against homosexuals is gender discrimination allows gay men and lesbians to say to the courts and the general public that their relationships are "much like yours, but for the gender of one of the parties." *Id.* at 649. Challenging pre-conceived notions of homosexual relationships by explaining them in relation to heterosexual relationships allows room for significant social change. *Id.*

178. *Palmore v. Sidoti*, 466 U.S. 429, 433. The Supreme Court stated that although the Constitution cannot control private prejudices, it must not tolerate them. *Id.* The Court warned that public officials who are sworn to uphold the Constitution have a duty not to validate prejudices they assume are widely and deeply held. *Id.*

179. *Id.* The Court also stated that most race-based classifications reflect racial prejudice rather than legitimate government interests. *Id.* at 432. This argument is equally applicable to gender-based classifications which are discriminatory only against same-sex couples.

Barbara will be protected from John's abuse because John is male, but Julie will be denied protection because Jill is female. Therefore, just as it is race-based discrimination to deny equal protection to a white woman because of her marriage to a black man, so it is gender-based discrimination to deny equal protection to a woman because her abusive partner is female or to a man because his abusive partner is male.¹⁸⁰

C. Rational Basis Analysis

The most deferential standard of review utilized in equal protection challenges is rational basis analysis.¹⁸¹ In order to withstand an equal protection challenge at this level of scrutiny, a legislative classification need only be related to a legitimate state interest.¹⁸² When a state statute is challenged for violating an individual's right to due process under the law, the burden is on the individual to establish that the legislature has acted in an arbitrary and irrational way.¹⁸³ In an equal protection challenge, on the other hand, the burden is on the state to provide a justification for its actions.¹⁸⁴ While a state has no duty to enact comprehensive domestic violence legislation, once it has done so, it must apply the legislation equally to all.¹⁸⁵ As Chief Justice William Rehnquist stated in *DeShaney v. Winnebago County Dep't of Soc. Serv.*, "[t]he State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."¹⁸⁶

180. In *Baehr v. Lewin*, 852 P.2d 44 (1993) the Hawaii Supreme Court, in granting same-sex couples the right to marry based upon gender-based equal protection grounds, pointed out that "[h]omosexual and same-sex marriages are not synonymous." *Id.* at 52 n.11. The Court further held that the issue of sexual orientation "is not material to the equal protection analysis." *Id.* at 54 n.14.

181. See *supra* note 90 and accompanying text.

182. *New Orleans v. Duke*, 427 U.S. 297 (1976); *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949) (stating that legislation will be upheld under rational basis analysis if a classification "has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection").

183. *Duke Power v. Carolina Envtl. Study Group*, 438 U.S. 59, 64 (1978) (upholding the Price-Anderson Act, which limits the aggregate liability for a single nuclear accident).

184. Although the rationality test involves only minimal scrutiny and a high degree of deference to federal and state legislatures, legal scholars have noted that:

[C]ourts should strike down laws under the rationality test when it is clear that there is no purpose for a classification other than denying a benefit (even if it is not a fundamental right) to a group (even a non-suspect classification) when the denial of the benefit can serve no possible purpose other than the desire to discriminate against a group which is disfavored by the legislature.

NOWAK & ROTUNDA, *supra* note 70, at 589.

185. See *supra* notes 69-84 and accompanying text.

186. *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 197 n.3 (1989). *DeShaney* involved a § 1983 due process challenge alleging a failure on the part of the department of social services to act when it had full knowledge of repeated incidents of abuse and had intervened

While it is not common for the Supreme Court to invalidate legislation under the rational basis test, the decisions in which it has done so indicate that invidious discrimination based on nothing more than irrational fear and prejudice will not be upheld.¹⁸⁷ Even under this minimum level of scrutiny, “mere negative attitudes, or fear” do not constitute a rational basis for a legislative classification.¹⁸⁸ In *Cleburne v. Cleburne Living Center*,¹⁸⁹ the Supreme Court held that, under a rational basis analysis, a city zoning ordinance was invalid as applied.¹⁹⁰ When the Cleburne Living Center submitted an application for a zoning permit to operate a group home for the mentally retarded, the city informed the Center that a special use permit would be required, which the city refused to grant.¹⁹¹ The Court found that the permit would have been granted but for the fact that the home was to be occupied by mentally retarded persons.¹⁹² The burden fell on the state to show that it was rational to treat the mentally retarded differently, but the Court held that the characteristics of the intended occupants of the home did not provide the city a justification rationally related to the denial when a similar permit would be granted to others occupying the same site.¹⁹³ The Court concluded that “some objectives—such as a bare desire to harm a politically unpopular group—are not legitimate state interests.”¹⁹⁴ Thus, a domestic violence statute that offers protection only against abuse by “a person of the opposite sex”¹⁹⁵ should be invalidated if a state’s only justification is the fear and prejudice its citizens feel

on numerous occasions. *Id.* at 192-93. In denying the plaintiff relief, the Court reasoned that due process is not violated unless the State has imposed limitations on an individual’s freedom to act on his own behalf. *Id.* at 200. See also *Developments in the Law—Legal Responses to Domestic Violence, IV. Making State Institutions More Responsive*, 106 HARV. L. REV. 1551, 1567-71 (1993) (discussing Equal Protection challenges to domestic violence statutes).

187. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

188. *Id.* The Court stated that the electorate as a whole, by referendum, cannot enact measures which violate the Equal Protection Clause. *Id.* The government cannot avoid the strictures of the Equal Protection Clause “by deferring to the wishes or objections of some fraction of the body politic.” *Id.* The Court, quoting *Palmore v. Sidoti*, again stated that private prejudice may not be given effect in the laws. *Id.*

189. 473 U.S. 432, 435 (1985).

190. *Id.*

191. *Id.* at 436-37.

192. *Id.* at 437. The facts showed that the same residential site was acceptable, without a special permit, for use as an apartment house, multiple dwellings, boarding and lodging houses, dormitories, fraternity or sorority houses, hotels, hospitals, nursing homes, or private clubs. *Id.* at 447. This finding negated the city’s asserted rational justification that the aim of the ordinance was to avoid a concentration of the population and congestion on the streets. *Id.* at 450.

193. *Id.* According to the Court, the city never justified how its decision to refuse the permit could bear a rational relationship to a legitimate interest. *Id.* Instead, the findings of the district court revealed that the city was concerned with the neighboring property owners’ objections to the group home. *Id.* at 448.

194. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985).

195. See *supra* note 60.

toward gay men and lesbians.¹⁹⁶

Domestic violence statutes are criminal statutes that should be applied in such a way as to provide for the prosecution of all persons who violate the law.¹⁹⁷ The legislation most commonly reviewed under the rationality standard, on the other hand, involves economic or social welfare benefits.¹⁹⁸ Given the wide deference afforded to legislation that does not affect a fundamental right or draw upon a suspect or quasi-suspect classification, states may put forth almost any economic argument with some confidence that courts will accept it as rational.¹⁹⁹ Unlike economic legislation, domestic violence legislation is enacted for the purpose of criminalizing violent acts.²⁰⁰ Only if financial resources are insufficient to fund criminal prosecution of all persons who commit acts of domestic violence, government actors could maintain that they have a rational basis for exempting gay men and lesbians who abuse their partners.²⁰¹ In this way, discriminatory domestic violence statutes might be upheld under a rational basis analysis.

IV. NO PRIVATE MATTER: POLICY CONSIDERATIONS

The equal protection challenge to domestic violence statutes that deny protection to same-sex partners does not rest upon privacy issues regarding sexual conduct. In general, issues of privacy have no place at all in

196. See *supra* notes 187-88.

197. See *supra* note 51 and accompanying text.

198. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 311 (1976) (upholding a mandatory retirement policy for state police officers at age 50); *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6 (1973) (upholding a local property tax scheme to finance public education despite the fact that great disparities would exist in the amounts of money being spent on students in various locales); *Dandridge v. Williams*, 397 U.S. 471, 476-78 (1970) (upholding a state law which limited the number of children for which a family could receive Aid to Families with Dependent Children).

199. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). The case involved a challenge to a city ordinance that prohibited pushcart vendors in the French Quarter of New Orleans unless the vendors had operated the same business for eight consecutive years. *Id.* The Court upheld the ordinance as "solely an economic regulation" aimed at enhancing the French Quarter's charm as a tourist attraction. *Id.* The Court found that vendors who had operated in the area, some for over 20 years, had built up a substantial reliance interest in the continued operation of their businesses which the newer vendors had not developed. *Id.* at 305. Therefore, the Court concluded that the ordinance did not "so lack rationality" that it constituted an impermissible denial of equal protection. *Id.*

200. See *infra* notes 202-18 and accompanying text.

201. This course of action, however, exposes government to a significant risk of substantial economic loss. See *supra* note 9.

considerations of domestic violence.²⁰² Distinctions that have been drawn between those areas of law deemed public and those areas deemed private certainly should not inform the policies upon which domestic violence legislation is grounded.²⁰³ In codifying the intent of its domestic violence statute, the Florida legislature explicitly stated that “[i]t is the intent of the Legislature that domestic violence be treated as an illegal act rather than a private matter.”²⁰⁴ Domestic abuse is an appropriate matter for public concern and a reasonable occasion for public interference, not a private activity in which victims engage voluntarily or an issue of domesticity traditionally deemed private.²⁰⁵

In particular, the Supreme Court decision in *Bowers v. Hardwick* in no way warrants the enactment or discriminatory application of domestic violence statutes that provide protection for heterosexual couples and not for homosexual couples.²⁰⁶ The Court did not deny suspect classification to gay men and lesbians, but narrowly held that homosexual sodomy could not be classified as a fundamental right.²⁰⁷ The Court rejected petitioner’s Ninth Amendment privacy claim and Fourteenth Amendment due process challenge, reasoning that states may prohibit behavior historically treated as criminal.²⁰⁸ The explicit policy considerations underlying the Court’s decision were those of morality and tradition.²⁰⁹ Since appeals to morality and tradition are no longer used to

202. Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 975-76 (1991). Schneider explains that the traditional notion of a dichotomy between “private” issues, such as the family, and “public” issues, such as the marketplace, has been nothing more than a “rationale for immunity in order to protect male domination.” *Id.* at 977. Schneider states that the “law’s absence from the private realm” is not a demonstration of lofty legal respect for individuals, but is rather a powerful expression of the society’s “assumptions of what is valued and important.” *Id.* at 978.

203. See Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 93 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994). Domestic violence is not a private, aberrational matter but is part of the systemic domination of women as a class. *Id.*

204. 1994 Fla. Sess. Law Serv. ch. 94-134, § 741.2901 (West).

205. Catherine MacKinnon writes:

It is probably not coincidence that the very things feminism regards as central to the subjection of women—the very place, the body; the very relations, heterosexual; the very activities, intercourse and reproduction; and the very feelings, intimate—form the core of what is covered by privacy doctrine. From this perspective, the legal concept of privacy can and has shielded the place of battery

CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 101 (1987). See also Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 35-36 (1992).

206. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (upholding a Georgia sodomy statute specifically as it pertains to homosexuals).

207. *Id.*

208. *Id.* at 192.

209. *Id.* See also Jo Ellen Lind, *Liberty, Community, and the Ninth Amendment*, 54 OHIO ST. L.J. 1259, 1278 (1993) (stating that the *Bowers* decision was an imposition of community values on all citizens without regard for individual well-being).

shield opposite-sex batterers from the reach of the law,²¹⁰ it would be ironic indeed for same-sex batterers to be exempted from domestic violence prosecution under the cloak of morality and tradition.

Unlike the reasoning in *Bowers*, the straightforward policy consideration underlying domestic violence statutes is the prohibition of violence that occurs within all adult relationships. As the court of appeals found in *State v. Hadinger*,²¹¹ the legislative intent behind domestic violence statutes is to provide protection to abused persons "regardless of their sex."²¹² Further, in *Hadinger*, a criminal prosecution of one woman for domestic violence against her female partner, the court reasoned that to exclude same-sex couples from protection under domestic violence statutes would be to "eviscerate the efforts of the legislature to safeguard, regardless of gender, the rights of victims of domestic violence."²¹³

Some legislatures have taken action in recognition of these policy considerations for protection of same-sex as well as of opposite-sex couples. In 1993, for example, the state of Missouri amended its domestic violence statute by deleting the words "of the opposite sex" from the section defining family or household members.²¹⁴ Following passage of this significant extension of protection against abuse, the bill's sponsor, Senator Joe Moseley, explained, "this provides equal, not special, protection."²¹⁵ Even Kerri Messer, the leader of Amendment Coalition, a conservative religious organization consistently opposed to special legal treatment of gay men and lesbians, commented favorably on the revised domestic violence statute by stating that "[c]riminal law should not vary no matter how a person has sex."²¹⁶

Domestic violence is a matter of public concern requiring legislation that effectively protects all victims and vigorously condemns all perpetrators, regardless of gender or sexual orientation. Further, domestic violence is neither a protected private behavior nor a voluntary activity in which individual victims choose to engage.²¹⁷ The Supreme Court's decision not to classify homosexual sodomy as a fundamental right does not constitute, warrant, or support a

210. Jane Maslow Cohen, *Private Violence and Public Obligation: The Fulcrum of Reason*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 349 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994). Feminism taught society that the norm of privacy resulted in the legal, social, and psychological subordination of women. *Id.* at 351.

211. 573 N.E.2d 1191 (Ohio Ct. App. 1991).

212. *Id.* at 1193.

213. *Id.*

214. MO. ANN. STAT. § 455.010 (Vernon 1994).

215. *Anti-Stalking Distraction*, THE JOPLIN GLOBE, July 19, 1993, at B2.

216. *Id.*

217. See *supra* notes 202-05 and accompanying text.

compelling, a substantial, or even a rational state interest in condoning domestic violence.²¹⁸ Because the policies behind domestic violence legislation concern the prohibition of violence in adult relationships, protection should be afforded to all persons equally.

V. THE PROTECTION OF AN EQUAL LAW: A MODEL STATUTE

One goal of this Note is to set forth a model domestic violence statute that will provide equal protection to victims of domestic violence regardless of sexual orientation. The statute will assist states in expanding current domestic violence legislation to ensure that police policies are in place which enable officers to effectively respond to domestic violence calls. Prosecutors' offices will be encouraged to implement policies that require uniform application of the law and represent a commitment to the criminalization of domestic violence. In addition, the statute will provide the judiciary with stringent guidelines for dealing with abusers. A final component in a comprehensive plan is the availability of support services to all victims of abuse.

The statute is specifically limited in its application to persons who have formed a legal, familial, or intimate relationship. By limiting the scope of the statute to exclude casual acquaintances, feuding neighbors, or business or social associations, the statute informs abusers and society in general that acts of domestic violence are criminal acts that will be actively prosecuted. Further, by providing the police, prosecutors, and judges with adequate information and resources with which to work, the statute attempts to promote uniformity through a coordinated approach to the problem.

A. Model Domestic Violence Statute

Chapter 1: Definitions . . . § 1

- (1) "Domestic violence" is the commission or threat of any injurious physical act against a household member.
- (2) "Household members" includes any two adults or emancipated minors:
 - (a) who are related by blood,
 - (b) who are or were joined in a legal marriage,
 - (c) who are or were residing together in an intimate relationship, or
 - (d) who are or were in an intimate relationship but have never resided together.
- (3) "Any two adults or emancipated minors" involved in domestic violence includes opposite-sex and same-sex couples.
- (4) An "intimate relationship" involves frequent and significant emotional

218. See *supra* notes 206-09 and accompanying text.

and/or physical interactions; it does not include casual business or social associations.

(5) A "victim" is an adult or emancipated minor who:

- (a) states that they have been abused, or
- (b) shows visible evidence of physical injury.

(6) An "alleged abuser" is the adult or emancipated minor who is or was the legal spouse or intimate partner of the victim.

Chapter 2: Arrest Procedures . . . § 1 Whether or not a warrant has been issued, police officers responding to a domestic violence call:

(1) may make an arrest if there is probable cause to believe that the alleged abuser has physically injured the victim or if physical injury to the victim is imminent; and

(2) must arrest the alleged abuser whenever:

- (a) there is visible evidence of serious physical injury to the victim, or
- (b) there is an existing protective order against the alleged abuser which was issued for the protection of the victim under chapter three of this statute.

. . . § 2 Police officers responding to domestic violence calls shall provide the victim with complete information on the availability of safe shelter, counselling, and community support services for victims of domestic violence. The information shall be provided to the victim before officers leave the scene.

Chapter 3: Protective Orders . . . § 1

(1) A protective order shall provide that the alleged abuser:

- (a) must stay away from the residence and/or place of employment of the victim,
- (b) refrain from contacting the victim, either in person, by telephone, or by mail,
- (c) refrain from any further acts or threats of physical violence against the victim,
- (d) refrain from taking or damaging any property belonging to the victim.

(2) A victim of domestic violence may request a protective order from a court in the jurisdiction of the victim's or the abuser's residency.

(3) The filing fees for protective orders issued under this statute shall be waived for victims who are unable to pay. No victims of domestic abuse shall be denied a protective order due to their indigence.

(4) A victim requesting a protective order shall make a sworn statement to either a judge or the clerk of the court stating the reason for the request.

(5) Mutual orders of protection shall not be issued unless a formal hearing is conducted by a judge.

(6) This order shall be effective until a formal hearing is conducted, no later than 14 days after the date of filing.

Chapter 4: Pro-prosecution Policy . . . § 1

(1) Once formal charges have been filed in a domestic violence case, the prosecutor's office shall have a two-year period within which to proceed with the charges.

(2) With the written consent of the victim, the prosecutor may offer the alleged abuser a probationary period of two years. If, during the probationary period, the alleged abuser refrains from any further abuse and complies with the provisions of any protective order that has been issued under this statute, the victim may, at the end of the probationary period, request that the charges be dropped.

(3) The victim may reinstate the initial abuse claim at any point during the two-year probationary period if the alleged abuser physically injures or threatens to injure the victim.

Chapter 5: Judicial Sentencing Guidelines . . . § 1

(1) If an abuser is convicted of, or pleads guilty to, a violation of this statute, the judge shall sentence the abuser to imprisonment in cases involving a pattern of abuse, serious physical injury, or a significant threat of continued harm to the victim.

(2) If an abuser is convicted of, or pleads guilty to, a first-time violation of this statute, the judge may sentence the abuser either to imprisonment or to probation, with counseling made a condition of the probation.

(3) The judge may also impose fines or restitution payments in addition to imprisonment or probation. The restitution payments may be determined according to the victim's lost wages, medical and counseling expenses, shelter costs, and replacement costs for damaged or destroyed property.

(4) The sentences imposed under this statute must be aimed at holding the abuser accountable, ending the abusive behavior, and meeting the needs of the victim and of society as a whole.

B. Comments and Explanations on the Proposed Statute

Domestic violence is a criminal offense. A broad definition of what constitutes domestic violence is necessary for several reasons. First, victims themselves are often unsure, when calling a police department, whether what they are experiencing is in fact something for which they can obtain help.²¹⁹

219. JULIE BLACKMAN, *INTIMATE VIOLENCE: A STUDY OF INJUSTICE* 35-37 (1989). Subjectivity plays a role in a victim's determination of whether or not they have been abused, and subjectivity also affects the outside observer's perception of domestic violence. *Id.* Many victims of domestic violence absolve their abusers of any blame for the violence or go further by denying

Second, it is equally important that police operators and dispatchers refrain from downplaying the seriousness of an abuse victim's call.²²⁰ Finally, prosecutors and judges will have the necessary statutory guidelines with which to prosecute and convict perpetrators of domestic violence, regardless of the subjective severity of the offense.²²¹

Because many police departments, prosecutors' offices, judges, and community support service personnel have not dealt regularly with same-sex partners involved in domestic abuse, it is essential to specify, by statute, that same-sex couples are to be treated identically to opposite-sex couples under the domestic violence legislation.²²² It is necessary to specify that same-sex couples are covered statutorily to ensure that a call for help by a victim of domestic violence in a same-sex relationship does not go unanswered or is not dismissed as simply a "homosexual tiff."²²³ There should be some discretion given to courts in determining what constitutes an intimate relationship; however, police responding to a domestic disturbance call should be instructed to respond to every call in accordance with the statutory requirements.²²⁴

that abuse is taking place. *Id.* It is crucial, therefore, to provide victims, police officers, prosecutors, and judges with the necessary statutory tools to categorize any threats or actual injurious physical acts as criminal behavior.

220. GAIL A. GOOLKASIAN, U.S. DEP'T OF JUSTICE, CONFRONTING DOMESTIC VIOLENCE: A GUIDE FOR CRIMINAL JUSTICE AGENCIES 32 (1986). Efforts to improve police response to domestic violence must begin at the first point of contact with victims of abuse. *Id.* If police departments are operating under a comprehensive domestic violence statute, there should be no concern that domestic violence calls will be either screened out or assigned a low priority. *Id.*

221. JULIE E. HAMOS, STATE DOMESTIC VIOLENCE LAWS AND HOW TO PASS THEM: A MANUAL FOR LOBBYISTS 36, 40 (1980). By responding to every act of domestic violence with a criminal prosecution, the judicial system is making an important public policy statement that domestic violence is criminal behavior which will be punished. *Id.* at 36. A broad statutory definition of domestic violence also helps to ensure that once cases have reached the courts they will not merely be dismissed. *Id.*

222. Symposium, *Report on Domestic Violence: A Commitment to Action*, 28 NEW ENG. L. REV. 313, 325 (1993). This report, done by the Massachusetts State Attorney General's Office, found that individuals involved in violent same-sex relationships face obstacles which are unique to their situation. *Id.* In an effort to reach these individual's needs, this report calls for mandatory sensitivity training for "police, judges, clerks, prosecutors, private attorneys, advocates, batterers' treatment providers, probation officers, and child protection workers." *Id.*

223. See *supra* notes 1-5 and accompanying text. Following community outcry over the handling of the Dahmer tragedy, the Milwaukee Police Department suspended the three officers who responded to the call concerning Konerak Sinthasomphone and Jeffrey Dahmer. Laurence, *supra* note 2, at 9. The proposed statute would clarify to all personnel involved in domestic violence cases that their response must be the same regardless of the sexual orientation of the victim and abuser, thereby reducing the likelihood of another tragedy like the one in Milwaukee.

224. The courts may not, under this statute, consider the sexual orientation of the parties when an instance arises that requires them to verify that the parties are intimately involved with one another. The factors that may be considered include, but are not limited to: the length of the relationship, the economic dependency of one party on the other, whether the parties have held

A necessary requisite in protecting victims of domestic violence is legislation which enables the police to immediately respond to the situation at hand.²²⁵ Domestic violence calls most often involve highly emotional situations in which violence escalates quickly.²²⁶ To require police officers to obtain a warrant before making an arrest on a domestic violence call would cause needless delay that could result in additional violence.²²⁷ By allowing police officers to make arrests without a warrant if there is probable cause to believe that violence has occurred or is likely to occur, the victim is protected, and it further enforces the message to the abuser that domestic violence is not a private matter, but will be dealt with through the criminal justice system.²²⁸

Police must arrest an abuser in response to a domestic violence call when it is evident that the victim has suffered serious physical injury, or if the victim has already obtained a protective order against the abuser. One objective of this portion of the statute is to protect victims of domestic violence by removing the abuser from the scene.²²⁹ Further, the mandatory arrest policy alleviates the potential for inconsistent arrest standards (particularly in the case of same-sex

themselves out to the public as a couple, and whether the parties have commingled real and personal property. *Watts v. Watts*, 405 N.W.2d 303, 306 (Wis. 1987) (discussing the factors used to determine a marriage by estoppel).

225. The National District Attorney's Association reports that more and more state courts are upholding challenges to warrantless arrests on domestic disturbance calls. *See Arrest, Search and Seizure—Warrantless Search: Domestic Violence Cases; Exigent Circumstances*, 14 No. 8 CASE COMMENTARIES AND BRIEFS 10, 11 (Sept. 1994).

226. *State v. Greene*, 784 P.2d 257, 259 (Ariz. 1989) (holding that an officer's entry into an apartment on a domestic violence call falls within the exigent circumstances exception to the usual warrant requirements).

227. *State v. Raines*, 778 P.2d 538, 542 (Wash. Ct. App. 1989). The court found that police officers responding to domestic violence calls have "a duty to ensure the present and continued safety and well-being" of the victim. *Id.* A domestic violence call creates a sufficient indication for the police to conclude that an exigency exists. *Id.*

228. HAMOS, *supra* note 221, at 38. A "warrantless arrest" policy eliminates the risk of additional harm that victims of abuse often face without such a policy. *Id.* When police respond to a domestic violence call under a policy that requires that they must either witness the abuse directly or have already obtained a warrant, the police are often left powerless to act because most abusers temporarily stop beating their victims in the presence of the police. *Id.*

229. Stephen B. Reed, *The Demise of Ozzie and Harriet: Effective Punishment of Domestic Abusers*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 337, 342 (1991). In arguing for the implementation of mandatory arrest policies, Reed points out that to deter domestic violence the threat of arrest must be real. *Id.* at 356. *See also* Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1149 (1994). This article suggests that mandatory arrest policies alone will not be effective unless combined with a coordinated program of stringent prosecutorial and sentencing guidelines as well as community support services for the victims. *Id.*

couples).²³⁰ Research suggests that “domestic violence offenders who were arrested had almost half as much repeat violence during the following six months as offenders who were not arrested.”²³¹

The issuance of a protective order can provide the victim with a certain sense of security.²³² Gay and lesbian victims of domestic violence have unique safety needs because their abusers can gain access to every place, such as single sex public facilities, that the victim can go; therefore, it is essential to have explicit provisions that include gay men and lesbians in domestic violence legislation.²³³ It is also important to limit the availability of mutual orders of protection, in order to prevent abusers from using such orders as another means of harassment and control of their victims.²³⁴ In addition, the judges who dealt with same-sex domestic violence orders have often issued mutual protective orders because they felt unable to determine which party needed protection.²³⁵

230. See HAMOS, *supra* note 221, at 43. Some critics argue that a mandatory arrest policy only serves to increase police power. *Id.* But see GAIL A. GOOLKASIAN, U.S. DEP'T OF JUSTICE, CONFRONTING DOMESTIC VIOLENCE: THE ROLE OF CRIMINAL COURT JUDGES 3 (1986). Goolkasian cites recent research supporting the consensus that the arrest of the abuser is “the most appropriate police response” to domestic violence incidents. *Id.*

231. GOOLKASIAN, *supra* note 220, at 32. See also Welch, *supra* note 229, at 1146. Welch discusses the Duluth Domestic Abuse Intervention Project, one of the few fully integrated programs in place for dealing with all aspects of domestic violence. *Id.* The program includes a mandatory arrest policy which, according to Ellen Pence, the program director, provides abusers “with clear limits on their behavior.” *Id.* A mandatory arrest policy also serves the function of reassuring victims that the abuse is not their fault. *Id.* at 1147.

232. Klein & Orloff, *supra* note 25, at 844. In order to be effective, protective orders must be made available to victims as quickly as possible. *Id.* Some states originally required a government attorney to petition the court on behalf of the victim, but most states now allow victims to make a request for a protective order on their own behalf. *Id.* at 845.

233. Lundy, *supra* note 33, at 286. Gay and lesbian batterers do not seem out of place in many of the areas where opposite-sex batterers would, including shelters and safe homes. *Id.* A heterosexual woman may inform family, friends, and coworkers that her male partner is abusing her, and these persons may help to screen her telephone calls or warn her if they notice her partner near her home or job. *Id.* Gay and lesbian victims may not wish to reveal their sexual orientation to persons who could offer the same type of help and must, therefore, rely more heavily upon the legal system for confidential assistance. *Id.*

234. Lundy, *supra* note 33, at 288. Judges commonly dismiss cases of same-sex domestic violence, finding that the alleged abuse is merely mutual fighting. *Id.* Possibly, a more harmful “solution” occurs when judges issue mutual orders of protection in same-sex cases. *Id.* This inappropriate attempt at relief gives the abuser another tool of abuse. *Id.*

235. Robson, *supra* note 38, at 579. The phenomenon of issuing mutual protective orders against same-sex couples may be due to the fact that most judges and others in the legal profession “have been educated in domestic violence issues in ways which emphasize the dominant/submissive patriarchal arrangement based on objective criteria such as gender.” *Id.* Mutual protective orders set a legal precedent that determines that any violence between same-sex partners is mutual, thus negating the existence of same-sex domestic violence. *Id.* The mutual protective order has an adverse effect on the victim in another way. Robson found that in some states the issuance of protective orders against individuals may disqualify them from state employment, thus impacting

Gay and lesbian victims should not be subjected to the potential harms of mutual orders of protection simply because of the gender of their abusers.²³⁶

A pro-prosecutorial policy that requires adjudication of domestic violence cases once formal charges have been filed reflects society's disdain for domestic violence, supports the public policy of criminalizing domestic violence, and can remove the "abuser's coercive strangle-hold over the victim."²³⁷ The two-year probationary period contained in this model legislation allows victims time to choose the best course of action for themselves, while providing a continual reminder to their abusers that domestic violence will not be tolerated.²³⁸ This pro-prosecutorial policy combats the reluctance of some district attorneys to prosecute domestic violence cases.²³⁹ Further, the policy relieves the frustration of other district attorneys who would vigorously prosecute abusers but often encounter victims who, for a variety of reasons, refuse to cooperate.²⁴⁰ By relieving the victim of the burden of making an immediate decision while keeping the threat of criminal charges in the mind of the abuser, the pro-prosecutorial policy serves as an integral part of the comprehensive approach to eradicating domestic violence.

The final component in this comprehensive plan calls for sentencing guidelines that reinforce the goal of providing protection to all victims of domestic violence. Arresting, charging, and imposing probation on a first-time offender may often prove a sufficient deterrent.²⁴¹ If courts deal firmly with the earliest manifestation of abusive behavior, they may forestall an escalating

their livelihood. *Id.* at 580.

236. See Robson, *supra* note 38, at 577.

237. See Reed, *supra* note 229, at 357. Reed points out that the battered partner should not be held in contempt for refusing to testify against the abuser, thereby further victimizing the battered partner. *Id.* See also GOOLKASIAN, *supra* note 230, at 4. Victims of domestic abuse are particularly vulnerable to retaliation by the abuser, but a no-drop policy has been found to shift the responsibility for prosecution away from the victim and onto the state. *Id.*

238. Reed, *supra* note 229, at 350. Domestic violence legislation must serve the short-term goal of effectively responding to the victims' needs, and look toward the long-term goal of breaking the cycle of violence. *Id.* The legal community must deal forcefully with the abuser and be sensitive to the emotional trauma that the victim is experiencing. *Id.* at 351.

239. See Welch, *supra* note 229, at 1139-40. Prosecutorial discretion has often resulted in cases being dropped because the responsibility for pursuing the charges is placed on victims who are frightened and hesitant to challenge their abusers.

240. STRAUS, *supra* note 18, at 233. Victims often fear retaliation from their abusers and would prefer to maintain the status quo rather than risk provoking their abusers further. *Id.*

241. HAMOS, *supra* note 221, at 42. Deterring abusers in the early stages of a violent relationship benefits the parties directly involved and society as a whole. Placing first-time offenders in already overcrowded jails might not benefit the victim, who may be financially dependent on the abuser, does not benefit the abuser, whose problem might be dealt with more efficiently through counseling, and places on society the burden of supporting the abuser and possibly the victim as well.

cycle of violence.²⁴² When continuing abuse demands more stringent measures, judges must be equipped with legislative directives that mandate harsh sentences for all persons who commit the crime of domestic abuse, regardless of the gender of the parties.²⁴³ Further, the victims of abuse by a same-sex or an opposite-sex partner must be provided with a support system that includes shelter, counseling services, and court-ordered counseling for the abusers.²⁴⁴

If gay and lesbian victims of domestic abuse sought protection under the domestic violence statutes challenged in this Note,²⁴⁵ they would be denied the protective services that heterosexual victims receive, and their gay and lesbian batterers would be exempted from prosecution.²⁴⁶ Under the model legislation presented here, gay and lesbian victims will be able to call the police and have their abusers arrested.²⁴⁷ Gay and lesbian victims will have the option of pressing criminal domestic violence charges against their abusers,²⁴⁸ and judges will have guidelines within which they may sentence all batterers.²⁴⁹ Under this model statute, the legal and social response to incidents of same-sex domestic violence would differ dramatically, from beginning to end. This statute would withstand a constitutional challenge while benefitting victims, abusers, and society as a whole.

242. GOOLKASIAN, *supra* note 230, at 5. Some abusers will comply with protective orders and probation because they are frightened by the prospect of serving time in jail. *Id.* Judges have the final say in the outcome of these cases, and they must act to protect the victims by determining the most effective sentence on a case-by-case basis. *Id.* See also Welch, *supra* note 229, at 1153-54 (discussing the deterrent effects of imprisonment and probation on abusers based upon their standing in the community).

243. HAMOS, *supra* note 221, at 43. From a civil libertarian perspective, an increase in police powers, lessening procedural requirements for arrest, and strict sentencing guidelines must not become an excuse for an increased police presence in minority and economically disadvantaged communities. *Id.* Nonetheless, this argument cannot be used as an excuse to ignore the needs of the domestic violence victim.

244. Symposium, *Report on Domestic Violence: A Commitment to Action*, 28 NEW ENG. L. REV. 313, 321 (1993). Victims of domestic violence must be able to reach out to trained advocates who can explain options that are available and create a safe plan for leaving the abuser. *Id.* The abusers must also have treatment if the cyclical abusive behavior is to be ended. *Id.* at 330. Treatment programs for batterers also serve to maintain contact with abusers who have completed jail sentences or are serving probationary terms. *Id.* at 332.

245. See *supra* notes 71-72 and accompanying text.

246. See *supra* notes 37-38, 42, 44, 210 and accompanying text.

247. See *supra* notes 222-23, 225-31 and accompanying text.

248. See *supra* notes 237-40 and accompanying text.

249. See *supra* notes 241-43 and accompanying text.

VI. CONCLUSION

Battered women endured generations of abuse at the hands of their fathers and husbands. When the women's movement brought this problem to the public eye, legislatures finally responded with domestic violence statutes that condemned abusers and protected victims. Significant societal change only comes as the result of a long and arduous struggle for recognition by an unpopular group. Gay and lesbian victims of domestic violence are now engaged in just such a struggle, yet their voices alone are not strong enough to be heard. All of us must join in their effort by criminalizing domestic violence without regard to gender or sexual orientation.

State domestic violence legislation that discriminates, either *de jure* or *de facto*, against gay and lesbian couples cannot withstand an equal protection challenge. Courts should either grant quasi-suspect classification to gay men and lesbians or recognize that discrimination against them is gender discrimination. The Supreme Court's unwillingness to protect homosexual sodomy as a fundamental right is irrelevant, because domestic abuse does not involve issues of privacy, morality, or tradition. Domestic violence legislation must provide all persons with equal protection under the law.

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