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WHEN DOMESTIC VIOLENCE AND SEX-BASED DISCRIMINATION COLLIDE: CIVIL RIGHTS APPROACHES TO COMBATING DOMESTIC VIOLENCE AND ITS AFTERMATH

BY ERICA FRANKLIN*

"It is still easier to convict a car thief than a rapist, and, authorities are more likely to arrest a man for parking tickets than for beating his wife. . . ." 1
—Then-Senator Joseph Biden, Vice President of the United States

The folkways of a society are not the highest ideals of a people. The folkways are, instead, the everyday beliefs and accepted truths that guide our lives. There is a constant effort by all members of our society, conscious and unconscious, to accommodate, in a gradual adjustment, the folkways to [our highest ideals]. The law often steps in to catalyze the process of adaptation. We saw this with the turmoil of the desegregation cases. At this point in our history, we are now encountering a parallel adaptation phase involving gender-based discrimination. 2
—Judge Goldberg, Circuit Judge

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2 McKee v. City of Rockwall, 877 F.2d 409, 426-27 (5th Cir. 1989) (Goldberg, J., dissenting).
I. INTRODUCTION

For many survivors of domestic violence, oppression extends far beyond the domicile. Myriad forms of discrimination, by state and private actors alike, add insult to injury. Calls to the police may fall on deaf ears, as police departments often make exceptions for violence that takes place between intimate partners.\(^3\) In the workplace, pink slips often follow the disclosure of a domestic violence situation. A domestic violence survivor may land on the streets when her landlord learns of her abusive relationship. While civil rights protections by no means offer a panacea to combat the discriminatory treatment of domestic violence survivors, they are, in many respects, a promising avenue for redress and reform.

Domestic violence is defined as a pattern of abusive behavior within a relationship that allows one partner to exert power and control over the other. Such behavior may serve to isolate, humiliate, manipulate, intimidate, terrorize, coerce, blame, or injure a survivor. Domestic violence can take the form of actions or threats of action and can be physical, sexual, emotional, psychological, or economic in nature.\(^4\)

This Comment explores the potential for successful challenges to discrimination against domestic violence survivors in three arenas: police nonintervention, employment, and housing. This undertaking requires close analysis of the Equal Protection Clause of the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, and the Fair Housing Act respectively. It argues that the struggles of female, heterosexual domestic violence survivors in each of these arenas are amenable to civil

\(^3\) Similarly, when police officers do make arrests in domestic violence cases, they often arrest the victim rather than the perpetrator. Such practices, while highly problematic, are outside the scope of this Comment.

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rights challenges, because all of these struggles are, at heart, a form of sex-based discrimination.

Because heterosexual domestic violence is a means by which men subordinate women, and because society has yet to aban- don the misogynistic norms under which domestic violence thrives, institutional actors often facilitate domestic violence rather than repudiate it. Furthermore, because women comprise the lion’s share of domestic violence survivors, they bear the brunt of policies and practices in civil society that amount to collateral consequences of domestic violence. In short, society turns a blind eye to domestic violence survivors because they are women, and because women are disproportionately represen- ted among domestic violence survivors, they are at a serious disadvantage in civil society. Thus, civil rights interventions are in high demand.

Empirical evidence suggests that heterosexual domestic vio- lence has a strong basis in sex. For example, rigid adherence to norms of male dominance and superiority is one of the primary individual and sociocultural risk factors for family violence. Indeed, a comprehensive, multi-state study revealed higher rates of wife abuse in states with strong patriarchal norms. On the international front, research by anthropologist David Levinson reveals that societies with little or no family violence have strong indicators of gender equality, including egalitarian deci- sion-making in domestic affairs, shared control of family re- sources, and egalitarian laws governing divorce and pre-marital

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sex. Levinson found non-egalitarian domestic decisionmaking to be a reliable predictor of intimate violence directed at wives.

Heterosexual domestic violence is also a function of gender inequality on the individual level. Domestic violence is widely recognized as a means of exerting power and control, and as such, it often stems directly from power discrepancies and patriarchal values. Indeed, in one study, men in batterers’ treatment cited gender-based, power-seeking motives, such as the desire to exert control over the woman, the desire to structure and control a relationship, and the belief that female independence is at odds with male control. In another study, which involved comprehensive interviews with former male batterers, 78% of the participants believed their behavior was justified because their wives had not lived up to stereotypical expectations, such as cooking well, being available for sex, and behaving deferentially towards their husbands.

The highly disparate rates at which men and women are subjected to domestic violence also evince the sex-based nature of this phenomenon. Research indicates that 90 to 95% of domestic violence victims are women. One high-profile, national study indicated that 92% of the victims of heterosexual violence were women. Another survey revealed about 554,000 female victims

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7 DAVID LEVINSON, FAMILY VIOLENCE IN CROSS-CULTURAL PERSPECTIVE 102-07 (Sage Publications 1987).
8 Id.
11 James Ptacek, Why do Men Batter Their Wives?, in FEMINIST PERSPECTIVES ON WIFE ABUSE 133, 147 (Kersti Yllo & Michelle Bograd, eds.1988).
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and 69,000 male victims of violent crime by an intimate partner in 2007.\textsuperscript{14} The discrepancy between male and female victimization is wider for more severe violence.\textsuperscript{15} Women are 13 times more likely than men to receive injuries from domestic violence.\textsuperscript{16} The rate of female homicide victims killed by their husbands or boyfriends is more than twice that of male homicide victims killed by their girlfriends or wives.\textsuperscript{17}

Despite the strong correlation between gender inequality and domestic violence, research indicates that domestic violence among same-sex couples is about as prevalent as that among heterosexual couples.\textsuperscript{18} Thus, while heterosexual domestic violence is largely a sex-based phenomenon, sex does not fully account for domestic violence, particularly when it occurs in same-sex couples. Moreover, while women account for 90 to 95% of domestic violence victims,\textsuperscript{19} men certainly may be victims of domestic violence as well.

However, with some exceptions, the civil rights challenges discussed in this Comment apply by their very nature only to female survivors of domestic violence—an inevitable limitation of the approach for which this Comment advocates. In addition, to the extent that discrimination against domestic violence survivors stems from a covert acceptance of male-on-female bat-

\textsuperscript{16} Violence and the Family, supra note 5, at 14.
\textsuperscript{19} Criminal Victimization, supra note 14, at 2.
tering, claims of intentional sex-based discrimination will be more useful to women in heterosexual relationships and presumably, more relevant to this population. In contrast, disparate impact claims in the employment context, discussed infra, apply regardless of sexual orientation. Similarly, claims of discrimination against domestic violence survivors as such, discussed with reference to police intervention, are gender-neutral. In sum, it is important to recognize that civil rights approaches to the collateral consequences of domestic violence are not universally applicable and do not purport to be a panacea, but rather, are useful only insofar as the oppression of domestic violence survivors in civil society constitutes sex-based discrimination.

In 2000, in a major defeat to domestic violence survivors and their advocates, the Supreme Court struck down the Civil Rights Remedy of the Violence Against Women Act (VAWA),20 the first national attempt to bring civil rights protections to bear on domestic violence.21 In the wake of its demise, alternative civil rights approaches are well worth pursuing, not least on account of their normative and expressive appeal. By reframing discrimination against domestic violence survivors as discrimination against women, advocates not only leverage the legal protections against sex-based discrimination but also help underscore the gravity of the challenged discrimination. For example, employment practices that place domestic violence survivors at a disadvantage are arguably more alarming when viewed in the aggregate, as a set of practices that seriously impact employment opportunities for women.

Civil rights challenges can play an educational role as well. Domestic violence is alive and well today due in large part to its widespread acceptance. For example, in the wake of extensive media coverage of pop star Rihanna's abusive relationship with

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fellow celebrity Chris Brown, nearly half of the teens surveyed by the Boston Public Health Commission responded that Rihanna was at fault for the severe violence she experienced at the hands of her boyfriend.\footnote{Media Release, Boston Public Health Commission, Public Health Commission Surveys Youth on Dating Violence (Mar. 12, 2009), available at http://www.bphc.org/Newsroom/Pages/TopStoriesView.aspx?ID=60.} In recasting police nonintervention as a form of illicit gender discrimination, bold judicial decisions in police nonintervention cases can help to lay bare the subtle discrimination underlying widely accepted distinctions between intimate and non-intimate violence. Thus, rather than waiting for the complete demise of discriminatory social constructs, courts can help bring about such a demise by exposing and interrogating deeply entrenched social norms.

In addition, a renewed focus on the civil rights component of domestic violence law makes sense from a practical standpoint. Criminal justice interventions, such as restraining orders issued by criminal courts and no-drop prosecution policies, are only useful if the police departments charged with enforcing domestic violence prohibitions actually do so and hold perpetrators responsible. Similarly, domestic violence survivors are hard-pressed to seek help in the workplace when they fear they will be penalized for their domestic violence status. Nor can a domestic violence survivor be expected to leave her batterer once she has lost a source of income or the roof over her head.

This Comment proceeds in three parts. First, it discusses the viability of Equal Protection challenges when police fail to intervene in domestic violence incidents, all too often with lethal consequences. While the weight of authority cuts against such an approach, this Comment argues that Equal Protection approaches in this arena are well worth re-exploring, in light of the Supreme Court's recent rejection of a substantive and procedural due process challenge to police nonintervention.\footnote{Castle Rock v. Gonzalez, 545 U.S. 748 (2005).} Next, this Comment turns to employment and highlights creative avenues...
for Title VII sex-based harassment, disparate impact, and disparate treatment claims, relying on precedent within and outside the employment arena. Finally, it explores possibilities for challenges to discriminatory housing policies under the Fair Housing Act, arguing that this statute can be used to combat both evictions and denials of safety transfers to domestic violence survivors.

II. POLICE NONINTERVENTION

In 1999, a resident of Castle Rock, Colorado named Jessica Lenahan (then Jessica Gonzales) obtained a temporary restraining order (TRO) on behalf of herself and her three young daughters when she entered into divorce proceedings with her abusive husband.\(^\text{24}\) Shortly thereafter, in flagrant violation of the restraining order, Ms. Lenahan's husband abducted the children from her home.\(^\text{25}\) That evening, Ms. Lenahan called the Castle Rock Police Department, entreating the officers to enforce her TRO and return her daughters.\(^\text{26}\) But rather than taking swift action at her request, the officers told Ms. Lenahan to call again at ten o'clock if her husband had not returned the children.\(^\text{27}\) Meanwhile, Ms. Lenahan received a call from her husband, who told her that he had taken the girls to an amusement park in another county.\(^\text{28}\) Immediately—and repeatedly thereafter—Ms. Lenahan called the police department, only to be told to call again later, even though ten o'clock had come and gone.\(^\text{29}\) At 12:10 a.m., Ms. Lenahan was told an officer would come to her house, but no one came.\(^\text{30}\) Nearly an hour later, she went to the

\(^{24}\) Id. at 751.

\(^{25}\) Id. at 753.

\(^{26}\) Id.

\(^{27}\) Id.

\(^{28}\) Id.

\(^{29}\) Id.

\(^{30}\) Id.
police station and submitted an incident report herself. But rather than taking steps to locate the missing children, the officer who responded to the incident report left for dinner.

Hours later, Ms. Lenahan’s husband appeared at the Castle Rock police station and opened fire on the police, who shot back and killed him. Ms. Lenahan’s three young daughters were found dead in the back of Mr. Gonzales’ pickup truck.

In 2001, Ms. Lenahan sued the town of Castle Rock in United States District Court pursuant to 42 U.S.C. § 1983, alleging substantive and procedural due process violations. When Defendants prevailed on a motion to dismiss, Ms. Lenahan appealed, and the Tenth Circuit ruled in her favor. However, in a 7-2 decision in 2005, the Supreme Court reversed, relying heavily on a previous decision, Deshaney v. Winnebago County Department of Social Services, in which it held that the failure of child protection officials to prevent serious child abuse did not violate the child’s substantive due process rights and that no violation of procedural due process had occurred. In addition, the Court’s reading of the governing Colorado statute was deeply at odds with the statutory text; while the statute stated that officers “shall” make arrests for restraining order violations, the Court held that such arrests were discretionary.

Relentless in her pursuit of justice, Ms. Lenahan has turned to the Inter-American Commission on Human Rights (IACHR),

31 Id. at 753-54.
32 Id. at 754.
33 Id.
34 Id.
36 Gonzalez v. City of Castle Rock, 366 F.3d 1093, 1118 (10th Cir. 2004).
38 Castle Rock, 545 U.S. at 761.
an international human rights body. Though likely to be influential, the IACHR’s recommendations, which are pending at the time of writing, will not be binding on the United States.

Castle Rock dealt a decisive blow to domestic violence survivors whose calls for police protection go unanswered. In particular, it shut the door to due process claims against police officials whose inaction in response to domestic violence calls results in injury or death.

In the wake of Castle Rock, Equal Protection arguably remains a viable approach for survivors in Ms. Lenahan’s shoes, and is likely the only viable pathway to relief in the area of police nonintervention, at least on the domestic front. In the late 1980s and early 1990s, after Deshaney dealt an initial blow to due process challenges in the context of police nonintervention, a number of academic commentators advocated for the use of Equal Protection claims to address police inaction in domestic violence cases. While recent cases have been less than encouraging, this part of the Comment revisits this approach in light of the alternatives foreclosed in Castle Rock. Specifically, it synthesizes and builds upon existing arguments, addresses openings and obstacles in recent case law, and puts forth a renewed call for such approaches. It also argues that intentional discrimi-

40 Deshaney, 489 U.S. 189.
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nation by police departments against domestic violence survivors as such—for which the burden of proof is significantly lower—are likely to run afoul of the Equal Protection Clause, even under rational basis review. Consequently, this gender-neutral approach presents another avenue for post-Castle Rock challenges to police nonintervention.

A. Gender-Based Approach: Police Nonintervention as Discrimination Against Women

While law enforcement protocols for responding to domestic violence and other violent incidents are usually gender-neutral, police are often more likely, in practice, to respond to violence between non-intimates than to violence between intimates. This well-documented practice quite literally denies domestic violence survivors “equal protection of the laws” and as such, is the basis for § 1983 claims against police departments and municipalities incorporating the Equal Protection Clause of the Fourteenth Amendment.

The Supreme Court has not ruled directly on the applicability of the Equal Protection Clause to police inaction cases, and the Circuits are split, albeit unevenly. The majority of federal courts that have addressed police inaction in the domestic violence

42 See, e.g., Watson v. City of Kansas City, 857 F.2d 690, 695 (10th Cir. 1988) (reflecting that the arrest rate for non-intimate violence is nearly double that for intimate violence in Kansas City).
43 U.S. CONST. Amend. XIV.
44 Many disagree, from a normative and empirical perspective, with the premise that police should arrest batterers, particularly when the victim—usually female—objects to the arrest. The appropriateness of pursuing an arrest (and prosecution) against a victim’s wishes is beyond the scope of this Comment, and thus, the argument is confined to cases such as Castle Rock v. Gonzalez, 545 U.S. 748 (2005), in which a victim affirmatively requests police intervention. Moreover, it is the very act of punishing certain acts of violence, namely non-intimate, while failing to punish others, namely intimate, that amounts to a denial of Equal Protection.
context have rejected gender-based Equal Protection claims, with the notable exception of the Ninth Circuit and various federal district courts. Nevertheless, it is well worth exploring—and seeking to expand—the narrow openings for successful Equal Protection claims, in light of the normative appeal of civil rights approaches to domestic violence law, the flaws in existing jurisprudence, the blow that Castle Rock dealt to battered women and their families, and the impasse it left in its wake.

Few, if any, police departments have domestic violence arrest or response policies that explicitly reference gender. Nevertheless, facially neutral classifications run afoul of the Equal Protection Clause of the Fourteenth Amendment when they are administered in a discriminatory fashion. Indeed, in the seminal case of Deshaney v. Winnebago County Department of Social Services, in which the Supreme Court held, in a precursor to Castle Rock, that the Due Process Clause of the Fourteenth

45 See Eagleston v. Guido, 41 F.3d 865 (2d Cir. 1994) (rejecting Equal Protection claim); McKee v. City of Rockwall, 877 F.2d 409 (5th Cir. 1989) (rejecting Equal Protection claim); Ricketts v. City of Columbia, 36 F.3d 775 (8th Cir. 1994) (rejecting Equal Protection claim); Watson, 857 F.2d 690 (rejecting sex-based Equal Protection claim but finding genuine issue of fact with regard to discrimination against domestic violence survivors); Hynson v. City of Chester, 864 F.2d 1026 (3d Cir. 1988) (rejecting Equal Protection claim); Navarro v. Block, 72 F.3d 712 (9th Cir. 1995) (rejecting sex-based Equal Protection claim but finding genuine issue of fact with regard to discrimination against domestic violence survivors); Soto v. Flores, 103 F.3d 1056 (1st Cir. 1997) (rejecting sex-based Equal protection claim for lack of discriminatory intent); Semple v. City of Moundsville, 963 F. Supp. 1416 (N.D. W. Va. 1997) (rejecting Equal Protection claim).


Amendment did not provide an affirmative right to police protection, the Court emphasized the applicability of the Equal Protection Clause to cases of police inaction. After ruling that an individual could not hold the police liable for failing to prevent private acts of violence, the Court, in an oft-cited footnote, offered a caveat: "The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."

In Eagleston v. Guido, the Second Circuit set forth the prevailing standard for adjudicating sex-based Equal Protection claims under 42 U.S.C. § 1983 based on the differential treatment of intimate and non-intimate violence:

A directed verdict is appropriate in a domestic violence equal protection claim unless the plaintiff adduces evidence sufficient to sustain the inference that there is a policy or a practice of affording less protection to victims of domestic violence than to other victims of violence in comparable circumstances, that discrimination against one sex was a motivating factor, and that the policy or practice was the proximate cause of the plaintiff's injury.

A single instance of police indifference is insufficient to establish the requisite "policy or practice" for a § 1983 claim alleging deprivation of Constitutional rights. However, a plaintiff may prevail in such an action without reference to other members of her protected class if she is able to demonstrate a history of police indifference to her own pleas for protection. A plaintiff

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49 Id.
50 Eagleston v. Guido, 41 F.3d 865, 878 (2d Cir. 1994).
52 Thurman v. City of Torrington, 595 F. Supp. 1521, 1530 (D. Conn. 1984) ("[i]n the instant case, however, the plaintiff Tracey Thurman has specifically alleged in her statement of facts a series of acts and omissions on the part of..."
who can point to differential training policies to demonstrate
differential treatment of intimate and non-intimate violence also
may prevail in an Equal Protection claim. 53 In contrast, a statisti-
cal pattern of a police department’s differential treatment of
intimate and non-intimate violence may be insufficient, unless it
is extreme in magnitude. 54

Absent a showing of intentional discrimination, policies and
practices with a disparate impact on a disfavored minority gen-
erally will survive constitutional scrutiny under prevailing Equal
Protection jurisprudence. 55 This exacting and often unrealistic 56
standard has doomed the majority of Equal Protection claims in
this arena at the Circuit Court level. 57

the defendant police officers and police department that took place over the
course of eight months. From this particularized pleading a pattern emerges
that evidences deliberate indifference on the part of the police department to
the complaints of the plaintiff Tracey Thurman and to its duty to protect her.
Such an ongoing pattern of deliberate indifference raises an inference of ‘cus-
tom’ or policy on the part of the municipality’). See also, Macias v. Ihde, 219
F.3d 1018 (9th Cir. 2000) (finding Equal Protection violation based solely on
plaintiff’s treatment). But see, Watson v. City of Kansas City, 857 F.2d 690,
696 (10th Cir. 1988) (“we doubt whether evidence of deliberate indifference
in the plaintiff’s case alone would be sufficient evidence of different
treatment”).

53 Watson, 857 F.2d at 696.

54 Id. at 695 (statistical evidence demonstrating a significantly higher arrest
rate for stranger violence than for intimate violence may not be sufficient to
establish requisite policy or custom). McKee v. City of Rockwall, 877 F.2d
409, 415 (5th Cir. 1989) (statistical evidence demonstrating lower arrest rate
for domestic violence cases insufficient to establish policy of differential
treatment). But see McClesky v. Kemp, 481 U.S. 279, 294 n.12 (1987) (ext-
treme statistical discrepancies may be sufficient to establish equal protection
violation).

disparate impact may be sufficient to establish equal protection violation in
the absence of discriminatory intent).

Bias Approach to Discrimination and Equal Employment Opportunity, 47

57 See Eagleston v. Guido, 41 F.3d 865 (2d Cir. 1994); Ricketts v. City of
Columbia, 36 F.3d 775 (8th Cir. 1994); Watson, 857 F.2d 690. But see Balis-
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Nevertheless, the hurdle of discriminatory intent, while formidable, is not insurmountable. Even in the absence of smoking gun statements (of the politically incorrect variety that savvy state actors have by and large learned to avoid), police departments’ differential treatment of intimate and non-intimate violence evinces an intent to discriminate against women and thereby invokes intermediate scrutiny.

For one, disparate impact is probative of discriminatory intent, particularly when the disparate impact is extreme in magnitude. Because women make up 90-95 percent of domestic violence victims, the disparate impact of differential police responses to intimate and non-intimate violence is enormous in magnitude.

Historical background also can shed light on discriminatory motives. Viewed in historical context, police non-intervention in domestic violence cases emerges as part of an extended history of shielding “private” acts of violence from public regulation. This history reflects a conceptual framework of discrimination and as such, is probative of the intent behind contemporary practices.

In the past, parents, masters, husbands, and others “having authority in foro domestico” were authorized to “give reasonable correction to those under their care.” Furthermore, they were not liable when such “correction” resulted in death, unless the use of force was excessive. The law of chastisement was

treri v. Pacifica Police Dep’t, 901 F.2d 696, 701 (9th Cir. 1988) (finding evidence of animus towards women in police officer’s blatantly misogynistic comments).

Arlington Heights, 429 U.S. at 266.

Bureau of Justice Statistics, supra note 12, at 2.

Arlington Heights, 429 U.S. at 267 (“[t]he historical background of the decision is one evidentiary source [of discriminatory intent], particularly if it reveals a series of official actions undertaken for invidious purposes”).

Eppler, supra note 41, at 792-93.

2 Joel Prentiss Bishop, Commentaries on the Criminal Law §§ 604, 619.

Id.
deeply intertwined with the common law concept of coverture, under which a wife’s legal identity merged with that of her husband, rendering a husband liable for certain crimes committed by his wife. Because husbands had to answer for their wives’ wrongdoing, the argument went, they were entitled to restrain their wives via chastisement. Since the mid-eighteenth century, the chastisement of wives by their husbands has been prohibited by law. Nevertheless, in about 1892, while chastisement was still illegal, husbands could “exercise over the wife a physical restraint not precisely defined.”

The institution of marriage also shielded men from other types of prosecution. For example, a man was excused for the rape of a virgin if he promptly married her, and while he ordinarily would be liable for passing on a sexually transmitted disease to an unwitting female, he could escape prosecution if the unwitting female happened to be his wife. Thus, the law constructed marriage as an institution in which ordinary norms of conduct did not apply and which consequently afforded free reign to men in disciplining their wives. This construction necessarily rested on invidious stereotypes as to the inferiority and subordination of women.

While the notion of coverture has dissipated, the widespread acceptance of domestic violence—and its corollary, a rhetorical distinction between intimate and non-intimate violence—persists today. This acceptance manifests itself in both de jure and de facto forms, from rape statutes that render marital rape a

64 See Id.
66 1 Joel Prentiss Bishop, Commentaries on the Criminal Law § 726 (2d ed. 1858-59).
67 1 Joel Prentiss Bishop, Commentaries on the Criminal Law § 891 (8th ed. 1892).
68 Id. at § 947 n. 6 (citing 1 Hawk. P.C. Cuw. Ed. 123 § 11).
69 1 Emlin McClain, A Treatise on the Criminal Law as Now Administered in the United States § 238 (1897).
lesser crime than other forms of rape\textsuperscript{70} to the respective reluctance of police and prosecutors to make arrests and file charges when violence occurs between intimate partners.

Thus, an ostensibly gender-neutral distinction between intimate and non-intimate violence is anything but gender-neutral. In turning a blind eye towards domestic violence and affording relative impunity to batterers, police departments engage in and perpetuate a longstanding practice of shielding these “private” behaviors from public regulation—a practice grounded in antiquated stereotypes as to women’s roles in intimate relationships and society. Courts have long recognized that the use of stereotypes constitutes intentional discrimination.\textsuperscript{71} Thus, the social and historical underpinnings of this ostensibly benign classification shed light on its very nature and give rise to an inference of intentional discrimination on the part of police departments.\textsuperscript{72}

Equal Protection claims in the police protection arena often have failed because Circuit Court judges have been unwilling to make the requisite leap from (well documented) discrimination against domestic violence survivors to (harder to prove) intentional discrimination against women.\textsuperscript{73} Disparate treatment of intimate and non-intimate violence clearly has a \textit{disparate im-}

\textsuperscript{70} Four states still have a marital rape exception of some kind. \textit{See} KY. REV. STAT. ANN. § 510.035 (LexisNexis 2008) (marriage a complete defense to statutory rape); LA. REV. STAT. ANN. § 14:43 (2007) (rape occurs when “female victim” submits because she is under the false impression that the offender is her husband); OKLA. STAT. ANN. tit. 21, § 1111 (West 2002) (nonconsensual intercourse between married individuals only qualifies as rape when force is used or threatened); S.C. CODE ANN. § 16-3-658 (2003) (nonconsensual intercourse between married individuals only qualifies as rape under limited circumstances).


\textsuperscript{72} For a similar argument, \textit{see} Eppler, \textit{supra} note 41.

\textsuperscript{73} Ricketts v. City of Columbia, 36 F.3d 775 (8th Cir. 1994).
pact on women, but courts have rejected sex-based Equal Protection claims in this context.\textsuperscript{74} In rejecting such claims, courts have relied heavily on the legal standard the high Court handed down in \textit{Personnel Administrator of Massachusetts v. Feeney}.\textsuperscript{75} \textit{Feeney} concerned an Equal Protection challenge to a state hiring preference for veterans.\textsuperscript{76} Because the vast majority of veterans were men, the policy heavily favored men regardless of its ostensible gender-neutrality.\textsuperscript{77} In oft-cited terms that have become the touchstone for discriminatory intent in the context of gender, the Court upheld the challenged policy: “‘Discriminatory purpose,’ however, implies more than intent as volition or intent as awareness of consequences. . . .it implies that the decision maker. . . .selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of’ its adverse effects upon an identifiable group.”\textsuperscript{78}

Similarly, in \textit{Washington v. Davis}, the seminal case on disparate impact, the Supreme Court upheld a qualifying exam with a disparate impact on minorities, holding that disparate impact alone did not constitute a constitutional violation.\textsuperscript{79}

Contrary to the view espoused by the majority of jurisdictions, this standard does not foreclose properly conceived sex-based Equal Protection claims. Police nonintervention is a far cry from privileging stranger violence over domestic violence \textit{in spite of} the foreseeable impact on women. Instead, as this Com-

\textsuperscript{74} See \textit{Id.}
\textsuperscript{75} Soto v. Flores, 103 F.3d 1056, 1067 (1st Cir. 1997) (citing Pers. Adm’r of Mass.v. Feeney, 442 U.S. 256 (1979) as the governing legal standard and thus finding that the view adopted by the majority of circuits was more consistent with Supreme Court precedent than the minority view advanced in Balisteri v. Pacifica, 901 F.2d 696 (9th Cir. 1988) and Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984)).
\textsuperscript{76} \textit{Feeney}, 442 U.S. at 259.
\textsuperscript{77} \textit{Id.} at 260.
\textsuperscript{78} \textit{Id.} at 256.
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ment has outlined, police departments subordinate domestic violence to stranger violence because of a deeply rooted—and highly misogynistic—social understanding of gender relations that militates against state intervention in “private” matters.

Otherwise stated, it is no coincidence, nor even a vestige of historical discrimination, that females make up the vast majority of domestic violence survivors, just as women make up the vast majority of non-veterans and whites made up the majority of high-scorers on written achievement tests. By its very nature, domestic violence is sex-based. Nor is it a coincidence that the subordination of “private” acts of violence has a disproportionate impact on women, just as veterans’ preferences privilege men. The theoretical distinction between the private and the public is itself a highly gendered concept. Thus, police non-intervention claims are distinguishable from other Equal Protection claims that have failed for want of discriminatory intent.

However, the Court’s decision in McClesky v. Kemp gives reason for pause. In McClesky, plaintiffs challenged a jury verdict that subjected a black man to the death penalty for the murder of a white police officer. In support of their Equal Protection claim, plaintiffs cited a study indicating a strong correlation between the race of the victim and defendant and the imposition of the death penalty. The McClesky Court rejected plaintiffs’ claim, holding that robust evidence of discrimination on the societal level did not evince discriminatory intent on the individual level, and noting that “because discretion is essen-

80 See Id.; Pers. Adm’r of Mass.v. Feeney, 442 U.S. 256 (1979). This distinction is not intended to condone the results of Feeney and Davis, given the discriminatory legacies that laid the groundwork for both cases.
81 See, e.g., YLLO & STRAUS, supra note 6.
83 See, e.g., Feeney, 442 U.S. 256.
85 Id. at 286.
86 Id. at 308 (statistical evidence indicating robust correlation between race and imposition of death penalty cannot “prove that race enters into any capi-
tial to the criminal justice process, [the Supreme Court demands] exceptionally clear proof before [it] would infer that the discretion has been abused.”87 One might levy a similar attack against an Equal Protection claim directed at an individual police officer for failure to arrest a batterer, and indeed, courts have taken this tact in rejecting civil rights challenges to police nonintervention.88

However, affording police officers in nonintervention cases the degree of deference afforded to jurors in *McClesky* is inconsistent with the Supreme Court’s treatment of police discretion in the nonintervention context. In *Deshaney*, discussed *supra*, the Court emphasized the discretion police officers enjoyed in making arrests but nevertheless noted that, "the State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.”89 That prohibition is meaningless when police exercises of discretion enjoy a presumption of constitutionality.

Other Equal Protection cases present a more favorable outlook. For example, the Supreme Court’s 1996 opinion in *United States v. Virginia* suggests a willingness to strike down policies and practices that stem from overbroad stereotypes.90 To some extent, the claims at issue in *United States v. Virginia* are distin-

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87 Id. at 297.
88 See, e.g., Ricketts v. City of Columbia, 36 F.3d 775, 782 (8th Cir. 1994) (“Police ‘discretion is essential to the criminal justice process’” and “[w]here the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious.”’ (quoting *McClesky*, 481 U.S. at 297, 313)); Eagleston v. Guido, 41 F.3d 865, 878 (2nd Cir. 1994) (“Because of the inherent differences between domestic disputes and nondomestic disputes, legitimately different factors may affect a police officer’s decision to arrest or not to arrest in any given situation.”’ (quoting Ricketts, 36 F.3d at 781)).
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guishable from the Equal Protection claims a battered woman or her survivors might bring against an unresponsive police department, because the challenged policy in that case was an explicit gender-based classification, namely the exclusion of women from the Virginia Military Institute. However, as this Comment has illustrated, systematic policies of nonintervention in "private" violence amount to a tacit approval of the subordination of women, and as such, are tantamount to disparate treatment of men and women.

The legislative history of the now-defunct Civil Rights Remedy under the Violence Against Women Act (VAWA) lends support to the validity of Equal Protection claims challenging police nonintervention. The Civil Rights Remedy created a private right of action against "a person...who commits a crime of violence motivated by gender."91 Congress enacted this provision pursuant to its Commerce Clause and Section 5 powers.92 As Section 5 legislation, VAWA was premised on the Congressional finding that states' differential treatment of intimate and non-intimate violence (spanning a wide range of policies and practices, including police non-intervention)93 was a form of intentional gender discrimination proscribed by the Equal Protection

93 See Johanna R. Shargel, In Defense of the Civil Rights Remedy of the Violence Against Women Act, 106 YALE L.J. 1849, 1873-74 (1997) ("Congressional hearings on the VAWA Remedy showed that gender bias contaminates every level of the state system, and that insensitive and unresponsive treatment by police, prosecutors, and judges often results in low reporting and conviction rates. Police, responsible for the initial screening of cases, are notorious for not responding to situations involving violence against women, particularly domestic violence. The Fund for the Feminist Majority reported at the VAWA legislative hearings that ‘23% of women who decline from reporting their being raped to the police do so because they thought the police would be inefficient, ineffective, or insensitive.’").
Clause. Specifically, Congress found that gender motivated crimes violated "the victim's right to equal protection of the laws" and freedom from "discrimination on the basis of gender." Congress also found that,

"State and federal laws do not adequately protect against the bias element of crimes of violence motivated by gender, which separates those crimes from acts of random violence, nor do these adequately provide victims of gender-motivated crimes the opportunity to vindicate their interests; existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled. . . . a Federal civil rights action as specified in this section is necessary to guarantee equal protection of the laws. . . . and the victims of crimes of violence motivated by gender have a right to equal protection of the laws, including a system of justice that is unaffected by bias or discrimination and that, at every relevant stage, treats such crimes as seriously as other violent crimes." 

This finding was supported by testimony indicating discrepancies between laws on the books addressing gender-based violence and actual prosecution for gender-based crimes. The Civil Rights Remedy sought to redress these Equal Protection violations at the state level by providing a federal forum in which injured parties could seek the relief their home states de-

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95 *Id.* at 7.
nied. 98 However, because this remedy directly targeted private actors, namely batterers, rapists, and the like, while the Fourteenth Amendment covers only state actors, the Supreme Court held in United States v. Morrison that the Civil Rights Remedy failed the congruence and proportionality requirements for Section 5 legislation. 99 Holding the Civil Rights Remedy to be an invalid exercise of Congress' Section 5 Power—as well as Commerce Power—the Court struck down the Civil Rights Remedy in 2000. 100

However, in so doing, the Court did not deny that state responses to domestic violence, including policies and practices of police nonintervention, ran afoul of the Equal Protection Clause; it simply maintained that a remedy against private actors was incongruent with alleged Constitutional violations on the part of state actors. 101 Thus, the underlying premise of the Civil Rights Remedy, buttressed by years of advocacy, Committee Reports and Congressional findings, remains a compelling and viable claim—albeit less authoritative than a judicial pronouncement. 102 Moreover, because the Civil Rights Remedy was enacted after a number of Circuits had soundly rejected Equal Protection challenges to police nonintervention, 103 its enactment suggests the continued political viability of Equal Protection theories in this arena, despite significant setbacks in the courtroom. Despite Morrison—and in light of Castle Rock—the at-

100 Morrison, 529 U.S. at 629.
101 Id. at 625-26.
102 See City of Boerne v. Flores, 521 U.S. 507 (1997) (finding that Congress cannot change the scope of constitutional rights in enacting Section 5 legislation).
103 See, e.g., Watson v. City of Kansas City, 857 F.2d 690 (10th Cir. 1988); Hynson v. City of Chester, 864 F.2d 1026 (3rd Cir. 1988).
tempt by VAWA’s proponents to bring the power of civil rights legislation to bear on domestic violence is well worth reviving.104

B. Gender-Neutral Approach: Police Nonintervention as Discrimination Against Domestic Violence Survivors

Given the inherent challenges of establishing intent to discriminate against women, it is critical to explore gender-neutral challenges to discrimination against domestic violence survivors as such, an approach that has proved successful in more than one instance in which a sex-based discrimination approach has failed.105 While sex-based discrimination provides a more accurate conceptual framework for police nonintervention in light of the deep-rooted stereotypes and norms underlying these practices, the stakes are too high to leave a stone unturned in pursuing legal recourse for domestic violence victims and their surviving kin.

Because domestic violence survivors do not constitute a suspect class, claims of discrimination against this population are subject to rational basis review, a less rigorous standard than intermediate scrutiny.106 However, the relative ease of establishing the requisite intent—and in some cases, the absence of an intent requirement—under this approach may outweigh the disadvantages of the lower standard. Furthermore, discrimination against domestic violence survivors runs afoul of the Equal Protection Clause even under this deferential standard of review.

104 The recent election of Sen. Joseph Biden to the post of Vice President may present a unique opportunity for doing so, given his leading role in enacting VAWA and his continued support for women’s rights. See Susan Milligan, Activists Expect Clinton to Propel Women’s Rights, BOSTON GLOBE, December 1, 2008, at A1 (Kim Gandy, President of the National Organization for Women, heralds Biden’s appointment as a boon to women’s rights efforts).

105 See Navarro v. Block, 72 F.3d 712 (9th Cir. 1995); Watson, 857 F.2d at 695.

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To the extent that police department policies and practices explicitly classify domestic violence survivors as distinct from survivors of comparable but non-intimate violence, intent is not required, as any classification will be found unconstitutional in the absence of a rational basis. However, even in the absence of explicit classifications, inferring an intent to discriminate against domestic violence survivors does not require the conceptual and historically grounded leap necessary for sex-based claims.

Empirical evidence as to the efficacy of arrests belies the notion that distinctions between intimate and non-intimate violence are grounded in a rational basis. The seminal Minneapolis Domestic Violence Experiment compared the efficacy of three interventions: arresting a perpetrator, providing advice and mediation, and ordering a perpetrator to leave for eight hours. The study found that perpetrators who were not arrested were twice as likely as those who were arrested to assault their partners again. Furthermore, in light of widely used "no-drop" prosecution policies (which mandate prosecution for domestic violence crimes regardless of victims' wishes), police departments are hard pressed to claim that arrests are less effective for intimate violence due to the tendency of domestic violence survivors to recant and drop charges.

107 Id.  
108 See, e.g., Eagleston v. Guido, 41 F.3d 865, 878 (2nd Cir. 1994) ("A community may decide that mediation makes more sense, or is more promising, in disputes between members of the same family, or between neighbors, than in disputes between strangers, or that Family Court or counseling is a useful alternative to the criminal courts in certain situations. These considerations may impact arrest statistics without violating the equal protection clause").  
110 Id.  
III. Employment

Job loss, and other adverse employment actions, can be particularly devastating collateral consequences of domestic violence. Studies indicate staggering rates of job loss for domestic violence survivors, on the order of 24 to 52%. At the same time, stable employment is critical to the safety and well-being of these individuals. Without an independent source of income to support themselves and their children, many survivors have little choice but to remain with their batterers.

Moreover, the impact of domestic violence on employment extends far beyond individual employees and places women at a serious disadvantage in the workplace. In the aggregate, domestic violence survivors lose nearly eight million days of work per year. In addition, 55 to 65% of welfare (Temporary Assistance for Needy Families) recipients report that they have experienced physical abuse by an intimate partner at some point in their lifetime.

Despite the passage of Title VII, rampant discrimination against women in the workplace persists, particularly in the subtle, but nonetheless invidious form of collateral consequences for domestic violence survivors in the workplace. Because Title VII includes no explicit protections for domestic violence survivors, and because the civil rights of domestic violence survivors often go unprotected despite applicable federal prohibitions on sex-discrimination, it is worth exploring ways in which to leverage, and push the boundaries of, Title VII’s prohibition on sex-

based discrimination in order to combat the myriad hardships that domestic violence survivors experience in the workplace.

A. Sex-Based Harassment Under Title VII (Hostile Work Environment)

When an employee experiences domestic violence in the workplace, an employer that fails to meet its remedial obligation may be liable under Title VII for sex-based harassment. Sex-based harassment has been defined as hostile or intimidating behavior that is unwelcome and "sufficiently severe or pervasive to alter the conditions of the [victim's] employment and create an abusive working environment."\(^{116}\)

1. "Sex-based" Prong

Sex-based harassment must arise from gender but need not be sexual in nature to be actionable under Title VI.\(^ {117}\) As detailed above, heterosexual domestic violence as a societal phenomenon falls squarely within the rubric of sex-based conduct defined as such, as it stems from deeply rooted patriarchal norms.

\(^{116}\) Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

\(^{117}\) Policy Guidelines on Current Issues of Sexual Harassment, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/policy/docs/currentissues.html (last visited April 5, 2011) ("harassment not involving sexual activity or language may also give rise to Title VII liability (just as in the case of harassment based on race, national origin or religion) if it is 'sufficiently patterned or pervasive' and directed at employees because of their sex") (citing Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416 (10th Cir. 1987); McKinney v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985)). See also EEOC v. Farmer Brothers, 31 F.3d 891, 898 (9th Cir. 1994) ("sexual" element of sexual harassment may be secondary to a general desire to subordinate women).
2. Requisite Degree of Hostility

Instances of domestic violence in the workplace qualify as sex-based harassment when "such hostile conduct pollutes the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay on in her position."\(^{118}\) Such conduct need not inflict documented psychological damage to rise to the level of sex-based harassment.\(^{119}\)

Courts have used a sliding scale test for sex-based harassment, such that the degree of requisite severity varies inversely with that of frequency. Thus, a single instance of harassing conduct, if sufficiently severe, can be sufficient to establish a hostile work environment.\(^{120}\) For example, a single instance of physical assault, or a pattern of phone calls or stalking may constitute sex-based harassment.

Courts will look to "social context" to determine whether a particular behavior is sufficiently severe or pervasive to create a hostile work environment from the standpoint of a reasonable person in the plaintiff's shoes.\(^{121}\) In cases of hostile work environment involving domestic violence cases, it is critical that courts undertake the "social context" analysis carefully so as to

\(^{118}\) Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463 (9th Cir. 1994).


\(^{120}\) Cf. Tomka v. Seiler Corp., 66 F.3d 1295, 1305 (2d Cir. 1995) ("even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability"); Brock v. United States, 64 F.3d 1421, 1423 (9th Cir. 1995) (rape and sexual assault were sufficient to establish a Title VII claim).

\(^{121}\) Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81-2 (1998) ("A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed").
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avoid hasty conclusions and false assumptions based on what may appear to be submissive or acquiescent behavior on the part of survivors.

3. Sex-Based Harassment by a Supervisor

In some cases, an employer may be liable when an employee’s supervisor abuses her. When the harassing conduct culminates in a “tangible employment action,” the employer is strictly liable for the supervisor’s conduct.\textsuperscript{122} “Tangible employment action” includes “discharge, demotion. . . undesirable reassignment. . . [and] constructive discharge.”\textsuperscript{123} However, when the harassing conduct does not result in a tangible employment action, an employer may avoid liability by asserting an affirmative defense.\textsuperscript{124} Specifically, the employer must demonstrate that it “took reasonable care to prevent and correct promptly any sexually harassing behavior”\textsuperscript{125} and that the employee “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”\textsuperscript{126}

4. Sex-Based Harassment by Fellow Employees

Employers may be liable for acts of domestic violence perpetrated by one employee against another. For example, in Fuller v. City of Oakland, the Ninth Circuit found that domestic violence and stalking occurring between two city employees constituted sex-based harassment under Title VII.\textsuperscript{127} Appellant, a former police officer, filed suit against the City of Oakland when

\textsuperscript{123} Id. at 137.
\textsuperscript{125} Ellerth, 524 U.S. at 765.
\textsuperscript{126} Id.
\textsuperscript{127} Fuller v. City of Oakland, 47 F.3d 1522 (9th Cir. 1995).
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a former co-worker, with whom she had previously been in a romantic relationship, engaged in a series of abusive tactics that led appellant to develop a severe stress disorder and ultimately resign.\textsuperscript{128} Once on notice as to the harassment, the City failed to prevent its continuation.\textsuperscript{129} The Ninth Circuit found that the stalking and abuse—which included harassing and threatening phone calls, aggressive behavior, and unwarranted scrutiny of appellant’s work—constituted a hostile work environment and that the city had failed to meet its remedial obligations.\textsuperscript{130}

5. Sex-Based Harassment by Non-Employees

Domestic violence is not confined to intimate settings, and indeed, often follows domestic violence survivors to their places of employment, even when they do not work with their batterers. For example, a batterer may lurk the hallways of a survivor’s office or frequent the cafe where she works as a waitress. In such cases, employers may be liable for acts of domestic violence committed by a non-employee on workplace premises. According to persuasive EEOC guidance, an employer may be liable for sexual harassment of an employee by a non-employee “where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action.” In “reviewing these cases the Commission will consider the extent of the employer’s control and any other legal responsibility which the employer may have with respect to the conduct of non-employees.”\textsuperscript{131}

These regulations are consistent with established tort principles governing employer liability, in that an employer exercises “at least some degree of control over anyone on its premises.”\textsuperscript{132}

\textsuperscript{128} Id. at 1525-26.
\textsuperscript{129} Id. at 1526.
\textsuperscript{130} Id. at 1525-29.
\textsuperscript{131} 29 C.F.R. § 1604.11(e) (2009).
\textsuperscript{132} Jarman v. City of Dundee, 682 F. Supp. 1375, 1378 n.5 (N.D. Ill. 1997).
Moreover, numerous federal courts have relied on this guideline to impose liability for sexual harassment by non-employees.\textsuperscript{133}

In response to an allegation of sex-based harassment by a non-employee, an employer may assert that circumstances outside of the workplace exposed the employee to harassment.\textsuperscript{134} In some cases, an employee will successfully counter such a defense if she can establish that the nature of her job placed her in contact with her abuser, stalker, or attacker, particularly if her job is one that frequently exposes her to the public.\textsuperscript{135}

6. Remedial Obligations of Employers

An employer is liable for an employee’s harassment of a fellow employee when the employer knows or has reason to know about the harassing conduct and nevertheless takes inadequate—or simply unsuccessful—measures to remedy the situation.\textsuperscript{136} When “an employer receives a complaint or otherwise learns of an alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly” and “[t]he employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or

\textsuperscript{133} See, e.g., Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982) (“the environment in which an employee works can be rendered offensive in an equal degree by the acts of supervisors, coworkers, or even strangers to the workplace”) (citations omitted); Little v. Windermere Relocation, Inc., 265 F.3d 903, 912 (9th Cir. 2001) (employer acquiesced in hostile work environment when employee reported that she had been raped by client during business dinner); Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1074 (10th Cir. 1998) (standard for employer liability for sexual harassment by customers is the same as that for sexual harassment by co-workers).


\textsuperscript{135} Id.

\textsuperscript{136} Nichols v. Azteca Rest. Enters., 256 F.3d 864, 875 (9th Cir. 2001).
opportunities, and prevent the misconduct from occurring."\textsuperscript{137} Thus, when an employer knows or has reason to know that an employee has been subjected to domestic violence on workplace premises, and the harassing conduct persists, the employer may be liable for sex-based harassment under Title VII. For example, if a domestic violence survivor provides her employer with a photo of her abuser, the employer has an affirmative duty to prevent him from entering the building; if she asks to change shifts so as to avoid encounters with her abuser, the employer must honor her request.

Title VII's prohibition of sex-based discrimination extends to both male and female domestic violence survivors.\textsuperscript{138} In addition, sex-based harassment proscribed by Title VII includes same-sex harassment.\textsuperscript{139} Thus, a male or female survivor of domestic violence perpetrated by a member of the same sex may have a valid Title VII claim for sex-based discrimination, provided the requisite conditions for hostile work environment are met. To determine whether particular behavior directed at an individual of the same sex constitutes sex-based discrimination, a court will undertake a totality of circumstances test, "examining the social context in which particular behavior occurs and is experienced by its target."\textsuperscript{140}

As detailed above, domestic violence correlates strongly with sex, and is motivated predominantly by sex. Thus, domestic violence survivors who suffer disparate treatment or disparate impact in the workplace by virtue of their domestic violence status may invoke Title VII's prohibitions against sex-based discrimination.

\textsuperscript{137} EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, supra note 117.
\textsuperscript{139} Id. at 82.
\textsuperscript{140} Id. at 81.
B. Disparate Treatment

An aggrieved employee seeking relief for disparate treatment under Title VII must establish that she is a member of a protected class (i.e., a woman), that she is qualified for the job at issue, that she suffered an adverse employment action (e.g., failure to hire, termination, demotion, disciplinary action, etc.), and that the circumstances give rise to an inference of discrimination.\textsuperscript{141} If the employee meets her initial burden, the burden shifts to the employer to establish a non-discriminatory reason for the adverse action.\textsuperscript{142} Finally, the burden shifts back to the aggrieved employee to establish that the employer’s stated justification for the adverse action is pretextual and that the adverse action was motivated by discriminatory intent.\textsuperscript{143}

A female survivor of domestic violence may establish disparate treatment through the use of a comparator, or a similarly situated male who receives more favorable treatment than she.\textsuperscript{144} In this context, two individuals are similarly situated when they “are involved in or accused of the same offense and are disciplined in different ways.”\textsuperscript{145} The individuals need not share a position, nor must job performance be equivalent.\textsuperscript{146}

For example, in \textit{Rohde v. K.O. Steel Castings, Inc.}, a male employee assaulted plaintiff, a female employee, on workplace premises. The assault was an act of domestic violence, as the employees were intimately involved. When their employer was apprised of the incident, it promptly suspended and subsequently discharged plaintiff but took no adverse action against her male batterer. The Fifth Circuit held that the aggrieved employee had established a \textit{prima facie} case of disparate treatment: “Where two employees were engaged in an altercation and the

\textsuperscript{141} See Weinstock v. Columbia Univ., 224 F.3d 33, 42 (2nd Cir. 2000).
\textsuperscript{142} See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973).
\textsuperscript{143} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
aggressor went unpunished while the victim, a member of a minority protected by the [Civil Rights] Act [of 1964], bore the full brunt of retribution, it is clear to us that Congress intended a cause of action to lie in the absence of a sufficient explanation of non-discriminatory reasons for the disparity.\footnote{Id. at 323. See also Excel Corp. v. Bosley, 165 F.3d 635, 638, 641 (8th Cir. 1999) (disparate treatment in violation of Title VII where female survivor was discharged after her husband, an employee who suffered no adverse action, abused her at work).}

A female domestic violence survivor can establish disparate treatment without claiming that all members of her protected class, namely all female employees, are treated unfavorably;\footnote{See Back v. Hastings On Hudson Union Free Sch. Dist., 365 F.3d 107, 118-19 (2d Cir. 2004).} she may be the only domestic violence survivor in her workplace. Nor must she prove that similarly situated individuals outside of her protected class, namely similarly situated males, received more favorable treatment.\footnote{Id. at 121 (“In determining whether an employee has been discriminated against ‘because of such individual’s... sex,’ the courts have consistently emphasized that the ultimate issue is the reasons for the individual plaintiff’s treatment, not the relative treatment of different groups within the workplace.”).}

In particular, a female survivor can prevail in a disparate treatment claim without identifying a comparator when she can demonstrate that her employer’s adverse actions arose from stereotypes about women.\footnote{See Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (“[I]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,” (quoting Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707 n. 13 (1978))). See also Balistreri v. Pacifica, 901 F.2d 696 (9th Cir. 1988) (finding defendant’s animus toward battered women sufficient to state a claim of intentional sex-based discrimination); Smith v. City of Elyria, 857 F. Supp. 1203 (N.D. Ohio 1994) (finding that the police department’s differential response to domestic violence and other complaints reflected stereotypes of women and thus created a genuine issue of fact as to intentional sex-based discrimination).} For example, a dismissal may be accompanied by a snide comment about deserved abuse.

\footnote{147 Id. at 323. See also Excel Corp. v. Bosley, 165 F.3d 635, 638, 641 (8th Cir. 1999) (disparate treatment in violation of Title VII where female survivor was discharged after her husband, an employee who suffered no adverse action, abused her at work).\

148 See Back v. Hastings On Hudson Union Free Sch. Dist., 365 F.3d 107, 118-19 (2d Cir. 2004).\

149 Id. at 121 (“In determining whether an employee has been discriminated against ‘because of such individual’s... sex,’ the courts have consistently emphasized that the ultimate issue is the reasons for the individual plaintiff’s treatment, not the relative treatment of different groups within the workplace.”).\

150 See Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (“[I]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,” (quoting Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707 n. 13 (1978))). See also Balistreri v. Pacifica, 901 F.2d 696 (9th Cir. 1988) (finding defendant’s animus toward battered women sufficient to state a claim of intentional sex-based discrimination); Smith v. City of Elyria, 857 F. Supp. 1203 (N.D. Ohio 1994) (finding that the police department’s differential response to domestic violence and other complaints reflected stereotypes of women and thus created a genuine issue of fact as to intentional sex-based discrimination).}
More broadly, if a female employee suffers an adverse employment action that arises from her status as a survivor of domestic violence, she may have a valid cause of action for sex-based discrimination, even in the absence of overt evidence of stereotyping. This cause of action has strong underpinnings in the intimate, and indeed causal, relationship between gender and domestic violence; insofar as domestic violence is a function of sex, discrimination against domestic violence victims constitutes discrimination against women.

C. Disparate Impact

Employment policies and practices that burden victims of domestic violence have a disparate impact on women, and as such, are proscribed under Title VII, regardless of discriminatory intent. Because women make up 90 to 95% of domestic violence victims, policies and practices that place survivors of domestic violence at a special disadvantage in the workplace have a disparate impact on women and thus run afoul of Title VII.

151 Such an approach has prevailed in analogous Equal Protection cases. See, e.g., Williams v. City of Montgomery, 21 F. Supp. 2d 1360, 1365 (M.D. Ala. 1998).

152 See EEOC v. Dial Corp., 469 F.3d 735, 742 (8th Cir. 2006).


154 This line of reasoning has prevailed in Fair Housing Act challenges to housing policies that place domestic violence survivors at a disadvantage. Disparate impact analysis under Title VII is consistent with that under the Fair Housing Act, and as such, illustrates the useful cross-pollination that arises from a broad-based civil rights approach to domestic violence law. See, e.g., Winsor v. Regency Property Mgm’t, No. 94CV2349 (7th Cir. 1995) (landlord’s facially neutral policy of categorically excluding domestic violence survivors established prima facie case of disparate impact on the basis of sex); Alvera v. C.B.M. Group, Case No. 01-857 (D. Or. 2001), available at http://www.aclu.org/files/images/asset_upload_file457_33995.pdf (landlord’s zero-tolerance policy for violence in rental units had disparate impact on women, in violation of Fair Housing Act). But see Robinson v. Cincinnati Housing Auth., 2008 U.S. Dist. LEXIS 39523, *12 (2008) (rejecting disparate impact
Title VII’s prohibitions on disparate impact may be particularly useful to survivors who experience abuse outside of the workplace, who suffer at the hands of their employers but cannot prove overt discrimination or discriminatory intent, and who do not work with their abusers.\textsuperscript{155} For example, prohibitions on flex-time arrangements have a disparate impact insofar as they penalize battered women who need flexibility to address, escape, and recover from abuse at home.

To make out a \textit{prima facie} case of disparate impact employment discrimination, an aggrieved employee must identify a facially neutral policy or practice, establish that it has a disparate impact on her protected class, and show causation.\textsuperscript{156} To rebut a disparate impact claim, an employer must demonstrate that the practice at issue is “related to safe and efficient job performance and is consistent with \textsc{business necessity}.”\textsuperscript{157} If the employer meets this burden, an aggrieved employee can prevail nevertheless if she can demonstrate that an alternative policy or practice would serve the same ends through less discriminatory means.\textsuperscript{158}

\section*{IV. Housing}

Domestic violence has a disproportionate impact on low-income women,\textsuperscript{159} and as such, it often complicates already tenuous housing situations. Indeed, domestic violence plays a major role in homelessness among women: 22 to 50\% of homeless

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\textsuperscript{155} Calaf, \textit{supra} note 134, at 186.
\textsuperscript{156} See Lewis v. Aerospace Community Credit Union, 114 F.3d 745, 750 (8th Cir. 1997).
\textsuperscript{157} EEOC v. Dial Corp., 469 F.3d 735, 742 (8th Cir. 2006).
\textsuperscript{158} \textit{Id.}
\end{flushright}
women cite domestic violence as the direct cause of their homelessness.\textsuperscript{160} In the 2005 Hunger and Homeless Survey conducted by the United States Conference of Mayors, half of U.S. cities identified domestic violence as a primary cause of homelessness.\textsuperscript{161} The threat of homelessness often prevents survivors from taking steps to extricate themselves from abusive relationships,\textsuperscript{162} and homelessness, like other forms of economic instability, often forces domestic violence survivors to return to their abusers.\textsuperscript{163}

While discrimination is not the only cause of homelessness and housing instability among domestic violence survivors, it plays a significant role in these phenomena. Many landlords hasten to evict tenants who are experiencing domestic violence, and others categorically refuse to rent to those with a known history of domestic violence.\textsuperscript{164} For example, a 2005 study conducted by the Anti-Discrimination Center of Metro New York indicated that 28\% of New York City housing providers either categorically refused to rent to domestic violence victims or failed to follow up with testers claiming to represent domestic violence survivors seeking housing.\textsuperscript{165} In addition, many public housing authorities evict domestic violence survivors pursuant to “zero-tolerance” policies—policies dating back to the Clinton


\textsuperscript{162} Id.

\textsuperscript{163} See LEMON, supra note 111, at 1079-1100.

\textsuperscript{164} EMILY J. MARTIN & DEBORAH A. WIDISS, supra note 160, at 2.

Indeed, Congress has acknowledged that “[w]omen and families across the country are being discriminated against, denied access to, and even evicted from public and subsidized housing because of their status as victims of domestic violence.”

This discrimination further oppresses domestic violence survivors. Moreover, domestic violence survivors who fear that they will be penalized for their domestic violence status have an incentive to hide the abuse they are experiencing, and consequently, may hesitate to seek help from a landlord (e.g., changing the locks, transferring units, enlisting the assistance of security personnel) and from civil society (e.g., obtaining a restraining order, seeking on-site police intervention, etc).

While the Violence Against Women Act of 2005 (VAWA) explicitly protects domestic violence survivors from being evicted or denied housing due to domestic violence status, it applies only to tenants in certain types of federally subsidized housing—public housing, private housing paid for with a Section 8 voucher, Section 8 project-based housing, and certain

166 Tara M. Vrettos, Victimizing the Victim: Evicting Domestic Violence Victims from Public Housing Based on the Zero-Tolerance Policy, 9 CARDOZO WOMEN’S L.J. 97, 102-04 (2002).


168 Id.


171 42 U.S.C.A. § 1437d.

172 42 U.S.C.A. § 1437f(o).

173 42 U.S.C.A. § 1437f(c),(d).
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types of supportive housing.\textsuperscript{174} In addition, VAWA includes an "actual and imminent threat" exception, which allows a public housing authority to "terminate the tenancy of any tenant if the public housing agency can demonstrate an actual and imminent threat to other tenants or those employed at or providing service to the property if that tenant’s tenancy is not terminated."\textsuperscript{175}

The Fair Housing Act (FHA), which applies to both public and private housing and prohibits housing discrimination on the basis of sex, protects a broader class and arguably offers more robust protection than VAWA.\textsuperscript{176} Because this Comment focuses on sex-based discrimination in the context of domestic violence rather than discrimination against domestic violence survivors \textit{per se}, it primarily examines the FHA.

To date, there have been few FHA challenges in the domestic violence context, and many of the challenges that have been raised have resulted in settlements with limited precedential value.\textsuperscript{177} In light of this legal vacuum, advocates should look to alternatives to litigation, such as state legislation rendering domestic violence survivors a protected class and carving out exceptions for domestic violence survivors in landlord-tenant provisions. Nevertheless, the success of FHA challenges to date and the untapped potential for further challenges suggest that FHA litigation remains a promising avenue for preventing and remedying evictions and other forms of housing discrimination.

\textsuperscript{176} The Fair Housing Act makes it illegal "to refuse to sell or rent...or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C.A. 3604(a) (West 2005).
Plaintiffs can bring both disparate impact and disparate treatment claims under the FHA, and can bring such claims affirmatively or as a defense to eviction.

A. Disparate Treatment

A plaintiff may prevail under a disparate treatment theory if she can establish that she was treated differently from a similarly situated man. Alternatively, in the absence of a comparator, she may prevail nevertheless by showing that her treatment stemmed from gender stereotypes and therefore constituted intentional sex-based discrimination.

In one of the few Fair Housing Act cases in the domestic violence arena that resulted in a published court opinion, plaintiff Quinn Bouley, a tenant in rural Vermont, challenged her eviction under a disparate treatment theory. After Ms. Bouley was assaulted at home by an abusive husband, her landlord suggested turning to Christ for assistance. Angrily, Ms. Bouley responded that she did not wish to discuss religion with her landlord. Shortly thereafter, Ms. Bouley’s landlord sent Ms. Bouley an eviction letter, stating that she believed the violence that had taken place in Ms. Bouley’s unit would continue. In an FHA suit challenging the eviction as, inter alia, sex-based dis-
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crimination, Ms. Bouley argued that her landlord had employed gender stereotypes in assuming that Ms. Bouley was not a genuine victim of domestic violence given her hostile attitude; her landlord had assumed that “real” domestic violence survivors were meek and submissive. In 2005, the district court denied defendant’s motion for summary judgment, and shortly thereafter, the case settled. While the court did not address Ms. Bouley’s allegation of stereotyping, the denial of summary judgment indicates favorable treatment of disparate claims resting on the stereotyping of domestic violence survivors.

B. Disparate Impact

To make out a *prima facie* case of housing discrimination under a disparate impact theory, a plaintiff must show “that a particular facially-neutral practice actually or predictably imposes a disproportionate burden upon members of the protected class.” In contrast to the Equal Protection Clause, the FHA does not impose an intent requirement on plaintiffs alleging disparate impact. Next, the burden shifts to the defendant to establish that the challenged actions “furthered, in theory and in practice, a legitimate, bona fide, governmental interest and that no alternative would serve that interest with less discriminatory effect.” In order to prevail once a defendant has established a bona fide objective, a plaintiff must show that the defendant unreasonably failed to adopt an alternative policy that would serve the same end in a less discriminatory manner.

186 *Id.*
188 EMILY J. MARTIN & DEBORAH A. WIDISS, supra note 160, at 4.
189 *Id.*
191 Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir. 1988).
192 *Id.* at 936.
193 Hack, 237 F.3d at 101.
Because women, as noted above, constitute 90 to 95% of domestic violence survivors, plaintiffs will have relatively little difficulty making out a *prima facie* case of disparate impact by claiming that “zero tolerance” policies and other practices that penalize domestic violence survivors have a disparate impact on women. To the extent that the categorical exclusion of domestic violence survivors reduces violence on a property, a landlord may be able to assert a “business necessity” defense for a zero tolerance policy. However, in that event, plaintiffs can likely counter that other policies would have served the same ends with less discriminatory means. For example, a housing provider could file a civil or criminal complaint against the batterer, help a domestic violence survivor obtain and enforce a restraining order, improve security, or allow a survivor to transfer units, terminate a lease early, or change the locks in order to protect herself from her abuser.

A disparate impact theory proved successful in *Alvera*, a case that ultimately settled favorably for the plaintiff. In that case, plaintiff Tiffani Alvera was brutally assaulted by her husband in her apartment. When she subsequently obtained a restraining order and provided it to her landlord, she immediately received an eviction notice, pursuant to the zero-tolerance policy of her housing development, Creekside Village Apartments. Alvera challenged the zero-tolerance policy on disparate impact grounds, and the Department of Housing and Urban Development (HUD) found probable cause that the zero tolerance policy contravened the FHA. HUD and Alvera brought action against the Creekside Village Apartments, and

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194 *Bureau of Justice Statistics*, *supra* note 12, at 2.
195 *Emily J. Martin & Deborah A. Widiss*, *supra* note 160, at 5.
197 *Id.*
198 *Tara M. Vrettos*, *supra* note 166, at 98.
199 *Emily J. Martin & Deborah A. Widiss*, *supra* note 160, at 5.
the case settled on terms favorable to Alvera, albeit non-binding on outside parties.\textsuperscript{200}

Similarly, in \textit{Windsor v. Regency Property Management, Inc.}, a domestic violence survivor prevailed in state court on a disparate impact challenge to a private landlord’s refusal to rent to a survivor of domestic violence under state legislation analogous to the Fair Housing Act.\textsuperscript{201}

In \textit{Lewis v. North End Village et al.}, a domestic violence survivor brought a disparate impact suit against a private landlord when she was evicted after her “guest,” an abusive partner against whom she had filed a restraining order, violated the restraining order and caused damage to her property. The case settled on terms favorable to the plaintiff, marking the first settlement of its kind involving a private landlord. The settlement stipulated not only that the landlord would cease to evict domestic violence survivors but also that it would provide early lease termination to survivors who needed to relocate for safety reasons.\textsuperscript{202}

In \textit{Warren v. Ypsilanti Housing Commission}, a domestic violence survivor brought suit against a public housing authority to challenge a “one-strike” policy under which she had been evicted after being assaulted in her unit.\textsuperscript{203} This case also settled on favorable terms for the plaintiff and resulted in an agreement by the housing authority to renounce its “one-strike” policy.\textsuperscript{204}

\begin{flushleft}
\textsuperscript{200} \textit{Id.}
\textsuperscript{201} See \textit{Winsor v. Regency Property Mgm’t, No. 94CV2349 (7th Cir. 1995).}
\textsuperscript{203} See \textit{Warren v. Ypsilanti Housing Authority, Case No. 4:02-cv-40034 (E.D. Mich. 2003).}
\textsuperscript{204} See \textit{Id.}
\end{flushleft}
C. Emergency Transfers

In 2008, Yolaunda Robinson, a public housing tenant, was brutally attacked by her ex-boyfriend, who had found his way to her apartment and forcibly gained entry. In order to protect herself and her children, Ms. Robinson requested a transfer to a different unit, pursuant to the housing authority’s policy of providing “administrative transfers” to “residents who are victims of federal hate crimes or extreme harassment.” The housing authority refused, maintaining that domestic violence was not grounds for a transfer under the prevailing policy. Ms. Robinson challenged this denial under both disparate impact and disparate treatment theories, arguing that the housing authority’s policy reflected intentional discrimination and imposed a disproportionate burden on domestic violence survivors. However, in denying plaintiff a preliminary injunction based on the merits of her case, the court held that while the FHA prohibited the denial of housing on the basis of gender, it did not extend to emergency transfers. Thus, the court refused to rely on FHA cases in which plaintiffs had challenged the eviction of domestic violence survivors on similar grounds. Moreover, the court held that the challenged policy was facially neutral and as such, did not single out domestic violence survivors, even though the housing authority had interpreted it to exclude domestic violence as grounds for an administrative transfer. However, even though the court denied the preliminary injunction, the

206 Id. at *3.
207 Id.
208 Id. at *5.
209 Id. at *16.
210 Id.
211 Id.
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housing authority has since agreed to amend its policy to provide emergency transfers to victims of domestic violence.  

Robinson creates an uphill battle for domestic violence survivors and their advocates challenging denials for safety transfers. Nevertheless, the Robinson court's decision was fundamentally flawed, and as such, should not close the door to future challenges of its kind. Contrary to the court's holding, the FHA, which proscribes discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling," plainly applies to emergency transfers that affect a tenant's level of safety in her apartment. Moreover, the housing authority's refusal to characterize domestic violence as a form of "extreme harassment" or alternatively, to place it on par with federal hate crimes, constitutes the same tacit acceptance of domestic violence that constitutes intentional discrimination in the police nonintervention and employment contexts.

V. Conclusion

Rather than aiding and empowering domestic violence survivors, societal practices frequently result in further oppression. The stakes are high, and the results all too often fatal. This Comment demonstrates the viability of civil rights challenges in combating discrimination against domestic violence survivors in the contexts of police nonintervention, employment, and housing. Specifically, the Equal Protection Clause, Title VII of the Civil Rights Act of 1964, and the Fair Housing Act are powerful antidotes to a set of practices that, upon close examination, constitute veiled sex-based discrimination. While civil rights law is no panacea, its promises outweigh its pitfalls, and as such, it is a critical tool in combating domestic violence and its aftermath.

212 E-mail from Meliah Schulzman, National Housing Law Project, to Erica Franklin (May 6, 2009) (on file with author).
213 42 USC § 3604(a)(b).