

# SAME-SEX DOMESTIC VIOLENCE: THE NEED FOR AFFIRMATIVE LEGAL PROTECTIONS AT ALL LEVELS OF GOVERNMENT

CHRISTINA SAMONS\*

## I. INTRODUCTION

Although U.S. legislatures and courts have taken steps to mitigate domestic violence within the lesbian, gay, bisexual, transgender (LGBT) community, the general population and those in law enforcement positions must be educated about the unique characteristics associated with LGBT domestic violence. Further, steps should be taken to ensure that current gender-based domestic violence laws are enforced consistently and fairly. Statistics on the incidence of domestic violence are staggering: in 2007, almost one-third of female homicide victims were killed by an intimate partner; an estimated 1.3 million women are physically assaulted by an intimate partner each year; and 25% of women will experience domestic violence over the course of their life.<sup>1</sup> The effects of domestic violence are long lasting—victims are at a high risk for physical and mental health problems and other issues, such as poverty.<sup>2</sup>

The anti-rape movement in the 1970s prompted the creation of various laws to deter domestic violence and protect victims from being re-

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\* J.D. Class of 2013, University of Southern California Gould School of Law; B.A. Rhetoric 2009, University of California, Berkeley. Special thank you to Professor Thomas D. Griffith, the LACBA Barristers' Domestic Violence Clinic, and the Los Angeles Gay & Lesbian Center.

<sup>1</sup> NAT'L COAL. AGAINST DOMESTIC VIOLENCE, *Domestic Violence Facts* (July 2007), available at [www.ncadv.org/files/DomesticViolenceFactSheet\(National\).pdf](http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf).

<sup>2</sup> *Long-Term Effects of Domestic Violence*, THE CLARK CNTY. PROSECUTING ATTORNEY, <http://www.clarkprosecutor.org/html/domviol/effects.htm> (last visited July 30, 2013).

victimized in court.<sup>3</sup> It was during this time that female survivors also gained better access to the justice system.<sup>4</sup> Since the 1980s, society has become more attentive and responsive to domestic violence issues.<sup>5</sup> As a result of this increased awareness, citizens began to criticize the way domestic violence incidents were handled by the police.<sup>6</sup> For example, studies in the 1980s “indicated that it was common police policy to delay response [to domestic violence calls] in the hopes [that] the problem would resolve itself or the [aggressor] would leave before police arrive.”<sup>7</sup> Further, police dispatchers frequently screened out domestic violence calls “in favor of more crime-fighting work.”<sup>8</sup> Public outcry against the prevalence of and apathetic attitudes toward violence against women led to sweeping reform to criminal and family laws at both the state and federal level.<sup>9</sup>

While this shift is laudable, there has not been a similar recognition of domestic violence within same-sex relationships.<sup>10</sup> Due to the character of and common misperceptions surrounding same-sex relationships, LGBT domestic violence victims face even more challenges than heterosexual domestic violence victims.<sup>11</sup>

Over the last ten years, LGBT domestic violence victims “have gone from being virtually invisible and silenced . . . to being featured [] in national media outlets, and at the center of national political debates about domestic violence services for survivors.”<sup>12</sup> In 2011, the National

<sup>3</sup> *Brief History of the Movement to Address Domestic Violence*, COLO. BAR ASS'N, <http://www.cobar.org/index.cfm/ID/0/subID/161/Brief-History-of-the-Movement-to-Address-Domestic-Violence/> (last visited July 30, 2013) [hereinafter *Brief History*].

<sup>4</sup> *Id.*

<sup>5</sup> Meg Townsend et al., LAW ENFORCEMENT RESPONSE TO EMERGENCY DOMESTIC VIOLENCE CALLS FOR SERVICE 7 (Feb. 1, 2005), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/215915.pdf>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 8.

<sup>8</sup> *Id.*

<sup>9</sup> See *Brief History*, *supra* note 3 (explaining how the feminist movement created support for domestic violence victims and pushed for legal and social change).

<sup>10</sup> See Michael J. Brown & Jennifer Groscup, *Perceptions of Same-Sex Domestic Violence Among Crisis Center Staff*, 24 J. FAM. VIOLENCE 87, 87–89 (2009); *Domestic Violence in Gay and Lesbian Relationships*, AN ABUSE, RAPE, AND DOMESTIC VIOLENCE AID AND RES. COLLECTION (Mar. 3, 2011), <http://www.aardvarc.org/dv/gay.shtml> [hereinafter AARDVARC].

<sup>11</sup> AARDVARC, *supra* note 10 (explaining that the system as a whole is oppressive and hostile toward the LGBT population and how those in the helping position may have inadequate levels of experience and training in working with LGBT victims).

<sup>12</sup> NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, *Lesbian, Gay, Bisexual, Transgender*,

Coalition of Anti-Violence Programs received 3930 reports of intimate partner violence between same-sex couples.<sup>13</sup> Nevertheless, according to a 2009 survey, crisis center staff considered homosexual domestic violence less serious than heterosexual domestic violence.<sup>14</sup>

This Note compares domestic violence statutes at the federal and state level and analyzes how these statutes have increased or decreased protection for victims of same-sex domestic violence. Part II describes the barriers to reporting same-sex domestic violence incidents. Part III discusses how the federal government has interpreted the Violence Against Women Act, the Defense of Marriage Act, and the Fourteenth Amendment broadly to rationalize its homophobia. Part IV compares responses to same-sex domestic violence issues in Hawaii, Montana, and New York, and argues that state domestic violence statutes need to be more specific. Finally, Part V argues that strengthening protections for domestic violence within the existing legal structure would better serve the LGBT community. The goal of this Note is to ensure that domestic violence against the LGBT community gains the same amount of public support as the women's movement did when the Violence Against Women Act was first enacted.

## II. BARRIERS FACED BY VICTIMS OF SAME-SEX DOMESTIC VIOLENCE

Domestic violence is “a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner.”<sup>15</sup> It encompasses physical and psychological harm, such as withholding money and preventing a partner from contacting family and friends without permission.<sup>16</sup> Domestic violence is also cyclical in nature.<sup>17</sup> In the first phase, “the tension building stage,” the abuser commits minor batteries like verbal and

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*Queer and HIV-Affected Intimate Partner Violence 2011* 5 (2011), available at [http://www.avp.org/storage/documents/Reports/2012\\_NCAVP\\_2011\\_IPV\\_Report.pdf](http://www.avp.org/storage/documents/Reports/2012_NCAVP_2011_IPV_Report.pdf) [hereinafter NCAVP Report].

<sup>13</sup> *Id.* at 7.

<sup>14</sup> Brown & Groscup, *supra* note 10, at 87.

<sup>15</sup> *Domestic Violence*, U.S. DEP'T OF JUSTICE: OFFICE ON VIOLENCE AGAINST WOMEN (Mar. 2013), <http://www.ovw.usdoj.gov/domviolence.htm>.

<sup>16</sup> Linda M. Peterman & Charlotte G. Dixon, *Domestic Violence Between Same-Sex Partners: Implications for Counseling*, 81 J. COUNSELING & DEV. 40, 41–42 (2003).

<sup>17</sup> *Id.* at 42.

emotional abuse.<sup>18</sup> In the second phase, the abuser commits an “acute battering incident,” which “can result in serious physical and psychological harm.”<sup>19</sup> In the third phase, the “honeymoon phase,” abusers typically “beg for forgiveness, profess their love, and promise to never abuse their partner again.”<sup>20</sup>

Women are disproportionately the victims of domestic violence in heterosexual relationships.<sup>21</sup> More often than not, female domestic violence victims do not report the abuse because they believe it is a private matter or for fear that the violence would intensify.<sup>22</sup> Like heterosexual domestic violence, same-sex domestic violence might also stem from unequal power between two parties.<sup>23</sup> Same-sex domestic violence victims, however, face greater community and institutional barriers to reporting the abuse.<sup>24</sup> Communal barriers include societal pressures against reporting domestic violence.<sup>25</sup> On the other hand, institutional barriers include the lack of domestic violence shelters that serve same-sex domestic victims, and law enforcement’s often inadequate response to reports that are made.<sup>26</sup>

#### A. COMMUNAL BARRIERS

As society becomes more accepting of the LGBT community, more people feel safe coming out, and the community expands in numbers. Specific LGBT communities, however, usually consist of small, tight-knit groups where victims and abusers often have the same acquaintances; thus, it is difficult for victims to discuss domestic violence issues with friends, who could tell the abuser.<sup>27</sup> It may also be difficult for same-sex

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Domestic Violence Statistics*, DOMESTIC VIOLENCE RES. CTR., <http://dvrc-or.org/domestic/violence/resources/C61/> (last visited Jan. 23, 2013) (“Women accounted for 85% of the victims of intimate partner violence, men for approximately 15%.”).

<sup>22</sup> *Id.* (“On average, only 70% of nonfatal partner violence is reported to law enforcement.”).

<sup>23</sup> Peterman & Dixon, *supra* note 16, at 43.

<sup>24</sup> Kim Fountain & Avy A. Skolnik, *Lesbian, Gay, Bisexual and Transgender Domestic Violence in the United States in 2006* 7–8, (2007), available at [http://www.ncavp.org/common/document\\_files/Reports/2006NationalDVReport\(Final\).pdf](http://www.ncavp.org/common/document_files/Reports/2006NationalDVReport(Final).pdf).

<sup>25</sup> *See id.*

<sup>26</sup> *See id.*

<sup>27</sup> Peterman & Dixon, *supra* note 16, at 43.

victims to seek shelter with their families, who may not know that they are gay or support the same-sex relationship.<sup>28</sup>

One way that same-sex abusers control their partners is through the use of psychological threats, such as threatening to “out” their partners if they do not comply with certain requests.<sup>29</sup> These types of threats carry an immense amount of weight within the LGBT community, especially in cases where victims have not revealed to their families, employers, or loved ones that they are gay.<sup>30</sup> These threats also undermine these victims’ autonomy to choose when and how to disclose their sexual orientation.<sup>31</sup> Similarly, abusers may threaten to reveal their partner’s HIV/AIDS status, which carries a devastating social stigma regardless of the individual’s sexual orientation.<sup>32</sup>

Moreover, cities across the country lack social resources, including crisis counseling and shelters for same-sex domestic violence victims.<sup>33</sup> Although Los Angeles, New York, San Francisco, and other major cities with large LGBT populations have multiple centers and resources for victims to receive legal and personal advice on these issues, these cities are not representative of the United States as a whole.<sup>34</sup> Rather, smaller, rural cities may be viewed as reluctant to provide resources to LGBT domestic violence victims because of the unfortunate misconception that there is little to no demand for those services, or because they believe that their resources would be better spent on other services.<sup>35</sup>

Third, LGBT same-sex domestic violence victims often believe that they must hide their sexual orientation and the gender of their abuser to receive domestic violence services.<sup>36</sup> Further, LGBT individuals may need to locate specialized domestic violence shelters that are sensitive to their needs.<sup>37</sup> Likewise, because domestic violence shelters are typically

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<sup>28</sup> *Id.* at 44.

<sup>29</sup> *Issues: Domestic Violence*, NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS, <http://www.ncavp.org/issues/DomesticViolence.aspx> (last visited Jan. 23, 2013).

<sup>30</sup> See Peterman & Dixon, *supra* note 16, at 44.

<sup>31</sup> See *id.*

<sup>32</sup> *Issues: Domestic Violence*, *supra* note 29.

<sup>33</sup> See Peterman & Dixon, *supra* note 16, at 40–41.

<sup>34</sup> See Suzy Khimm, *Why the Violence Against Women Act is an LGBT Issue*, THE WASHINGTON POST: WONKBLOG (Apr. 30, 2012, 12:50 PM), [http://www.washingtonpost.com/blogs/wonkblog/post/why-the-violence-against-women-act-is-a-lgbt-issue/2012/04/30/gIQAe34qrT\\_blog.html](http://www.washingtonpost.com/blogs/wonkblog/post/why-the-violence-against-women-act-is-a-lgbt-issue/2012/04/30/gIQAe34qrT_blog.html).

<sup>35</sup> *Id.*

<sup>36</sup> AARDVARC, *supra* note 10.

<sup>37</sup> *Issues: Domestic Violence*, *supra* note 29.

female-only, transgender individuals may be denied entry based on their legal status or genitalia.<sup>38</sup> Also, very few domestic violence shelters serve male victims, making it difficult for gay men to receive support.<sup>39</sup> Adding to the communal barriers to services is the fact that the percentage of victims turned away from shelters increased from 44.6% in 2010 to 61.6% in 2011.<sup>40</sup> The absence of available shelters coupled with the tight-knit nature of LGBT communities causes victims to feel that they have nowhere to turn, which then forces them back to their abusers.<sup>41</sup>

### B. INSTITUTIONAL BARRIERS

A common institutional barrier as to why same-sex couples are often unwilling to report incidents of domestic violence to law enforcement officials is fear that reporting the incident will reinforce negative LGBT stereotypes.<sup>42</sup> LGBT persons deny that there are problems in their community so that outsiders cannot use domestic violence issues against them.<sup>43</sup> Since victims of same-sex domestic violence are often more reluctant to report these incidents to the police, they must search other outlets for help. A 1992 study showed that lesbian victims of domestic violence reported that they first sought help from friends, counselors, relatives, police, religious advisors, hotlines, and shelters.<sup>44</sup> Only one third of lesbian participants sought help from family members.<sup>45</sup> Ultimately, the lack of available outlets for victims of same-sex domestic violence motivates victims to stay in their abusive relationships.<sup>46</sup>

Additionally, same-sex domestic violence victims may face opposition by law enforcement when they come forward to report incidents.<sup>47</sup> Specifically, they encounter institutionalized stereotypes about

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<sup>38</sup> NAT'L COAL. AGAINST DOMESTIC VIOLENCE, *Domestic Violence and Lesbian, Gay, Bisexual, and Transgender Relationships*, available at [http://www.uncfsp.org/projects/userfiles/File/DCESTOP\\_NOW/NCADV\\_LGBT\\_Fact\\_Sheet.pdf](http://www.uncfsp.org/projects/userfiles/File/DCESTOP_NOW/NCADV_LGBT_Fact_Sheet.pdf) (last visited Jan. 23, 2013).

<sup>39</sup> Peterman & Dixon, *supra* note 16, at 44.

<sup>40</sup> NCAVP REPORT, *supra* note 12, at 38.

<sup>41</sup> *See id.*

<sup>42</sup> Peterman & Dixon, *supra* note 16, at 44.

<sup>43</sup> *See id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *See id.*

<sup>47</sup> Maria Cramer, *Same-Sex Domestic Abuse Targeted: Spate of Deaths Spurs Bid to Raise Awareness*, BOSTON GLOBE, Sept. 5, 2011, [http://articles.boston.com/2011-09-05/news/30116250\\_1\\_domestic-violence-batterer-domestic-abuse](http://articles.boston.com/2011-09-05/news/30116250_1_domestic-violence-batterer-domestic-abuse).

the nature of their relationships.<sup>48</sup> For example, many believe that the abuse is always mutual in same-sex relationships because both partners can exert equal levels of power.<sup>49</sup> Another reason for this misconception is that “lesbians might fight back more because self-defense courses are more widespread in the feminist/lesbian community.”<sup>50</sup> Regardless of their origin, overcoming these institutionalized stereotypes is an uphill battle for some police departments.<sup>51</sup> For instance, officers from a police department in Massachusetts walked out of a workshop on helping gay victims of domestic violence because they did not think that they needed any classes beyond the department’s standard “diversity training.”<sup>52</sup>

When law enforcement training excludes information about how same-sex domestic violence differs from heterosexual domestic violence, police officers responding to domestic violence calls are likely to be unable to identify the aggressor.<sup>53</sup> Further, when police officers cannot identify the batterer, they often just arrest both parties.<sup>54</sup> “Mandatory-arrest” policies for domestic violence also play an important role in predicting the likelihood of arrest.<sup>55</sup> There seems to be no significant difference between police responses to heterosexual domestic violence calls and same-sex domestic violence calls when same-sex domestic violence calls are aggregated<sup>56</sup>—however, arrests are far more common in disputes between female same-sex couples than male same-sex couples.<sup>57</sup> Problems with misidentification of the victim and the aggressor are exacerbated by stereotypes, such as assuming the larger partner is the aggressor.<sup>58</sup> Lesbian couples may face additional discrimination if law enforcement officials downplay the abuse simply because it involves two women and not a man and a woman.<sup>59</sup>

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<sup>48</sup> See *id.*

<sup>49</sup> Peterman & Dixon, *supra* note 16, at 44.

<sup>50</sup> *Id.*

<sup>51</sup> Cramer, *supra* note 47.

<sup>52</sup> *Id.*

<sup>53</sup> April Pattavina et al., *A Comparison of the Police Responses to Heterosexual Versus Same-Sex Intimate Partner Violence*, 13 VIOLENCE AGAINST WOMEN 374, 388–90 (2007).

<sup>54</sup> Peterman & Dixon, *supra* note 16, at 46.

<sup>55</sup> Pattavina et al., *supra* note 53, at 388–90.

<sup>56</sup> *Id.* at 390.

<sup>57</sup> *Id.* at 390.

<sup>58</sup> Peterman & Dixon, *supra* note 16, at 46.

<sup>59</sup> *Id.*

### III. FEDERAL PROTECTIONS FOR VICTIMS OF SAME-SEX DOMESTIC VIOLENCE

Although the Violence Against Women Act (VAWA) was originally passed to protect women from domestic violence,<sup>60</sup> the federal government has expanded its scope to include protections for LGBT victims of domestic violence.

VAWA was signed into law in 1994 by President William Jefferson Clinton to “improve [the] criminal justice system’s response to violence against women and to increase services available to victims,” by creating new domestic violence crimes in federal jurisdiction and directing states to enforce protection orders issued by other jurisdictions.<sup>61</sup> Since its enactment, VAWA has successfully protected illegal aliens that apply for special visas if they assist law enforcement in reporting domestic violence against them.<sup>62</sup> It also authorized annual federal funding for programs that support services and improve law enforcement responses to domestic violence victims.<sup>63</sup> Congress’s enactment of VAWA in 1994 paved the way for local communities to learn more about specific issues affecting women.<sup>64</sup> It increased awareness about the prevalence of domestic violence within a number of marginalized communities and sought to address the lack of services for these communities.<sup>65</sup>

VAWA was heralded at its onset for combating gender-based violence against women.<sup>66</sup> Since VAWA, reports of domestic violence have increased by up to 51%,<sup>67</sup> with national hotlines receiving over 21,000 calls per month in over 170 languages.<sup>68</sup> Placing VAWA on the

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<sup>60</sup> Proclamation, President Barack Obama of the United States of America, Fifteenth Anniversary of the Violence Against Women Act (Sept. 14, 2009), *available at* [http://www.whitehouse.gov/assets/documents/2009vama\\_prcl.pdf](http://www.whitehouse.gov/assets/documents/2009vama_prcl.pdf).

<sup>61</sup> *Id.*

<sup>62</sup> Amanda Terkel, *Violence Against Women Act Becomes Partisan Issue*, HUFFINGTON POST (Feb. 14, 2012, 4:16 PM), [http://www.huffingtonpost.com/2012/02/14/violence-against-women-act\\_n\\_1273097.html](http://www.huffingtonpost.com/2012/02/14/violence-against-women-act_n_1273097.html).

<sup>63</sup> Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down but Not Ruled Out*, 39 FAM. L.Q. 157, 158 (2005).

<sup>64</sup> See Sarah F. Russell, *Covering Women and Violence: Media Treatment of VAWA’s Civil Rights Remedy*, 9 MICH. J. GENDER & L. 327, 328 (2003).

<sup>65</sup> See *id.* at 410–13.

<sup>66</sup> Terkel, *supra* note 62.

<sup>67</sup> *Id.*

<sup>68</sup> *Violence Against Women (VAWA): 10 Years of Progress and Moving Forward*, NAT’L DOMESTIC VIOLENCE HOTLINE, <http://www.thehotline.org/get-educated/violence-against-women-act-vawa> (last visited Aug. 3, 2013).



books at the federal level encouraged comparable legislation at the state level: states have passed over 660 laws to fight “domestic violence, dating violence, sexual assault[,] and stalking.”<sup>69</sup>

Since 1994, VAWA’s success in championing the rights of women has led to a second phase: supporting the rights of LGBT domestic violence victims.<sup>70</sup> VAWA was reauthorized three times, most recently in February 2013.<sup>71</sup> The 2013 reauthorization takes a major step toward strengthening protections for both opposite-sex and same-sex couples by explicitly including lesbians, transgender people, illegal immigrants, and Native American women under the provisions of the Act.<sup>72</sup>

Although the language of VAWA was not always inclusive of lesbian couples, it has been used to raise awareness and encourage lesbian victims to report domestic violence incidents.<sup>73</sup> The original text of the Act, as signed into law in 1994, mandates punishment for “Interstate domestic violence” for any:

[P]erson who travels across a State line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person’s spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner [or who] causes a spouse or intimate partner to cross a State line or to enter or leave Indian country by force, coercion, duress, or fraud and, in the course or as a result of that conduct, intentionally commits a crime of violence and thereby causes bodily injury to the person’s spouse or intimate partner.<sup>74</sup>

While on its face, this provision did not seem to exclude a lesbian victim of domestic violence from being included under the term “intimate partner,” the Act could exclude such same-sex relationships through a narrow definition of “intimate partner.” “Spouse or intimate partner” is defined as:

(A) a spouse, a former spouse, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited with the abuser as a spouse; and

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<sup>69</sup> *Id.*

<sup>70</sup> Khimm, *supra* note 34.

<sup>71</sup> Terkel, *supra* note 62.

<sup>72</sup> Ashley Parker, *House Renews Violence Against Women Measure*, N.Y. TIMES (Feb. 28, 2013), [http://www.nytimes.com/2013/03/01/us/politics/congress-passes-reauthorization-of-violence-against-women-act.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/03/01/us/politics/congress-passes-reauthorization-of-violence-against-women-act.html?pagewanted=all&_r=0).

<sup>73</sup> *See id.*

<sup>74</sup> 18 U.S.C. § 2261(a)(1)–(2) (1994).

(B) any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State in which the injury occurred or where the victim resides.<sup>75</sup>

By defining “intimate partner” in this way, the federal government avoided potentially overstepping its bounds by proscribing a conception of relationships to which certain states may not agree.<sup>76</sup> This definition effectively left same-sex couples in states that do not recognize such relationships or allow same-sex couples to achieve equivalent status unprotected,<sup>77</sup> even though the violent incidents may be exactly the same.<sup>78</sup> The definitions contained in VAWA are also interpreted with reference to the 1996 Defense of Marriage Act (DOMA).<sup>79</sup> According to DOMA, the term “spouse refers only to a person of the opposite sex who is a husband or wife.”<sup>80</sup> DOMA also mandates that this definition of “spouse” be used to interpret “any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States.”<sup>81</sup> In light of this definition, VAWA’s protections for same-sex victims of domestic violence were severely limited.

The 1994 version of VAWA also included a provision, commonly referred to as the Gender-Motivated Violence Act (GMVA), which aimed to “protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate

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<sup>75</sup> *Id.* § 2266.

<sup>76</sup> Similar efforts can be inferred from other provisions of VAWA. See William G. Bassler, *The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources?*, 48 RUTGERS L. REV. 1139, 1147–48 (1996) (“The Act . . . specifically excludes federal jurisdiction ‘over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree,’ and thus does not abolish the domestic relations exception to diversity jurisdiction.” (quoting 42 U.S.C. § 13981(e)(4) (1995))).

<sup>77</sup> The earlier draft of VAWA with its limited definition of “spouse or intimate partner” frustrated the contemporary goal of stopping domestic violence by limiting protection orders to cohabitating married individuals. Nancy D. Polikoff, *Ending Marriage As We Know It*, 32 HOFSTRA L. REV. 201, 214–15 (2003).

<sup>78</sup> AARDVARC, *supra* note 10; Elizabeth M. Schneider, *Domestic Violence Law Reform in the Twenty-First Century: Looking Back and Looking Forward*, 42 FAM. L.Q. 353, 357 (2008) (“[A]buse does not just occur in heterosexual relationships, but in same-sex relationships as well.”).

<sup>79</sup> 1 U.S.C. § 7 (2006), declared unconstitutional by *U.S. v. Windsor*, 133 S. Ct. 2675 (2013); 28 U.S.C. § 1738C.

<sup>80</sup> 1 U.S.C. § 7.

<sup>81</sup> *Id.*

commerce.”<sup>82</sup> The GMVA provided a federal civil rights claim for “crime[s] of violence motivated by gender.”<sup>83</sup> Although this civil rights remedy under VAWA was struck down in *United States v. Morrison*,<sup>84</sup> cases that were decided while the provision was in effect helped to interpret VAWA’s scope.

In *Schwenk v. Hartford*,<sup>85</sup> decided three months before *Morrison*, the Ninth Circuit held that the GMVA protected men, women, and transsexuals.<sup>86</sup> Plaintiff Schwenk was a male-to-female transsexual who identified as female since adolescence.<sup>87</sup> In June 1993, Schwenk was incarcerated in an all-male prison where she was sexually harassed by a prison guard after she refused his sexual advances.<sup>88</sup> In response to Schwenk’s GMVA claim, the prison guard argued that Schwenk did not fall within the protection of the Act because *she* was a man and “that transsexuals are not covered by the Act in general.”<sup>89</sup> The court rejected both arguments.<sup>90</sup> It did not matter that the GMVA was part of VAWA.<sup>91</sup> Further, the animus requirement was satisfied if the crime resulted from “a strong emotional response to the victim’s gender or sexual identity.”<sup>92</sup>

When VAWA was reauthorized in 2005, Congress amended the language of section 2261(a) in favor of same-sex relationships by extending protections to “dating partners,” in addition to spouses and intimate partners.<sup>93</sup> A “dating partner” is “a person who is or has been in a social relationship of a romantic or intimate nature with the abuser.”<sup>94</sup> The existence of a dating relationship is depends on “the length of the relationship[,] . . . the type of relationship[,] and the frequency of

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<sup>82</sup> 42 U.S.C. § 13981(a) (2006), *declared unconstitutional by U.S. v. Morrison*, 529 U.S. 598 (2000).

<sup>83</sup> *Id.* § 13981(c).

<sup>84</sup> *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress did not have the authority to enact the GMVA provision under the Commerce Clause or the Fourteenth Amendment).

<sup>85</sup> *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

<sup>86</sup> *Id.* at 1199–1202.

<sup>87</sup> *Id.* at 1193.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1199.

<sup>90</sup> *Id.* at 1202.

<sup>91</sup> *Id.* at 1202–03.

<sup>92</sup> *Id.* at 1202 (emphasis added).

<sup>93</sup> 18 U.S.C. § 2261(a) (2006).

<sup>94</sup> *Id.* § 2266(10) (West 2006).

interaction between the persons involved in the relationship.”<sup>95</sup> Nothing in the legislative history, however, indicates that the purpose of these changes was to extend VAWA’s protections to same-sex couples.<sup>96</sup>

Despite the more inclusive 2005 language, some circuit courts continued to deny a cause of action to victims of same-sex domestic violence under VAWA.<sup>97</sup> In *Price-Cornelison v. Brooks*, the Tenth Circuit upheld an Oklahoma undersheriff’s liability for violating the equal protection rights of a domestic violence victim when he refused to enforce an emergency protective order against the plaintiff’s lesbian abuser.<sup>98</sup> Plaintiff Price-Cornelison and Vickie Rogers were in a same-sex relationship for about seven years, and the couple lived together on a farm owned by Price-Cornelison.<sup>99</sup> In late 2003, the couple’s relationship “deteriorated,” and Price-Cornelison obtained an emergency protective order and a move-out order against Rogers after she had threatened to shoot Price-Cornelison and herself.<sup>100</sup> That same day, Rogers attempted to remove Price-Cornelison’s property from the farm and Price-Cornelison called the sheriff’s office to enforce the orders.<sup>101</sup> Undersheriff Brooks refused to write a report about the incident or stop Rogers from removing the property; instead, he told Price-Cornelison that she would be arrested if she tried to prevent Rogers from taking property from the farm.<sup>102</sup> Two weeks later, Price-Cornelison received a permanent protective order against Rogers.<sup>103</sup> Although Rogers violated the order, when Price-Cornelison called the sheriff’s office, the deputy said “that ‘they’ were ‘busy’ and were not going to send anyone out to [the] farm”; in fact, no one from the sheriff’s office came to the farm that day.<sup>104</sup> The lower court found that Price-Cornelison asserted sufficient evidence indicating that “the County ha[d] a policy of providing less protection to lesbian victims of domestic violence than to heterosexual domestic violence victims.”<sup>105</sup>

Though the court ultimately ruled for Price-Cornelison, this case

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<sup>95</sup> *Id.* § 2266(10)(A)–(C) (2006).

<sup>96</sup> *See* H.R. REP. NO. 109-233 (2005).

<sup>97</sup> *See Price-Cornelison v. Brooks*, 524 F.3d 1103 (10th Cir. 2008).

<sup>98</sup> *Id.* at 1105.

<sup>99</sup> *Id.* at 1106.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1107.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 1110.

should not be viewed as championing same-sex rights because the court qualified its decision in two important ways.<sup>106</sup> First, the opinion relied on Tenth Circuit precedent to find that “there is no general constitutional right to police protection” to hold that Price-Cornelison’s claim did not involve a fundamental right.<sup>107</sup> Second, the court implied that lesbians were not a protected class so the claim did not warrant heightened scrutiny.<sup>108</sup> Therefore, the court continued to allow the government to “distinguish between its citizens on the basis of sexual orientation” for a goal that is rationally related “to some legitimate end.”<sup>109</sup> The court’s reasoning, while in line with both Supreme Court and Tenth Circuit precedent, seemed reluctant to find for Price-Cornelison, and only did so because Brooks did not assert any reason for providing less protection to lesbian victims of domestic violence.<sup>110</sup> If Brooks had asserted any justification, the court may have declined Price-Cornelison’s equal protection claim.<sup>111</sup>

After President Barack Obama and his administration took office, the U.S. Attorney General’s Office released an official opinion interpreting VAWA in a broad and inclusive manner.<sup>112</sup> The April 27, 2010 opinion stated that “[t]he criminal provisions of [VAWA] apply to otherwise covered conduct when the offender and victim are the same sex.”<sup>113</sup> Not only did this opinion recognize the need for consistent federal protection for same-sex domestic violence victims<sup>114</sup>—it set the stage for the 2012 reauthorization debate.

After months of stalemate in the House of Representatives, VAWA was reauthorized on February 28, 2013 with necessary protections for victims of same-sex domestic violence and other vulnerable

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<sup>106</sup> *Id.* at 1113–14.

<sup>107</sup> *Id.* at 1113 (citing *Watson v. City of Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988)).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 1113–14 (citing *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1213 (10th Cir. 2002)).

<sup>110</sup> *Id.* at 1114 (“[W]e cannot discern on this record, a rational reason to provide less protection to lesbian victims of domestic violence than to heterosexual domestic violence victims.”).

<sup>111</sup> *Id.*

<sup>112</sup> David J. Barron, *Memorandum Opinion for the Acting Deputy Attorney General: Whether the Criminal Provisions of the Violence Against Women Act Apply to Otherwise Covered Conduct When the Offender and Victim are the Same Sex*, U.S. DEP’T OF JUSTICE (Apr. 27, 2010), available at <http://www.justice.gov/olc/2010/vawa-opinion-04272010.pdf>.

<sup>113</sup> *Id.* at 1.

<sup>114</sup> *See id.* at 6.

populations.<sup>115</sup> The reauthorization bill authorizes grants to “carry out local, regional, or national public information campaigns focused on addressing adult, youth, or minor domestic violence, dating violence, sexual assault, stalking, or trafficking within tribal and underserved populations and immigrant communities . . . .”<sup>116</sup> “‘Underserved populations’ includes populations underserved because of geographic location, underserved racial and ethnic populations, populations underserved because of special needs (such as language barriers, disabilities, alienage status, or age), and any other population determined to be underserved by the Attorney General or . . . Secretary of Health and Human Services . . . .”<sup>117</sup> Thus, the definition is expansive; it includes homosexual, transgender, and trans-sex individuals. The definition’s broadness finally recognizes and acknowledges the need for specific, legislatively mandated protections for same-sex domestic violence victims. Providing such specific examples of underserved groups ensures that same-sex victims will obtain consistent protection across all fifty states because it removes ambiguity, so judicial misinterpretations do not dilute its protections.

#### IV. STATE PROTECTIONS FOR VICTIMS OF SAME-SEX DOMESTIC VIOLENCE

Despite recent advancements in same-sex domestic violence protections at the federal level, crime will not significantly decrease unless states follow suit, because the majority of domestic violence criminal cases are adjudicated solely based on state law.<sup>118</sup> States typically provide protections against domestic violence in family and criminal law statutes.<sup>119</sup>

In general, domestic violence provisions that fall within state family law statutes describe requirements and procedures for obtaining a preventative domestic violence protection order. A protective order protects petitioners against certain respondents, specific acts, or other

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<sup>115</sup> Parker, *supra* note 72.

<sup>116</sup> 42 U.S.C. § 14045 (2013).

<sup>117</sup> *Id.* § 13925(33).

<sup>118</sup> See Goldscheid, *supra* note 63, at 165 (quoting *United States v. Morrison*, 529 U.S. 598, 618 (2000)).

<sup>119</sup> See Samuel V. Schoonmaker, IV, *Criminal Law or Family Law: The Overlapping Issues*, 44 FAM. L.Q. 155, 163 (2010).

behavior.<sup>120</sup> California does not require that any criminal charges be filed against the respondent before a protective order can be issued.<sup>121</sup> The court may grant a protective order solely based on the petitioner's affidavit as long as it demonstrates "reasonable proof of a past act or acts of abuse."<sup>122</sup> Domestic violence protective orders mandate that respondents stay away from petitioners and respondents who do not comply risk arrest.<sup>123</sup> Further, domestic violence protective orders often include additional protections, such as emergency child custody orders, court ordered batterer intervention classes for the respondent, and move-out orders.<sup>124</sup>

The specific elements and potential punishment for domestic violence offenses under criminal statutes vary by state.<sup>125</sup> Under some state criminal statutes, domestic violence crimes mandate increased incarceration time.<sup>126</sup> For example, in California, aggravated battery can be charged either as a felony or misdemeanor, and requires that "serious bodily injury" be inflicted on the victim.<sup>127</sup> Aggravated battery is punishable by a monetary fine and two to four years in a county jail.<sup>128</sup> Thus, in a domestic violence situation, aggravated battery exists with the willful infliction of force or violence against an intimate partner, even if the partner is not injured.<sup>129</sup> One of the potential benefits for victims under this subsection is that batterers must complete a one-year batterer's intervention treatment program.<sup>130</sup> A person convicted of domestic battery may also have to pay a fine to a battered women's shelter and reimburse the victim for reasonable expenses incurred as a result of the abuse.<sup>131</sup>

It is beyond the scope of this Note to provide a comprehensive

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<sup>120</sup> CAL. FAM. CODE § 6218 (West 2013).

<sup>121</sup> See *id.* § 6300.

<sup>122</sup> *Id.*

<sup>123</sup> *Domestic Violence*, CAL. CTS.: THE JUDICIAL BRANCH OF CAL., <http://www.courts.ca.gov/selfhelp-domesticviolence.htm> (last visited Jan. 23, 2013).

<sup>124</sup> *Id.*

<sup>125</sup> See Sarah H. St.Vincent, *Coercion's Common Threads: Addressing Vagueness in the Federal Criminal Prohibitions on Torture by Looking to State Domestic Violence Laws*, 109 MICH. L. REV. 813, 840–43 (2011).

<sup>126</sup> See, e.g., CAL. PENAL CODE § 243(e) (West 2013) (increasing the possible imprisonment time from no more than six months in a county jail to no more than one year).

<sup>127</sup> *Id.* § 243(d).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* § 242 ("A battery is any willful and unlawful use of force or violence upon the person of another.").

<sup>130</sup> *Id.* § 243(e).

<sup>131</sup> *Id.*

comparative study of the domestic violence laws of all fifty states. This Note analyzes certain family and criminal law statutes in Hawaii, Montana, and New York: three states that exemplify the three different levels of protections for same-sex domestic violence victims. In Hawaii, same-sex domestic violence victims are protected through express statutory language.<sup>132</sup> Oppositely, victims are unprotected and excluded by statute in Montana.<sup>133</sup> Whereas, in New York, same-sex domestic violence victims receive protection implicitly through gender-neutral statutory language.<sup>134</sup> This Note argues that express statutory language is the best way for states to protect same-sex domestic violence victims.

#### A. HAWAII

Hawaii's domestic violence statutes expressly protect same-sex domestic violence victims and are some of the most inclusive in the nation.<sup>135</sup> In Hawaii, it is "unlawful for any person, singly or in concert, to physically abuse a family or household member or to refuse compliance with the lawful order of a police officer."<sup>136</sup> The statutory definition of "family or household member" includes those individuals who are considered "reciprocal beneficiaries."<sup>137</sup> Hawaii's reciprocal beneficiary law creates a legal status for same-sex couples equivalent to marital status. Moreover, although Hawaii's statute is similarly worded to New York's gender-neutral statute, Hawaii's inclusion of "reciprocal beneficiaries" broadens the scope of protections to include same-sex domestic violence victims.<sup>138</sup>

Though Hawaii's statutes provide protection to same-sex domestic

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<sup>132</sup> NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, LGBT DOMESTIC VIOLENCE IN 2001, APPENDIX A: PROTECTION ORDER AVAILABILITY CHART 51 (2002), *available at* [http://www.ncavp.org/backup/document\\_files/Order%20of%20Protection%20Availability%20Chart.pdf](http://www.ncavp.org/backup/document_files/Order%20of%20Protection%20Availability%20Chart.pdf) [hereinafter NCAVP, APPENDIX A].

<sup>133</sup> *Id.* at 57.

<sup>134</sup> *Id.* at 59.

<sup>135</sup> *See id.* at 51.

<sup>136</sup> HAW. REV. STAT. § 709-906(1) (2013), *amended by* 2013 Haw. Sess. Laws 251.

<sup>137</sup> *Id.* Under Hawaiian law, a valid reciprocal beneficiary relationship requires that: "(1) Each of the parties be at least eighteen years old; (2) Neither of the parties be married, a party to another reciprocal beneficiary relationship, or a partner in a civil union; (3) The parties be legally prohibited from marrying one another under chapter 572; (4) Consent of either party to the reciprocal beneficiary relationship has not been obtained by force, duress, or fraud; and (5) Each of the parties sign a declaration of reciprocal beneficiary relationship . . . ." HAW. REV. STAT. § 572C-4 (2013).

<sup>138</sup> *See* NCAVP, APPENDIX A, *supra* note 132, at 51, 59.



violence victims, there is room for improvement when it comes to victims who are minors. Hawaii only allows minors who are victims of dating violence to obtain protective orders if a family member, household member, or state agency applies on their behalf.<sup>139</sup> In reality, minors who are in same-sex relationships are likely to hide their sexual orientation, making it more difficult for someone to step in on their behalf to obtain a protective order.<sup>140</sup>

## B. MONTANA

Directly opposite to Hawaii in providing same-sex domestic violence protections is Montana. Under Montana's domestic violence statutes, an actionable offense occurs with "bodily injury" to family members or "partners."<sup>141</sup> "Family members" are immediate and extended relatives.<sup>142</sup> "Partners," however, are "spouses, former spouses, [and] persons who have been or are currently in a dating or ongoing intimate relationship with a person of the *opposite sex*."<sup>143</sup> Thus, same-sex victims are affirmatively excluded from protection and Montana courts are left with no way to extend domestic violence protection to same-sex couples.

Although stalking, incest, sexual assault, and rape victims may obtain a protective order regardless of their relationship to their abuser, victims of moderate crimes such as minor assault, battery, verbal abuse, and financial or social domination are left without such recourse.<sup>144</sup>

## C. NEW YORK

In 2000, New York City had the largest population of same-sex couples in the United States.<sup>145</sup> Surprisingly, however, in New York State, domestic violence is not considered a crime when committed against someone of the same sex who is not a relative.<sup>146</sup>

According to the New York Family Court Act of 2002, a domestic

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<sup>139</sup> HAW. REV. STAT. § 586-3 (2013).

<sup>140</sup> See Sarah Kramer, 'Coming Out': Gay Teenagers, in *Their Own Words*, N.Y. TIMES, May 20, 2011, <http://www.nytimes.com/2011/05/23/us/23out.html>.

<sup>141</sup> MONT. CODE ANN. § 45-5-206(1)(a) (2011).

<sup>142</sup> *Id.* § 45-5-206(2)(a).

<sup>143</sup> *Id.* § 45-5-206(2)(b) (emphasis added) (amended 2013, "opposite sex" clause deleted).

<sup>144</sup> NCAVP, APPENDIX A, *supra* note 132, at 57.

<sup>145</sup> *Gay Facts and Statistics 2013*, GIDEON I. ALPER (Jan. 1, 2013), <http://www.galperlaw.com/domestic-partnership-florida/gay-facts-statistics-2013/>.

<sup>146</sup> NCAVP, APPENDIX A, *supra* note 132, at 59.

violence victim could petition for a protective order for crimes like assault and harassment.<sup>147</sup> This provision benefitted same-sex domestic violence victims by providing some type of legal assistance; nevertheless, it also denigrated them since the abuse must fit within a very narrow category of crimes to qualify for relief. Thus, there could be a disconnect between the victim's feelings about the severity of the violence and the courts' recognition of only certain violent crimes. Further, same-sex victims could think the abuse is less severe simply because it is not a crime. Since same-sex domestic violence victims already incur high costs when reporting abuse, like being "outed," those experiencing the abuse cycle for the first time may question the severity of the violence, self-select themselves out of the legal process, and continue to be abused.<sup>148</sup>

A 2011 Report compiled by the National Coalition of Anti-Violence Programs found that 78.8% of victims that sought a protection order in 2011 were successful, however, only 2.7% of domestic violence survivors applied for an order.<sup>149</sup> Even if courts could grant protective orders to same-sex domestic violence victims, judges have a lot of discretion and can decide to just impose minimal penalties.<sup>150</sup> They do not even need to issue "no contact" orders or force abusers to attend counseling.<sup>151</sup>

The Family Court Act was amended in 2010 to substantially broaden the definition of "family or household members."<sup>152</sup> The change in definition now captures large portions of the population that had not been addressed in the earlier statute:

[P]ersons who are not related by consanguinity or affinity and who are or have been in an intimate relationship whether such persons have lived together at any time. Factors to consider in determining whether a relationship is an 'intimate relationship' include but are not limited to: the frequency of interaction between the persons; and the duration of the relationship.<sup>153</sup>

One benefit of the amended Act is that the provisions do not apply to just "household members." Some states have domestic violence laws that are gender-neutral but only apply when both individuals "cohabitate" or

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<sup>147</sup> N.Y. FAM. CT. ACT § 828 (McKinney 2013).

<sup>148</sup> Peterman & Dixon, *supra* note 16, at 43–44.

<sup>149</sup> NCAVP REPORT, *supra* note 12, at 39.

<sup>150</sup> Peterman & Dixon, *supra* note 16, at 46.

<sup>151</sup> *Id.*

<sup>152</sup> N.Y. FAM. CT. ACT § 812(1)(e) (McKinney 2013).

<sup>153</sup> *Id.*

are members of the same household.<sup>154</sup> In those situations, domestic violence laws would not cover individuals who are in non-cohabitating same-sex relationships.

Since the language of the current domestic violence statute is gender neutral, New York state courts could follow the lead of other states and interpret the statute to include same-sex domestic violence victims.<sup>155</sup> While this interpretation makes sense, it is not actually mandated by the statute.<sup>156</sup> Courts have the discretion to weigh certain factors and potentially exclude same-sex victims from the statute's protection.<sup>157</sup> While heterosexual victims face the same problem, the risk of unfettered discretion may be higher for same-sex victims because domestic violence in the LGBT community is less understood.<sup>158</sup>

#### D. CONCLUSIONS ON THE STATE APPROACHES IN HAWAII, MONTANA, AND NEW YORK

As with their analogues at the federal level, most state legislatures have started to protect same-sex domestic violence victims.<sup>159</sup> Approaches like Montana's are unacceptable because they consciously leave a substantial subset of the population open to continued violence and abuse.<sup>160</sup> Approaches similar to New York's are preferable, but inherently risky since judges may refuse to look beyond the statute's text.<sup>161</sup> Approaches modeled after Hawaii's statutes are most beneficial because they expressly protect same-sex couples.<sup>162</sup>

In sum, it is important that state legislatures stop conceptualizing domestic violence as family violence. State legislatures should write specific language into their domestic violence statutes that explicitly

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<sup>154</sup> See NCAVP, APPENDIX A, *supra* note 132.

<sup>155</sup> See *Domestic Violence Civil Protection Orders (CPOs) by State*, AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE (June 2009), available at [http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/dv\\_cpo\\_chart.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/dv_cpo_chart.authcheckdam.pdf).

<sup>156</sup> See N.Y. FAM. CT. ACT § 812 (McKinney 2013).

<sup>157</sup> See *Domestic Violence Civil Protection Orders (CPOs) by State*, *supra* note 155, at 19.

<sup>158</sup> Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming A Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325, 346 (1999).

<sup>159</sup> *Id.* at 341–42 (stating that forty-two states either have gender-neutral laws regarding domestic violence or explicitly protect same-sex victims).

<sup>160</sup> *Domestic Violence Civil Protection Orders (CPOs) by State*, *supra* note 155, at 16.

<sup>161</sup> *Id.* at 19.

<sup>162</sup> *Id.* at 7.

applies to same-sex domestic violence victims.

## V. SUGGESTIONS TO BETTER SERVE THE LGBT COMMUNITY

### A. EQUAL PROTECTION CHALLENGES

Under current equal protection clause jurisprudence, sexual orientation has not been given full “suspect class” status,<sup>163</sup> but it has been categorized under gender discrimination, which is subject to intermediate scrutiny.<sup>164</sup> Equal protection clause challenges might be hard to sustain, however, because most statutes are phrased in gender-neutral terms, which are facially neutral.<sup>165</sup> Some courts have used “intermediate scrutiny” hesitantly and have been highly deferential to a proponent’s reasons for gender distinctions.<sup>166</sup>

The trend of deferring to proponents’ reasons for gender distinctions under an equal protection analysis may have finally shifted with the recent Supreme Court decision in *Hollingsworth v. Perry*.<sup>167</sup> In *Hollingsworth*, the Supreme Court held that the Petitioners did not have standing to appeal the District Court’s decision finding California’s Proposition 8 unconstitutional on equal protection grounds; resulting in affirmation of the District Court’s decision.<sup>168</sup> The landmark decision of *Hollingsworth* may be the much needed stepping-stone for challenges to same-sex marriage bans across the United States.

Eventually, sex-based classifications may come under the umbrella of strict scrutiny and, like race, be rendered presumptively invalid.<sup>169</sup> It is not necessary for courts to find that a person’s sex is an immutable characteristic for gender to qualify for strict scrutiny.<sup>170</sup> In fact, immutability has decreased in importance; courts recognize that “‘society, not nature, gives many traits their significance.’”<sup>171</sup> In order for this area

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<sup>163</sup> *Romer v. Evans*, 517 U.S. 620, 635 (1996).

<sup>164</sup> *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723–24 (1982).

<sup>165</sup> Valorie K. Vojdik, *Conceptualizing Intimate Violence and Gender Equality: A Comparative Approach*, 31 *FORDHAM INT’L L.J.* 487, 502–03 (2008).

<sup>166</sup> *Id.*

<sup>167</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

<sup>168</sup> *Id.* at 2668.

<sup>169</sup> See Chinyere Ezie, *Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination--The Need for Strict Scrutiny*, 20 *COLUM. J. GENDER & L.* 141, 175–179 (2011).

<sup>170</sup> *See id.* at 181.

<sup>171</sup> *Id.* at 183 (quoting Suzanne B. Goldberg, *Equality Without Tiers*, 77 *S. CAL. L. REV.*

of law to develop greater protections for the LGBT community, individuals should continue to challenge courts at all levels of government on equal protection grounds and push the boundaries of this doctrine by arguing for a standard of intermediate or strict scrutiny.

#### B. LGBT-INCLUSIVE STATE DOMESTIC VIOLENCE LAWS

When crafting domestic violence legislation, states should constantly keep in mind that definitions matter. The way in which a specific individual or group is statutorily defined has an immense impact on how courts interpret the statute, and in turn, how evolving case law influences the goals and methods of social organizations that provide direct services to underrepresented groups. Statutes with explicit enumerated protections for victims of same-sex domestic violence better promote the interests of the LGBT community.

Following the Supreme Court's decision in *Morrison*, many states passed laws providing civil rights remedies due to gender-based violence, thereby enhancing protections for victims of same-sex domestic violence.<sup>172</sup> A few notable examples, such as California and Oregon, use text similar to the text from VAWA that was previously struck down as unconstitutional.<sup>173</sup> The strongest protections for LGBT individuals will come from such state legislative efforts. In the absence of statutory state protections, however, states courts should interpret the definition of "gender" broadly so that LGBT victims of domestic violence are not left out.

#### C. LGBT SENSITIVITY TRAINING IN LAW ENFORCEMENT AND COUNSELING SERVICES

The failure of state governments to address the issue of domestic violence within the LGBT community is not a result of discrimination or hatred towards same-sex relationships, but rather the result of an incomplete understanding of the LGBT community. In order for criminal statutes to be equally enforced, law enforcement and legal professionals must take into account the unique attributes of each community they serve.

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481, 505–06 (2004)).

<sup>172</sup> Goldscheid, *supra* note 63, at 165 ("California, Illinois, New York City, and Westchester . . . enacted civil rights remedies that were modeled after the now-defunct federal law.").

<sup>173</sup> Compare CAL. CIV. CODE § 52.4 (2003), and OR. REV. STAT. § 30.866 (2003), with 13 U.S.C. § 13891.

This can be accomplished through educational programs designed by members of the LGBT community and funded by state or federal assistance programs. The 2013 VAWA reauthorization provides federal funding to expand federal programs designed to assist local law enforcement.<sup>174</sup>

While mandatory arrest policies often prevent more serious immediate violence from occurring, they cannot be executed blindly and arbitrarily. Since police officers are more likely to make dual arrests when responding to an incident involving a same-sex couple,<sup>175</sup> training materials should address the underlying gender-based rationale behind such a policy. Additionally, police officers should be instructed on the differences between domestic violence victimization for same-sex couples and heterosexual couples.

Last, crisis and mental health counselors must be sensitive to the specific issues affecting LGBT clients and adapt their practices to address these specific issues within the domestic violence context. Counselors should strive to promote self-disclosure by their clients,<sup>176</sup> because victims of domestic violence often internalize their pain and place guilt on themselves for ending the relationship.<sup>177</sup> Helping LGBT clients self-disclose the abuses they have suffered may be more difficult than with heterosexual clients because the stigma of being a domestic violence victim is compounded with discrimination against LGBT people.<sup>178</sup>

## VI. CONCLUSION

In recent decades, the social landscape has shifted toward greater awareness and recognition of gender-based crimes. As awareness of gender-based crimes increases, resistance to LGBT rights is gradually eroding. Congress has the authority to effectuate and repeal the above laws, and the President can also influence the direction of same-sex domestic violence policies.

Both Congress and the executive branch need to prioritize LGBT domestic violence victims like it did for the 2013 reauthorization of the Violence Against Women Act. Further, states can use federal laws as a

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<sup>174</sup> 42 U.S.C. § 14045 (West 2013).

<sup>175</sup> Peterman & Dixon, *supra* note 16, at 46.

<sup>176</sup> Peterman & Dixon, *supra* note 16, at 45–46.

<sup>177</sup> *Effects of Domestic Violence on Women*, PTSD TRAUMA TREATMENT (Jan. 17, 2011), <http://www.ptsdtraumatreatment.org/trauma-effects/effects-domestic-violence/>.

<sup>178</sup> Peterman & Dixon, *supra* note 16, at 45–46.

model to improve domestic violence protections for same-sex couples within their respective penal codes. Broad policy changes, such as these, must be implemented at the federal level so that same-sex partners are protected, at a minimum, by constitutional principles of equal protection.

Removing barriers to domestic violence claims between same-sex individuals will require not only immense financial resources but also logistical planning. Nevertheless governments at all levels—federal, state, and local—must be willing to make bold policy decisions to promote absolute equality for same-sex relationships.