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Victims of Abuse and Discrimination: Protecting Battered Homosexuals Under Domestic Violence Legislation

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NOTE

VICTIMS OF ABUSE AND DISCRIMINATION: PROTECTING BATTERED HOMOSEXUALS UNDER DOMESTIC VIOLENCE LEGISLATION

I. INTRODUCTION

The prevailing societal assumption is that domestic violence involves a man who beats his wife. Many scholars, as well, limit their definition of domestic violence to this subset of victims.[1] These views fail to account for the broader class of people who also fall victim to violence in the home. Although male to female abuse is the most prevalent form of domestic violence, not only does the notion of domestic violence include women abusing men, it is also a reality in homosexual relationships.[2] "Domestic violence is a pattern of interaction that includes the use of physical violence, coercion, intimidation, isolation, and/or emotional, economic, or sexual abuse by one intimate partner to maintain power and control over the other intimate partner."[3] Domestic violence is not restricted to a single racial, ethnic, cultural, or socio-economic group;[4] rather, it occurs in all types of families and in all communities. In essence, the batterer uses any means possible to maintain control over the battered.[5]

1. *See, e.g.*, MARGI LAIRD MCCUE, DOMESTIC VIOLENCE: A REFERENCE HANDBOOK 2-3 (1995) ("[T]his book defines domestic violence as violence perpetrated by men against women with whom they have or have had an intimate relationship.").

2. *See* DAVID ISLAND & PATRICK LETELLIER, MEN WHO BEAT THE MEN WHO LOVE THEM: BATTERED GAY MEN AND DOMESTIC VIOLENCE 1 (1991).

3. Jo Ann Merica, *The Lawyer's Basic Guide to Domestic Violence*, 62 TEX. B.J. 915, 915 (1999).

4. *See* MCCUE, *supra* note 1, at 86.

5. *See* 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, 275-76 (1993) (noting that the batterer may force a diabetic victim to eat sugar or may deprive a disabled victim of a means of mobility).

Abuse in same sex relationships is significantly overlooked in social, as well as legal responses to domestic violence.[6] Gays and lesbians today, like battered women in the 1960s, are struggling for recognition of this potentially deadly problem.

Presently, some states exclude same sex couples from protection under domestic violence statutes.[7] Because these statutes deny homosexuals the same protections given to heterosexuals, under an equal protection analysis, these statutes are unconstitutional. This Note demonstrates that same sex domestic violence victims deserve the same protections afforded to heterosexual victims. Part II discusses the historical pattern of violence against women and the public recognition of homosexual domestic violence. Part III introduces the concepts underlying same sex domestic violence. It discusses heterosexual and homosexual domestic violence, identifying and explaining the similarities and differences. Part IV makes an equal protection challenge to the domestic violence statutes that exclude homosexuals from protection. It argues that an individual's right to equal protection should not be abridged on the basis of sexual orientation. Part IV.C asserts that under the lowest level of scrutiny, rational basis review, the domestic violence statutes are unconstitutional. This Section briefly analyzes *Romer v. Evans*,[8] recognizing a move toward heightened rational basis review for gays and lesbians. Part IV.D.1 discusses granting homosexuals suspect class status through an examination of four factors: history of purposeful discrimination, inaccurate prejudices and stereotypes, immutability, and political powerlessness. Finally, Part IV.D.2 argues that classifications based on sexual orientation should be treated as gender classifications and found unconstitutional under intermediate scrutiny. It discusses the evolution of review of gender based classifications and explains why discrimination on the basis of homosexuality is, in effect, gender discrimination.

6. *See* Carla M. da Luz, *A Legal and Social Comparison of Heterosexual and Same-Sex Domestic Violence: Similar Inadequacies in Legal Recognition and Response*, 4 S. CAL. REV. L. & WOMEN'S STUD. 251, 267-72 (1994).

7. *See infra* notes 172-76 and accompanying text.

8. 517 U.S. 620 (1996).

II. VIOLENCE AGAINST WOMEN AND THE RECOGNITION OF SAME SEX DOMESTIC VIOLENCE

A. *The Historical Acceptance of Abuse Against Women*

Throughout America, until the latter half of the nineteenth century, women were regarded as property.[9] Marital violence was referred to as a husband's privilege[10] and men, as of right, exercised physical domination over women.[11]

During the age of chivalry, wives were expected to endure their husbands' beatings without question, allowing the husband to be the master.[12] If a wife did wrong, the husband was advised to "'readily beat her, not in rage but out of charity and concern for her soul, so that the beating will resound [his] merit and her good.'"[13] This way of thinking was brought to America and became commonplace in American society as well.

In 1864, a North Carolina court held a husband choking his wife to be permissible, rationalizing that "the law permits him to use such a degree of force as necessary to control an unruly temper and make her behave herself."[14] The court noted its preference not to invade the domestic forum in the absence of excessive and permanent injury.[15] Historically, restrictions on wife beating were only as much as the customs of the community dictated.[16] In effect, the severity of violence was not controlled.[17] In 1882, Maryland was the first state to pass a law

9. *See* Michèle Harway & Marsali Hansen, *An Overview of Domestic Violence*, *in* BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE 1, 4 (Marsali Hansen & Michèle Harway eds., 1993).

10. *See* Terry Davidson, *Wifebeating: A Recurring Phenomenon Throughout History*, *in* BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE 2, 4 (Maria Roy ed., 1977).

11. *See* Bradley v. State, 1 Miss. (1 Walker) 156, 158 (1824) (holding that the law should not disturb the husband's role as disciplinarian, including his right to use moderate chastisement); Barbara J. Hart, *The Legal Road to Freedom*, *in* BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE, *supra* note 9, at 13; *see also* Joan M. Krauskopf & Rhonda C. Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558, 561-62 (1974) (stating that wives had no legal existence at common law and therefore did not have the right to sue in their own name).

12. *See* MCCUE, *supra* note 1, at 26 (citations omitted).

13. *Id.* at 27 (citations omitted).

14. *Id.* at 33.

15. *See id.*

16. *See* Harway & Hansen, *supra* note 9, at 4.

17. *See id.* at 4-5 (defining a lower standard of protection than victims of other crimes which made it permissible for husbands to chastise their wives with a whip no larger than the thumb).

making wife beating a crime.[18] Nevertheless, intervention by authorities was sporadic at best, and men who abused their wives were generally granted immunity from prosecution with the intention of keeping the family a private sphere.[19]

The turn of the century marked the establishment of family and domestic relations courts across the United States, created to deal with incidents of family violence.[20] Notwithstanding the seemingly positive intentions behind the creation of such courts, they actually encouraged female subservience and economic dependence, suggesting that domestic violence was a private rather than a criminal matter.[21] It was not until the late 1970s that battered women were recognized by the legal system.[22]

The women's liberation movement of the late 1960s developed support centers and phone crisis lines.[23] Battered women came forward, shared their stories of domestic terrorism, and sought assistance.[24] "[W]omen declared themselves sisters in a movement to end male violence,"[25] and challenged the long existing notion of male dominance.[26] They finally exposed their plight and sought help from lawyers and legislators. They challenged the passivity of the legal system and demanded recognition of the violence occurring within the home.[27] The feminist movement focused its efforts on educating the public about domestic violence and changing society's perceptions about victims of these assaults.[28]

18. *See* Hart, *supra* note 11, at 14 (subjecting wife beaters to 40 lashes or up to a year in jail).

19. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996).

20. *See* MCCUE, *supra* note 1, at 36.

21. *See id.*

22. *See* Hart, *supra* note 11, at 15.

23. *See id.*

24. *See id.*

25. SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 12 (1982).

26. *See id.*

27. *See* da Luz, *supra* note 6, at 261.

28. *See* HARVEY WALLACE, VICTIMOLOGY: LEGAL, PSYCHOLOGICAL, AND SOCIAL PERSPECTIVES 8 (1998).

B. The Evolution of Domestic Violence Legislation

In 1976, the civil protection order marked the birth of modern domestic violence law.[29] A protection order is a "temporary court order issued on an emergency basis in domestic-violence matters to protect a spouse or child from physical harm."[30] Over the years, most jurisdictions have expanded the class of victims protected by such orders to include divorced victims, prior or current household members of the batterer, victims related by marriage or blood to the batterer, and those in a sexual relationship with the abuser.[31] Currently, civil protection orders offer protection to battered women in all fifty states and the District of Columbia.[32] Despite these expansions of the civil protection order, only one state statute explicitly covers gay and lesbian couples.[33]

Over the past twenty years, the social and legal system has begun to understand and recognize the problem of heterosexual domestic violence.[34] For example, courts' traditional reluctance to get involved in cases of wife battering has slowly evolved into the present view that women have a right to be protected from abuse by their intimate partner.[35] Additionally, during the 1980s, several jurisdictions developed programs to change the criminal justice system's response to battering, including recognition that wife beating is a crime.[36] Currently, numerous services are available to victims, as well as abusers, to rehabilitate and to provide legal and psychological relief.[37]

In addition, Congress' 1994 passage of the Violence Against Women Act ("VAWA") federalized domestic violence.[38] It represented a federal recognition of the reality of gender-motivated violence.[39] Pur-

29. *See* Hart, *supra* note 11, at 20 (noting that within 13 years of the introduction of the civil protection order, all 50 states and the District of Columbia passed similar legislation).

30. BLACK'S LAW DICTIONARY POCKET ED. 510 (1996); *see also* BLACK'S LAW DICTIONARY 1315 (7th ed. 1999) (equating a protection order to a restraining order).

31. *See* Hart, *supra* note 11, at 20.

32. *See infra* notes 172-77 and accompanying text.

33. *See infra* notes 161-70 and accompanying text.

34. *See* da Luz, *supra* note 6, at 261-67.

35. *See* MCCUE, *supra* note 1, at 130.

36. *See, e.g., id.* at 129 (discussing the San Francisco Family Violence Project and the Domestic Abuse Project of Minneapolis).

37. *See id.* at 117-49.

38. *See* Violence Against Women Act of 1994 § 40302, 108 Stat. 1941-42 (1994).

39. *See* S. REP. NO. 103-138, at 41 (1993) ("The Violence Against Women Act represents an essential step in forging a national consensus that our society will not tolerate violence against women.").

poses of the VAWA include: prohibiting interstate domestic violence,[40] prohibiting interstate violations of a state court's order of protection,[41] and providing that courts nationwide give full faith and credit to protection orders issued by state courts.[42] Although its title and congressional findings underlying its enactment suggest that the VAWA targets male offenders and female victims,[43] the actual language of the statute is gender neutral.[44] Like many state domestic violence statutes, it is unclear whether the VAWA applies in cases of same sex battering, absent courts' interpretation of its applicability.

Despite the developments women achieved over the past twenty years, battered homosexuals are faced with the same struggle for recognition and assistance today. One homosexual advocate accurately described the phenomenon: "'No matter where you are, [the homosexual movement is] 20 years behind wherever the heterosexual battered woman's movement is.'"[45]

40. *See* 18 U.S.C. § 2261(a)(1) (1994). This section makes it a felony for an actor to cross state lines with "the intent to injure, harass, or intimidate that person's spouse or intimate partner" and to "intentionally commit[] a crime of violence and thereby cause[] bodily injury to such spouse or intimate partner." *Id.* Additionally, the statute prohibits a person from causing a "spouse or intimate partner to cross a State line ... by force, coercion, duress, or fraud ...." *Id.* § 2261(a)(2).

41. *See id.* § 2262(a)(1)-(2). An actor's conduct is in violation of this section, as with § 2261, when he crosses a state line or causes his spouse or intimate partner to do so by force, coercion, duress, or fraud. *See id.* § 2262(a)(1)(A)(i), (a)(2).

42. *See* 18 U.S.C. § 2265(a). This section requires all jurisdictions to enforce valid state court orders of protection, if violated within the territory of another state, "as if it were the order of the enforcing State ...." *Id.* This section does not require that the offender cross a state line or cause the victim to do so. *See id.*

43. *See* Kerrie E. Maloney, Note, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After* Lopez, 96 COLUM. L. REV. 1876, 1878-83 (1996) (suggesting that Federal Bureau of Investigation statistics and congressional reports exemplifying the severity of violence against women prompted Congress to enact the Violence Against Women Act ("VAWA")).

44. *See, e.g.*, 18 U.S.C. § 2261(a)(1) (making it a crime for "a person" to travel across state lines with the intent to commit certain acts); 42 U.S.C. § 13981(c) (describing "a person ... who commits a crime of violence").

45. Patricia G. Barnes, *'It's Just a Quarrel': Some States Offer No Domestic Violence Protections to Gays*, A.B.A. J., Feb. 1998, at 24 (quoting Greg Merrill, co-author of the coalition report and director of client services at Community United Against Violence in San Francisco).

C. *The Appearance of Same Sex Intimate Violence in the Public Sphere*

The early 1980s marked the first time that same sex domestic violence received public attention.[46] Prior to the 1980s, lesbian battering was "kept in the closet" by both the lesbian community and the battered women's movement.[47] The 1983 meeting of the Lesbian Task Force of the National Coalition Against Domestic Violence was the first public address of the problem of lesbian battering, outside the context of local communities.[48] The movement to protect gay male domestic violence victims also received recognition in the early 1980s when the Seattle Counseling Service for Sexual Minorities began providing services to these victims and their batterers.[49] "'The irony is that gay men and lesbians are more at risk of violence at the hands of their partners than they are from ... gay bashers.'"[50] The severity of the problem begs for greater recognition in society at large and in the legal system.

46. *See* Kerry Lobel, *Introduction*, *in* NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING 1, 1 (Kerry Lobel ed., 1986).

47. *See* Linda Geraci, *Making Shelters Safe for Lesbians*, *in* NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING, *supra* note 46, at 77, 77; Julie Chao, *Reported Partner Abuse Among Gays Increasing*, S.F. EXAMINER, Oct. 6, 1998, at A4 (stating that because of "lesbian utopianism" lesbians generally do not believe that domestic violence happens within their community and that gays and lesbians believe that domestic violence is a problem only in heterosexual relationships).

48. *See* ELAINE LEEDER, TREATING ABUSE IN FAMILIES: A FEMINIST AND COMMUNITY APPROACH 65 (1994); Lydia Walker, *Battered Women's Shelters and Work With Battered Lesbians*, *in* NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING, *supra* note 46, at 73, 75.

49. *See* ISLAND & LETELLIER, *supra* note 2, at 35. As the 1980s continued, greater services were provided to gay victims of domestic violence, as well as their batterers. *See id.* In 1986, the New York City Gay and Lesbian Anti-Violence Project began providing services to both lesbian and gay victims and batterers. *See id.* In addition, that same year, the Community United Against Domestic Violence in San Francisco created the Gay Men's Domestic Violence Project and, another San Francisco group, Men Overcoming Violence, expanded its services to include counseling for gay men who batter. *See id.* Overall, however, there has been little progress in the movement to stop gay male domestic violence. *See id.*

50. Chuck Nowlen, *Secrecy Shrouds Torment of Gay Victims of Abuse*, CAP. TIMES, Oct. 5, 1998, at 2A (quoting Stacy Seibert, Chairwoman of the Dane County Same Sex Domestic Violence Committee).

III. SAME SEX DOMESTIC VIOLENCE DEFINED: A COMPARISON BETWEEN HOMOSEXUAL AND HETEROSEXUAL DOMESTIC VIOLENCE

A. Defining Lesbian Domestic Violence

Lesbian battering has been defined as "that pattern of violent and coercive behaviors whereby a lesbian seeks to control the thoughts, beliefs or conduct of her intimate partner or to punish the intimate for resisting the perpetrator's control over her."[51] This definition does not limit battering to physical assaults. When a lesbian's life is controlled by fears of violent attacks by her partner, even absent actual physical violence, this lesbian may be battered.[52] Elaine Leeder, Associate Professor and Chair of the Sociology Department at Ithaca College, has identified three forms of lesbian battering: (1) situational battering; (2) chronic abuse; and (3) emotional or psychological abuse.[53] Situational battering occurs only once or a few times, but then never again, and statistically it occurs much less frequently than the other two forms of battering.[54] Chronic battering is defined as violence occurring two or more times, escalating over time.[55] Emotional abuse is characterized by psychological and verbal threats that suggest the victim is inferior.[56]

The main difference between heterosexual domestic violence and lesbian battering is the unique pressure a lesbian feels to hide the abuse. In general, many lesbians feel that violence and dominance in a relationship are traits displayed only by men.[57] Given a lesbian's feelings of shame and the notion that the lesbian relationship was supposed to free her from this type of oppression of women, she is less likely to admit

51. Barbara Hart, *Lesbian Battering: An Examination, in* NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING, *supra* note 46, at 173, 173. According to this definition, physical violence is only battering when it is a reoccurring phenomenon, concluding in the batterer possessing enhanced control over the victim. *See id.* Physical violence in this context includes assaults on the person, sexual abuse, destruction of personal property, violence directed at family, friends, or pets, or threats to do the former. *See id.*

52. *See id.* at 173-74.

53. *See* LEEDER, *supra* note 48, at 65.

54. *See id.* at 68.

55. *See id.* at 70 (stating that this type of abuse may become life threatening; the chronic battering relationship is typified by financial attachment, living together, emotional entanglement, and intertwined lives).

56. *See id.* at 74 (noting that emotional abuse may involve "blaming the victim for problems, threatening with violence, manipulating with lies and emotions, insulting, criticizing, harassing the victim with attacks of jealousy, and denying that the victim is being abused").

57. *See* Angela West, *Prosecutorial Activism: Confronting Heterosexism in a Lesbian Battering Case*, 15 HARV. WOMEN'S L.J. 249, 262 (1992).

the abuse than a heterosexual woman.[58] Because of a woman's typical economic disadvantage,[59] lesbians face an even greater obstacle than their gay male counterparts when faced with threats of being "outed." "Outing" is the process by which the same sex batterer tells family members, friends, and co-workers of the victim's sexual orientation.[60] The possibility of losing her job or custody of children as a result of being "out," weighs heavily in a lesbian's decision to keep quiet about the abuse.[61]

It is purely a myth that all lesbian relationships follow the "butch-femme" dichotomy and that the stronger, "butch" lesbian is the batterer.[62] Violence in lesbian relationships occurs in egalitarian, role-typed, and traditional couples.[63] Furthermore, it is equally a myth that when lesbian partners are of the same size, they engage in "mutual battering."[64] In actuality, the lesbian who fights back is just engaging in self-defense.[65] The community's adoption of the notion of mutual battering only serves to deter reporting of battering incidents. In addition, the battered lesbian's own guilt from having defended herself contributes to the refusal to seek help.[66]

B. Defining Gay Male Domestic Abuse

Gay men's domestic violence has been defined as "any unwanted physical force, psychological abuse, material or property destruction inflicted by one man on another."[67] It is up to the victim to decide if he has been physically or psychologically hurt and if abuse is occurring.[68] Central to the concept of gay men's domestic violence, as well as to

58. *See id.*; Lundy, *supra* note 5, at 286 ("Lesbian communities . . . may be reluctant . . . to acknowledge that women can batter other women, because to do so would mean shattering a utopic vision of a peaceful, women-centered world.").

59. *See* ISLAND & LETELLIER, *supra* note 2, at 102 (recognizing how our culture characterizes women with "frailty, dependence, weakness, emotionality, and need of protection").

60. *See* Lundy, *supra* note 5, at 282-83. "Outing" is the process by which the same sex batterer tells family members, friends, and co-workers of the victim's sexual orientation. *See id.*

61. *See* West, *supra* note 57, at 263; *see also, e.g.*, Shahar v. Bowers, 114 F.3d 1097, 1101 (11th Cir. 1997) (involving a woman who was terminated from employment on the basis of her status as a lesbian); *Ex parte* J.M.F., 730 So. 2d 1190, 1196 (Ala. 1998) (denying custody to the mother based, in part, on her open lesbian relationship).

62. *See* LEEDER, *supra* note 48, at 66.

63. *See id.*

64. *See id.*

65. *See* CLAIRE M. RENZETTI, VIOLENT BETRAYAL: PARTNER ABUSE IN LESBIAN RELATIONSHIPS 108-11 (1992).

66. *See id.* at 109.

67. ISLAND & LETELLIER, *supra* note 2, at 27.

68. *See id.* at 26.

most forms of domestic violence, is, again, the element of power.[69] Through the actual use or even just the threat of violence, the batterer maintains power and control over his victim. It is this power, not gender, or any sort of relationship problem, that is the compelling force in gay male abuse.[70] In defining these types of abusive relationships, David Island and Patrick Letellier stress the importance of deviating from terms such as "violent relationships," "battering relationships," and "abusive relationships," in order to avoid reinforcing the popular misconception that gay battering is simply a fair fight between two men.[71] Likewise, this relates to avoidance of the term "mutual battering" in the context of lesbian battering.[72] In both circumstances, victims may not even recognize the problem as domestic violence if the violent incident is referred to as a "fair fight" or "mutual battering."[73]

C. *Homosexual "Coupling"*

The structure of gay and lesbian relationships mirrors that of their heterosexual counterparts. Homosexual "coupling" stems from far more than a desire to have a steady sexual partner.[74] Like the heterosexual search for a partner, homosexuals look for emotional commitment, love, companionship, and friendship in their partner.[75] Homosexual partnerships are marked by love and romance, as well as sharing in many aspects of their lives.[76] Gay partners care for each other when sick and ex-

69. *See id.* at 28.

70. *See id.* at xix; *see also id.* at 29 ("Gay men's domestic violence is not a *relationship* problem, but rather a deliberate, violent criminal act by one man.").

71. *See id.* at 28-29.

72. *See* Kathleen Finley Duthu, *Why Doesn't Anyone Talk About Gay and Lesbian Domestic Violence?*, 18 T. JEFFERSON L. REV. 23, 29 (1996).

73. *See id.*

74. *See* CHARLES SILVERSTEIN, MAN TO MAN: GAY COUPLES IN AMERICA 121 (1981) (arguing that homosexuals want a sense of continuity in their relationships that is absent in purely sexual encounters); 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, 550-51 (1992) (refuting the stereotype that sex is the focus of homosexual relationships and that homosexuals are empty and promiscuous).

75. *See* SEYMOUR KLEINBERG, ALIENATED AFFECTIONS: BEING GAY IN AMERICA 228 (1980) ("[T]his constant talk about sex in relationships is overdone. I can love someone without having sex with him. It's more important to have a loving relationship whether there's sex or not."); DAVID P. MCWHIRTER & ANDREW M. MATTISON, THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP 5 (1984) ("Gay men can and do establish long-term, committed relationships, which are characterized by stability, mutual caring, generosity, creativity, love, support, and nurturing."). For a thorough discussion of the similar characteristics of homosexual and heterosexual relationships in terms of love and emotional commitment, see Fajer, *supra* note 74, at 550-58.

76. *See* SILVERSTEIN, *supra* note 74, at 151-52 (noting that the synergy of money and possessions shows the actual commitment to the homosexual relationship).

perience the same emotions and grief as their heterosexual counterparts when they lose their companion.[77] The parallels between homosexual and heterosexual relationships make homosexual domestic violence equally as disturbing as heterosexual violence and reinforce society's need to confront the phenomenon.

D. The Patterns of Domestic Abuse

Gay and lesbian domestic violence occurs in relatively the same proportions as domestic violence in heterosexual relationships.[78] Researchers approximate that heterosexual domestic violence occurs in twenty-five percent of all such couples.[79] The incidence of battering in homosexual relationships is estimated to occur at the same rate.[80] Nevertheless, it is probable that the frequency of homosexual abuse is greatly underestimated because homosexual abuse is marked by a greater failure to report than heterosexual abuse.[81]

The dynamics of gay and lesbian battering are also similar to male to female battering.[82] For example, the cycle of violence is applicable to both homosexual and heterosexual couples.[83] This theory, detailed in Lenore Walker's book, *The Battered Woman*, explains a three-phase cycle in which domestic violence operates.[84] Phase one, the tension building phase, is characterized by minor battering incidents leading up to the acute battering incident, defined as phase two.[85] In phase three, the makeup or honeymoon period, the victim is showered with love, presents, and attention.[86] The victim typically believes, as has been observed in cases of heterosexual abuse, that the battering is her fault.[87] In this

77. *See id.* at 304-08; *see also* SUSAN E. JOHNSON, STAYING POWER: LONG TERM LESBIAN COUPLES 138-39 (1990) (relating how women in a long term relationship discussed the possibility of one of them dying with extreme emotion); SILVERSTEIN, *supra* note 74, at 286 (noting that a gay male became an alcoholic when his lover died).

78. *See* Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325, 328-29 (1999).

79. *See* Deborah Kurelik, *Forum to Address Issue of Same-Sex Domestic Violence*, TAMPA TRIBUNE, Oct. 8, 1999, at 2 (stating that one in four is a conservative estimate of physical, emotional, psychological, verbal, or financial abuse occurring between heterosexual couples).

80. *See id.*

81. *See* da Luz, *supra* note 6, at 268, 269.

82. *See* Duthu, *supra* note 72, at 30.

83. *See* ISLAND & LETELLIER, *supra* note 2, at 94 (citing generally Lenore Walker's book, THE BATTERED WOMAN (1979)).

84. *See* LENORE E. WALKER, THE BATTERED WOMAN 55-70 (1979).

85. *See* ISLAND & LETELLIER, *supra* note 2, at 94.

86. *See* WALKER, *supra* note 84, at 65-70.

87. *See* ISLAND & LETELLIER, *supra* note 2, at 95 (citing GINNY NICARTHY, GETTING FREE: A HANDBOOK FOR WOMEN IN ABUSIVE RELATIONSHIPS 11 (1987)).

phase, the battered woman wants to believe that her batterer has really changed and will no longer abuse her.[88] The victim will stay in the relationship because of this newfound hope and the cycle will begin again.[89]

Learned helplessness is another theory that can be applied to both heterosexual and homosexual battering.[90] This theory is premised on the notion that "when a person feels helpless as a result of repeated abuse he or she has a distorted perception of reality."[91] Many times battered women seeking help are turned away and told to stop provoking the violence.[92] They begin to feel as if they have no other option but to remain with their batterer.[93] Their focus changes inward to try to avoid "causing" further violence.[94] The victim begins to feel worthless and blames herself for the occurrences of violence.[95] The victim believes she has failed as a woman.[96] The violence continues, becoming more frequent and more severe. Battered lesbians and gay males have reported these same feelings of helplessness and fear.[97] They too are subjected to the powerful trap of the domestic violence cycle.

E. The Disparity of Services Available to Homosexuals

Despite the similarities, differences exist between heterosexual domestic violence and same sex domestic violence. A significant difference encountered in same sex relationships is the lack of services available and the lack of protections afforded to the victims of violence.[98] No city has a shelter specifically tailored to gay and lesbian victims, and specialized counseling services are available to gays and lesbians only in New York, San Francisco, Seattle, and Minneapolis.[99]

When battered lesbians seek help, they must not only overcome the devalued trait of femaleness, but the stigma associated with homosexuality as well.[100] Faced with these obstacles, and the fact that most re-

88. *See id.* at 94-95.
89. *See id.*
90. *See id.* at 95-96.
91. MCCUE, *supra* note 1, at 96 (citing M. SELIGMAN, HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH (1975)).
92. *See* ISLAND & LETELLIER, *supra* note 2, at 95.
93. *See id.*
94. *See id.* at 95-96.
95. *See id.* at 95.
96. *See id.*
97. *See id.* at 99.
98. *See* WALLACE, *supra* note 28, at 238.
99. *See id.*
100. *See* Claire M. Renzetti, *Violence in Lesbian Relationships*, *in* BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE, *supra* note 9, at 188, 193.

sources are geared towards heterosexuals, few battered lesbians seek help at all. Where shelters do admit lesbians, the potential exists for them to meet with hostility from other victims.[101] Not only does this discourage lesbians from looking to shelters for protection, it also impedes the recovery process surrounding same sex domestic violence.[102]

Lesbians also face the dilemma of whom to go to when they do decide to seek help. Unlike battered heterosexual women, many battered lesbians cannot go to their family and friends because they fear their relatives and friends will respond negatively to their plight.[103] Relatives may not even know of the victim's lesbianism.[104] Lesbians feel that disclosing the abuse to relatives and friends will only serve to fuel the homophobic fire and reinforce the negative stereotypes.[105]

Gay male victims of domestic violence face even greater obstacles than their gay female counterparts in leaving a violent relationship and getting assistance.[106] American culture socializes society to see women as weak, frail victims and men as the powerful victimizers.[107] Battered gay men may not be able to recognize themselves as victims of domestic abuse because men have been socialized to believe that this role belongs only to women.[108] Consequently, many gay men stay with their abusers, perpetuating their victimization. This socialization theory also impacts the way American culture, as a whole, responds to battered gay men.[109] More often than not, the problem of gay male domestic violence

101. *See* RENZETTI, *supra* note 65, at 125 (noting that lesbians "run[] the risk of incurring hostility and ostracism from other shelter residents" because of their sexual orientation); Knauer, *supra* note 78, at 347 (reporting that lesbians have expressed feeling unwelcome at shelters).

102. *See* Knauer, *supra* note 78, at 347.

103. *See* Renzetti, *supra* note 100, at 196-97.

104. *See id.*

105. *See id.* at 197; *see also* Knauer, *supra* note 78, at 326 (asserting that anti-gay associations use same sex domestic violence to enhance their claims of the perverse and hazardous nature of homosexual relationships); Kurelik, *supra* note 79, at 2 (noting that airing problems within same sex relationships only serves to inflame the controversy over same sex couples).

106. *See* ISLAND & LETELLIER, *supra* note 2, at 102. The authors argue that society's view of men as "victimizers, but never victims" causes "[v]irtually everyone . . . who comes into contact with a battered gay man [to] fail to recognize the problem of domestic violence, simply because the injured party they see is male." *Id.*

107. *See id.* (describing American culture as sexist in the view that women are dependent, emotional, and in need of protection, while men are strong, tough, decision makers who will not be victims).

108. *See id.* (stating that men may see violence as a phenomenon only occurring to women and therefore not view the abuse they endure in the context of domestic violence); MIKE LEW, VICTIMS NO LONGER: MEN RECOVERING FROM INCEST AND OTHER SEXUAL CHILD ABUSE 62 (1988) ("[O]ur culture provides no room for a man as victim. Men are simply not supposed to be victimized. A 'real man' is expected to be able to protect himself in any situation.").

109. *See* ISLAND & LETELLIER, *supra* note 2, at 102.

is overlooked, and instead interpreted as just "two guys fighting."[110] Because many men falsely believe that violence is an innate characteristic of males, these men may not see the abuse as a domestic violence problem.[111] Instead the violence is inaccurately attributed to both men.[112] Accordingly, neither the victim nor the outside community recognizes the victimization. Even when gay men identify the problem as one of domestic abuse, few agencies or shelters exist to give them support.[113] Making it even more difficult is the fact that many therapists have little or no experience working with gay male domestic violence victims.[114]

F. Homophobia Used as a Means of Control

Homophobia compounds the problems faced by gay and lesbian victims of domestic violence.[115] Society's fear and hatred towards gays and lesbians, in general, contributes to the difficulties faced by battered homosexuals.[116] Homosexual victims must cope with identifying themselves as members of two taboo groups: victims and homosexuals.[117] The homosexual may have internalized society's negative perceptions of homosexuality, thus feeling shame and doubt in admitting the problem.[118] He or she may lie about the nature of the injuries, lie about the gender of the abuser, or fail to report the incident altogether.[119]

Societal homophobia leads to isolation of gay and lesbian victims of domestic violence, in effect, contributing to the violence.[120] When gay and lesbian victims feel that no alternatives to the violence exist, they will stay with their batterers and endure further abuse.[121] Homosexual victims face the fears and anxiety of being "outed" by their batterers.[122] As a result, the same sex abuser can use society's homophobia as a means of maintaining the imbalance of power and control in the rela-

110. *Id.* at 103.
111. *See id.* at 102-03.
112. *See id.* at 103.
113. *See* Knauer, *supra* note 78, at 346 (stating that no shelters exist for gay men).
114. *See* ISLAND & LETELLIER, *supra* note 2, at 149.
115. For a thorough discussion of the characteristics, causes, and treatment of homophobia, see generally MARTIN KANTOR, HOMOPHOBIA: DESCRIPTION, DEVELOPMENT, AND DYNAMICS OF GAY BASHING (1998).
116. *See* ISLAND & LETELLIER, *supra* note 2, at 100, 102; Duthu, *supra* note 72, at 31.
117. *See* da Luz, *supra* note 6, at 269.
118. *See* Duthu, *supra* note 72, at 32.
119. *See* da Luz, *supra* note 6, at 269.
120. *See* LEEDER, *supra* note 48, at 68; Duthu, *supra* note 72, at 31.
121. *See* ISLAND & LETELLIER, *supra* note 2, at 95-96.
122. *See* Duthu, *supra* note 72, at 31.

tionship.[123] The victimizer may try to convince the victim that because he or she is homosexual, the battering is well-deserved.[124] Society's homophobic attitudes result in many people believing that gay and lesbian victims are not entitled to legal protection.[125] Congruently, those victims who have internalized such negativity may also believe that they are less deserving of any assistance or protection.[126] Victims' aversion to seeking help is further complicated by their lack of access to protective or support services.[127] For example, police response to same sex domestic violence has been called "misguided at best and homophobic at worst."[128]

Faced with this type of response, many battered gays and lesbians choose to keep their victimization a secret. Some even feel that if they were deserving of protection, the community would work to achieve or develop better services. If victims are forced into believing that they are unworthy of any support, the problem of same sex domestic violence will further remain a mystery. We cannot let society's ignorance of homosexuals reinforce the idea that gay and lesbian battering is acceptable. The first step in combating the problem of gay and lesbian domestic violence is acknowledging that it exists.[129] The second step is creating support services skilled at dealing specifically with same sex domestic violence.[130] The third step is including them in domestic violence statutes.

G. The Exclusion of Gays and Lesbians from Domestic Violence Legislation

The exclusion of same sex couples from protection under domestic violence statutes of certain states is the most striking factor differenti-

123. *See id.*

124. *See id.*; *see also* KANTOR, *supra* note 115, at 54 (stating that gays and lesbians may abuse their lovers because they feel that homosexuality makes their lovers defective).

125. *See* Duthu, *supra* note 72, at 32.

126. *See id.* at 31, 32.

127. *See* Nancy E. Murphy, Note, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335, 342 (1995).

128. Chao, *supra* note 47, at A4; *see also* Knauer, *supra* note 78, at 348 (noting the widespread distrust of police among the homosexual community).

129. *See* da Luz, *supra* note 6, at 271 ("Common knowledge of the problem will stimulate discourse, which may encourage victims to confront their attackers, to reach out for assistance and to thereby encourage the public establishment of necessary services.").

130. *See* Julie Chao, *National Survey of Gay Domestic Violence Includes Murder Cases: Abuse Rates Same as with Heterosexuals*, S.F. EXAMINER, Oct. 5, 1999, at A4 (recognizing that by diverting resources to the issue of same sex domestic violence authorities will "make a dent" in helping those "break free of the violence").

ating homosexual and heterosexual domestic violence. All fifty states and the District of Columbia have enacted various forms of domestic violence statutes.[131] This legislation was created to protect persons victimized by domestic violence.[132] It is a "mechanism whereby the State . . . can protect the general health, welfare, and safety of its citizens by intervening when abuse of a member of a household by another member of a household occurs or is threatened to occur, thus preventing further violence."[133] The focus of these types of statutes is on "prevention of and protection from abuse,"[134] as well as providing assistance to victims and prosecuting the abusers.[135] The general goals of the statutes are "[t]o recognize domestic violence as a serious crime against the individual and society" and "[t]o expand the power of the justice system to respond effectively to situations of domestic abuse."[136]

The problem, however, is that statutes, in certain states, afford less or even no legal protection to same sex couples, raising significant equal protection issues.[137] Only one state domestic violence statute explicitly extends to same sex couples.[138] Where homosexual couples are implicitly protected by the statute, the police and the court system do not fairly or consistently enforce it.[139]

States justify excluding same sex couples from protection under domestic violence statutes because, in most respects, the law does not recognize gays and lesbians as a family unit.[140] However, as one Florida trial judge correctly explained, applying a domestic violence law to a same sex couple is not a validation or a recognition that a homosexual relationship is a "family."[141] The court exists as a means to protect victims and to stop violence. A failure to apply the domestic violence law in the situation of same sex abuse undermines the purpose of the statute to safeguard victims of domestic violence, regardless of gender.[142] To apply domestic violence statutes to same sex couples is simply to act

131. *See* Murphy, *supra* note 127, at 344.

132. *See* 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, 557 (1992).

133. ARK. CODE ANN. § 9-15-101 (Michie 1998).

134. da Luz, *supra* note 6, at 261.

135. *See id.*

136. ME. REV. STAT. ANN. tit. 19-A, § 4001 (West 1999).

137. *See* Murphy, *supra* note 127, at 339, 346.

138. *See infra* note 425 (describing new Vermont legislation).

139. *See* RENZETTI, *supra* note 65, at 123.

140. *See* da Luz, *supra* note 6, at 289-90.

141. *See* Gary Sprott, *Judge Says Law Covers Gay Homes*, TAMPA TRIB., June 24, 1999, at 4.

142. *See id.*

consistently with the policy behind the statutes themselves. Jane Morrison, a managing attorney of the Lambda Legal Defense and Education Fund, said, "'[i]t is unfortunate and wrongheaded for someone to try to avoid the responsibilities that come from a relationship by arguing a loophole in the law.'"[143] Advocating that states should provide the same protection to victims irrespective of sexual orientation, Michael Bedke, co-chair of the American Bar Association's Commission on Domestic Violence, said: "'I don't care how one chooses to define the domestic unit. . . . Acts of domestic violence should not be tolerated by a civilized society.'"[144]

In denying protection to same sex couples, the legal system is, in effect, condoning gay and lesbian partner abuse.[145] The chief purpose of domestic violence statutes is to afford the victims of such violence a form of legal redress.[146] Violence, whether occurring between loved ones or strangers, members of the same sex or of the opposite sex, is still violence.[147] Same sex domestic violence can be as debilitating and as deadly as violence in a heterosexual relationship.[148] To act consistently with the aims of domestic violence statutes, the legal system needs to recognize that violence between gays and lesbians is no less violent and no less deserving of protection than violence between a man and a woman.[149] Consequently, battered gays and lesbians should be furnished with equal protection under the law.

Opponents of protecting gays and lesbians under the domestic violence statutes reason that battered homosexuals are not being denied equal protection because they have the option of pressing criminal charges.[150] This argument fails to consider the differences in the civil and criminal system and the benefits associated with civil protection or-

143. Sue Carlton, *Same-Sex Domestic Charges are Challenged: Attorneys Say Domestic Violence Charges in a Gay Relationship are Invalid Because No "Family" Exists*, ST. PETERSBURG TIMES, June 19, 1999, at 3B (quoting Jane Morrison, managing attorney of the Lambda Legal Defense and Education Fund).

144. Barnes, *supra* note 45, at 25 (quoting Michael Bedke, Co-Chair of the American Bar Association's Commission on Domestic Violence).

145. *See* da Luz, *supra* note 6, at 274.

146. *See, e.g.*, *supra* notes 29-45.

147. *See* da Luz, *supra* note 6, at 287.

148. *See* Knauer, *supra* note 78, at 329; Chao, *supra* note 47, at A4.

149. *See* da Luz, *supra* note 6, at 287.

150. In 1997, Kentucky Senator Tim Philpot justified exclusion of same sex couples from state domestic violence statutes because "any victim of violence is free to file criminal charges." Knauer, *supra* note 78, at 343. In California, opponents to the removal of the "opposite sex" requirement of state domestic violence laws argued that the "lack of gender inequities in the case of same-sex domestic violence made it less important for the state to intervene and duplicate the services that were already available by simply calling 911." *Id.*

ders. Two significant differences between a civil protection order and a criminal prosecution are: (1) the issuance of a civil protection order requires a lower standard of proof than a criminal conviction, and (2) a protection order is intended to separate the victim and the abuser to prevent future violence rather than to punish past offenses.[151] A civil protection order affords victims of domestic violence immediate relief from abuse.[152] For example, batterers can be evicted from a shared residence almost instantaneously.[153] On the other hand, the criminal process prolongs the abusive situation because the plaintiff is typically forced to live with the abuser until trial.[154] Further, because a conviction may mandate little or no jail time, even after a criminal trial, the victim may be unable to escape the abuse.[155]

In addition, the criminal process is ill equipped to deal with the retaliation commonly associated with pressing domestic violence charges and the cycle of violence that the abuser may sustain, even after charges are pressed.[156] Civil protection orders meet the unique needs associated with domestic violence.[157] Likewise, civil protection orders may be preferential to pressing criminal charges when the victim wants relief but does not want the abuser jailed or punished as a "criminal."[158] Therefore, homosexuals' limited remedial access through the civil system, foreclosing them from the distinctive advantages of civil protection orders, is a denial of equal protection.

Currently, only one state automatically classifies violence in same sex relationships as domestic violence.[159] Vermont, after the landmark decision, *Baker v. State*,[160] and the subsequent legislative act responding to this decision, affords protection to victims of violence in same sex intimate relationships.[161] *Baker* involved two lesbian couples and one gay male couple who brought suit after being denied marriage licenses

151. *See* Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 FAM. L.Q. 43, 44 (1989).

152. *See id.* at 43.

153. *See id.* at 44.

154. *See id.*

155. *See id.*

156. *See id.* (noting that if the parties live together the batterer is given the chance to play on the victim's sympathy by promising that the violence will never happen again).

157. *See id.*

158. Generally, this situation arises if children are involved and one parent wants to avoid the risk of the other parent being fired from a job and being unable to support the child. *See id.*

159. *See* Elaine Herscher, *Gay Domestic Violence Mirrors Society at Large*, S.F. CHRON., Oct. 6, 1997, at A1.

160. 744 A.2d 864 (Vt. 1999).

161. *See infra* notes 164-70 and accompanying text.

by their town clerks.[162] The couples argued that the denial of a marriage license foreclosed them from at least 300 benefits at the state level and greater than 1000 at the federal level.[163] Although *Baker* does not deal directly with same sex protection under domestic violence statutes, the Vermont Supreme Court held that "the state is constitutionally required to extend same-sex couples the common benefits and protections that flow from marriage under Vermont law."[164] The court left it to the legislature to decide whether equality for same sex couples would come from inclusion within the marriage laws or from a parallel "domestic partnership" system,[165] and ultimately the legislature passed the first bill in the nation "creating marriage-like civil unions for same-sex couples."[166] The Act provides for the establishment of a civil union between persons of the same sex who are therefore excluded from the marriage laws, are not a party to another civil union or marriage, and who meet the record and licensing requirements.[167]

> (a) Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.
>
> (b) A party to a civil union shall be included in any definition or use of the terms "spouse," "family," "immediate family," "dependent," "next of kin," and other terms that denote the spousal relationship, as those terms are used throughout the law.[168]

Included in the legal benefits applicable to parties to a civil union is protection under spouse abuse programs.[169] This ruling and the legislative response marks greater recognition of and protection for same sex couples than any other state.[170] Ending unequal treatment for gay and

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162. *See Baker*, 744 A.2d at 867-68.

163. *See Court OKs Same-Sex Benefits*, NEWSDAY (Long Island), Dec. 21, 1999, at A7; *see also Baker*, 744 A.2d at 870 (Plaintiffs contend "that in denying them access to a civil marriage license, the law effectively excludes them from a broad array of legal benefits and protections incident to the marital relation . . . .").

164. *Baker*, 744 A.2d at 867.

165. *See id.*

166. Carey Goldberg, *How Vermont's Top Judge Shaped Law on Civil Unions*, N.Y. TIMES, Apr. 28, 2000, at A14.

167. *See Acts of the 1999-2000 Vermont Legislature, No. 91 An Act Relating to Civil Unions* (approved Apr. 26, 2000) § 1202 (2000)) <http://www.leg.state.vt.us/docs/2000/acts/ACT091 HTM> (official website).

168. *Id.* § 1204 (a)-(b).

169. *See id.* § 1204 (e)(6).

170. *See Court Oks Same-Sex Benefits*, *supra* note 163, at A7.

lesbian couples in the realm of "spousal" benefits foreshadows homosexual couples receiving equal treatment in other states as well. Following this example, states may recognize same sex couples as deserving the common benefits and protections as those given to married opposite sex couples. Although *Baker* is a step in the right direction, it is important to realize that most states are far from providing protection to homosexuals under domestic violence statutes.

For instance, some states specifically exclude same sex couples from protection under domestic violence statutes by requiring that the victim and the abuser be members of opposite sexes. The South Carolina Domestic Relations Code protects "household members" from abuse by providing them with an action for a Petition for an Order of Protection.[171] Household members are defined as "spouses, former spouses, . . . and a male and female who are cohabitating or formerly have cohabitated."[172] In Michigan, domestic violence is:

> a violent physical attack or fear of violent physical attack . . . in which the victim is a person assaulted by or threatened by assault by his or her spouse or former spouse or an adult person . . . assaulted by an adult person . . . of the opposite sex with whom the assaulted person cohabits or formerly cohabited.[173]

The domestic violence statutes of Arizona, Delaware, Indiana, Mississippi, Montana, North Carolina, and Washington contain similar provisions, making homosexuals who live with their partner ineligible for protection by affording protection to cohabitants of the opposite sex.[174]

171. *See* S.C. CODE ANN. § 20-4-40 (Law Co-op. Supp. 1999).

172. *Id.* § 20-4-20(b).

173. MICH. COMP. LAWS ANN. § 400.1501(c) (West 1999).

174. The Arizona domestic violence statute requires that "[t]he victim . . . [i]s the spouse or former spouse of the defendant . . . [or] [r]esides or resided in the same household and is the opposite sex of the defendant." ARIZ. REV. STAT. ANN. § 13-3601(A) (West 1999). In Delaware, domestic violence is defined as "abuse perpetrated by one member against another member of the following protected classes: . . . a man and a woman co-habitating together with or without a child of either or both, or a man and a woman living separate and apart with a child in common." DEL. CODE ANN. tit. 10, § 1041(2)(b) (1999). Indiana's provision for the treatment and prevention of domestic violence provides that the services of the domestic violence treatment center should be available to a person who "(1) has been assaulted by the person's spouse or former spouse; or (2) fears imminent serious bodily injury from the person's spouse or former spouse." IND. CODE ANN. § 12-18-4-12 (West 1999). The Mississippi domestic relations law protects "'family or household member[s],'" defined as "spouses, former spouses, persons living as spouses, parents and children, or other persons related by consanguinity or affinity." MISS. CODE ANN. § 93-21-3(d) (Supp. 1999). In Montana, partners, in the context of partner or family member assault, are defined as "spouses, former spouses, persons who have a child in common, and persons who have been or are currently in a dating or ongoing intimate relationship with a person of the opposite sex." MONT. CODE ANN. § 45-5-206(2)(b) (1999). The North Carolina domestic violence law protects people in

Other statutes exclude gays and lesbians implicitly, through a requirement of marriage or connection to each other as biological parents of the same child.[175]

In the remaining states, where there is no explicit opposite sex requirement, victims of same sex domestic violence may qualify for protection under the statute by satisfying either the dating or the cohabitation requirement, where neither is defined as including only opposite sex citizens.[176] Absent interpretation by the courts, however, it remains unclear whether same sex couples are protected. The matter is further complicated because of the existence of sodomy statutes.[177] In many of the states where same sex couples may potentially be covered by the state domestic violence statute, battered gays and lesbians may have to

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a "personal relationship" and defines such wherein the parties "(1) [a]re current or former spouses; (2) [a]re persons of opposite sex who live together or have lived together; . . .(6) [a]re persons of the opposite sex who are in a dating relationship or have been in a dating relationship." N.C. GEN. STAT. § 50B-1(b)(1), (2), (6) (1999). The public health and safety section of Washington's code protects violence between cohabitants. *See* WASH. REV. CODE ANN. § 70.123.020(5) (West 2000) Under this statute, "'[c]ohabitant' means a person who is married or who is cohabiting with a person of the opposite sex like husband and wife at the present or at sometime in the past." *Id.*

175. *See, e.g.*, TEX. FAM. CODE ANN. §§ 71.003, 71.004, 71.005 (West 2000); Knauer, *supra* note 78, at 340-41.

176. *See* ALA. CODE § 30-5-2(a)(4) (1998); ALASKA STAT. § 18.66.990(5)(B)-(D) (Michie 1998); ARK. CODE ANN. § 9-15-103(b) (Michie 1998 & Supp. 1999); CAL. FAM. CODE § 6211(b)-(c) (West 2000); COLO. REV. STAT. ANN. § 14-4-101(2) (West 1999); CONN. GEN. STAT. ANN. § 46b-38(a)(2) (West 1999); FLA. STAT. ANN. § 741.28(2) (West 2000); GA. CODE ANN. § 19-13-1 (1999); HAW. REV. STAT. § 586-1(2) (1993); IDAHO CODE § 39-6303(2) (Supp. 1999); 750 ILL. COMP. STAT. ANN. 60/103(6) (West 1993); IOWA CODE ANN. § 236.2(4)(a) (West Supp. 1999); KY. REV. STAT. ANN. § 403.720(3) (Michie 1999); LA. REV. STAT. ANN. § 2132(4) (West 1997); ME. REV. STAT. ANN. tit. 19-A, § 4002(4) (West 1999); MD. CODE ANN., FAM. LAW § 4-501(c), (h) (1999); MASS. GEN. LAWS ANN. ch. 209A, § 1 (West 1999); MINN. STAT. ANN. § 518B.01(2)(b) (West 2000); MO. ANN. STAT. § 455.010(5) (West 2000); NEB. REV. STAT. ANN. § 42-903(3) (Michie 1999); NEV. REV. STAT. ANN. § 33.018(1) (Michie Supp. 1999); N.H. REV. STAT. ANN. § 173-B:1(X)(a), (XV) (Supp. 1999); N.J. STAT. ANN. § 2C:25-19(d) (West 1999); N.M. STAT. ANN. § 40-13-2(D) (Michie 1999); N.Y. SOC. SERV. LAW § 459-a(2)(e) (McKinney 1999-2000); N.D. CENT. CODE § 14-07.1-01(4) (Supp. 1999); OHIO REV. CODE ANN. § 3113.33(B)(1) (Anderson 1996 & Supp. 1997); OKLA. STAT. ANN. tit. 22, § 60.1(4)-(5) (West Supp. 2000); OR. REV. STAT. § 107.705(3)(d)-(e) (1997); 23 PA. CONS. STAT. ANN. § 6102(a) (West 1999); R.I. GEN. LAWS § 15-15-1(5) (1996); S.D. CODIFIED LAWS § 25-10-1(2) (Michie 1999); TENN. CODE ANN. § 36-3-601(9) (Supp. 1999); UTAH CODE ANN. § 30-6-1(2) (1998); VT. STAT. ANN. tit. 15, § 1101(2) (1999); VA. CODE ANN. § 16.1-228 (Michie 1999); W. VA. CODE § 48-2A-2(b) (1999); WIS. STAT. ANN. § 46.95(1)(c) (West 1999); WYO. STAT. ANN. § 35-21-102(a)(iv) (Michie 1999).

177. *See* Knauer, *supra* note 78, at 341 n.99 (noting that 19 states have criminal sodomy statutes).

confess to a criminal act to prove the existence of a domestic relationship.[178]

Individual states have already interpreted the ambiguous language of the statutes and found, consistent with the underlying policies of domestic violence, that battered gays and lesbians are entitled to protection. For example, in *Glater v. Fabianich*,[179] the Appellate Court of Illinois declined to restrict the domestic violence statute's cohabitation requirement to only those persons related by blood or marriage.[180] The court stated that the act was instituted to prevent abuse between family and household members, and held that the protections extended to same sex couples.[181]

Similarly, in *State v. Linner*,[182] the Hamilton County Municipal Court of Ohio used a functional definition of "spouse" to apply the state's domestic violence statute to same sex couples.[183] The court stated that if the legislature intended to exclude members of the same sex from the statute's protections, it would have made explicit references to gender.[184] Acting consistently with the goals of ensuring the victim's safety and holding the batterer accountable, the court held that the statute was intended to include same sex couples.[185] Furthermore, the court recognized that the failure to apply domestic violence statutes to gay and lesbian couples would render the statute unconstitutional on equal protection grounds.[186]

In *Ireland v. Davis*,[187] the court ruled that in order to provide equal treatment under the law for same sex victims of domestic violence, the Kentucky domestic violence statute affords protection to same sex cou-

178. *See id.* at 341; Barnes, *supra* note 45, at 24 (identifying Louisiana, Mississippi, and Oklahoma as having criminal sodomy statutes).

179. 625 N.E.2d 96 (Ill. App. Ct. 1993).

180. *See id.* at 99.

181. *See id.*

182. 665 N.E.2d 1180 (Hamilton County Mun. Ct. 1996).

183. *See id.* at 1183.

184. *See id.*; *see also* State v. Hadinger, 573 N.E.2d 1191, 1193 (Ohio Ct. App. 1991) (interpreting the legislature's failure to explicitly refer to gender in the State's domestic violence statute as its intent to protect cohabitants regardless of gender).

185. *See Linner*, 665 N.E.2d at 1185; *see also* State v. Yaden, 692 N.E.2d 1097, 1101 (Ohio Ct. App. 1997) (holding that the court could "see no tangible benefit to withholding this statutory protection from same-sex couples"); *Hadinger*, 573 N.E.2d at 1193 (noting that to read the domestic violence statutes as providing protection only to heterosexuals "would eviscerate the efforts of the legislature to safeguard, regardless of gender, the rights of victims of domestic violence").

186. *See Linner*, 665 N.E.2d at 1184 (stating that assaults between homosexuals are just as worthy of protections as violence between heterosexuals and recognizing the resulting disparity of legal protection were the statute not to apply to same sex couples).

187. 957 S.W.2d 310 (Ky. Ct. App. 1997).

ples.[188] The court noted that to find otherwise would be inconsistent with the statutory purpose of allowing victims of domestic abuse to obtain effective, short term protection against further violence.[189] The court refuted the argument that this holding gave preferential treatment to homosexuals, finding instead that it merely provided same sex victims of domestic violence with equal protection under the law.[190]

The aforementioned decisions exemplify the recent efforts of courts to extend protection to same sex victims of domestic violence. Despite these efforts, a few legislatures have still been reluctant to follow the judiciary's example. For example, in *People v. Silva*,[191] the California Court of Appeals recognized that domestic violence in same sex relationships is a problem.[192] Still, the court held that the state spousal abuse statute that excluded homosexuals was constitutional.[193] Although this suit was initiated before a 1994 amendment to the California statute protecting persons in "a dating or engagement relationship,"[194] studies on same sex domestic violence continue to include California as a state where homosexual coverage is, at best, "uncertain."[195]

IV. SAME SEX VICTIMS OF DOMESTIC VIOLENCE DESERVE EQUAL PROTECTION UNDER THE LAW

A. The Equal Protection Clause

In discussing the exclusion of same sex couples from the domestic violence statutes, it is necessary to raise an equal protection challenge to those statutes discriminating on the basis of sexual orientation. The Equal Protection Clause of the Fourteenth Amendment provides in rele-

188. *See id.* at 312.

189. *See id.* at 312 n.4.

190. *See* Mark R. Chellgren, *Ruling Protects Same-Sex Partners: Court Applies Violence Law*, CINCINNATI ENQUIRER, Dec. 13, 1997, at BO2 (discussing the decision in *Ireland v. Davis* and the interpretation of the domestic violence statutes to include same sex couples).

191. 33 Cal. Rptr. 2d 181 (Cal. Ct. App. 1994).

192. *See id.* at 184-85.

193. *See id.* at 187.

194. CAL. FAM. CODE § 6211(c) (West 2000).

195. *See* Knauer, *supra* note 78, at 343. Prior to the 1994 amendment, the California statute protected abuse between cohabitants, defined as persons who regularly reside in the household. *See* CAL. FAM. CODE § 6209. Despite this provision, the court still conceded that the statute did not extend protection to homosexuals. *See Silva*, 33 Cal. Rptr. 2d at 187. This may provide support for the argument that even with the addition of the 1994 amendment, the statute would still deny protection to homosexuals. If nothing less, the extent of coverage by the statute remains uncertain absent a decision interpreting the amended provision. *See* Knauer, *supra* note 78, at 343.

vant part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[196] The provision was intended to restrict "state legislative action inconsistent with elemental constitutional premises."[197] It serves as a means to prohibit differential treatment on the basis of class, absent a legitimate government objective.[198] Generally, the Clause guarantees that persons who are similarly situated will be treated alike.[199]

Although the Equal Protection Clause was originally enacted to procure equal treatment for ex-slaves, the United States Supreme Court has interpreted it to impose a restraint on government use of classifications based on sex, alienage, and national origin.[200] Historians, supporting this expanded construction based on the framers' failure to limit the amendment's terms to racial discrimination, argue that the framers designed the Clause to ensure that all persons are entitled to equal treatment free from state interference, notwithstanding their personal characteristics.[201] Furthermore, commentators have argued that the Clause should be interpreted and adapted to the changing circumstances of the world and the evolving needs of the law.[202]

B. Homosexuals' Right to Action

Many courts facing equal protection claims by homosexuals have misconstrued the Supreme Court's decision in *Bowers v. Hardwick*[203] to preclude such claims by homosexuals. In *Hardwick*, respondent, a homosexual adult male, was arrested in the bedroom of his home for violating Georgia's anti-sodomy statute.[204] He challenged the constitutionality of the statute, arguing that the Federal Constitution confers a

196. U.S. CONST. amend. XIV, § 1.

197. Plyler v. Doe, 457 U.S. 202, 216 (1982).

198. *See* John Charles Hayes, Note, *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, 410 (1990).

199. *See* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

200. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

201. *See* HOWARD JAY GRAHAM, EVERYMAN'S CONSTITUTION 298-336 (1968).

202. *See* Hayes, *supra* note 198, at 407; *see also* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988) (differentiating between the prospective focus of the Equal Protection Clause and the retroactive focus of the Due Process Clause and recognizing the intent of the Equal Protection Clause to invalidate even long-standing tradition if it becomes invidiously discriminatory as times change).

203. 478 U.S. 186 (1986).

204. *See id.* at 187-88.

fundamental right upon homosexuals to engage in sodomy.[205] The Supreme Court, in an interpretation of the Due Process Clause, held that Georgia's statute criminalizing sodomy did not violate the fundamental rights of homosexuals.[206] The Court explicitly noted that the decision was not being challenged on equal protection grounds.[207] Despite the Court's blatant reliance on the Due Process Clause, many courts have interpreted the *Hardwick* decision to categorically bar equal protection claims by homosexuals.

For example, in *Padula v. Webster*,[208] the plaintiff was denied a position as a special agent in the Federal Bureau of Investigation, after confirming at a follow-up interview that she is homosexual.[209] The Court of Appeals for the District of Columbia held that the decision in *Bowers v. Hardwick* was an "insurmountable barrier[] to [plaintiff's] claim" that homosexuals should be added to the list of suspect or quasi-suspect classes, and thus declined to extend this status to homosexuals.[210]

In *Woodward v. United States*,[211] the court again used *Hardwick* to refuse to impart suspect or quasi-suspect status onto homosexuals and similarly did not require the government to assert a compelling interest to justify discrimination against the plaintiff.[212] The court acknowledged that "[a]fter *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm."[213]

Finally, in *High Tech Gays v. Defense Industrial Security Clearance Office*,[214] the Court of Appeals for the Ninth Circuit reversed the decision of the District Court granting homosexuals quasi-suspect status, subjecting classifications on this basis to heightened scrutiny.[215] The court noted that:

> if there is no fundamental right to engage in homosexual sodomy under the Due Process Clause of the Fifth Amendment, . . . it would be incongruous to expand the reach of equal protection to find a funda-

205. *See id.* at 188.
206. *See id.* at 196.
207. *See id.* at 196 n.8.
208. 822 F.2d 97 (D.C. Cir. 1987).
209. *See id.* at 99.
210. *See id.* at 102.
211. 871 F.2d 1068 (Fed. Cir. 1989).
212. *See id.* at 1076.
213. *Id.*
214. 895 F.2d 563 (9th Cir. 1990).
215. *See id.* at 565.

mental right of homosexual conduct under the equal protection component of the Due Process Clause of the Fifth Amendment.[216]

The problem with the aforementioned cases is that they fail to take into account that the *Hardwick* Court did not address an equal protection issue. Because the Court explicitly stated that the decision was not being challenged on equal protection grounds,[217] the lower courts' interpretation of *Hardwick* to bar equal protection claims by homosexuals is clearly unfounded. The error, in large part, stems from the understanding of the Constitution as a whole rather than the sum of its independent provisions.[218] The individual sections were enacted to deal with particular problems and thus, each must be read in isolation from the whole.[219] It is not a constitutional oddity "to find that one constitutional provision invalidates practices about which another provision has nothing to say."[220] The Court's holding in *Hardwick*, upholding the criminalization of homosexual sodomy in the face of the Due Process Clause, has no direct bearing on the Equal Protection Clause. Each has its own distinct foundation and it follows that the analysis of each differs as well.[221] This argument does not deny the possible implications that a decision regarding the due process issue may have on the equal protection claim. However, it is at best a recognition that such implications do not foreclose an equal protection challenge.

The Constitution grants Congress the power to enforce the Equal Protection Clause through legislation.[222] Lacking congressional direction, courts have developed standards to assess the validity of statutes challenged on equal protection grounds.[223] In examining the constitutionality of state statutes, the Supreme Court applies "mere rationality" review, strict scrutiny, or intermediate scrutiny.

In the equal protection context, domestic violence statutes that deny homosexuals the same protections given to heterosexuals are unconstitutional. The statutes that exclude homosexuals allow for the continued victimization of battered gays and lesbians. It is clear that protecting all victims, not merely a select group, is most consistent with the

216. *Id.* at 571 (citations omitted).
217. *See* Bowers v. Hardwick, 478 U.S. 186, 196 n.8 (1986).
218. *See* Sunstein, *supra* note 202, at 1167.
219. *See id.*
220. *Id.*
221. *See id.* at 1168.
222. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").
223. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-40 (1985).

statutes' objective of protecting victims from abuse suffered at the hands of their partners. The remainder of Part IV analyzes the constitutionality of domestic violence statutes excluding homosexuals under "mere rationality" review, strict scrutiny, and intermediate scrutiny. It demonstrates that, to be upheld, these statutes must afford homosexual victims of domestic violence the same protections as given to their similarly situated heterosexual counterparts.

C. *Under "Mere Rationality" Review, Domestic Violence Statutes Excluding Homosexuals Should Be Stricken*

The lowest level of review, "mere rationality," is applied to social or economic issues.[224] Under this standard, a statute will be deemed unconstitutional only if the classification is purely arbitrary.[225] The elements examined by the Court are the classification, the legitimate state interest, and the rational relationship between the two.[226] Generally, for the statute to be sustained, the classification must be rationally related to a legitimate state interest.[227]

When applying rational basis review, the Court will review a classification with extreme deference and with a presumption of constitutionality.[228] Accordingly, the mere rationality standard does not allow courts to judge the wisdom or integrity of legislative policy making.[229] Actually, "[t]he Court's rationale for this deferential standard is that democratic processes can capably rectify improvident decisions."[230] Under "mere rationality," if any possible explanation exists to provide a rational basis for the classification, the statute will withstand an equal protection challenge.[231] The burden is on the party challenging the statute to negate any rational relationship between the classification and a legitimate governmental interest.[232] No affirmative obligation exists within Congress or the states to produce evidence demonstrating the

224. *See id.* at 440.

225. *See* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

226. *See* Raffi S. Baroutjian, Note, *The Advent of the Multifactor, Sliding-Scale Standard of Equal Protection Review: Out with the Traditional Three-Tier Method of Analysis, in with* Romer v. Evans, 30 LOY. L.A. L. REV. 1277, 1284 (1997).

227. *See Cleburne*, 473 U.S. at 440; *see also* Heller v. Doe, 509 U.S. 312, 320 (1993) (stating that "a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose").

228. *See Cleburne*, 473 U.S. at 440.

229. *See* FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).

230. Baroutjian, *supra* note 226, at 1284.

231. *See Beach Communications*, 508 U.S. at 313.

232. *See* Baroutjian, *supra* note 226, at 1290.

statute's rationality.[233] Therefore, in the majority of cases where mere rationality review is the standard, the Court upholds the challenged statute.[234]

Nevertheless, even under this deferential standard, circumstances do exist where the Court finds the state's objective to be illegitimate.[235] If the Court finds that the differential treatment resulting from the statute's classification scheme is unrelated to a legitimate state interest, the Court will conclude that the legislation is irrational and unconstitutional.[236]

The Court sometimes finds that legislation is motivated by hostility towards a certain class of people. When this occurs, the Court has used the "mere rationality" approach to strike down the legislation based on either the rationale that the desire to harm an unpopular group is not a legitimate government objective or that there is no rational relation between the means and end of the statute.[237] The state may not rely on a classification when it is so far removed from its alleged purpose, making it, in effect, a merely arbitrary distinction.[238]

In *Evans v. Romer*,[239] the Colorado Supreme Court reviewed proposed Amendment Two to the Colorado Constitution which explicitly prohibited "all legislative, executive or judicial action at any level of state or local government designed to protect ... homosexual persons."[240] The State Supreme Court upheld the trial court's determination that Amendment Two to the Colorado Constitution violated the fundamental right of homosexuals to participate equally in the political process.[241] The court held that the classification could not pass muster under strict scrutiny.[242] The United States Supreme Court affirmed the decision

233. *See id.*

234. *See* 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, 808 (1984).

235. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (striking down a Texas city's denial of special use permit for a home for the mentally retarded); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 869-70 (1985) (invalidating the Alabama statute that taxed out-of-state insurance companies at a higher rate than in state companies).

236. *See* Hunter, *supra* note 132, at 590.

237. *See Cleburne*, 473 U.S. at 446-47.

238. *See id.* at 446.

239. 882 P.2d 1335, 1338-39 (Colo. 1994), *aff'd sub nom.*, Romer v. Evans, 517 U.S. 620, 635 (1996) (noting that Colorado's proposed Amendment Two prevented the State from passing legislation that would protect gays and lesbians from discrimination and would wipe out all existing legislation of the sort).

240. *Romer*, 517 U.S. at 624.

241. *See id.* at 625.

242. *See id.* at 625-26.

of the Colorado Supreme Court based, however, on a different rationale.[243]

The Court held that the controversial amendment is "born of animosity toward the class of persons affected," thus serving no legitimate government interest.[244] Furthermore, the means proposed by the amendment bore no rational relation to the objective asserted by the state.[245] In effect, the *Romer* Court established that arbitrary discrimination against homosexuals violates the Equal Protection Clause.[246]

Although the Court purported to apply a rational basis analysis, commentators have argued that it actually applied a higher standard than the ordinary rational basis test. One commentator has termed this elevated level of rational basis "legitimacy review."[247] The Court, in applying "legitimacy review," demanded that the legislative classification bear "a rational relation to some legitimate end."[248] Colorado advanced numerous reasons which would have sustained the statute under traditional "mere rationality" review.[249] Nevertheless, Colorado could not satisfy the heightened standard of rational basis review, requiring more than just a rational basis for the classification.[250]

Others have argued that what really is at work in *Romer* is "rational basis with teeth," "a hybrid form of rational basis whereby the Court, 'under the guise of 'mere rationality,'' actually applies a heightened and more demanding level of review."[251] The Supreme Court declined to review Amendment Two under strict scrutiny as the state court had done, yet it found the Amendment unconstitutional alleging use of the less exacting mere rationality standard.[252] Avoiding the determination of homosexuals as a quasi-suspect or suspect class, coupled with a finding that

243. *See id.* at 626.

244. *Id.* at 634; *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) (stating that fear or negative attitudes towards the mentally retarded is not a valid reason for refusing to grant a special use zoning permit when such a permit would be granted to others occupying the same site).

245. *See Romer*, 517 U.S. at 635. The objectives proffered by the State were "respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality [and] conserving resources to fight discrimination against other groups." *Id.*

246. *See id.* at 631-32. The Court never reached the question of whether sexual orientation constituted a suspect or quasi-suspect class. *See id.*

247. *See* Todd M. Hughes, *Making* Romer *Work*, 33 CAL. W. L. REV. 169, 176 (1997).

248. *Romer*, 517 U.S. at 631.

249. *See* Jason D. Kimpel, Note, *"Distinctions Without a Difference": How The Sixth Circuit Misread* Romer v. Evans, 74 IND. L.J. 991, 1013 (1999).

250. *See id.*

251. Baroutjian, *supra* note 226, at 1310 (citation omitted).

252. *See id.* at 1312.

Amendment Two was unconstitutional, strongly suggests use of a "rational basis with teeth" analysis.[253] Independent of an actual label, commentators are in agreement that the *Romer* Court applied some elevated form of rational basis review.[254]

Under *Romer v. Evans*, domestic violence statutes excluding homosexuals should not be upheld. The Court should apply the same rational basis analysis as applied in *Romer* and find the statutes unconstitutional. Once a state enacts a domestic violence statute, it must equally apply the provision to everyone.[255] Because the circumstances regarding domestic violence statutes mirror those involving Amendment Two in *Romer v. Evans*, for the same reasons that the Court held Amendment Two unconstitutional, discriminatory domestic violence statutes should be stricken.

Foremost, in *Romer*, the Court held that Amendment Two violated "the principle that government [must] remain open on impartial terms to all who seek its assistance"[256] by "imposing a broad and undifferentiated disability on a single named group."[257] Because Amendment Two made it more burdensome for some groups to obtain aid from the government than others, it, on its face, was contrary to the Constitution's guarantee of equal protection.[258]

Similarly, when considering domestic violence statutes, gays and lesbians, when excluded, must sustain a higher burden in order to get government aid in the form of protection or intervention.[259] For example, many state statutes excluding homosexuals require less harm to be endured before the offense is considered "committed" so police or others

253. *See id.* at 1310-14.

254. *See supra* notes 247-51 and accompanying text.

255. *See, e.g.*, DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 197 n.3 (1989) (stating that selective denial of protective services to disfavored minorities would be a violation of the Equal Protection Clause).

256. Romer v. Evans, 517 U.S. 620, 633 (1996).

257. *Id.* at 632.

258. *See id.* at 633-34.

259. *See* State v. Linner, 665 N.E.2d 1180, 1184 n.2 (Hamilton County Mun. Ct. 1996) The court stated:

> The notion that gay victims can be just as protected by pursuing an assault case rather than a domestic violence case and seeking a stay-away order as a condition of bond is specious because the protection of a temporary protection order is clearly more significant, as its violation results in additional criminal liability versus merely revocation of bond.

Id.; *supra* notes 150-58 and accompanying text for a comparison of civil protection orders and criminal prosecutions.

can intervene.[260] Forcing homosexuals to press criminal charges requires them to meet a higher standard to obtain protection. Such a heightened requirement is a per se violation of the pledge of equal protection.

The *Romer* Court's second reason for striking down Amendment Two was because the "sheer breadth [of Amendment Two] is so discontinuous with the reasons offered for it that [it] seems inexplicable by anything but animus toward the class it affects."[261] In its opinion, the Court further explained that by "making a general announcement that gays and lesbians shall not have any particular protections from the law, [Amendment Two] inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it."[262] Not only was Amendment Two so expansive as to prevent homosexuals from gaining special treatment through future legislation, it afforded homosexuals far less protection than the ordinary citizen enjoyed.[263] Ultimately, in the most extreme sense, Amendment Two was an attempt to make homosexuals unequal to other citizens.[264]

Homosexuals excluded from domestic violence statutes are faced with the same predicament as posed by Amendment Two. In the face of abuse, homosexuals are furnished with far less protection and even less opportunity than heterosexual citizens.[265] In addition, by excluding gays and lesbians from protection under domestic violence statutes, the statutes, by no means, achieve the objective they were created for—to protect all persons from domestic violence occurring in adult relationships. In fact, no legitimate objective is achieved by this discriminatory exclusion. When there is no rational basis for believing that the classification will further the state's legitimate interest, it is necessary to deem the classification invalid.[266]

State statutes that deny same sex couples protection from domestic violence cannot withstand an equal protection challenge under the lowest standard of review. Although proponents of the exclusive domestic

260. *See* People v. Silva, 33 Cal. Rptr. 2d 181, 184 (Ct. App. 1994) ("'[T]he Legislature has clothed persons of the opposite sex in intimate relationships with greater protection by requiring less harm to be inflicted before the offense is committed.'") (quoting People v. Gutierrez, 171 Cal. App. 3d 944, 952 (Ct. App. 1985)).

261. *Romer*, 517 U.S. at 632.

262. *Id.* at 635.

263. *See* Robert D. Dodson, *Homosexual Discrimination and Gender: Was* Romer v. Evans *Really a Victory for Gay Rights?*, 35 CAL. W. L. REV. 271, 282 (1999).

264. *See* Baroutjian, *supra* note 226, at 1299.

265. *See supra* notes 145-59, 171-78 and accompanying text.

266. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (holding that the requirement of a special permit in order to build a home for the mentally retarded rests on an irrational prejudice against the mentally retarded, thus invalidating the zoning ordinance).

violence statutes may attempt to distinguish between the broad, sweeping scope of Amendment Two and the narrower effects of the domestic violence statutes, the majority decision in *Romer v. Evans* is not unprecedented.[267] Other laws, less extensive in scope, have been invalidated by the Court as well.[268] Therefore, under rational basis review, domestic violence statutes excluding homosexuals are unconstitutional.

D. Heightened Scrutiny

In limited circumstances, courts deviate from mere rationality review and subject legislation to heightened scrutiny.[269] Heightened scrutiny refers to intermediate and strict scrutiny review and is applied when the challenged law burdens the exercise of a fundamental right or curtails the rights of a suspect or quasi-suspect classification.[270] Specifically, when a law affects a fundamental right or discriminates against a suspect class, a strict scrutiny analysis is applied.[271] Fundamental rights are those rights which have their source in the Constitution.[272] The notion of suspect class status, on the other hand, is a judicial construction that evolved from Justice Stone's famous footnote within the Supreme Court decision *United States v. Carolene Products Co.*[273] In *Carolene Products*, Justice Stone noted that "prejudice against discrete and insular minorities" should be subject to independent review.[274] A suspect class refers to a classification that is more likely a reflection of an ingrained prejudice than a legitimate objective.[275] Under the strict scrutiny approach, courts conduct an independent review of the challenged classification, upholding the classification if it is necessary to promote a compelling government interest and if the legislation is closely tailored

267. *See* Dodson, *supra* note 263, at 289.

268. *See, e.g., Cleburne*, 473 U.S. at 433; Department of Agric. v. Moreno, 413 U.S. 528, 529 (1973).

269. *See infra* notes 274-88 and accompanying text.

270. *See* Plyler v. Doe, 457 U.S. 202, 216-18 (1982).

271. *See id.* at 216-17.

272. *See id.* at 217 n.15 (stating that a classification deserves strict scrutiny if the rights infringed upon have their source, explicitly or implicitly, in the Constitution because these rights are fundamental); Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (recognizing the right to participate in state elections even though this right is not explicitly protected by the Constitution); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (noting that certain state imposed limits or exclusions can violate the Equal Protection Clause by restricting the exercise of a basic civil right of man and are thus subject to strict scrutiny review).

273. 304 U.S. 144 (1938).

274. *Id.* at 153 n.4.

275. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

to meet that need.[276] "Strict scrutiny is essentially a presumption that the challenged law is invalid."[277] Currently, classifications based on race,[278] alienage,[279] and nationality[280] are considered suspect and are subject to strict scrutiny.

Quasi-suspect classes refer to those groups that share some characteristics of a suspect class, yet are not "'discrete and insular minorit[ies].'"[281] They receive intermediate review instead of strict scrutiny.[282] The Court has only applied intermediate scrutiny to classifications based on gender[283] and illegitimacy.[284] Unlike the extremes of "mere rationality" or strict scrutiny, the application of the intermediate level of review does not produce an absolute result, making the precision of the Court's review an important factor in determining the constitutionality of the statute.

The Court assesses four criteria in determining whether a challenged classification should be reviewed under heightened scrutiny. The Court will ask:

> (1) Has the group suffered a history of purposeful discrimination? (2) Is the class the object of such deep-seated prejudice that it is often subjected to disabilities based on inaccurate stereotypes that do not

276. *See id.*

277. Miller, *supra* note 234, at 810.

278. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (recognizing race as a suspect class and subjecting classifications on this basis to the "most rigid scrutiny"); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964).

279. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971) (acknowledging alienage as a suspect class).

280. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (recognizing national origin as a suspect class); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

281. Sande Buhai Pond, *No Dogs Allowed: Hawaii's Quarantine Law Violates the Rights of People with Disabilities*, 29 LOY. L.A. L. REV. 145, 191-92 (1995).

282. *See* Plyler v. Doe, 457 U.S. 202, 218 n.16 (1982). In the Opinion of the Court, Justice Brennan wrote:

> we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State.

Id. at 217-18.

283. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982) (recognizing gender classifications as quasi-suspect); Craig v. Boren, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny to a statute that prohibited sales of intoxicating beverages to males under the age of 21 and females under the age of 18); Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (rejecting the "mere rationality" standard for sex based classifications and expressing the need to apply strict scrutiny in these situations).

284. *See* Lalli v. Lalli, 439 U.S. 259, 264-65 (1978) (recognizing illegitimacy as a quasi-suspect class).

> truly reflect the members' abilities? (3) Is the class defined by the presence of an immutable trait that is beyond a class member's control and yet bears no relation to the individual's ability to contribute to society? (4) Is the group a politically powerless minority?[285]

Each of these criteria need not be met to justify heightened scrutiny.[286] In fact, no single factor is a "rigid prerequisite" to heightened review.[287] The factors serve merely as a "guidepost" for the courts to analyze and weigh in determining whether a classification is suspect.[288]

1. Homosexuals Should be Afforded Suspect Class Status

If gays and lesbians are determined to be a suspect class, domestic violence statutes excluding homosexuals will be subject to strict scrutiny. Although designating homosexuality as a suspect class would not, by itself, do away with the many forms of discrimination experienced by gays and lesbians, it could furnish a doctrinal framework whereby the judiciary could more efficiently address the problem of homosexual inequality in the context of domestic violence legislation.[289] In determining if homosexuals constitute a suspect class, it is necessary to examine the four factors individually.

a. Gays and Lesbians Have Suffered a History of Purposeful Discrimination

A historical review of the treatment of gays and lesbians demonstrates the purposeful discrimination to which they have been subjected. Courts that have addressed this issue have conceded that homosexuals have endured a history of hostility and discrimination.[290] This discrimination against gays and lesbians is largely the product of traditionally

285. Dean v. District of Columbia, 653 A.2d 307, 339-40 (D.C. 1995).

286. *See* Amicus Brief for Respondent at 6, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039).

287. *See id.* at 21.

288. *See id.* at 21 n.4.

289. *See* Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1297 (1985) [hereinafter *The Constitutional Status of Sexual Orientation*].

290. *See, e.g.*, Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1984) (Brennan, J., dissenting) (stating that "homosexuals have historically been the object of pernicious and sustained hostility"); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) (conceding that "homosexuals have suffered a history of discrimination"); Ben-Shalom v. Marsh, 881 F.2d 454, 465 (7th Cir. 1989); Padula v. Webster, 822 F.2d 97, 104 (D.C. Cir. 1987).

held views about the proper roles of men and women.[291] Deviation from these prescribed roles has resulted in identifying gays and lesbians as the "unacceptable 'other.'"[292] Since colonial times, gay and lesbian communities in America have been consistently, deliberately, and vigorously discriminated against.[293] As early as 1566, a Frenchman was executed by Spanish colonists in St. Augustine, Florida because he was "a great Sodomite."[294] In the eighteenth century, a visitor to Philadelphia wrote negatively of women who "seek unnatural pleasures with persons of their own sex."[295] During the 1950s, homosexuality became embroiled in Senator Joseph McCarthy's attack on government agencies.[296] He accused the Truman Administration of permitting "'sexual perverts'" to infiltrate the government, threatening national security.[297] Throughout the McCarthy Era, homosexuality was the basis of dismissals of thousands of homosexuals from government, as well as private employment.[298] McCarthy's persecution had enduring effects in the following decade. Homosexuality became the justification for doctors and lawyers to lose their licenses and also was a permissible foundation for divorce and loss of child custody.[299]

In contemporary times, public hysteria over Acquired Immune Deficiency Syndrome ("AIDS") has led to unjustified discrimination against gay men and lesbians.[300] Because homosexual men are among the most vulnerable to AIDS, homosexuality is stigmatized as the "mark of death."[301] AIDS, coupled with society's ignorance of homosexuality, is a pretext for increased discrimination against homosexuals.[302]

This increased discrimination against homosexuals is evident in all aspects of their lives.[303] "'[B]eing identified with homosexuality has

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291. *See* Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 WOMEN'S RTS. L. REP. 143, 165 (1988).

292. *Id.*

293. *See generally* JONATHAN KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A. 17-195 (1976) (discussing the historical treatment of homosexuals in America).

294. *Id.* at 14.

295. *Id.* at 26.

296. *See id.* at 103-05; Arriola, *supra* note 291, at 167.

297. *See* Arriola, *supra* note 291, at 167.

298. *See id.* at 168.

299. *See id.*

300. *See id.* at 158.

301. *Id.*

302. *See id.*

303. *See* DIANE SILVER, THE NEW CIVIL WAR: THE LESBIAN AND GAY STRUGGLE FOR CIVIL RIGHTS 85 (1997); *see also* Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1011 (1984) (Brennan, J., dissenting) (discriminating in public employment by firing homosexual teacher on that basis alone); Shahar v. Bowers, 114 F.3d 1097, 1099 (11th Cir. 1997) (withdrawing offer of

been the basis of . . . the ruin of careers, undesirable military discharges, denials of occupational licenses, denials of the right to adopt, . . . denials of national security clearances and denials of the right to enter the country.'"[304] It is clear that homosexuals have endured a pattern of purposeful discrimination throughout history that has intruded on every aspect of their public and private lives.

b. Homosexuals Have Been Classified Based on Inaccurate Stereotypes and Prejudice

In addition to the requirement of purpose, for discrimination to be subject to strict scrutiny, the discrimination must be of an invidious sort. Invidious discrimination is offensive or objectionable because it is based on prejudice or stereotypes.[305] The concept of suspect classifications may be viewed as a means of protecting individuals from unequal treatment on the basis of irrelevant characteristics.[306] In applying strict scrutiny, the Court looks to whether the challenged law was based on deep rooted prejudice, not reflective of the individual's ability to contribute to society.[307] Other courts have suggested that the prevalence of stereotypes concerning a group make it more likely that classifications which disadvantage that group will be found "suspect." Because factors such as race, alienage, and national origin, for example, are hardly relevant to achieving a legitimate state interest, the Court has determined these classifications to be a product of prejudice and abomination.[308] Consistent with the Supreme Court, lower courts have centered their suspect classification analysis on the stigma and ignominy associated

employment in office of State Attorney General upon finding that prospective employee was a lesbian); Dean v. District of Columbia, 653 A.2d 307, 309 (D.C. 1995) (refusing to issue a marriage license to a same sex couple); Ross v. Denver Dep't of Health and Hosps., 883 P.2d 516, 518 (Colo. Ct. App. 1994) (denying family sick leave benefits to same sex domestic partners); Baehr v. Lewin, 852 P.2d 44, 48-49 (Haw. 1993) (denying marriage license to same sex couple); Tucker v. Tucker, 910 P.2d 1209, 1212-13 (Utah 1996) (reinstating custody award to father because mother's lesbian cohabitational relationship demonstrated a lack of a moral example); Roe v. Roe, 324 S.E.2d 691, 691 (Va. 1985) (denying homosexual parent custody of child upon a determination that because the parent carries on a homosexual relationship in the same residence as the child, the best interests of the child would not be met).

304. *Dean*, 653 A.2d at 344 (quoting Arriola, *supra* note 291, at 157).

305. *See* BLACK'S LAW DICTIONARY 480 (7th ed. 1999).

306. *See The Constitutional Status of Sexual Orientation*, *supra* note 289, at 1299.

307. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976).

308. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

with membership in the relevant group, as well as the group's unequal treatment.[309]

Homosexuals have been the subject of a variety of negative stereotypes. Many statutory classifications based on sexual orientation are a product of these offensive typecasts. It is merely a myth that gays and lesbians try to lure young people into a homosexual lifestyle by making it appear like an attractive option.[310] Additionally, homosexuals are no more likely to be child molesters than are heterosexuals.[311] Homosexuality is not a product of a mental illness or an indicator of psychopathology.[312] Sex researcher Magnus Hirschfield characterized homosexuality as "a normal variation of human sexuality."[313] In fact, mental health professionals' firm belief in this assertion led them to remove homosexuality from the American Psychiatric Association's *Diagnostic and Statistical Manual of Psychiatric Disorders* in 1973.[314]

c. Homosexuality Is an Immutable Trait

The notion of immutability refers to character traits that are "unchosen [and] unalterable."[315] Determining whether a classification is suspect or quasi-suspect is based, in part, on the degree to which an individual controls the defining trait and how easy or difficult it would be to change the trait.[316] Immutability alone is insufficient to find a classifi-

309. *See The Constitutional Status of Sexual Orientation*, *supra* note 289, at 1299. For evidence of the unequal treatment of homosexuals, see Miller, *supra* note 234.

310. *See* Miller, *supra* note 234, at 821-22 (stating that there is no factual basis that gays "proselytize children to homosexuality" or that exposure to a gay person will affect a child's sexual orientation).

311. *See id.* at 822-23; *see also* SILVER, *supra* note 303, at 78 (noting that researchers and health care workers have most frequently found child molesters to be heterosexual).

312. *See* Miller, *supra* note 234, at 824 (quoting Freud that "'[h]omosexuality is assuredly no advantage, but it is nothing to be ashamed of . . . it cannot be classified as an illness; we consider it to be a variation of the sexual function'"); ANSWERS TO YOUR QUESTIONS ABOUT SEXUAL ORIENTATION AND HOMOSEXUALITY (American Psychological Ass'n Office of Public Communications 1998) ("Psychologists, psychiatrists and other mental health professionals agree that homosexuality is not an illness, mental disorder or an emotional problem.").

313. SIMON LEVAY, QUEER SCIENCE: THE USE AND ABUSE OF RESEARCH INTO HOMOSEXUALITY 215 (1996).

314. *See id.* at 211.

315. *See The Constitutional Status of Sexual Orientation*, *supra* note 289, at 1302.

316. *See* Dean v. District of Columbia, 653 A.2d 307, 346 (D.C. 1995).

cation as suspect or quasi-suspect.[317] Likewise, it is not a prerequisite to such finding.[318]

Regarding sexual orientation, immutability is a very controversial area.[319] Many scholars do not believe that homosexuality is an immutable characteristic. Instead, they firmly support the notion that people make a conscious choice to be homosexual,[320] and additionally, they adhere to the belief that a person's sexual orientation is amenable to change.[321]

However, overwhelming evidence exists to the contrary, strongly supporting the immutability of homosexuality. In the late 1800s, Magnus Hirschfield asserted that "sexual orientation was a life-long attribute . . . determined by prenatal developmental events [which] generally remained stable after emergence at sexual maturity, even in the face of attempts to change it."[322] Although the scientific debate over the immutability of sexual orientation continues, researchers have generally agreed that becoming homosexual or heterosexual is not a conscious decision that one makes.[323] Rather, recent studies indicate that homosexuality has its roots in biology.[324] The American Psychological Association refutes the notion that sexual orientation is a choice and explains that sexual orientation emerges in early adolescence without any prior sexual experience.[325] For decades researchers have concluded that homosexuality is an unchangeable characteristic of one's person, not a chosen ideology. The Alfred C. Kinsey Institute for Sex Research concluded that:

317. *See* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1073-74 nn.51-52 (1980) (stating that immutability is "neither sufficient nor necessary").

318. *See* Miller, *supra* note 234, at 813; *see also* Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 507-16 (1994) (arguing that immutability is not a requirement for suspect class status).

319. *See The Constitutional Status of Sexual Orientation*, *supra* note 289, at 1302.

320. *See* Halley, *supra* note 318, at 517; Karen De Witt, *Quayle Contends Homosexuality Is a Matter of Choice, Not Biology*, N.Y. TIMES, Sept. 14, 1992, at A17. Former Vice President Dan Quayle said, when discussing homosexuality: "'My viewpoint is that it's more of a choice than a biological situation. . . .I think it is a wrong choice.'" *Id.*

321. For a discussion of sexual orientation conversion techniques, see generally David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297 (1999).

322. LEVAY, *supra* note 313, at 53.

323. *See* SILVER, *supra* note 303, at 42.

324. *See id.*

325. *See* ANSWERS TO YOUR QUESTIONS ABOUT SEXUAL ORIENTATION AND HOMOSEXUALITY, *supra* note 312.

> [H]omosexuality is as deeply ingrained as heterosexuality.... [E]xclusive homosexuality probably is so deeply ingrained that one should not attempt or expect to change it. Rather, it would probably make far more sense simply to recognize it as a basic component of a person's core identity.... There is no reason to think it would be any easier for homosexual men or women to reverse their sexual orientation than it would be for heterosexual[s] ... to become predominantly or exclusively homosexual.[326]

Generally, procedures dedicated to converting homosexuals to heterosexuals have met with little success, leaving both physical injury and emotional trauma.[327] Purported cures tend to be no more than a result of an effort to avoid incarceration, other criminal punishment, or any displeasing situation.[328] Recently, twin studies have offered "watertight evidence that there is a genetic influence on sexual orientation," as well as evidence demonstrating the existence of "gay genes" that predispose people to homosexuality.[329] The role of genetics as an influence on sexual orientation further fosters the conclusion that homosexuality is immutable.

One argument regarding immutability dismisses the importance of character traits altogether, and instead considers the role these traits play in self-identification, group affiliation, and recognition by others.[330] Considering sexuality, a person's sexual orientation shapes who they are and with whom they associate. Gays and lesbians, for example, feel isolated from the heterosexual community, and thus, form their own networks within the homosexual community. This lends credence to homosexuality being an immutable characteristic and further supports the recommendation that classifications based on sexual orientation be subject to strict scrutiny.[331]

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326. ALAN P. BELL ET AL., SEXUAL PREFERENCE: ITS DEVELOPMENT IN MEN AND WOMEN 190, 211, 222 (1981).

327. *See* LEVAY, *supra* note 313, at 95 (relaying the story of a homosexual male who endured burns and emotional trauma from aversion therapy and was allegedly cured, only later to fall in love with his male roommate); *id.* at 260-62 (discussing the failure of techniques dedicated to changing sexual orientation).

328. *See id.* at 96-97 (noting the case history of a 19-year-old who was sentenced to prison for homosexuality, with a pardon conditioned on the correction of this "perversion." After convulsive therapy with metrazol, his homosexual tendencies had allegedly disappeared.); *id.* at 111-12 (commenting that apparent changes in sexual orientation of concentration camp prisoners as a result of surgically implanting an artificial male sex gland in the homosexual prisoners was probably faked in order to be released from the camp).

329. *See id.* at 177, 178-88.

330. *See The Constitutional Status of Sexual Orientation*, *supra* note 289, at 1303.

331. *See id.* at 1304.

d. Homosexuals Are Politically Powerless

Finally, courts consider whether or not a particular group is politically powerless—whether they are a member of a "discrete and insular minority."[332] The notion of political powerlessness, in the equal protection context, does not necessitate absolute foreclosure from the political process.[333] It is enough that a group has historically been excluded from the political process and has consistently had to overcome obstacles to participate in the system.[334]

Justice Scalia concludes in his dissent in *Romer v. Evans* that homosexuals possess political power.[335] He fails, however, to demonstrate any real source of the power. His argument is largely based on the fact that homosexuals may "reside in disproportionate numbers in certain communities."[336] This falls short, by itself, of establishing political power. "[T]he assertions Justice Scalia makes to 'prove' that gays and lesbians 'possess political power much greater than their numbers' are themselves either false, meaningless, or are used by Justice Scalia in a simplistic, and . . . acontextual, way."[337] For example, Scalia's analogy between polygamy and homosexuality to support the notion that Amendment Two is merely "the effort by the majority of citizens to preserve its view of sexual morality statewide, against the efforts of a geographically concentrated and politically powerful minority to undermine it"[338] is clearly out of context. Although it may remain debatable whether people consciously decide to be homosexual, polygamy is clearly a choice, making the two incomparable. Finally, Justice Scalia's dissent ignores the context from which the concentrated gay presence in urban areas arises: The alienation, fear, and violence experienced by homosexuals in their rural or suburban home towns causes them to find refuge in the cities, hoping to find others like themselves, as well as a

332. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

333. *See* Amicus Brief for Respondent at 17, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039).

334. *See id.* at 18.

335. *See* Romer v. Evans, 517 U.S. 620, 646 (1996) (Scalia, J., dissenting).

336. *Id.* at 645.

337. Samuel A. Marcosson, Romer *and the Limits of Legitimacy: Stripping Opponents of Gay and Lesbian Rights of Their "First Line of Defense" in the Same-Sex Marriage Fight*, 24 J. CONTEMP. L. 217, 227-29 (1998).

338. *Romer*, 517 U.S. at 648.

safer life.[339] In fact, this reasoning actually supports the argument that homosexuals are politically powerless.

Homosexuals' political weakness is exacerbated by societal homophobia and stereotypes.[340] Because of society's negative views of homosexuals, gays and lesbians keep their sexual orientation a secret, hampering their ability to form coalitions.[341] Additionally, because of society's obstacles restricting homosexual participation in the political process, many gays and lesbians refrain altogether from attempting to join groups that can increase their political power.[342] Therefore, until societal homophobia and stereotypes dissipate, homosexuals will not form coalitions and will continue to be politically powerless.

Although the Supreme Court has yet to recognize homosexuals as a suspect class, lower court decisions demonstrate a trend toward heightened scrutiny.[343] Because few classifications are afforded suspect status, it will be a slow progression for sexual orientation to be afforded such status. However, as evidenced by the decision in *Romer*, the Supreme Court has already taken steps to stray from the traditionally applied "mere rationality" standard.

e. Case Law Supporting the Use of Strict Scrutiny Review for Homosexuals in an Equal Protection Challenge

Gay Rights Coalition of Georgetown University Law Center v. Georgetown University[344] involved Georgetown University's failure to "recognize" homosexual student groups by denying tangible benefits to these groups on the basis of their sexual orientation.[345] Additionally at issue was the application of the Human Rights Act.[346] The Human

339. *See* Marcosson, *supra* note 337, at 229; *see also, e.g.*, NEIL MILLER, IN SEARCH OF GAY AMERICA 14 (1989) (discussing the notion that gay people in a small town had only two options: "Either they ran you out of town or you left before they got around to it.").

340. *See* Amicus Brief for Respondent at 18-20, Romer v. Evans, 517 U.S. 120 (1996) (No. 94-1039).

341. *See id.* at 19.

342. *See* Murphy, *supra* note 127, at 356-57.

343. *See* Watkins v. United States Army, 847 F.2d 1329, 1349 (9th Cir. 1988) (proffering that homosexual orientation is a classification subject to heightened equal protection review); Jantz v. Muci, 759 F. Supp. 1543, 1551 (D. Kan. 1991), *rev'd on other grounds,* 976 F.2d 623 (10th Cir. 1992) (holding that a classification based on an individual's sexual orientation is inherently suspect); Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 39 (D.C. 1987) (acknowledging that classifications based on homosexuality should be subject to strict or heightened scrutiny).

344. 536 A.2d 1 (D.C. 1987).

345. *See id.* at 10-14.

346. *See id.* at 16.

Rights Act was a state level statute enacted to outlaw sexual orientation discrimination in employment, real estate transactions, public accommodations, educational institutions,[347] and elsewhere.[348] The *Gay Rights Coalition* decision was the first appellate decision to extend the equal protection doctrine to gays and lesbians in the context of heightened scrutiny.[349]

In *Gay Rights Coalition*, the court held that because "recognition" of homosexual student groups involved implicit endorsement of that group, the Human Rights Act did not require a grant of "University Recognition."[350] The Act did, however, demand that Georgetown not deny tangible benefits to student groups based on their sexual orientation.[351] In the equal protection context, equal access to tangible benefits was mandated by the District's compelling constitutional interest in eradicating sexual orientation discrimination.[352] The District of Columbia Council stated that:

> [A] person's sexual orientation, like a person's race and sex, . . . tells nothing of value about his or her attitudes, characteristics, abilities or limitations, [and thus] is a false measure of individual worth, . . . oppressive to the person concerned, [and] harmful to others because discrimination inflicts a grave and recurring injury upon society as a whole.[353]

In rendering its decision, the court went through a detailed analysis of the factors recognized as warranting suspect or quasi-suspect classification. The court concluded that sexual orientation is not reflective of individual merit[354] and is thus immutable;[355] homosexuals have been subjected to prejudice in "all walks of life, . . . persist[ing] throughout most of history";[356] homosexuals have been the victim of "unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities";[357] and "due to the legal and social penalties commonly triggered by public acknowledgment of homosexuality, . . . persons so

347. *See* D.C. CODE ANN. §§ 1-2512, 1-2515-2517, 1-2519, 1-2520 (1999) (respectively).
348. *See id.* § 1-2511.
349. *See* Walter J. Walsh, *The Fearful Symmetry of Gay Rights, Religious Freedom, and Racial Equality*, 40 HOW. L.J. 513, 524 (1997).
350. *See Gay Rights Coalition*, 536 A.2d at 38.
351. *See id.*
352. *See* Walsh, *supra* note 349, at 523-24.
353. *Gay Rights Coalition*, 536 A.2d at 32.
354. *See id.* at 33-35.
355. *See supra* notes 315-31 and accompanying text.
356. *Gay Rights Coalition*, 536 A.2d at 35-36.
357. *Id.* at 36.

orientated . . . constitute [a] 'discrete and insular minorit[y]'."[358] Ultimately, the court "reasoned that for Fourteenth Amendment equal protection purposes official classifications based on homosexuality should be considered suspect, and therefore subject to strict or heightened constitutional scrutiny."[359]

The dissent in *Rowland v. Mad River Local School District*[360] also suggests the use of strict, or at least intermediate scrutiny, to review classifications based on sexual orientation.[361] *Rowland* involved a public high school employee who was fired for revealing to her secretary and fellow teachers that she was bisexual.[362] The Sixth Circuit Court of Appeals reversed the decision of the lower court and decided that no equal protection claim could be made because no evidence existed showing that employees with different sexual preferences were treated any differently.[363]

In *Rowland*, Justice Brennan dissented from the Court's denial of the petition for writ of certiorari.[364] In his dissent, he suggested using strict, or at least intermediate scrutiny, to review classifications based on sexual orientation. He concluded that homosexuals "constitute a significant and insular minority of this country's population [and] [b]ecause of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their [political] rights."[365] He further stated that the hostility that homosexuals have faced historically "is 'likely . . . to reflect deep-seated prejudice rather than . . . rationality.'"[366] Additionally, Justice Brennan noted that "discrimination based on sexual preference has been found by many courts to infringe various fundamental constitutional rights, . . . requir[ing] the State to demonstrate [a] compelling interest to survive strict judicial scrutiny."[367] An

358. *Id.* at 37.
359. Walsh, *supra* note 349, at 524.
360. 470 U.S. 1009 (1984).
361. *See id.* at 1014 (Brennan, J., dissenting).
362. *See id.* at 1011.
363. *See id.* at 1010.
364. *See id.* at 1009.
365. *Id.* at 1014.
366. *Id.* (quoting Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982) (Burger, C.J., dissenting)).
367. *Id.* at 1015; *see also* Gay Alliance of Students v. Matthews, 544 F.2d 162, 167 (4th Cir. 1976) (invalidating the denial of homosexual student group to equal access to state university facilities absent substantial government interest supporting infringement of First and Fourteenth Amendment rights); ben Shalom v. Secretary of Army, 489 F. Supp. 964, 969, 973-77 (E.D. Wis. 1980) (violating the First and Ninth Amendments and the right to privacy by requiring discharge of homosexuals based on homosexual desires, not overt acts); People v. Onofre, 415 N.E.2d 936,

analysis of the classifications from either perspective therefore warrants either strict or, at least, intermediate review.

As Justice Brennan properly notes, once a court concludes that the legal classification burdens a suspect class, it focuses on the state's identification of a compelling interest.[368] The classification will be legitimate only if the state can meet this burden.

In *Dean v. District of Columbia*,[369] the court stated that it excluded same sex couples from the opportunity to marry because, if such marriages were legitimate, it could influence the sexual orientation and behavior of children.[370] The court noted that if there was any truth to this rationale, it may be substantial enough to deprive same sex couples the right to marry, but would not necessarily justify discrimination in other areas such as housing and employment.[371] This decision recognizes that although courts may continue to deny homosexuals the right to marry based on a "sanctity of marriage" rationale, this reasoning will not be sufficient to withstand an equal protection challenge of other provisions discriminating on the basis of sexual orientation. Just as discrimination in housing or unemployment could not be justified by a "sanctity of marriage" argument, it seems virtually unlikely that a state will be able to establish a compelling interest through the exclusion of same sex domestic violence victims from the protection of state domestic violence statutes. Therefore, state statutes excluding homosexual victims of domestic violence are unconstitutional.

Because the plight of battered gays and lesbians unequivocally meets the standards essential to establishing a suspect class, a strict scrutiny review should be applied to the legislation discriminating against them. However, because it is unlikely for the Court to alter its long-standing refusal to recognize homosexuals as a suspect class, it is necessary to consider applying intermediate review to classifications on the basis of sexual orientation by denoting sexuality a gender classification. Based on the foregoing analysis, as well as the subsequent section, laws that discriminate against gays and lesbians are unconstitutional under intermediate scrutiny.

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943 (N.Y. 1980) (finding criminal statute prohibiting private homosexual conduct violative of constitutional rights to privacy and equal protection).

368. *See* Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1016 (1984) (Brennan, J., dissenting).

369. 653 A.2d 307 (D.C. 1995).

370. *See id.* at 355.

371. *See id.*

2. Because Classification on the Basis of Sexual Orientation Is, in Effect, a Gender Classification, Domestic Violence Statutes Excluding Homosexuals Should Be Subject to Intermediate Scrutiny

The invalidation of statutes that discriminate on the basis of sex aims to alter the traditional methodologies that legally, socially, and economically subordinate persons on the basis of gender.[372] Courts have applied intermediate scrutiny to classifications presumably based on unwarranted stereotypes.[373] If classifications are intentionally made on the basis of sex, the government must show that the gender based classifications serve an important objective and that the classification scheme is substantially related to that objective.[374] It is necessary to carefully examine the statute to assure that the objective itself is not a reflection of archaic stereotypes.[375] The Court has consistently struck down statutes created to preserve traditional notions of gender inequality.[376] Absent a showing of a substantial relationship between the gender classification and a sufficiently important government interest, the classification must fail.[377] The statute will be upheld only where it reflects accurate sex based generalizations.[378] A statute resting solely on the stereotypical traditional roles of the sexes has never been upheld under a heightened scrutiny analysis.[379]

The examination of statutes which classify based on gender have met with many changes over the years. The 1970s marked the beginning of gender classifications receiving more than the lowest level of review in its traditional form.[380] In *Reed v. Reed*,[381] the Court struck down a provision of the Idaho probate code which gave preference to men over women within the same entitlement class in determining the administrator of a decedent's estate.[382] Because the statute gave differential treatment to similarly situated persons, the statute violated the Equal

372. *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 214 (1994).

373. *See* Miller, *supra* note 234, at 797.

374. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

375. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724-25 (1982) (stating that a statute's objective, and thus the entire statute, is illegitimate if it seeks to exclude members of one gender because they are considered innately inferior).

376. *See* Koppelman, *supra* note 372, at 217.

377. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985).

378. *See* Koppelman, *supra* note 372, at 218.

379. *See id.* at 218-19.

380. *See* Reed v. Reed, 404 U.S. 71, 75-76 (1971).

381. 404 U.S. 71 (1971).

382. *See id.* at 77.

Protection Clause.[383] Although the Court claimed to use the mere rationality standard, the invalidation exemplifies that such assertion was simply illusory. Whether superficial or clandestine, the Court applied a higher level of review.

The Court, in *Frontiero v. Richardson*,[384] explicitly rejected the "mere rationality" standard for reviewing gender based classifications.[385] Four Justices argued that "classifications based upon sex . . . are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[386] *Frontiero* involved a married female Air Force officer who sought benefits for her husband under certain statutes.[387] These statutes, however, limited the availability of benefits to spouses of male members of the uniformed services.[388] Spouses of female members were considered dependents only if they were dependent for more than one-half of their support.[389] The Court held that because:

> [S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system" . . . invidiously relegating the entire class . . . to inferior legal status without regard to the actual capabilities of its individual members.[390]

In *Craig v. Boren*,[391] the Court created intermediate scrutiny.[392] This case dealt with an Oklahoma statute prohibiting the sale of "nonintoxicating" 3.2% beer to males under the age of twenty-one and to females under the age of eighteen.[393] The provision was challenged on the basis that it denied eighteen to twenty year old males equal protection under the law.[394] The Court followed the proposition in *Reed* that in order "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially re-

383. *See id.*
384. 411 U.S. 677 (1973).
385. *See id.* at 688 (stating that classifications based on sex, like classifications based on race, alienage, or national origin, are inherently suspect and must be subjected to strict judicial scrutiny).
386. *Id.*
387. *See id.* at 679-80.
388. *See id.* at 680.
389. *See id.*
390. *Id.* at 686-87 (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972)).
391. 429 U.S. 190 (1976).
392. *See id.* at 197, 199-200.
393. *See id.* at 191-92.
394. *See id.* at 192.

lated to achievement of those objectives."[395] In accordance with this standard, the Court held that Oklahoma's statute, discriminating against males eighteen to twenty, violated the Equal Protection Clause.[396]

Recently, as a result of *United States v. Virginia*,[397] the level of intermediate scrutiny for gender based classifications closely approaches strict scrutiny review.[398] *United States v. Virginia* involved a military institution exclusive to males.[399] The Court held a heightened standard of review applicable to sex based classifications to avoid perpetuating the notion of inferiority of women in the legal, social, and economic spheres.[400] Under this standard of review, a party seeking to uphold the challenged statute must show that important government objectives are served by the classification and that the classification scheme is substantially related to achieving the stated objectives.[401]

Statutory classifications based on sexual orientation should be subject to at least that level of scrutiny applied to gender based classifications. In effect, the exclusion of gays and lesbians from domestic violence statutes is a gender based classification. Although gender classifications originated as a means to give women equal protection under the law, it has extended to protect males from discriminatory classifications as well.[402] The gender classification analysis should further extend to homosexual classifications. In actuality, when a woman whose partner is a woman is excepted from domestic violence protection under these statutes, she is a victim of a gender based classification. Because both the abused and the abuser are women, under these statutes, the system considers the victim to be undeserving of protection. However, were the abused a man whose partner is a woman, or a woman whose partner is a man, he or she would be eligible for protection. Therefore, these classifications are made on the basis of sex, whether it be exclusion because of the sex of the victim or of the abuser. As one commentator has explained, "if a homosexual chooses a partner of the opposite

395. *Id.* at 197.

396. *See id.* at 210.

397. 518 U.S. 515 (1996).

398. *See id.* at 531-33 (stating that legislation should be invalidated when it stems from traditional, stereotypical thinking about gender roles and differing abilities of the two sexes and requiring "exceedingly persuasive justification" for a gender-based classification by reviewing such legislation with "skeptical scrutiny").

399. *See id.* at 519-20.

400. *See id.* at 533-34.

401. *See id.* at 533.

402. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982) (noting that the standard of intermediate scrutiny applies to gender discrimination against males); Craig v. Boren, 429 U.S. 190, 192 (1976) (applying intermediate scrutiny to statute discriminating against males).

gender instead of a partner of the same gender, the State would not discriminate."[403] He has attributed the seemingly permissible legislation discriminating against homosexuals to the "traditional notions of the relationships between men and women."[404] Because society is socialized to view a man and a woman in an intimate relationship, as opposed to two men or two women, its members enact laws to sustain these traditional roles.[405]

Statutes classifying on the basis of sexual orientation rest upon a traditional gender role stereotype: sex is appropriate between a man and a woman but not between two individuals of the same sex.[406] Commentators have analogized discrimination on the basis of sexual orientation to racial classifications, specifically miscegenation, in an attempt to explain how laws affecting one group can actually serve to oppress another.[407] This rationale explains why classifications on the basis of sexual orientation are, in actuality, gender discrimination and should thus be afforded the appropriate level of scrutiny as such classifications require.

As Professor Andrew Koppelman explains, miscegenation is a notion that tends to enforce racism and is implicitly linked to white supremacy.[408] Laws prohibiting intermarriage are "part of a larger pattern of domination of blacks by whites."[409] Likewise, discrimination on the basis of homosexuality is part of the larger scheme of male domination over women.[410] A common basis for the stigma associated with homosexuality is the perception of homosexuals as sexual deviants.[411] The concept of homosexual sex is threatening because it questions the ideas of male dominance generally associated with heterosexual sex.[412] In large part, hostility towards homosexuals may be a consequence of traditional sex role beliefs.[413] Historically, the stigmatization of homosexuals was a product of the evolving concept of gender identity during the

403. Dodson, *supra* note 263, at 306.

404. *Id.* at 308.

405. *See id.*

406. *See* Koppelman, *supra* note 372, at 219.

407. *See id.* at 221. For a discussion of miscegenation and same sex marriage, see John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1164-80 (1999).

408. *See* Koppelman, *supra* note 372, at 222.

409. *Id.* at 221.

410. *See id.*

411. *See id.* at 234.

412. *See id.* at 235-36. This section of the analysis is more applicable to male than to female homosexuals. *See id.*

413. *See id.* at 237.

movement toward gender equality. Koppelman interprets the fortification of male over female dominance to be "both a cause and an effect of the homosexuality taboo's survival."[414] The disapproval regarding homosexuality reinforces the inequality between males and females. Just as intermarriage prohibitions serve to uphold notions of white supremacy, discrimination against homosexuals attempts to maintain notions of male dominance. In the same manner that courts have held unconstitutional provisions which deny interracial couples rights that same race couples are provided, courts should hold classifications forcing homosexuals to suffer legal disadvantages violative of equal protection as well.[415] Until the taboo surrounding homosexuality is eliminated, our society's devaluation of women through a system of male dominance will continue to thrive.[416]

The dissent in *Philips v. Perry*[417] exemplifies the recognition of discrimination based on sexual orientation as a form of gender discrimination. *Philips* involved a Navy service member who was discharged from the military following his disclosure that he is homosexual.[418] After his discharge, Philips challenged the "Don't Ask, Don't Tell" policy,[419] requiring gay and lesbian service members not to divulge their sexual orientation, on grounds that it violated his right to equal protection.[420] The Court of Appeals for the Ninth Circuit upheld Philips' discharge.[421] However, the dissent noted the realization "that Philips would not have been discharged had his sexual partners been women rather than men."[422] Notwithstanding the dissent's proposed use of rational basis review, his statement is a per se recognition that the law discriminated against Philips because he has intimate relations with men, not women.

This further supports the notion that classification on the basis of sexual orientation should be given the heightened level of scrutiny afforded to gender classifications. Although this argument has not been addressed by the federal courts and is infrequently even suggested to the

414. *Id.* at 249.

415. *See id.* at 284.

416. *See id.* at 285.

417. 106 F.3d 1420 (9th Cir. 1997).

418. *See id.* at 1421-22.

419. The "Don't Ask, Don't Tell" policy, observed by the United States military, is codified in 10 U.S.C.A. § 654(b) (West 1998). *See Philips*, 106 F.3d at 1421 n.1. Under this provision, homosexuals remain subject to exclusion from the armed services if they engage in or solicit homosexual acts. *See id.* at 1422 n.5. The military will not search for evidence of homosexual acts or orientation when it is not openly disclosed. *See id.* at 1421.

420. *See id.* at 1424 n.10.

421. *See id.* at 1421.

422. *Id.* at 1433 (Fletcher, J., dissenting).

courts,[423] it is one deserving consideration. Courts are reluctant to afford homosexuals suspect class status and to define discrimination against gays and lesbians as a violation of a fundamental right.[424] Defining discrimination on the basis of sexual orientation as a gender based classification affords classifications based on homosexuality a higher level of scrutiny than is typically applied, without forcing courts to resolve the issue of suspect class status or fundamental rights. It seems virtually unlikely that a state will be able to establish the achievement of any important government interest sufficient to withstand the intermediate scrutiny analysis by excluding gays and lesbians from state domestic violence statutes. Furthermore, as with statutes excluding on the basis of gender, the domestic violence statutes excluding homosexuals will be found unconstitutional under intermediate review.

V. CONCLUSION

Gay and lesbian domestic violence is not a new problem, only a newly recognized one. Homosexuals are fighting the same uphill battle today that battered women struggled with for centuries. Once the Battered Women's Movement forced society to recognize the problem as a public, rather than a private one, legislators and other advocates responded by creating services and statutes to protect the victims and reduce the abuse. Now that same sex domestic violence is creeping into the public sphere, it is necessary to give homosexuals the same availability of protective services and statutes as their heterosexual counterparts have. Domestic violence statutes, specifically, must protect same sex victims to the same degree heterosexual victims are protected. To do otherwise would be to violate the Equal Protection Clause of the Constitution.[425] Society, and legislators especially, should consider vio-

423. *See* Dodson, *supra* note 263, at 307.

424. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996).

425. The Supreme Court of Vermont has taken a step in the right direction. In *Baker v. State*, 747 A.2d 864 (Vt. 1999), the court acknowledged that same sex couples are entitled to the same benefits and protections that married, opposite sex couples receive. *See id.* at 867. To deny same sex couples these common benefits and protections would violate the Common Benefits Clause of the Vermont Constitution. *See id.* The subsequent legislation in response to the *Baker* decision grants same sex couples the same benefits and protections that Vermont law affords to married, opposite sex couples, including protection under spousal abuse statutes. *See Acts of the 1999-2000 Vermont Legislature, No. 91 An Act Relating to Civil Unions* (approved Apr. 26, 2000) <http://www.leg.state.vt.us/docs/2000/acts/ACT091.HTM>. Based on this decision and the legislative response, we can anticipate that other states will follow Vermont's lead and hopefully recognize homosexuals as deserving the common benefits and protections granted to heterosexuals under the law, and specifically under the state domestic violence statutes.

lence in homosexual relationships to be just as repugnant as violence occurring between a male and a female. In reviewing domestic violence statutes excluding homosexuals under an equal protection challenge, courts should find that under any level of scrutiny the statutes are unconstitutional. Nevertheless, courts should at least afford homosexuals quasi-suspect status or acknowledge that discrimination on the basis of sexual orientation is gender discrimination. Domestic violence statutes should comport with the equal protection guarantee and protect all victims of domestic abuse, regardless of sexuality.

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