
**THE GENDERED NATURE OF
DOMESTIC VIOLENCE:
STATISTICAL DATA FOR LAWYERS
CONSIDERING EQUAL PROTECTION
ANALYSIS**

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I. The Gender Classification of <i>Woods v. Horton</i>	106
A. The <i>Woods v. Horton</i> Case	106
B. The Challenged California Domestic Violence Shelter Statutes	109
II. Equal Protection Under the California Constitution	110
III. Equal Protection Under the Federal Constitution	112
IV. Women and Men Are Dissimilarly Situated with Regard to Domestic Violence.....	114
A. Historical Acceptance of Violence Against Women	116
B. Women’s Lesser Access to Material Resources Relative to Men.....	116
C. Women’s Grossly Disproportionate Risk of Violence from Male Partners.....	117
1. Homicide	118
2. Homicide-Suicide	121
3. Sublethal Violence.....	122
4. Injury	123
5. Sexual Violence.....	124
6. Stalking.....	125
7. Self Defense.....	126
8. Separation Assault	127

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V. Protecting Battered Women and Children from Abuse Is a Compelling State Interest.....	129
VI. The Statute Is Narrowly Tailored to Meet the State’s Compelling Interest	131
VII. Gender Classification Is Permissible to Remedy Past Discrimination	134
A. Courts Recognize Domestic Violence as Gender-Based Discrimination	135
B. Legislatures Recognize Domestic Violence as Gender-Based Discrimination	136
C. The Legislature Need Not Address All Aspects of a Problem.....	138
VII. Conclusion	139

In *Woods v. Horton*, the California’s Third District Court of Appeal in Sacramento ruled that a state Health and Safety Code section funding domestic violence shelter services specifically for battered women and their children violated equal protection.¹ Using the strict scrutiny standard of review, the court held that under the state’s Equal Protection Clause, women and men are “similarly situated” with regard to domestic violence and, therefore, the language in the code should be revised to make state funding for domestic violence shelter services under that code gender-neutral.² *Woods* is the first successful legal decision for the anti-feminist “fathers’ rights” movement in a series of lawsuits filed against battered women’s shelters and their funders.³ The case is important because it

1. *Woods v. Horton*, 84 Cal. Rptr. 3d 332, 349 (Ct. App. 2008) (holding that the programs were unconstitutional because they were implemented in a gender-restrictive manner).

2. *See id.* at 350 (stating that the programs should offer identical services to both men and women).

3. Although the fathers’ rights groups have filed several equal protection challenges to domestic violence shelters, those cases have failed either for failure to state a cause of action or for lack of standing. *See Booth v. Hvass*, 302 F.3d 849, 850 (8th Cir. 2002) (dismissing challenges to Minnesota statutes that authorized funds for domestic violence victims as discriminating against men for lack of standing); *Blumhorst v. Jewish Family Serv. of L.A.*, 24 Cal. Rptr. 3d 474, 482 (Ct. App. 2005) (dismissing a challenge that the domestic violence shelter discriminated against a battered husband for lack of standing); *Hagemann v. Stanek*, No. A03-2045, 2004 Minn. LEXIS 607, at *1 (Minn. Sept. 21, 2004) (denying petition for further review). The men’s rights movement has also mounted legal challenges to other laws that are gender-specific, such as laws relating to research in women’s health and laws that seek to remedy past discrimination against women in the workplace. *See Miller v. Cal. Comm’n on the Status of Women*, 198 Cal. Rptr. 877, 878-79 (Ct. App. 1984) (noting that plaintiffs sought to abolish the California Commission on the Status of Women for the organization’s efforts to promote equality for women in education and employment); *see also Coal. of Free Men v. California*, No. B172883, 2005 WL 713816, at *1, *1 n.1 (Ct. App. Mar. 30, 2005) (explaining that plaintiffs challenged,

highlights the limits of formal equality review of laws that confer benefits upon women. Specifically, in its formal equality review, the court failed to sufficiently consider the gendered nature of domestic violence and the social and political context in which violence against women occurs. Women are battered much more frequently, suffer much greater injuries, and are at much higher risk of being killed by their batterer than their male counterparts, particularly at separation.⁴ Further, women who are battered are in greater need of the specific services offered by shelters because of the profoundly gendered nature of battering, wherein women and children bear substantial risk of homicide, assault, rape, and stalking following separation from an abuser, whereas men do not.⁵ Women also have fewer economic resources and often are more dependent on their abusers than men due to women's persistently lower income and greater participation in child care.⁶ For these reasons, disparate funding for battered women's shelters should survive a strict scrutiny challenge because women and men are not similarly situated with regard to domestic violence. Because the risks faced by women and men following separation are essentially different, shelter services tailored to women and their dependent children are narrowly designed to address a compelling state interest in decreasing separation assault, assisting battered women in safely leaving abusers, and decreasing preventable homicides. By failing to acknowledge the important role that gender plays in domestic violence, the *Woods* decision set a precedent that threatens to erode the already inadequate laws and services specifically created in response to the quantitatively and qualitatively different types of violence faced by women, men, and children.

Anti-feminist "fathers' rights" groups have been characterized by their participants as a "civil rights" movement that seeks to protect the rights of fathers in the face of increasing state-facilitated services for battered women, enforcement of domestic violence laws, and collection of child

inter alia, statutes that fund domestic violence shelters, the position of Deputy Secretary of Women Veterans Affairs, Education Code sections that refer to the needs of women in establishing criteria for science education, and affirmative action goals for women).

4. See Suzanne C. Swan & David L. Snow, *A Typology on Women's Use of Violence in Intimate Relationships*, 8 VIOLENCE AGAINST WOMEN 286, 292 (2002) (hypothesizing that the instances of male abuse against women are greater and more serious than the reverse).

5. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, PREVALENCE, INCIDENCE AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 2 (1998) [hereinafter TJADEN & THOENNES, PREVALENCE, INCIDENCE, AND CONSEQUENCES].

6. Application for Leave to File Amici Curiae Brief and Amici Curiae Brief in Support of Respondents at 22-27, *Blumhorst v. Jewish Family Serv. of L.A.*, 24 Cal. Rptr. 3d 474 (Ct. App. 2005) (No. B170904).

support obligations.⁷ These groups believe that family law and domestic violence laws are biased in favor of women and that feminist activists in the court system have stripped fathers of their rightful place in the family.⁸ While the goals of the fathers' rights movement have increasingly been couched in neutral legal terms like "reverse discrimination" and "equal protection," their activities are in reality part of a systematic attack on laws designed to protect women and children.⁹

This Article offers an analysis of the Equal Protection Clause in the *Woods v. Horton* case under both the California Constitution and the federal Constitution. Part I describes the *Woods* case and the specific statutes at issue. Parts II and III examine the Equal Protection Clause under both the California Constitution and the federal Constitution, as well as the effect of Proposition 209 on California's equal protection analysis. Part IV examines the question of whether men and women are similarly situated with regard to domestic violence for purposes of equal protection. Specifically, we examine current domestic violence statistics to illustrate

7. See Glenn Sacks & Dianna Thompson, *Why Are There So Many Women in the Fathers' Movement?*, MINNEAPOLIS STAR-TRIBUNE, June 21, 2002 (stating that many fathers' rights groups began because of the increasing practice of taking children away from fathers through divorce); see also Equal Justice Foundation, Domestic Violence, <http://www.ejfi.org/DV/dv.htm> (last visited Mar. 31, 2009) (stating that female against male domestic violence is "deliberately obscured by radical feminists to further their political and funding agenda"); Robert Sheaffer, *Combatting [sic] Feminist Misinformation: Refuting the Most Common Feminist Lies and Pseudo-Scholarship*, <http://www.debunker.com/patriarchy.html> (last visited Mar. 31, 2009) (stating that feminists have "sabotaged and hijacked the fight against Domestic Violence, turning it into a weapon for use in their war against men").

8. See STEPHEN BASKERVILLE, *TAKEN INTO CUSTODY: THE WAR AGAINST FATHERHOOD, MARRIAGE, AND THE FAMILY* 168-69 (2007) (relating situations where domestic violence claims are used to take children away from fathers in situations where abuse cannot be proven); see also Charles E. Corry, Erin Pizzey, <http://www.ejfi.org/DV/dv-47.htm#pgfId-1310040> (last visited Mar. 31, 2009) (describing the creation of the first women's shelters in Great Britain); Karen Unland, *Shelters Used in the War on Men*, EDMONTON JOURNAL, Sept. 29, 1998, posted at <http://www.ejfi.org/DV/dv-48.htm>.

9. See Emily J. Sack, *Battered Women and the State*, 2004 WIS. L. REV. 1657, 1710 (2004) (arguing that the men's rights movement has no strategy to improve domestic violence policy but instead has an agenda of eroding protections for battered women through redistributing domestic violence service resources among both men and women); Shannon M. Garrett, Note, *Battered By Equality: Could Minnesota's Domestic Violence Statutes Survive a "Fathers' Rights" Assault?*, 21 LAW & INEQ. 341, 341-42 (2003) (describing court cases where fathers' rights organizations were attempting to eliminate domestic violence statutes under equal protection arguments). See generally FATHERS' RIGHTS ACTIVISM AND LAW REFORM IN COMPARATIVE PERSPECTIVE (Richard Collier & Sally Sheldon eds., 2006); REACTION AND RESISTANCE: FEMINISM, LAW, AND SOCIAL CHANGE (Dorothy E. Chunn et al. eds., 2007); SUSAN B. BOYD, *CHILD CUSTODY, LAW, AND WOMEN'S WORK* (2003); Carl E. Bertoia & Janice Drakich, *The Fathers' Rights Movement: Contradictions in Rhetoric and Practice*, 14 J. FAM. ISSUES 592 (1993); Susan B. Boyd, "Robbed of Their Families"? *Fathers Rights Discourses in Canadian Parenting Law Reform Processes*, in FATHERS' RIGHTS ACTIVISM AND LAW REFORM IN COMPARATIVE PERSPECTIVE, *supra* at 27.

how women and men are dissimilarly situated with regard to domestic violence in ways specifically addressed by battered women's shelters. Finally, Parts V, VI, and VII will discuss why, even assuming men and women are similarly situated, the California statutes meet the strict scrutiny standard because the state's program of women's shelters is narrowly tailored to meet the compelling state interest in protecting women from the immediate danger of injury and homicide and the long term social and economic effects of intimate partner violence. The unequal expenditure of resources for women's shelters is narrowly tailored to meet the compelling state interest in preventing injury and death as well as the devastating social and economic impact of domestic violence on the lives of women and children.

We conclude that domestic violence is uniquely gendered because it is a manifestation of discrimination against women. Failure to recognize the causal link between domestic violence and gender threatens to severely undermine formal equality because it fails to address the underlying problems that allow domestic violence to persist and does not address the victims' experience within the context of societal discrimination.¹⁰ It is critical to view domestic violence within the context of sex discrimination in order to reframe the issue as one of social and political concern rather than as simply a private matter of interpersonal relationships.¹¹ When domestic violence is understood as a manifestation of sex discrimination, individual victims become part of a larger class of people who have

10. See Julie Goldscheid, *Domestic and Sexual Violence as Sex Discrimination: Comparing American and International Approaches*, 28 T. JEFFERSON L. REV. 355, 375-76 (2006) [hereinafter Goldscheid, *Domestic and Sexual Violence*] (describing that government publications make little reference to the socio-political context of the violence); see also Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down But Not Ruled Out*, 39 FAM. L.Q. 157, 160 (2005) [hereinafter Goldscheid, *The Civil Rights Remedy*] (arguing that federal and state laws are vehicles to transform the dialogue on violence against women). See generally Sally F. Goldfarb, *Applying the Discrimination Model to Violence Against Women: Some Reflections on Theory and Practice*, 11 AM. U. J. GENDER SOC. POL'Y & L. 251 (2003).

11. See Goldscheid, *Domestic and Sexual Violence*, *supra* note 10, at 360 (claiming that on a large scale or in the "global sense" domestic violence is a problem of gender discrimination). In some instances these acts of violence may be driven more by psychological factors than by social or political causes, so that accordingly, "[i]t may be more accurate to say the problem of domestic violence is rooted in and reflects the legacy of sex discrimination and accompanying attitudes sanctioning male violence towards women." *Id.* See also ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 67-72 (2000) (recognizing variables other than gender that may affect domestic violence and that the "primacy" of gender does not exclude other factors that contribute to battering); Goldfarb, *supra* note 10, at 264 (acknowledging that "not every act of violence among intimates is dictated exclusively by gender, or even dictated by gender at all"); Goldscheid, *The Civil Rights Remedy*, *supra* note 10, at 160 (arguing that federal and state laws are vehicles to transform the dialogue on violence against women).

suffered harm as a result of gender inequality.¹² For purposes of the equal protection analysis, recognition of domestic violence as a problem of gender discrimination informs the analysis of whether battered men and battered women are similarly situated. Considering domestic violence in the broader context of gender inequality, it becomes clear that men and women are not similarly situated. Rather, domestic violence is a systemic political and social problem within which women are uniquely situated when compared to men. A re-examination of the issues in *Woods* is especially important at this critical juncture as the anti-feminist fathers' rights movement attempts to undermine the provision of safe shelter for abused women and children as well as recognition of the profoundly gendered nature of the problem. The history of anti-feminist fathers' rights litigation across the country on this issue points to a systematic attempt to, at the very least, divert already inadequate and scarce resources away from women's shelters and, at worst, impede battered women's efforts to secure safety, accurate information, and services that acknowledge and can address their highly gendered situation.¹³

I. THE GENDER CLASSIFICATION OF *WOODS v. HORTON*

A. *The Woods v. Horton Case*

The *Woods v. Horton* case is the most recent and, to date, the only successful challenge to state laws that provide funding to battered women's shelters.¹⁴ The case was brought by four men and the daughter of one who alleged that, although they were victims of domestic violence, they were denied services by domestic violence shelters because they were men.¹⁵ The plaintiffs brought suit against the State of California and two state agencies claiming that the gender-based classifications in two statutorily-funded programs that provide grants to domestic violence shelters and service providers violated the Equal Protection Clause of the California

12. See Goldfarb, *supra* note 10, at 256 (noting that topics of hearings reports on VAWA lumped violence against women with other aspects of gender inequality like poverty rates and homelessness); see also SCHNEIDER, *supra* note 11, at 38-40 (describing how the delineation of rights helps victims in the process of self-definition as well as "collective female identity").

13. See Sack, *supra* note 9, at 1710 (describing the overall strategy of fathers' rights organizations as attempting to undermine the statutory framework and resources put into place to assist battered women).

14. 84 Cal. Rptr. 3d 332, 350 (Ct. App. 2008) (holding that organizations that provide services to victims of domestic violence should receive the same grants under California statutes as any other organization, regardless of the gender of the victims).

15. See *id.* at 337 (stating that the plaintiffs feel that gender-neutral alternatives are not available for domestic violence shelters).

Constitution.¹⁶ The plaintiffs argued that because the statutes draw distinctions in shelter funding based on gender, the statutes should be reviewed under strict scrutiny.¹⁷

A superior court judge in Sacramento denied the plaintiffs' petition for writ of mandate, finding that the plaintiffs failed to show that men are similarly situated to women with respect to domestic violence.¹⁸ The superior court based its decision on the data, including recent state and federal studies indicating that women are significantly more likely than men to be victims of and be injured by domestic violence, and that women's and men's experiences of violence are qualitatively different.¹⁹ The court concluded from this factual data that, while men do experience domestic violence as victims, the domestic violence experienced by women has reached a level of severity and magnitude to warrant public funding for domestic violence services for women.²⁰ By contrast, male victims were not able to establish a similarly unmet need for domestic violence services in California.²¹ Indeed, the appellate court noted that eighty-five percent of domestic violence service providers who receive funding under California Health and Safety Code § 124250²² serve both men and women.²³

16. *See id.* at 338 (stating that the plaintiffs challenged programs that provide benefits for women and their children, but not men and their children). The lawsuit also challenged two programs designed for inmate mothers, but not fathers. The Third District Court of Appeal dismissed the cause of action relating to the inmates, finding that inmate fathers are not similarly situated to inmate mothers for purposes of Equal Protection Clause analysis. *See id.* at 672-73. Plaintiffs appealed this portion of the ruling and the California Supreme Court denied review. Cal. Supreme Ct. Mins. Dec. 23, 2008, Woods v. Shewry, No. S168367, available at <http://www.courtinfo.ca.gov/courts/minutes/documents/SDEC2308.PDF> (denying review); *see also* Petition for Review, Woods v. Shewry, No. S168367 (Cal. Nov. 18, 2008), 2008 WL 5586303.

17. *Woods*, 84 Cal. Rptr. 3d at 340-41.

18. *See id.* at 342 (describing the lower court ruling with regard to plaintiffs' failure to show that male domestic violence victims were similarly situated to female domestic violence victims).

19. *See id.* at 342-43 (noting that the trial court found ample data to support legislative findings that domestic violence against women, in particular, was increasing).

20. *See id.* at 342 (stating that the trial court found the plaintiffs had failed to show a similarly severe and unsatisfied need for male victims of domestic violence).

21. *See id.* at 344.

22. CAL. HEALTH & SAFETY CODE § 124250 (West 2007), held unconstitutional and modified by *Woods v. Horton*, 84 Cal. Rptr. 3d 332 (Ct. App. 2008). Senator Corbett has introduced Senate Bill 273 in the California Legislature to amend CAL. HEALTH & SAFETY CODE § 124250 in accordance with the court's decision in *Woods v. Horton*. The bill makes the following changes to the statutory language: The definition of domestic violence as occurring against an "adult or adolescent female" has been revised to an act against an "intimate partner." *See* CAL. HEALTH & SAFETY CODE § 124250(a)(1); In the definitions of "shelter-based" and "emergency shelter," the term "battered women" has been replaced with "victims

Accordingly, because the plaintiffs were unable to establish that male victims of domestic violence were experiencing levels and severity of domestic violence comparable to that of female victims, men and women are not similarly situated and therefore are not entitled to equal application of the statutory programs.²⁴

The Court of Appeal for the Third District reversed in part and held that male victims of domestic violence and female victims of domestic violence were similarly situated for purposes of the Equal Protection Clause under the California Constitution, and that no compelling state interest justifies the gender classification in funding domestic violence shelter programs only for women.²⁵ The court acknowledged that women are battered in greater numbers than men and suffer greater injuries than men who are battered, but held that this greater need for services did not constitute a compelling state interest.²⁶ Rather, the court held that equal protection rights are personal rights guaranteed to the individual, not group rights, and therefore equal protection cannot be denied simply because a group is "too small a number to be afforded equal protection."²⁷ Accordingly, the court advocated revising the challenged statutes to extend the statutory benefits of shelter services to men.²⁸

of domestic violence." See CAL. HEALTH & SAFETY CODE § 124250(a)(2) & (3); Language has been inserted in the Code specifically requiring that the State Department of Public Health administer the shelter-based grant program in compliance with the anti-discrimination rules set forth in CAL. GOV. CODE § 11135. See CAL. HEALTH & SAFETY CODE § 124250(b); Language from the Woods decision has been inserted in the Code providing that as a condition for receiving funding, battered women's shelters must provide services to all victims of domestic violence, regardless of gender, but that the services provided to males do not need to be identical to services provided to female victims of domestic violence. See CAL. HEALTH & SAFETY CODE § 124250(j)(3); References in CAL. HEALTH & SAFETY CODE § 124250(b) & (c) to "battered women's shelters" have not been changed. This permits battered women's shelters to remain women-only facilities to ensure the safety and comfort of the women and their children seeking refuge in shelters.

23. See *Woods*, 84 Cal. Rptr. 3d at 342 (referencing the testimony of Dr. Steinberg who declared that of the agencies funded by the Department of Health Services, 85% offered services to both men and women).

24. See *id.* at 342.

25. See *id.* at 350 (reversing the judgment of the trial court and stating that the services had to be provided on a gender-neutral basis).

26. See *id.* at 347 (stating that the justification for equal protection is not related to statistics).

27. See *id.*

28. See *id.* at 349-59 (noting that the court was not requiring that the domestic violence services offered to men and women be identical). Rather, the court held that

[i]n reforming the statutes that provide funding for domestic violence programs to be gender-neutral, we do not require that such programs offer identical

B. The Challenged California Domestic Violence Shelter Statutes

The first of the challenged statutes in the *Woods* case, Health and Safety Code § 124250, is a comprehensive shelter-based grant program for battered women's shelters that is administered by the Child Health Branch of the State Department of Health Services.²⁹ The statute provides grants to women's shelters that in turn provide emergency shelter, transitional housing and job assistance, legal and other types of advocacy, and other support services.³⁰ In each instance, the statute provides these services specifically to "women and their children."³¹ Indeed, the statute defines domestic violence as "the infliction or threat of physical harm against past or present adult or adolescent *female* intimate partners, and shall include physical, sexual, and psychological abuse against the *woman*, and is part of a pattern of assaultive, coercive, and controlling behaviors directed at achieving compliance from or control over, that *woman*."³²

The second statute, California Penal Code § 13823.15, provides for a comprehensive statewide domestic violence program administered by the Office of Emergency Services, which funds domestic violence programs and services such as twenty-four-hour crisis hotlines, counseling, emergency "safe" homes or shelters, and advocacy.³³ While the language of § 13823.15 is gender-neutral—referring to "victims of domestic violence" rather than women specifically—subsection (f) of the statute defines domestic violence as "the infliction or threat of physical harm against past or present adult or adolescent *female* intimate partners, including physical, sexual, and psychological abuse against the *woman*, and is part of a pattern of assaultive, coercive, and controlling behaviors directed at achieving compliance or control over that *woman*."³⁴ The statute describes the legislative intent of the funding program as follows:

The Legislature finds the problem of domestic violence to be of serious and increasing magnitude. The Legislature also finds that existing domestic violence services are underfunded and that some areas of the state are unserved or underserved. Therefore, it is the intent of the

services to men and women. Given the noted disparity in the number of women needing services and the greater severity of their injuries, it may be appropriate to provide more and different services to battered women and their children.

Id.

29. CAL. HEALTH & SAFETY CODE § 124250 (West 2007), *held unconstitutional and modified by Woods v. Horton*, 84 Cal. Rptr. 3d 332 (Ct. App. 2008).

30. *See id.* § 124250(c).

31. *Id.* § 124250(c)(1-4).

32. *Id.* § 124250(a)(1) (emphasis added).

33. CAL. PENAL CODE § 13823.15(b) (West 2007), *held unconstitutional and modified by Woods v. Horton*, 84 Cal. Rptr. 3d 332 (Ct. App. 2008).

34. *Id.* § 13823.15(f)(15)(A) (emphasis added).

Legislature that a goal or purpose of the Office of Emergency Services (OES) shall be to ensure that all victims of domestic violence served by the OES Comprehensive Statewide Domestic Violence Program receive comprehensive, quality services.³⁵

Thus, each of the statutes contains gender-classification in the administration of funding for domestic violence programs.

II. EQUAL PROTECTION UNDER THE CALIFORNIA CONSTITUTION

The Equal Protection Clause of the California Constitution provides that a person “may not be . . . denied equal protection of the laws.”³⁶ Similar to the federal constitutional guarantee of equal protection, the California courts have construed the Equal Protection Clause of the California Constitution to stand for the proposition that “equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.”³⁷ Despite the similar language of the California and federal Equal Protection Clauses, the California courts have consistently reviewed cases of gender classification using a standard of strict scrutiny while the federal courts have analyzed these cases using the more relaxed intermediate scrutiny standard.³⁸ Under the strict scrutiny standard, the state bears the burden of establishing that it has a compelling state interest that justifies the law and that the distinctions in that law based on gender are necessary to further that state interest.³⁹ Further, the courts have held that the standard of review for gender-based classifications will be the same regardless of

35. *Id.* § 13823.15(a).

36. CAL. CONST. art. I, § 7(a) (amended 1979).

37. *People v. Eric J.* (*In re Eric J.*), 601 P.2d 549, 553 (Cal. 1979) (quoting *In re Gary W.*, 5 Cal. 3d 296, 303 (1971), and noting that the state does not promote the same purpose when sentencing adults to prison as when the state commits minors to the Youth Authority).

38. *See Koire v. Metro Car Wash*, 707 P.2d 195, 202 (Cal. 1985) (noting that “classifications based on sex are considered ‘suspect’ for purposes of equal protection”); *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529, 539 (Cal. 1971) (explaining that strict scrutiny is applicable because classifications based on sex should be treated as suspect and the statute limited the fundamental right of one class of persons, women, to pursue the lawful profession of tending bar, but did not place the same restriction upon men); *Connerly v. State Personnel Bd.*, 112 Cal. Rptr. 2d 5, 26 (Ct. App. 2001) (applying strict scrutiny based on the California Constitution despite the fact that the federal Constitution does not require it).

39. *See Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 470 (1981) (holding that preventing teenage pregnancy is a compelling state interest and that a statute that distinguishes between statutory rape victims on the basis of gender is narrowly tailored to effectuate the state’s purpose); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1087 (Cal. 2000) (noting that equal protection allows discrimination and preferential treatment whenever a court determines they are justified by a compelling state interest and are tailored to address an identified remedial need).

whether the classification favors males or females.⁴⁰ The fact that a statutory scheme “discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review.”⁴¹

In 1996, California’s Equal Protection Clause was amended through Proposition 209, which added § 31 to article I, of the California Constitution.⁴² Section 31(a) provides that “[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”⁴³ The amendment not only reaffirms existing prohibitions on race and gender discrimination, but goes beyond them to add a prohibition on affirmative action by explicitly precluding the state from granting any preferences based on race or gender to any individual or group in the areas of public employment, public education, and public contracting.⁴⁴

Article I, § 31 provides a number of exceptions to the general ban on preferential or discriminatory treatment. While article I, section 31 generally prohibits the state from discriminating or giving preferential treatment in the form of affirmative action based on sex, § 31(c) provides that “[n]othing in this section shall be interpreted as prohibiting bona fide qualifications based on . . . sex . . . which are *reasonably necessary* to the normal operation of public employment, public education, or public contracting.”⁴⁵ To date, the courts have not addressed the specific question of a statutory scheme based solely on gender classification under the “bona fide qualification” exception of article I, § 31(c).⁴⁶

The Proposition 209 cases that have been litigated so far have held that the effect of § 31(a) is to require strict scrutiny in cases involving racial and

40. See *Connerly*, 112 Cal. Rptr. 2d at 26 (remarking that the California Supreme Court had even struck down claims that promotional discounts based on gender should be allowed).

41. See *id.* (solidifying the California Supreme Court’s decision not to establish different levels of equal protection for men and women (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982))).

42. See *Crawford v. Huntington Beach Union High Sch. Dist.*, 121 Cal. Rptr. 2d 96, 97 (Ct. App. 2002).

43. CAL. CONST. art. I, § 31(a).

44. See *id.*

45. See *id.* § 31(c) (emphasis added).

46. See *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1087-80 (Cal. 2000) (holding that the City of San Jose’s minority and women public contracting participation and outreach program was unconstitutional because it discriminated on an impermissible basis); *Crawford*, 121 Cal. Rptr. 2d at 104 (holding a racial and ethnic balancing component in the school’s transfer policy to be unconstitutional); *Connerly v. State Personnel Bd.*, 112 Cal. Rptr. 2d 5, 37 (Ct. App. 2001) (invalidating state statutory schemes that benefit women and minorities). *But see Woods v. Horton*, 84 Cal. Rptr. 3d 332, 348 (Ct. App. 2008) (stating that the court would not examine the effect of Proposition 209 because the plaintiffs failed to properly brief the issue).

gender classifications in California.⁴⁷ Article I, § 31(a) has been interpreted to require that preferential programs, including gender-based programs, must be narrowly tailored to meet a compelling state interest in creating such programs.⁴⁸ Further, these cases have held that in order to comply with the California Constitution, a government program that affords preferential treatment under § 31 must be required, not merely permitted, by the federal Equal Protection Clause.⁴⁹ Therefore, “[t]o the extent the federal Constitution would permit, but not require, the state to grant preferential treatment to suspect classes, Proposition 209 precludes such action.”⁵⁰

III. EQUAL PROTECTION UNDER THE FEDERAL CONSTITUTION

The Fourteenth Amendment of the Constitution of the United States provides: “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁵¹ Government action that intentionally discriminates against racial and ethnic minorities has been held to a standard of strict scrutiny requiring that the action must be justified by a compelling state interest.⁵² However, classification based on gender has been held to a lower standard of intermediate or heightened scrutiny. A gender-based classification will be upheld if it bears a substantial relationship to an important governmental objective.⁵³ The state must be able to show an “exceedingly persuasive justification” to sustain a gender-based classification.⁵⁴ The U.S. Supreme Court has also described the intermediate scrutiny standard for gender-based classifications as requiring a “fair and substantial relationship” to legitimate state ends.⁵⁵ Classification by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives. “[T]he mere recitation of a benign, compensatory purpose is not an

47. See *Connerly*, 112 Cal. Rptr. 2d at 24 (remarking that gender and race are suspect classes under the equal protection guarantee of California’s constitution).

48. See *id.* at 28 (describing the process by which strict scrutiny analysis should be conducted).

49. See *id.*

50. *Id.* at 27.

51. U.S. CONST. amend. XIV, § 1.

52. See *Woods v. Horton*, 84 Cal. Rptr. 3d 332, 346 (Ct. App. 2008) (stating that the strict scrutiny standard of California’s Equal Protection Clause applies to suspect classifications, such as those based on gender or race).

53. See *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 468-69 (1981); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (Powell, J., concurring) (explaining that the intermediate scrutiny standard of the federal Equal Protection Clause is not met upon a finding that a law is designed for administrative efficiency within the courts).

54. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

55. *Reed v. Reed*, 404 U.S. 71, 76 (1971).

automatic shield which protects against any inquiry into the actual purposes underlying a legislative scheme.”⁵⁶

The Supreme Court has upheld several statutes with gender classifications that favor women based on a finding that males and females were not similarly situated for purposes of equal protection. For example, in *Michael M. v. Superior Court of Sonoma County*, the Court upheld differential treatment of males and females in a statutory rape law that made males criminally liable for sexual intercourse with under-aged females.⁵⁷ The Court held that the law did not unlawfully discriminate against males because the law bore a substantial relationship to the important governmental interest of preventing teenage pregnancies and preventing the risks associated with sexual intercourse that have a greater impact on teenage girls than teenage boys.⁵⁸ The Court recognized that teen pregnancies are on the rise and have significant social, medical, and economic consequences for teenage girls, but not their male counterparts.⁵⁹ Indeed, in a concurring opinion, Justice Stewart included empirical evidence that teenage mothers are more likely to be on welfare, fail to finish high school, and be economically disadvantaged.⁶⁰ In its decision the Court stated, “this Court has consistently upheld statutes where the gender classification . . . realistically reflects the fact that the sexes are not similarly situated in certain circumstances.”⁶¹

In *Rostker v. Goldberg*, the Supreme Court upheld the Military Selective Service Act, which required draft registration of males but not females.⁶² The Court found that males and females were not similarly situated with respect to the draft because women could not serve in combat.⁶³ The Court deferred to the congressional intent for the exclusion of females citing combat restrictions and implying that it was due in part to their physiology.⁶⁴ In *Schlesinger v. Ballard*, the Court upheld the

56. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975) (stating that one must look to the statutory text as well as the legislative history of 42 U.S.C. § 402(g) to determine Congress’s intent in providing benefits to young widows with children); see also *United States v. Virginia*, 518 U.S. 515, 533-36 (1996) (requiring the state’s justification for gender distinction be an actual state purpose, not a post hoc rationalization).

57. See *Michael M.*, 450 U.S. at 475-76.

58. *Id.* at 473.

59. *Id.* at 471.

60. *Id.* at 479 n.9 (Stewart, J., concurring) (citing a study that found, for example, that 60% of mothers aged fifteen to seventeen receive welfare within two to five years of giving birth).

61. *Id.* at 469.

62. *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981).

63. *Id.* at 76, 78-79.

64. *Id.* at 78-82; see also, *Parham v. Hughes*, 441 U.S. 347, 355 (1979) (holding a Georgia law that prohibited fathers of illegitimate children from suing for wrongful

constitutionality of a federal statute in which male naval officers were discharged if they were not promoted within a certain length of time while female naval officers could continue on as officers even though they were not promoted within the same length of time.⁶⁵ The Court held that such disparate treatment was not discrimination against males in violation of the Equal Protection Clause, but reflected that male and female officers were not similarly situated because female officers were more restricted in their seagoing service than their male counterparts.⁶⁶ Thus, the Court will uphold a statute where men and women are not similarly situated and “a statutory classification is realistically based upon the differences in their situations.”⁶⁷

As described above, under the California Constitution, gender classification is subjected to strict scrutiny review. The intermediate level of scrutiny demanded by federal courts will necessarily be met when the higher strict scrutiny standard is met. Accordingly, for the remainder of the discussion, we will address the strict scrutiny standard of review.

IV. WOMEN AND MEN ARE DISSIMILARLY SITUATED WITH REGARD TO DOMESTIC VIOLENCE

The first step in both the federal and state equal protection analysis is determining that a statutory classification treats similarly situated persons or groups in an unequal manner. “The first prerequisite to a meritorious claim under the [E]qual [P]rotection [C]lause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.”⁶⁸ Accordingly, in order to prove a case of gender discrimination, the plaintiff must prove that she or he is similarly situated as an initial finding prerequisite to further analysis of unequal treatment.⁶⁹ The Equal Protection Clause does not “demand that a statute necessarily apply equally to all persons” nor does it require that “things which are

death was not a violation of the Equal Protection Clause because mothers and fathers of illegitimate children are not similarly situated).

65. *Schlesinger v. Ballard*, 419 U.S. 498, 498 (1975).

66. *Id.* at 508 (stating that women officers had less opportunity for promotion than their male counterparts because they had less seagoing experience due to the Navy’s restriction on women’s duties on vessels).

67. *Parham*, 441 U.S. at 354.

68. *See People v. Eric J. (In re Eric J.)*, 601 P.2d 549, 553 (Cal. 1979) (stating that “adults convicted in criminal courts and sentenced to prison” are not similarly situated to “youths adjudged wards of the juvenile courts and committed to the Youth Authority”).

69. *But see Rostker v. Goldberg*, 453 U.S. 57, 78-79 (1981) (proceeding with the Equal Protection Clause analysis in a case involving gender-based classifications despite initially finding that the parties were not similarly situated); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981).

different in fact . . . be treated in law as though they were the same.”⁷⁰ Rather, the Court will uphold a statute in which “the gender classification is not invidious but . . . reflects the fact that [in certain circumstances] the sexes are not similarly situated.”⁷¹ Indeed, the Court has described this permissible differential treatment by specifically stating that a legislature may “provide for the special problems of women.”⁷² Finally, the Court has held that “[g]ender-based classifications are not invariably invalid. When men and women are not in fact similarly situated in the area covered by the legislation in question, the [Equal Protection Clause] is not violated.”⁷³

Notwithstanding claims to the contrary, men and women are dissimilarly situated with regard to domestic violence. Indeed, the court in *Woods* acknowledged that women are more often the victims of domestic violence than men and suffer more severe injuries than men.⁷⁴ This notable difference is the basis for the court’s assertion that “we do not require that such [domestic violence] programs offer identical services to men and women [I]t may be appropriate to provide more and different services to battered women and their children. For example, a program might offer shelter for women, but only hotel vouchers for a smaller number of men.”⁷⁵ This statement narrowly acknowledges the quantitative disparity in the number of women seeking services and women’s injuries, but it fails to convey the magnitude of the quantitative and qualitative differences in the nature and dynamics of domestic violence.

Women and men are dissimilarly situated with regard to domestic violence for three primary reasons: the historical acceptance of men’s violence against women; women’s lesser access to material resources relative to men; and women’s grossly disproportionate risk of violence from male partners. These types of differences are interrelated and persistent. The intersection of these three factors was the impetus for the development of battered women’s shelters.⁷⁶ These factors also engender the enduring need for shelters and other services targeted to battered women. Although some of these forms of difference have been discussed fairly often in the legal literature, others have not yet been the object of

70. *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966).

71. *Michael M.*, 450 U.S. at 469.

72. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975).

73. *Caban v. Mohammad*, 441 U.S. 380, 398 (1979).

74. *See Woods v. Horton*, 84 Cal. Rptr. 3d 332, 343 (Ct. App. 2008) (stating that plaintiffs failed to show that men, unlike women, are underserved in terms of being victims of domestic violence).

75. *Id.* at 350.

76. *See generally* THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994); R. EMERSON DOBASH & RUSSELL P. DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY (1979).

substantive discussion. Accordingly, this section will touch on each of these factors, with a focus on explaining key dynamics of women's grossly disproportionate risk of violence from male partners.

A. *Historical Acceptance of Violence Against Women*

Documents submitted and cited in previous lawsuits against domestic violence service providers and their funders in California and elsewhere have commented extensively on the problems caused for women by the explicit and implicit acceptance of men's violence against women and children.⁷⁷ The historical acceptance of violence against women and the corresponding lack of intervention have been recognized in policy and practice, both in California and nationally.⁷⁸ From the creation of federal legislation and state codes to address the pressing problem of violence against women to alterations in police and prosecution practices, there has recently been widespread recognition of the costs of failing to intervene in violence against women. The historical acceptance of men's violence against women and the absence of any similar acceptance of violence against men has been extensively documented.⁷⁹ The historical expectation of male domination of women is even noted by the complainants in *Woods*, who cite as supporting documentation an article that recounts anecdotes about the social expectation that men dominate their female partners, noting the social sanctions both for women who are not submissive and for men who are not dominant.⁸⁰

B. *Women's Lesser Access to Material Resources Relative to Men*

Scholars have linked women's lower socioeconomic status to gender

77. See generally *Booth v. Hvass*, 302 F.3d 849 (8th Cir. 2002); Application for Leave to File Amici Curiae Brief and Amici Curiae Brief in Support of Respondents, *supra* note 6, at 22-27 (stating that historically, domestic abuse against a wife from her husband was neither discouraged nor illegal); Brief for Queen's Bench Bar Ass'n et al. as Amici Curiae Supporting Respondents, at 22-24, *Blumhorst v. Jewish Family Srvc. of L.A.*, 24 Cal. Rptr. 3d 474 (Ct. App. 2005) (No. B170904); Holly A. Williams, Comment, *Reaching Across Difference: Extending Equality's Reach to Encompass Governmental Programs that Solely Benefit Women*, 13 UCLA WOMEN'S L.J. 375 (2005).

78. CAL. OFFICE OF THE ATTORNEY GENERAL, REPORT ON ARRESTS FOR DOMESTIC VIOLENCE IN CALIFORNIA 1998, at 4 (1998), available at <http://caag.state.ca.us/cjsc/publications/misc/dv98.pdf>.

79. See, e.g., DOBASH & DOBASH, *supra* note 76, at ix (stating that a legal right for a husband to beat his wife is not explicitly recognized). See generally, SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975); SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE* (1982); SCHNEIDER, *supra* at note 11.

80. See Malcolm J. George, *Riding the Donkey Backwards: Men as the Unacceptable Victims of Marital Violence*, 3 J. MEN'S STUD. 137, 137-59 (1994) (stating that in post-Renaissance France and England, men who did not uphold the patriarchal ethos of dominating their wives were ridiculed and humiliated).

subordination in the private and public spheres, documenting the many ways that gender inequality is directly tied to the etiology, dynamics, and outcomes of domestic violence.⁸¹ Amicus briefs submitted in earlier lawsuits against domestic violence service providers and their funders have summarized the many economic risks disproportionately affecting abused women, including homelessness, precipitous declines in women's household income at separation, and disproportionate financial dependency on male partners due to such factors as women's greater participation in child care.⁸²

*C. Women's Grossly Disproportionate Risk of Violence
from Male Partners*

Those who assert that women and men are similarly situated with regard to domestic violence often make facile claims that women "initiate domestic violence as often as men" in intimate relationships.⁸³ Alternatively, they claim that gender is irrelevant to domestic violence because male victims and female perpetrators exist. The implication in either case is that women's and men's experiences of domestic violence are similar enough to merit identical treatment. Proponents of the ideology of sex symmetry in violence refer to texts they claim show that women are as violent as men, frequently suggesting that this position represents an "uncontroverted" consensus in the research field.⁸⁴ However, such texts have been extensively and consistently critiqued for more than thirty years for their failure to contextualize violence in a way that makes their findings intelligible.⁸⁵ Symmetry claims fail to account for the majority of

81. Williams, *supra* note 77, at 400-01.

82. See Application for Leave to File Amici Curiae Brief and Amici Curiae Brief in Support of Respondents, *supra* note 6, at 23 (stating that in deciding to leave their husbands, battered women consider access to income, transportation, and child care).

83. See Brief of Petitioner-Appellant at *11, *24, *Woods v. Horton*, 167 Cal. App. 4th 658 (Ct. App. 2007) (No. C056072) (citing a thirty-two-nation study by the University of New Hampshire that found women commit acts of violence as often as men and exhibit controlling behavior as often as male perpetrators).

84. See *id.* at *10-11 (listing appellants' "uncontroverted declarations" in arguing that male victims of domestic violence should not be excluded from group counseling).

85. See CURRENT CONTROVERSIES ON FAMILY VIOLENCE (Donileen Loseke & Richard Gelles eds., 1st ed. 1993); DOBASH & DOBASH, *supra* note 76; EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE (2007); Richard A. Berk et al., *Mutual Combat and Other Family Myths*, in THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH 197-212 (David Finkelhor et al. eds., 1983); Michele Bograd, *Why We Need Gender to Understand Human Violence*, 5 J. INTERPERSONAL VIOLENCE 132-135 (1990); Michele Bograd, *Family Systems Approaches to Wife Battering: A Feminist Critique*, 54 AM. J. ORTHOPSYCHIATRY 558-568 (1984); Walter DeKeseredy, *Current Controversies on Defining Non-Lethal Violence Against Women in Intimate Heterosexual Relationships: Empirical Implications*, 6 VIOLENCE AGAINST WOMEN 728-746 (2000); Walter DeKeseredy, *Tactics of the Antifeminist Backlash Against Canadian National Woman Abuse*

quantitative and qualitative studies on domestic violence, which demonstrate significant sex differences and the highly gendered nature of the problem.⁸⁶ In addition to this omission, many sources cited in the lawsuits proclaiming sex symmetry simply do not support the claim. Symmetry denotes exact correspondence, equivalence, or balance. Claims of sex symmetry in domestic violence can only be arrived at when researchers fail to consider homicide, rape, separation assault, injury, and other negative outcomes of violence and abuse. A concept of domestic violence that omits these factors can bear only the most cursory resemblance to the pressing social problem that domestic violence shelters and services were created to address. As such, these claims do not demonstrate that women are similarly situated to men.

1. Homicide

We begin our discussion of sex differences in domestic violence with homicide for two reasons. First, homicide statistics are the most objective measure of the most serious form of domestic violence. Unlike sublethal violence and abuse, homicides are almost always reported. Homicide statistics are also much less disputed than other estimates because they avoid definitional and measurement issues endemic to the study of sublethal violence and abuse. Thanks to domestic violence death review practices, many states now have multi-disciplinary death review teams that

Surveys, 5 VIOLENCE AGAINST WOMEN 1258-1276 (1999); Walter S. DeKeseredy & Molly Dragiewicz, *Understanding the Complexities of Feminist Perspectives on Woman Abuse: A Commentary on Donald G. Dutton's Rethinking Domestic Violence*, 13 VIOLENCE AGAINST WOMEN 874-884 (2007); Russell P. Dobash et al., *The Myth of Sexual Symmetry in Marital Violence*, 39 SOC. PROBLEMS 71-91 (1992); Russell P. Dobash & R. Emerson Dobash, *Women's Violence to Men in Intimate Relationships*, 44 BRITISH J. CRIMINOLOGY 324-49 (2004) (stating that research findings on whether women are as likely to perpetrate violence against an intimate partner as men are contradictory); Demie Kurz, *Physical Assaults by Husbands: A Major Social Problem*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE, *supra* at 88-103; Daniel Saunders, *Wife Abuse, Husband Abuse, or Mutual Combat? A Feminist Perspective on the Empirical Findings*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 90-113 (Kersti Yllö & Michelle Bograd eds., 1988); Martin Schwartz & Walter DeKeseredy, *The Return of the "Battered Husband Syndrome" Through the Typification of Women as Violent*, 20 CRIME L. & SOC. CHANGE 249-265 (1993); Murray Straus, *Physical Assaults by Wives: A Major Social Problem*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE, *supra* at 67-87; Kersti Yllö, *Political and Methodological Debates in Wife Abuse Research*, in FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* at 28-50; Walter DeKeseredy & Martin Schwartz, *Measuring the Extent of Woman Abuse in Intimate Heterosexual Relationships: A Critique of the Conflict Tactics Scales*, VAWNET (Nat'l Resource Ctr. on Domestic Violence/Pa. Coalition Against Domestic Violence), Feb. 1998, available at http://new.vawnet.org/Assoc_Files_VAWnet/AR_ctscrit.pdf [hereinafter DeKeseredy & Schwartz, *Measuring the Extent*].

86. See generally RONET BACHMAN & LINDA E. SALTZMAN, U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 1-2 (1995), available at <http://www.ojp.usdoj.gov/bjs/pub/ascii/femvied.txt>; TJADEN & THOENNES, PREVALENCE, INCIDENCE, AND CONSEQUENCES, *supra* note 5, at 1.

investigate domestic violence homicides, note patterns and trends in the violence, and make recommendations for prevention.⁸⁷ The vast majority of domestic homicide victims are women.⁸⁸ Most perpetrators of domestic homicide are men.⁸⁹

In California, there were eighty-six domestic homicides by a spouse or common law partner in 2006. Seventeen of those victims, or 20%, were male, while sixty-nine victims, or 80%, were female.⁹⁰ These numbers do not include homicides of ex-partners, which is significant because women are much more likely than men to be killed by former partners.⁹¹ It is important to remember that not all male deaths in domestic homicides indicate female perpetrators. There are occasionally same-sex domestic homicides.⁹² Male-perpetrated homicide-suicides also mean that body counts may not be as transparent as they appear at first glance. For example, San Diego's 2006 domestic homicide review report indicated that 80% of victims were female and 20% were male, but 12.5% of perpetrators were female and 87.5% were male.⁹³ The research showing domestic homicide as predominately male-perpetrated against female victims makes clear the sex differences in domestic homicide, but the research on the nature of domestic homicide brings this picture into even sharper focus. In order to understand homicide rates, it is essential to understand the context in which the homicide occurred.

Domestic homicide comprises a much greater portion of all homicides of women than men. In California between 1997 and 2006, overall homicide rates dropped significantly for both women and men.⁹⁴ Homicides of male victims dropped 9% and homicides of female victims dropped 21.4%.⁹⁵ Although there are many factors contributing to homicide rates, this was a

87. See MARCI L. FUKURODA, CALIFORNIA WOMEN'S LAW CENTER, MURDER AT HOME: AN EXAMINATION OF LEGAL AND COMMUNITY RESPONSES TO INTIMATE FEMICIDE IN CALIFORNIA 293 (2005) (recommending, for example, that "every county in California engage in some form of regular domestic violence death review").

88. See JAMES ALAN FOX & MARIANNE W. ZAWITZ, U.S. DEP'T OF JUSTICE, *Intimate Homicide*, in HOMICIDE TRENDS IN THE U.S. (2005), <http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm> (last visited Mar. 31, 2009) (click on the chart titled "Homicide of intimates based on gender of victim, 1976-2005") (finding that in 2005, there were 1,181 female intimate homicide victims nationwide as compared to 329 male victims).

89. CAL. DEP'T OF JUSTICE, HOMICIDE IN CALIFORNIA 2006, at 55 (2008), <http://ag.ca.gov/cjsc/publications/homicide/hm06/preface.pdf>.

90. *Id.*

91. SAN DIEGO DOMESTIC VIOLENCE FATALITY REVIEW TEAM, COUNTY OF SAN DIEGO 2006 REPORT 14 (2006).

92. See SCHNEIDER, *supra* note 11, at 68-69 (explaining the dearth of research relating to lesbian and gay battering).

93. SAN DIEGO DOMESTIC VIOLENCE FATALITY REVIEW TEAM, *supra* note 91, at 9.

94. CAL. DEP'T OF JUSTICE, *supra* note 89 at 4.

95. *Id.*

period of expansion for services targeting abused women and the implementation of aggressive policing of domestic violence.⁹⁶ Both of these initiatives benefited from federal funding under the Violence Against Women Act (VAWA) as well as state initiatives to address domestic violence.⁹⁷ These practices appear to have helped both women and men.

In 2006, 23.2% of female homicide victims in California were killed by their spouse, while only 1.6% of male homicide victims were killed by their spouse.⁹⁸ Where the circumstances leading up to homicide were known, domestic violence related homicide was the single largest category of female victims. More than one-third of homicides of women fit into this category.⁹⁹ The largest category of male victims was gang-related homicides (38.9%), followed by all other arguments (32.7%), all other contributing factors (12.9%); robbery/burglary (7.6%); and drug related homicides (6.2%).¹⁰⁰ Unlike women victims for whom domestic homicide was most common, the 1.6% of homicides of men that were domestic violence related comprised the smallest category of homicides of men.¹⁰¹ Strangulation, which is correlated with domestic violence against women, is the only category of homicide that in absolute numbers had more female than male victims in the state between 1992 and 1999.¹⁰² Any review of homicide records finds that men make up the vast majority of perpetrators and victims, and clearly violence prevention is needed to address men's disproportionate violence. However, because these statistics reveal the very different dynamics of homicide for women and men, we should not assume that the etiology of violence is similar for women and men.

National homicide statistics reflect the same broad trends. According to the Bureau of Justice Statistics (BJS), “[f]emale murder victims are substantially more likely than male murder victims to have been killed by

96. See FUKURODA, *supra* note 87, at 50 (finding that Violence Against Women Act's (VAWA) stringent eligibility requirements contributed to twenty-three states having laws mandating arrest for domestic violence and thirty-three states mandating arrest for violation of domestic violence restraining orders).

97. See *id.* at 38, 50-51, 238 (stating that VAWA funded specialized training courses on domestic violence, provided \$6 million in grants to states and local government to improve data collection on domestic violence and stalking).

98. CAL. DEP'T OF JUSTICE, *supra* note 89, at 11.

99. See *id.* at 22 (finding that in 2006, domestic violence homicide accounted for 35.5% of all female murders in California).

100. *Id.*

101. *Id.* at 21-22.

102. See LAURA E. LUND, CAL. DEP'T OF HEALTH SERVS., EPIC PROPORTIONS: VIOLENCE AGAINST WOMEN IN CALIFORNIA, 1992-1999, at 6 (2003), available at <http://www.cdph.ca.gov/HealthInfo/injviosaf/Documents/EP11-EPIC.pdf> (showing that over an eight year period, per 100,000 people in California, 547 women were victims of strangulation or hanging related homicide, as opposed to 323 men).

an intimate.”¹⁰³ BJS notes that in 2005, 33.3% of female homicide victims and 2.5% of male homicide victims were killed by intimate partners.¹⁰⁴ Furthermore, the proportion of female homicide victims killed by an intimate has been increasing in recent years while the proportion of male homicide victims killed by an intimate is decreasing.¹⁰⁵ National trends from 1976 to 2005 show a decline in all domestic homicides with an especially steep decline of 75% for male victims.¹⁰⁶ Nationally, lethal violence by women against male intimates is much less frequent than lethal violence by men against women. Domestic homicides comprise a third of all homicides of women and less than 3% of all homicides of men.¹⁰⁷ Clearly, women and men are dissimilarly situated with regard to domestic homicide. Indeed, the huge drop in domestic homicides of men since the establishment of battered women’s shelters and services suggests that current programs are working to address domestic homicides of men. For the entire United States, the decrease has been four times greater for men than for women.¹⁰⁸

2. *Homicide-Suicide*

A subset of domestic homicide is homicide-suicide. Although there is no national database for tracking homicide-suicide, analyses of available data indicate that most homicide-suicides are domestic violence related.¹⁰⁹ The vast majority of homicide-suicides are also perpetrated by men.¹¹⁰ In Dee Wood Harper and Lydia Voigt’s study of forty-two homicide-suicides in New Orleans between 1989 and 2001, thirty were domestic violence related, twenty-nine of which were perpetrated by men, and twenty-nine of

103. BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE U.S.: INTIMATE HOMICIDE 2000 (Washington D.C., Department of Justice), *available at* <http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm#intimates>.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *See* CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP’T OF JUSTICE, INTIMATE PARTNER VIOLENCE 3 (2000), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv.pdf> (stating that the number of women murdered by an intimate partner was stable from 1976 to 1993, declined 23% from 1993 to 1997, and then increased 8% between 1997 and 1998, whereas the number of men murdered by a domestic partner declined 60% from 1976 to 1998).

109. *See* VIOLENCE POLICY CENTER, AMERICAN ROULETTE: MURDER-SUICIDE IN THE UNITED STATES 5 (3d ed. 2008), *available at* <http://www/vpc.org/studies/amroul2008.pdf> (stating that based on the Violence Policy Center’s analysis of news stories and published studies on homicide-suicide in the United States an estimated 73% of murder suicides in 2007 involved an intimate partner).

110. *See id.* (stating that based on the Center’s analysis, 95% of the offenders in murder-suicides in 2007 were male).

the victims were women.¹¹¹ Most of the studies on domestic homicide-suicide link it to male dominance and controlling behavior.¹¹² Familicide, where a parent kills a partner and one or more children, is also highly gendered, with studies indicating that over 90% of perpetrators are male.¹¹³ Margo Wilson, Martin Daly, and Antonietta Daniele write, “[f]amilicide is virtually a male monopoly” and “[f]amilicide perpetration is strikingly and highly significantly more male-dominated than nonfamilicidal spouse-killing and filicide.”¹¹⁴ Wilson, Daly, and Daniele have also noted that the small number of women who perpetrate homicide-suicide almost never kill male partners.¹¹⁵

3. Sublethal Violence

Despite scholarly debates about the best method of measurement for domestic violence, dramatic sex differences in violence are also clear at the sublethal level. The National Violence Against Women Survey (NVAWS) found that “women were significantly more likely than men to report being victimized by an intimate partner, whether the period was the individual’s lifetime or the twelve months preceding the survey and whether the type of violence was rape, physical assault, or stalking.”¹¹⁶ The authors stress that

differences between women’s and men’s rates of physical assault by an intimate partner become greater as the seriousness of the assault increases. For example, women were two to three times more likely than men to report that an intimate partner threw something that could hurt or

111. Dee Wood Harper & Lydia Voigt, *Homicide Followed by Suicide: An Integrated Theoretical Perspective*, 11 HOMICIDE STUD. 295, 303 (2007).

112. See PATRICIA WEISER EASTEAL, KILLING THE BELOVED: HOMICIDE BETWEEN ADULT SEXUAL INTIMATES 4-5 (1993) (“[T]he factors normally cited as cause, for example, jealousy, possessiveness, conflict, separation, are all manifestations of male beliefs and control of women.”); see also MARTIN DALY & MARGO WILSON, HOMICIDE 137 (1988); Patricia Easteal, *Homicide-Suicides Between Sexual Intimates: An Australian Study*, 24 SUICIDE & LIFE-THREATENING BEHAV. 140, 140-42 (1994); R. A. Silverman & S. K. Mukherjee, *Intimate Homicide: An Analysis of Violent Social Relations*, 5 BEHAV. SCI. & L. 37, 45 (1987) (describing research which shows that males tend to be more violent than females).

113. Margo Wilson et al., *Familicide: The Killing of Spouse and Children*, 21 AGGRESSIVE BEHAV. 275, 279-80 (1995).

114. *Id.* (showing that men were the killers in 93% of familicide incidents in Canada and in 96% of familicides in England and Wales).

115. See DALY & WILSON, *supra* note 111, at 82 (describing a Canadian study that began in 1961, continued over a twenty-three year period, and revealed over sixty-one cases where a man killed his wife and at least one child; the study did not show a single such killing by a woman).

116. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 25 (2000) [hereinafter TJADEN & THOENNES, FULL REPORT] (“Using a definition of rape that includes forced vaginal, oral, and anal sex that was completed or attempted, the survey found that 7.7% of surveyed women and 0.3% of surveyed men were raped by a current or former intimate partner at some time in their life.”).

pushed, grabbed, or shoved them. However, they were 7 to 14 times more likely to report that an intimate partner beat them up, choked or tried to drown them, threatened them with a gun, or actually used a gun on them.¹¹⁷

Again, these findings indicate not only significant sex differences in the prevalence of domestic violence against women and men, but also different dynamics of the violence. The NVAWS stresses that men are the perpetrators in most violence against adults, and argues that prevention should focus primarily on men's violence.¹¹⁸

4. Injury

Prevalence rates for a limited set of violent acts can obscure another major impact of domestic violence: injury. Women are much more likely to be injured than men in domestic violence cases, and injuries due to domestic violence make up a much larger portion of total injuries from violence for women than for men. California created a "cause of injury code" in 1996 to identify hospital cases where domestic violence was the primary cause of injury to patients.¹¹⁹ Since that time, the code has been applied to 530 women and 42 men, with women receiving 93% of injuries primarily due to domestic violence.¹²⁰ When contributing or secondary causes are considered, the code identified 754 women and 72 men injured due to domestic violence, indicating that over 90% of those coded as injured due to domestic violence were women.¹²¹ The injury rates alone cannot indicate the context of the injury, or whether the injury was defensive or offensive. This injury code also does not capture all cases of domestic violence-related injury since information on the identity of the perpetrator is often missing from hospital records.¹²²

These numbers are in line with national statistics. The BJS report, *Violence-Related Injuries Treated in Hospital Emergency Departments*, found that "[a] higher percentage of women than men were treated for injuries inflicted by an intimate—a current or former spouse, boyfriend, or girlfriend. Men were more likely than women to be treated for injuries caused by nonrelatives: acquaintances and strangers."¹²³ Thirty-seven

117. TJADEN & THOENNES, PREVALENCE, INCIDENCE, AND CONSEQUENCES, *supra* note 5, at 7.

118. *See id.*

119. *See* LUND, *supra* note 102, at 10.

120. *Id.*

121. *Id.*

122. *Id.* at 11.

123. MICHAEL R. RAND, U.S. DEP'T OF JUSTICE, VIOLENCE-RELATED INJURIES TREATED IN HOSPITAL EMERGENCY DEPARTMENTS 1 (1997) (using patient statistics for injuries from confirmed or suspected intimate partner violence who were treated by

percent of the women and five percent of men were injured by a current or former partner.¹²⁴ As with the prevalence of violence, injuries due to domestic violence comprise a very different social problem for women than men.¹²⁵

5. *Sexual Violence*

Rape is seriously under-reported in both the National Crime Victimization Survey (NCVS) and NVAWS, but these are the largest scale studies available and they can be viewed as conservative estimates.¹²⁶ A scholarly review of the sexual assault literature published in 1993 found that published rates for women's lifetime rape prevalence ranged from 2% to 24%.¹²⁷ NVAWS found higher estimates of sexual assault than the NCVS because it asked about all sexual assaults, not just those that respondents identified as crimes.¹²⁸ NVAWS found that 17.6% of women and 3% of men had experienced attempted or completed rape at some time in their lives.¹²⁹ Of these assaults, 7.7% of women and 0.3% of men in the sample reported having been raped by a current or former partner in their lifetime.¹³⁰

The NCVS found that rates of sexual assaults of adult men were too small to analyze statistically, but 96% of all rape victims identified were women and 4% were men.¹³¹ The NCVS found that sexual assaults by partners were not usually reported to police: "[w]hen the offender was a current or former husband or boyfriend, about three-fourths of all

U.S. hospital emergency department personnel).

124. *Id.* at 5.

125. *See id.* ("[I]njured men were more likely than women to have been treated for injuries inflicted by nonrelatives: acquaintances and strangers.").

126. *See* Walter S. DeKeseredy et al., *Separation and Divorce Assault: The Current State of Social Scientific Knowledge*, 9 *AGGRESSION & VIOLENT BEHAV.* 675, 679 (2004) (stating that sexual assault is narrowly defined and restricts the definition of "rape" and therefore excludes many harmful behaviors); DeKeseredy & Schwartz, *Measuring the Extent*, *supra* note 85, at 4 (stating that people may not report sexual assaults for several reasons, including embarrassment, fear of reprisal, shame, or reluctance to recall traumatic memories).

127. Mary P. Koss, *Detecting the Scope of Rape: A Review of Prevalence Research Methods*, 8 *J. INTERPERSONAL VIOLENCE* 198, 200 (1993).

128. *See* BACHMAN & SALTZMAN, *supra* note 86, at 6-7 (describing how the NCVS questionnaire asked respondents to answer questions about a broad range of incidents, not just those involving weapons, severe violence, or violence by strangers).

129. TJADEN & THOENNES, *PREVALENCE, INCIDENCE, AND CONSEQUENCES*, *supra* note 5, at 3.

130. TJADEN & THOENNES, *FULL REPORT*, *supra* note 115, at 26 ("[I]ntimate partners include current and former spouses, opposite-sex and same-sex cohabiting partners, boyfriend/girlfriends, and dates.").

131. CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, *RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION 1992-2000*, at 1 (2002).

victimizations were not reported to police (77% of completed rapes, 77% of attempted rapes, and 75% of sexual assaults not reported).¹³² Women are not only more likely to have been raped in the past year or in their lifetimes, but the statistics on these sexual assaults indicate that rape is a highly gendered social problem.

6. *Stalking*

Stalking is another form of abuse that is correlated with domestic violence against women. Stalking is “a course of conduct directed at a specific person that involves repeated visual or physical proximity, nonconsensual communication, or verbal, written or implied threats, or a combination thereof, that would cause a reasonable person fear.”¹³³ National statistics on stalking find that 87% of perpetrators are male and 78% of victims are female.¹³⁴ Over a lifetime, women are four times more likely to be stalked than men, 8.1% and 2.2% respectively.¹³⁵ The dynamics of stalking are different for women and men. Patricia Tjaden and Nancy Thoennes write:

Though stalking is a gender-neutral crime, women are the primary victims of stalking and men are the primary perpetrators. Seventy-eight percent of the stalking victims identified by the survey were women, and 22 percent were men. Thus, four out of five stalking victims are women. By comparison, 94 percent of the stalkers identified by female victims and 60 percent of the stalkers identified by male victims were male. Overall, 87 percent of the stalkers identified by victims were male.¹³⁶

The language used by the researchers in this passage illustrates one source of confusion about what the research really says about the nature of domestic violence. Clearly, Tjaden and Thoennes are conceptualizing “gender neutral” very loosely. They describe large, statistically significant differences in the rates of stalking experienced and perpetrated by women and men.¹³⁷ In other parts of the article, Tjaden and Thoennes stress that men are more likely to be stalked by strangers and women are more likely

132. *See id.* at 3 (“[T]he closer the relationship between the female victim and the offender, the greater the likelihood that the police would not be told about the rape or sexual assault.”).

133. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUSTICE, *STALKING IN AMERICA: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 5* (1998), available at <http://www.ncjrs.gov/pdffiles/169592.pdf>.

134. *Id.*

135. *Id.* at 2-3.

136. *Id.* at 5 (reviewing findings from a telephone survey of 8,000 women and 8,000 men funded by the National Institute of Justice and the Centers for Disease Control and Prevention).

137. *See id.* at 3 (stating that annually, an estimated 1,006,970 women and 370,990 men are stalked in the United States, and the vast majority of stalkers are men).

to be stalked by intimates.¹³⁸ In other words, while women and men are clearly both affected by stalking, they are affected in ways that are substantially quantitatively and qualitatively different. The connection between women's experiences of being stalked and being physically abused makes this issue directly relevant to the provision of shelter services. Fifty-nine percent of female victims of stalking and thirty percent of male victims of stalking identified by the NVAWS were stalked by a current or former intimate partner.¹³⁹ Seventy-nine percent of female victims said they were stalked after they broke up with the perpetrator.¹⁴⁰ Eighty-one percent of the women who were stalked by a current or former partner were also physically assaulted by them, and 31% were sexually assaulted by the stalker.¹⁴¹ Tjaden and Thoennes found that men who stalk female partners are four times more likely to physically assault them and six times more likely to rape them than men who do not stalk.¹⁴² The most frequently reported reason for the end of stalking was the victim moving. These statistics reveal that the nature of stalking indicates emergency shelter may be particularly essential for female victims of domestic violence and stalking.¹⁴³

7. *Self Defense*

While statistics about the prevalence of violence can provide general information about what kinds of violence constitute a social problem, and for whom, they leave out many relevant factors. The research on women's use of violence that pays attention to the context in which violence is used indicates that a significant portion of women's violence against intimates is defensive.¹⁴⁴ While no one claims that all of women's violence is defensive, research on the motives and context of violence is essential to understanding prevalence numbers.

138. *See id.* at 5-6 (stating that 36% of men and 23% of women stalking victims were stalked by strangers, whereas 59% of women and 30% of men were stalked by some type of an intimate partner).

139. *See id.* at 6 (explaining that for the purposes of the report "intimate partner" includes current or former husbands/wives, same- or opposite-sex cohabiting partners, or boyfriends/girlfriends).

140. *Id.*

141. *Id.* at 8.

142. *See id.*

143. *See id.* at 5-7 (revealing that women who are stalked are more likely than men to report that "their stalkers followed them, spied on them, or stood outside their home or place of work or recreation").

144. *See* Shamita Das Dasgupta, *A Framework for Understanding Women's Use of Nonlethal Violence in Intimate Heterosexual Relationships*, 8 *Violence Against Women* 1364, 1372 (2002); Daniel G. Saunders, *When Battered Women Use Violence: Husband-Abuse or Self-Defense?* 1 *Violence and Victims* 47, 50-51 (1986) (summarizing published research on defensive violence).

Research has repeatedly documented that male victim domestic homicides are often victim precipitated. A report on risk factors for intimate partner homicide says, “[i]n 70 to 80 percent of intimate partner homicides, no matter which partner was killed, the man physically abused the woman before the murder. Thus, one of the primary ways to decrease intimate partner homicide is to identify and intervene promptly with abused women at risk.”¹⁴⁵ The message is clear: protecting women from men’s domestic violence also protects men. Another researcher noted that

[p]erhaps the most important sex difference to emerge in the St. Louis data on intimate partner homicide, however, concerns the degree and nature of the victim’s involvement in the events leading up to his or her death. In more than half of intimate partner homicides with male victims, the victim precipitated the conflict in which the killing occurred. Only 12.5% of the events with female victims were victim precipitated.¹⁴⁶

Other studies have also found that female perpetrated domestic homicide is often defensive.¹⁴⁷

8. Separation Assault

Separation assault has often been absent from discussions about sex differences in domestic violence. The studies cited to claim sex symmetry in domestic violence often exclude violence and abuse by former partners, which is a serious limitation. Research has consistently found significant sex differences in the risk of lethal violence by ex-spouses and partners. Between 1976 and 2005, former spouses perpetrated 1.4% of domestic homicides of women and 0.2% of domestic homicides of men in the United States.¹⁴⁸ A larger portion of domestic homicides are likely properly conceived as separation assault in cases occurring during separation but prior to divorce, or at the time a woman announces her intention to separate.

A California study that reviewed domestic homicide cases found that

145. Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, NAT’L INST. JUSTICE J., Nov. 2003, at 15, 18.

146. Rich Rosenfeld, *Changing Relationships Between Men and Women: A Note on the Decline in Intimate Partner Homicide*, 1 HOMICIDE STUD. 72, 76 (1997).

147. See Rosenfeld, *supra* note 145, at 79-80 (stating that women’s efforts to protect themselves from threatening relationships by divorcing their abusive spouse or staying at battered women’s shelters may help explain the decline in non-marital intimate homicides); Margo I. Wilson & Martin Daly, *Who Kills Whom in Spouse Killings? On the Exceptional Sex Ratio of Spousal Homicides in the United States*, 30 CRIMINOLOGY 189, 206 (1992) (“Unlike men, women kill male partners after years of suffering physical violence, after they have exhausted all available sources of assistance, when they feel trapped, and because they fear for their own lives.”).

148. See FOX & ZAWITZ, *supra* note 88 (click on chart titled “Homicides of intimates by relationship of victim to the offender, 1976-2005”).

45% of women were killed when they were recently separated or in the process of separating from their abuser.¹⁴⁹ Separation has been identified as a risk factor for domestic homicide even in relationships where there is no documented history of abuse.¹⁵⁰ Harper and Voigt found that domestic homicide-suicides in their sample were typically in the context of actual or impending separation.¹⁵¹ San Diego's 2006 domestic homicide report indicated that while 28% of male perpetrators of domestic homicide killed a former or estranged partner, no women in the sample killed estranged or former partners.¹⁵² The San Diego report also states that pending or actual separation was the most common risk factor for domestic homicide: 79.2% of cases shared this risk factor.¹⁵³ These differences are extremely pertinent to the provision of shelter services targeting women. In addition, they highlight what is at stake for shelters that admit men who are perpetrators, but who have falsely identified themselves as victims.

The body of literature on domestic violence as a whole clearly indicates that women and men are significantly dissimilarly and asymmetrically situated with regard to domestic violence, especially at separation.¹⁵⁴ Their experiences are both quantitatively and qualitatively different according to both large, random sample studies and small, targeted studies. Women are not only at greater risk from current and previous male partners than men are from female partners, but homicide and injury of women by male partners also makes up a disproportionately large portion of the total amount of violence against women.¹⁵⁵ This means that although there is a small minority of men who are abused or assaulted by women, these incidents neither comprise a significant portion of all violence against men nor constitute a significant social problem for the public the way that violence against women does. The risk to women of domestic violence and

149. FUKURODA, *supra* note 87, at 11.

150. *See id.* at 13 ("In 49% of our surveyed murder cases involving a non-abusive relationship, the victim had recently separated herself from the perpetrator, the perpetrator suspected the victim was having an affair or was jealous of a new intimate relationship and/or the perpetrator was experiencing serious financial difficulties.").

151. Harper & Voigt, *supra* note 110, at 304.

152. *See* SAN DIEGO DOMESTIC VIOLENCE FATALITY REVIEW TEAM, *supra* note 91, at 9 (showing that 16% of perpetrators were estranged husbands and 12% were ex-boyfriends).

153. *Id.* at 11.

154. *See* Suzanne C. Swan & David L. Snow, *A Typology on Women's Use of Violence in Intimate Relationships*, 8 VIOLENCE AGAINST WOMEN 286, 310-11 (2002) (stating that male aggressors are significantly more coercively controlling than female aggressors and that male partners commit more physical abuse, sexual coercion, injury, and severe physical violence).

155. *See id.* at 290 (stating that the National Survey of Families and Households showed that 73% of the time, the individual reporting injury from domestic violence was female).

abuse after separation is clearly documented. No parallel risk has been demonstrated for men. This difference is directly relevant to the provision of shelter services.

While a showing that the parties are not similarly situated will most often be the end of the Equal Protection Clause analysis, several courts have looked to the other elements of strict scrutiny despite an initial finding that the parties are not similarly situated.¹⁵⁶ We next examine the remaining strict scrutiny issues of whether the statute reflects a compelling state interest and whether the statute is narrowly tailored to meet that compelling government interest.

V. PROTECTING BATTERED WOMEN AND CHILDREN FROM ABUSE IS A COMPELLING STATE INTEREST

The state may fund a program that benefits women so long as the state can show that there is a compelling need for the program and that the program is narrowly tailored to meet that need.¹⁵⁷ Statutes with gender classifications must be based on a compelling state interest rather than on “over-broad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class.”¹⁵⁸ Gender-based classifications cannot be based upon administrative convenience or upon “archaic assumptions about the proper role of the sexes.”¹⁵⁹ Accordingly, a state’s interest in a

156. *See, e.g., Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 473 (1981).

157. *See id.* (declaring that preventing teenage pregnancy is a compelling state interest to justify treating males and females differently in statutory rape laws); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1087 (Cal. 2000) (“Equal protection allows discrimination and preferential treatment whenever a court determines they are justified by a compelling state interest and are narrowly tailored to address an identified remedial need.”).

158. *Parham v. Hughes*, 441 U.S. 347, 354 (1979); *see also United States v. Virginia*, 518 U.S. 515, 533 (1996) (stating the rule that justifications for gender-based classifications “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females”).

159. *See Michael M.*, 450 U.S. at 478 (upholding a gender classification in a statutory rape law because it was substantially related to the important governmental interest in the fact that sexual intercourse physically injures young women more than young men); *see also Craig v. Boren*, 429 U.S. 190, 209 (1976) (holding that gender-based differential treatment in selling alcohol violated the Equal Protection Clause); *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (opining that the different treatment of male and female naval officers was justified and was not based on overbroad generalizations since the treatment reflects the fact that such officers are not similarly situated); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (concluding that “by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience” the state violates the Due Process Clause by requiring a female to prove her dependency on her husband); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971) (stating that the Equal Protection Clause denies separate treatment that is unrelated to the objective of the statute).

gender-based classification must be based on more than simply stereotypes about the roles of men and women.

The U.S. Supreme Court has held that, when determining the state's interest in equal protection cases, courts must accord great deference to the legislature's findings as to the purpose of the statute.¹⁶⁰ The purpose and design of the battered women's shelter funding statutes in the *Woods* case are to provide funding to expand domestic violence shelters and services for women in unserved and underserved areas of the state.¹⁶¹ This increased expenditure of public funding is not based on stereotypes about gender roles, but rather is a direct response to the legislative finding that domestic violence is a problem "of serious and increasing magnitude" and that existing domestic violence services for women are inadequate.¹⁶² As described above, women are significantly more likely than men to be victims of domestic violence. There is no evidence that there is a similarly severe unmet need by men for shelter services. To the contrary, 85% of domestic violence services in the state funded by the Department of Health Services already serve battered men, as their services are available without regard to the gender of the victim.¹⁶³ Further, the lower court in *Woods* indicated that the petitioners failed to identify any domestic violence service provider that served battered women but not men.¹⁶⁴ It is precisely because women experience dramatically increased levels of domestic violence as compared to men that the state specifically created a funding scheme with a gender classification. This heightened demand by women is what warrants focused public funding to specifically address the needs of female victims of domestic violence.

The purpose of the gender-based domestic violence shelter funding is to prevent injury and death of battered women and to protect their children from the harm of witnessing violence in the home.¹⁶⁵ The California legislature specifically acknowledged the unique needs of female victims of

160. *Michael M.*, 450 U.S. at 470 (citing *Reitman v. Mulkey*, 387 U.S. 369, 373-74 (1967)).

161. See CAL. PENAL CODE § 13823.15 (West 2007). Subsection (f) of CAL. PENAL CODE § 13823.15 was invalidated by *Woods v. Horton*, 84 Cal. Rptr. 3d 332 (Ct. App. 2008). See also CAL. HEALTH & SAFETY CODE § 124250 (West 2007), held unconstitutional and modified by *Woods*, 84 Cal. Rptr. 3d 332 ("The Maternal Child and Health Branch shall administer grants . . . to expand existing services or create new services, and to establish new battered women's shelters to provide services.").

162. CAL. PENAL CODE § 13823.15(a).

163. *Woods*, 84 Cal. Rptr. 3d at 342, 350.

164. See *id.* at 343 (describing the trial court's ruling as motivated in part by the trial court finding that services for domestic violence victims (most of whom are women) are severely underfunded).

165. Cf. Barbara J. Hart, *The Legal Road to Freedom*, in BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE 17 (Marsali Hansen & Michele Harway eds., 1993) (finding that 50-70% of men who batter their wives also abuse their children).

domestic violence when they enacted the shelter services programs for the benefit of women and their children. In 1994, the California legislature enacted the Battered Women Protection Act (BWPA),¹⁶⁶ which established the Battered Women Shelter Program. Governor Pete Wilson's statement, in signing the BWPA into law, illustrates the gender-specific aims of California's domestic violence efforts:

I have signed this date Assembly Bill No. 167. This bill implements the 1994 Budget Act agreement to establish the Battered Women Protection Act of 1994, providing for a much-needed comprehensive shelter-based services program for battered women and children, and increasing by nearly eight hundred percent what the state previously spent on domestic violence services. In this time of fiscal austerity, I am pleased at the commitment California is making to the innocent victims of domestic violence. Both as a member of the U.S. Senate and as Governor, I have actively proposed and advocated efforts to strengthen protections for these victims. It is a tragic fact of life that many women and children in this state need a safe haven, a refuge to escape the brutality of an abusive relationship. The program established by AB 167 will address this immediate need to provide women presently involved in violent relationships with intervention and assistance.¹⁶⁷

The courts should defer to the intent of California's legislature, which identified domestic violence as an issue that primarily affects women. The legislative intent of the statute was specifically that "women and children in this state need a safe haven, a refuge to escape the brutality of an abusive relationship."¹⁶⁸ The statutes in the *Woods* case reflect the California legislature's recognition that the magnitude of the problem of domestic violence against women warrants public funding for under-funded and unfunded programs designed to protect women.

VI. THE STATUTE IS NARROWLY TAILORED TO MEET THE STATE'S COMPELLING INTEREST

Under strict scrutiny, a statute will be upheld only if it achieves the state's compelling interest through the least restrictive means available.¹⁶⁹ The gender classification will survive strict scrutiny only where the statute creates an "exact connection between the justification and the classification."¹⁷⁰ The disproportionate funding of shelters for women

166. CAL. HEALTH & SAFETY CODE § 124250 (West 2007).

167. *Id.*; see also 1993-94 Reg. Sess. Assemb., at 7911 (Cal. 1994).

168. See Cal. Stats. 1994, ch. 140 (Assemb. B. 167) (proposing further to facilitate the prosecution of abusers as an additional means of protecting abuse victims).

169. See *Connerly v. State Personnel Bd.*, 112 Cal. Rptr. 2d 5, 16 (2001) (explaining that the strict scrutiny standard is required for suspect classification cases because they are pernicious and rarely relevant to a legitimate governmental purpose).

170. *Id.* at 23.

reflects the fact that women experience more partner violence than men, suffer greater injuries when battered by intimate partners than their male counterparts, and face extremely different risks of lethal and sublethal violence at separation.¹⁷¹ The legislative history recognizes that it is the magnitude and prevalence of domestic violence against women that spurred the legislature into action to protect battered women and their children through gender-based funding of shelters.¹⁷² Domestic violence is a serious public concern that warrants the expenditure of resources to combat this epidemic.

Providing shelter services for battered women and their children is a narrowly tailored, effective means to accomplish the state's compelling interest of protecting women from domestic violence because shelters provide physical safety to battered women as well as resources to allow battered women to begin to live independently of their batterers. Experts in the field of domestic violence view emergency and transitional shelters as vital to the safety and survival of battered women.¹⁷³ Women disproportionately suffer domestic violence and are more likely to face economic challenges when trying to leave an abusive relationship than their male counterparts. Battered women are vulnerable to poverty and becoming homeless when forced to leave the family home due to domestic violence.¹⁷⁴ Indeed, the language of § 124250(c)(2) provides for "[t]ransitional housing programs to help women and their children find housing and jobs so that they are not forced to choose between returning to a violent relationship and becoming homeless."¹⁷⁵ Violence against women leads to and perpetuates women's poverty.¹⁷⁶ Further, domestic violence is

171. See Application for Leave to File Amici Curiae Brief and Amici Curiae Brief in Support of Respondents, *supra* note 6, at 18 (citing TJADEN & THOENNES, FULL REPORT, *supra* note 115); see also L. Kevin Hamberger & Claire E. Guse, *Men's and Women's Use of Intimate Partner Violence in Clinical Samples*, 8 VIOLENCE AGAINST WOMEN 1301, 1305 (2002). See generally RENNISON & WELCHANS, *supra* note 108.

172. See Application for Leave to File Amici Curiae Brief and Amici Curiae Brief in Support of Respondents, *supra* note 6, at 21-22 (concluding that the prevalence of domestic violence against women has caused the California legislature to act three times to combat this serious problem: in the California Welfare & Institutions Code § 18290, in domestic violence prevention laws, and in criminal domestic violence provisions).

173. *Id.* at 2.

174. See Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1020-21 (2000) (reporting that women are vulnerable to losing jobs, educational opportunities, careers, homes, and savings in their attempt to separate from abusive partners).

175. CAL. HEALTH & SAFETY CODE § 124250; CAL. HEALTH & SAFETY CODE § 124250(c)(2) (West 2007), held unconstitutional and modified by *Woods v. Horton*, 84 Cal. Rptr. 3d 332 (Ct. App. 2008).

176. See Application for Leave to File Amici Curiae Brief and Amici Curiae Brief in Support of Respondents, *supra* note 6, at 22 (citing NOW LEGAL DEFENSE AND EDUCATION FUND, SURVIVING VIOLENCE AND POVERTY: A FOCUS ON THE LINK

the leading cause of homelessness among women and children.¹⁷⁷ Finally, women face economic disadvantages that make them less able to live on their own without the job training and job placement offered by shelters.

Economic vulnerability also makes women more likely to return to abusive relationships rather than face the possibility of living on the streets with their children.¹⁷⁸ Economic self-sufficiency is often “a critical factor in the decision-making of battered women considering separation from the batterer [T]he most likely predictor of whether a battered woman will permanently separate from her abuser is whether she has the economic resources to survive without him.”¹⁷⁹ Battered women are often compelled to return to an abusive relationship because of a lack of economic resources.¹⁸⁰ Because economic resources are imperative for women’s future safety, the state’s decision to protect women and children from battering through funding of shelter services is narrowly tailored to meet the state’s compelling interest of stopping the cycle of domestic violence and keeping women and their children safe.¹⁸¹

Men are not being discriminated against in shelter services for victims of domestic violence. Rather, the allocation of resources acknowledges the

BETWEEN DOMESTIC AND SEXUAL VIOLENCE, WOMEN’S POVERTY, AND WELFARE (2002)).

177. See *id.* (citing Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 421, 421 (1991)); see also U.S. CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY 19 (2004) (reporting that 28% of the cities surveyed named domestic violence as a primary cause of homelessness); WILDER RESEARCH CENTER, HOMELESS IN MINNESOTA: KEY FACTS FROM THE SURVEY OF MINNESOTANS WITHOUT PERMANENT HOUSING 22 (2004) (reporting that domestic violence in part caused one-third of homeless women to become homeless).

178. See CAL. WELF. & INST. CODE § 18290 (West 2009) (finding that, in 1977, “it is the poor who suffer most from marital violence, since they have no immediate access to private counseling and shelter for themselves and their children”).

179. See Application for Leave to File Amici Curiae Brief and Amici Curiae Brief in Support of Respondents, *supra* note 6, at 20 (citing Hart, *supra* note 164, at 18); see also REBEKAH LEVIN ET AL., CENTER FOR IMPACT RESEARCH, PATHWAYS TO AND FROM HOMELESSNESS: WOMEN AND CHILDREN IN CHICAGO SHELTERS 3 (2004) (reporting that in 22% of the cases, domestic violence was the immediate cause of homelessness). See generally E. Gondolf et al., *Racial Differences Among Shelter Residents: A Comparison of Anglo, Black and Hispanic Battered Women*, 3 J. FAM. VIOLENCE 39 (1988).

180. Hart, *supra* note 164, at 17.

181. See Brief for Battered Women’s Justice Project as Amici Curiae Supporting Respondents at 20, *Blumhorst v. Haven Hills, Inc.*, 24 Cal. Rptr. 3d 474 (Ct. App. 2004) (No. B170904); Application for Leave to File Amici Curiae Brief and Amici Curiae Brief in Support of Respondents, *supra* note 6, at 25 (citing ELEANOR LYON, NAT’L ONLINE RESOURCE CTR. ON VIOLENCE AGAINST WOMEN, POVERTY, WELFARE AND BATTERED WOMEN: WHAT DOES THE RESEARCH TELL US?, in NATIONAL ELECTRONIC NETWORK ON VIOLENCE AGAINST WOMEN No. 1 (Dec. 1997), http://new.vawnet.org/Assoc_Files_VAWnet/WELres.pdf (last visited Mar. 4, 2009) (“Several studies in the past ten to fifteen years have documented the importance of economic resources for battered women’s decision-making.”), available at <http://www.vawnet.org>.

unique social and economic challenges that women face as victims of domestic violence. The statutes that fund shelters for battered women reflect the compelling state interest of preventing battered women from being injured and killed by their batterers as well as protecting children from the trauma that can occur from witnessing domestic violence. The legislative history of the shelter statutes at issue in *Woods* illustrates that the statutes were specifically designed and intended to keep women safe from family violence.¹⁸² This interest in providing a safe haven from violence to battered women and their children is a compelling state interest. The funding provisions for shelter services for battered women and their children are specifically and narrowly designed to address those interests.

VII. GENDER CLASSIFICATION IS PERMISSIBLE TO REMEDY PAST DISCRIMINATION

The California and federal courts agree that gender classifications that favor women in the allocation of resources will be supported if the resources are being spent to remedy past discrimination against women or address a lack of opportunity for women.¹⁸³ In *Miller v. California Commission on the Status of Women*, the California court rejected the argument that efforts by the California Commission on the Status of Women—which sought to foster the economic and social equality of women—were a denial of equal protection to men under the California Constitution.¹⁸⁴ Rather, the court held that “the use of gender-framed measures, supported by public resources, to remedy gender bias serves the interests of equality protected by our Constitution.”¹⁸⁵ The court reasoned that where public resources help to develop and foster the economic and social equality of women, the law is not discriminatory but rather serves the function of promoting equality as embodied by the California Constitution.¹⁸⁶

The U.S. Supreme Court has also held that distinctions based on gender

182. See Cal. Stats. 1994, ch. 140, subsections (b)(1) & (2), subsection 4 (Assemb. B. 167); *Woods v. Horton*, 84 Cal. Rptr. 3d 332, 342-43 (Ct. App. 2008).

183. See *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (upholding a statutory distinction based on gender for mandatory discharge from the armed forces because men and women are not similarly situated regarding opportunities for advancement); see also *Miller v. Cal. Comm’n on the Status of Women*, 198 Cal. Rptr. 877, 881 (Ct. App. 1984) (ruling that the use of public resources to create a commission promoting women’s economic and social equality was permissible under the Equal Protection Clause).

184. See *Miller*, 198 Cal. Rptr. at 881 (rejecting the plaintiffs’ argument that the existence of the California Commission itself violates state and federal concepts of equal protection laws).

185. See *id.*

186. See *id.*

may be permissible in cases in which the gender classification seeks to remedy past discrimination against women.¹⁸⁷ In *Califano v. Webster*, male recipients of social security benefits challenged the constitutionality of Social Security Act provisions that allowed female wage earners to exclude three lower-earning years more than a similarly situated male wage earner in the computation of her benefits.¹⁸⁸ The Supreme Court upheld the provision reasoning that allowing women to eliminate additional low-earning years from the calculation of their retirement benefit worked directly to remedy the effect of past discrimination and was therefore constitutional.¹⁸⁹ The Court held that redressing a long history of discrimination is an important governmental objective that justifies gender-based classification in laws that aim to reduce the economic disparity between men and women.¹⁹⁰ The Court further reasoned that “[w]hether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs.”¹⁹¹ Finally, the Court cited the statute’s legislative history to illustrate that Congress directly addressed the justification for differing treatment of men and women in the former version of that section and purposely enacted the more favorable treatment for female wage earners to compensate for past employment discrimination against women.¹⁹²

A. Courts Recognize Domestic Violence as Gender-Based Discrimination

A growing number of cases recognize domestic violence as a form of gender discrimination for purposes of equal protection. In *Bouley v. Young-Sabourin*, a domestic violence victim was evicted from her apartment by her landlord after she was battered by her spouse.¹⁹³ The judge ruled that because women are most often the victims of domestic violence, the prohibition against sex discrimination in the Fair Housing Act is violated when a victim of domestic violence is evicted as a result of her

187. See *Califano v. Webster*, 430 U.S. 313, 318 (1977).

188. See *id.*

189. See *id.* at 320 (concluding that the legislative history explains the provision was not the result of traditional bias against women, but a deliberate means of compensating women for past discrimination).

190. See *id.* at 317 (citing *Schlesinger v. Ballard*, 419 U.S. 498 (1975), and *Kahn v. Shevin*, 416 U.S. 351 (1974)).

191. See *id.* at 318 (citing *Kahn*, 416 U.S. at 353); see also *id.* at 318 n.5 (finding that, despite this remedy, women on average received lower retirement benefits than men).

192. See *Califano*, 430 U.S. at 320 (clarifying that the fact that Congress later equalized the treatment of men and women is not an admission that its previous policy was invidiously discriminatory).

193. 394 F. Supp. 2d 675, 675 (D. Vt. 2005).

abuse.¹⁹⁴ Domestic violence has also been equated to gender discrimination in cases in which the police fail to respond to domestic violence calls and leave the victim unprotected from violence. In *Smith v. City of Elyria*, the court ruled that a domestic violence victim was denied equal protection because she suffered gender discrimination when police officers permitted her ex-husband to remain in the home against her will and even advised him to go back to the house if she tried to throw him out.¹⁹⁵ The court stated that the officer's conduct "reveal[ed] a sexually discriminatory assumption that [the defendant] has a right to exercise dominion and control over his ex-wife and her home."¹⁹⁶ The court recognized as gender discrimination the fact that the police department treated domestic violence disputes differently than other disputes because women were victims of domestic violence more often than men they suffer disproportionate harm when the police fail to respond to domestic violence calls.¹⁹⁷ In *Thurman v. City of Torrington*, the court found that the police department discriminated against women based on gender in violation of the Equal Protection Clause when police consistently afforded less protection to domestic violence victims.¹⁹⁸ The court discussed the long tradition of permitting "chastisement" of wives. The court stated that just as a man is no longer permitted to physically abuse his wife merely because he is her husband, a police officer may not knowingly refrain from interfering in such violence.¹⁹⁹ To do so, the court concluded, is gender discrimination and a violation of equal protection.²⁰⁰ While the court recognized the possibility that men could also be victims of battering, it ruled that domestic violence was gender discrimination because in the vast majority of cases women are the victims of battering.²⁰¹

B. Legislatures Recognize Domestic Violence as Gender-Based

194. See *Reynolds v. Fraser*, 781 N.Y.S.2d 885, 889 (App. Div. 2004) (holding that an employer violated anti-discrimination laws by terminating a woman made homeless by domestic violence because she failed to provide a verifiable address). Similar results have been reached in employment discrimination cases in which employers were held liable for discrimination for terminating a woman because she was a victim of domestic violence. See Goldscheid, *The Civil Rights Remedy*, *supra* note 10, at 174-78.

195. See *Smith v. City of Elyria*, 857 F. Supp. 1203, 1203 (N.D. Ohio 1994).

196. *Id.* at 1212.

197. See *id.* (finding a genuine issue of material fact on defendants' summary judgment motion where they failed to present evidence that the police department's policy was substantially related to an important government objective).

198. See *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1521 (D. Conn. 1984).

199. See *id.* at 1528 (asserting that such inaction by a police officer is a denial of equal protection laws).

200. See *id.*

201. See *id.*

Discrimination

In 1994 Congress passed amendments to VAWA, which provided civil rights remedies for gender-motivated violence.²⁰² In hearings that spanned a period of four years, Congress amassed a vast record of data to support the law's recognition that domestic violence is gender discrimination and is a deprivation of civil rights.²⁰³ The civil rights remedy of VAWA was struck down by the Supreme Court in *United States v. Morrison* as an unconstitutional exercise of congressional authority in violation of the Commerce Clause.²⁰⁴ Many states, however, have enacted statutes that seek to implement the civil rights remedy of VAWA through state law.²⁰⁵ In California Civil Code § 52.4, California created a civil cause of action for damages arising from gender violence.²⁰⁶ Section 52.4(c) specifically provides that domestic violence is "gender violence" and is a form of sex discrimination.²⁰⁷ Further, the legislative history of § 52.4 shows that the legislature declared:

- (a) Existing state and federal laws do not adequately prevent and remedy gender-related violence, such as domestic violence, *which disproportionately occurs against women*.
- (b) Sexual abuse harms many *women*, children, and families, and is often not reported to the authorities or prosecuted.

202. See Goldfarb, *supra* note 10, at 252 (describing the 1994 version of the Act as the first law recognizing that gender violence deprives women of their fundamental right to equality).

203. See Goldscheid, *The Civil Rights Remedy*, *supra* note 10, at 160-61. For an in-depth comparison of how domestic violence is viewed as a form of gender discrimination internationally, but not in the United States, see Goldscheid, *Domestic and Sexual Violence as Sex Discrimination*, *supra* note 10. For example, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) specifically recognizes domestic violence as a problem of gender discrimination. See *id.* at 379-80 (citing Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* July 17, 1980, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW]); see also Goldfarb, *supra* note 10, at 259.

204. *United States v. Morrison*, 529 U.S. 598, 598 (2000).

205. See, e.g., CAL. CIV. CODE § 52.4 (West 2009) (permitting victims of gender violence to seek actual, compensatory, and punitive damages, injunctive relief, or any combination thereof); 740 ILL. COMP. STAT. ANN. 82/10 (LexisNexis 2004) (permitting individuals subjected to gender-related violence to bring a civil action for damages, injunctive relief, or other appropriate relief against their abusers); N.Y. CITY ADMIN. CODE § 8-902 (LexisNexis 2007) (creating a private right of action for victims to seek redress for their injuries from their perpetrator); WESTCHESTER COUNTY, N.Y., VICTIMS OF GENDER-MOTIVATED VIOLENCE PROTECTION ch. 701.01 (2001) (providing domestic violence victims with a private right of action against their abusers as an exercise of the state's police power).

206. See Gender Related Violence: Hearing on Assemb. B. 1928 Before the Assemb. Comm. on Judiciary, at 4 (Cal. 2002) (stating that the Legislature enacted CAL. CIV. CODE § 52.4 in response to the Supreme Court's decision in *United States v. Morrison*, which voided the damages remedy in VAWA for gender).

207. CAL. CIV. CODE § 52.4(c)(1)-(2) (West 2009).

(c) Acts of domestic violence and sexual abuse on the basis of gender constitute a form of *sexual discrimination*.

(d) All persons within California have the right to be free from crimes of violence motivated by gender.²⁰⁸

Thus, the California Legislature has specifically defined domestic violence as gender discrimination and has identified that this type of discrimination occurs disproportionately against women.

The increasing recognition by the courts and state legislatures across the country that domestic violence is gender discrimination that mainly occurs against women strengthens the argument that the gender-based classification in *Woods* is permissible to remedy past discrimination as set forth in cases like *Califano* and *Miller*. In *Califano* and *Miller*, the Supreme Court and the California court specifically permitted gender-based classification schemes that favor women if the result is to remedy discrimination that flows from “overt discrimination or from the socialization process of a male-dominated culture.”²⁰⁹ The courts and several state legislatures are beginning to make such a connection. More importantly, identifying domestic violence as gender discrimination answers the more basic and preliminary question of whether men and women who are battered are similarly situated for purposes of the equal protection analysis. Once domestic violence is seen in the larger social context as a form of gender discrimination, it takes on larger social and political significance. Domestic violence is no longer a private family issue that occurs between individuals. Rather, domestic violence is, by its very definition, gendered. The recognition of domestic violence as gender discrimination against women means that men and women are not similarly situated for purposes of equal protection.²¹⁰

C. *The Legislature Need Not Address All Aspects of a Problem*

The Supreme Court has held that “a state legislature is free to address itself to what it believes to be the most serious aspect of a broader problem. ‘[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.’”²¹¹ In *Woods*, the California legislature chose to apply the greatest

208. See Assemb. B. 1928, 2002 Assem. (Cal. 2002) (emphasis added).

209. See *Califano v. Webster*, 430 U.S. 313, 318 (1977) (summarizing the legislative history of the relevant statute for which Congress initially reduced the retirement age for women as a way to compensate them for discrimination in the job market).

210. *Contra Woods v. Horton*, 84 Cal. Rptr. 3d 332, 347 (2008) (finding that men and women, though disparately affected by domestic violence, are similarly situated in their need for domestic violence services as individual victims).

211. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 481 n.13

amount of resources to protect women who have been the victims of domestic violence.²¹² While eighty-five percent of domestic violence shelters in California offer services to men, the state has chosen to give the greater amount of the state's resources to battered women.²¹³ This decision to disproportionately fund battered women's shelters reflects the fact that women are disproportionately the victims of battering and face greater consequences as a result of being battered. The Supreme Court has held that it is not a violation of the Equal Protection Clause if the legislature chooses to allocate its resources to attack "the most serious aspect of a broader problem."²¹⁴ While men and women can both be victims of domestic violence, it is well within the state's discretion to decide that more resources should be allocated to protecting women since women are battered in far greater numbers than men and because they are more likely to suffer greater harm as a result of that battering.

VII. CONCLUSION

Women face profoundly different challenges when attempting to escape an abusive relationship than their male counterparts. Women tend to be more dependent on their batterers, face greater risk of injury and homicide upon separating from their batterers, and tend to be more reliant on shelter services than men.²¹⁵ For this reason, women and men are not similarly situated with regard to domestic violence. The California legislature recognized the unique needs of battered women when it drafted Health and Safety Code § 124250 and Penal Code § 13823.²¹⁶ The legislative history and the express intent of the statutes reflects the legislature's recognition that women are disproportionately the victims of domestic violence and have greater need of shelter services to escape battering relationships. Therefore, even if the court finds that battered men and women are similarly situated, the legislature has expressed a compelling state interest in funding battered women's shelters and the gender classification of shelter funding is narrowly tailored to meet that compelling interest. Further, both the California and United States Supreme Courts have recognized that gender-based classifications are permissible to remedy gender discrimination.²¹⁷ The courts, the California legislature, and

(1981) (quoting *Dandridge v. Williams* 397 U.S. 471, 486-87 (1970)).

212. *Woods*, 84 Cal. Rptr. 3d at 338-39.

213. *See id.* at 337-38.

214. *See Michael M.*, 450 U.S. at 481.

215. *See* CAL. HEALTH & SAFETY CODE § 124250(c)(2) (West 2007) (creating transitional housing programs to help battered women and children find housing and jobs so that they are not forced to return to a violent home or become homeless).

216. *See id.* § 124250(c).

217. *See Kahn v. Shevin*, 416 U.S. 351, 355 (1974) (upholding a Florida statute

Congress have each identified domestic violence as gender discrimination. Thus, disparate funding of shelters should be permitted to remedy gender discrimination. More importantly, however, recognition of domestic violence as gender discrimination compels the conclusion that men and women who are battered are not similarly situated for purposes of equal protection because domestic violence is profoundly gendered. Acknowledgement of domestic violence as gender discrimination allows the courts to transcend the limits of formal equality review and analyze domestic violence within the social and political framework that both perpetuates and reinforces violence against women.

permitting widows a property tax exemption and not widowers); *see also* Miller v. Cal. Comm'n on the Status of Women, 198 Cal. Rptr. 877, 881 (Ct. App. 1984) (permitting the creation of a commission to further women's economic and social equality).