STUDENT SCHOLARSHIP

REACHING ACROSS DIFFERENCE: EXTENDING EQUALITY'S REACH TO ENCOMPASS GOVERNMENTAL PROGRAMS THAT SOLELY BENEFIT WOMEN

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"Whatever the defects of the Aristotelian model when applied to race and nation — and they are substantial — it is stunningly inappropriate to sex."[2]

INTRODUCTION

Equality, in its classic formal sense, is inextricably linked to the notion of sameness. Having adopted the Aristotelian principle that likes should be treated alike very early on in the development of its equal protection jurisprudence,[3] the Supreme Court has repeatedly defined equality to mean similar treatment.[4] In the same way, the purpose of equal protection under

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2. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1290 (1991); *see also* Aristotle, ETHICA NICOMACHEAN, vol. 3 1131a-1131b (W. Ross trans. 1925) ("[E]quality in morals means this: things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness").

3. MacKinnon, *supra* note 2 at 1286-87.

4. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no

the law is frequently explained without context: all individuals should be treated the same.[5] To accommodate this framework, scrutiny under the Equal Protection Clause is often conditioned on an initial finding that two individuals be "similarly situated" with respect to the challenged law.[6]

However, formal equality's fixation with sameness can pose a barrier to individuals or groups that do not stand in equal relationship to the legal or social norms implicit in a law being challenged on equal protection grounds.[7] Under the current model of formal equality, accounting for individualized difference, if attempted at all, is typically done on a reluctant and very temporary basis.[8] Failure to account for past societal discriminatory treatment, the contextualization of differential impacts and effects, and the conceptualization of individualized difference in general make notions of substantive equality difficult to reconcile with traditional legal conceptions of equal treatment.

The framework is particularly difficult to apply where a challenged classification differentiates on the basis of gender. Indeed, formal equality analysis seems to have left behind the second strand of the Aristotelian model: those who are not alike may be treated differently yet equally; more importantly, their differences may be substantively relevant to achieving that equality.[9] The inability of gender-specific legislation to fully conform to formal notions of equality has perplexed the Court and femi-

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State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." citing Plyler v. Doe, 457 U.S. 202, 216 (1982)).

5. *Id.*

6. *Id.* The similarly situated requirement is sometimes called the reasonable classification test. *See* Joseph Tussman & Jacobus TenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

7. *See, e.g.*, Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1313 (1987) ("women and men frequently stand in asymmetrical positions to a particular social institution"); Colleen Sheppard, *Equality Rights and Institutional Change: Insights From Canada and the United States*, 15 ARIZ. J. INT'L & COMP. L. 143, 154 (1998) (stating that "[a] definition of equality that focuses on equal treatment is problematic . . . and [may] only provide relief to individuals who can conform or assimilate.").

8. *See* Grutter v. Bollinger, 537 U.S. 1043 (2002); City of Richmond v. J.A. Croson Co. 488 U.S. 469 (1989); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

9. Aristotle, *supra* note 2; *see also* MICHAEL QUINN, JUSTICE AND EGALITARIANISM: FORMAL AND SUBSTANTIVE EQUALITY IN SOME RECENT THEORIES OF JUSTICE 9-14 (1991) ("It is clear that for Aristotle the important task is the substantive one of establishing which particular inequalities are to count as relevant to a discussion of justice").

nist legal scholars alike. Both have struggled to define, to varying degrees and on varying terms, *which* biological and cultural differences between the sexes are constitutionally permissible bases for laws that afford dissimilar treatment to women and men.[10]

Laws that are perceived to confer a benefit to women highlight the need for a more expansive application of the equal protection clause, given that they strive to provide equal yet differential treatment between the sexes. Currently, statutes that provide for differential treatment on the basis of gender are in danger of being challenged as unconstitutional grants of "preferential" treatment to women which deny men equal protection of law. *Coalition of Free Men v. State of California* presents one such challenge, and reveals the ambivalent relationship of formal equality to gender-specific legislation.[11] In the case, representatives of the National Coalition of Free Men claim that a number of California laws that provide services to women violate the California Constitution's Equal Protection Clause because they do not provide similar services to men. A California Superior Court has dismissed the Free Men's request to issue a permanent injunction or to declare the laws unconstitutional; however, the case is now on appeal in the Second Appellate District.

Free Men presents the issue of what, if anything, the Equal Protection Clause requires of laws that are crafted as a reaction to circumstances in which two groups of individuals — here, women and men — are not similarly situated. More generally, it renews the difficult questions of sameness and difference with which numerous feminist legal scholars have grappled. This Comment seeks to contribute to that conversation by subjecting one of the programs at issue — shelters that admit battered women but not battered men — to detailed scrutiny in order to question the need for and constitutional validity of such programs. In so doing, this Comment intends to underscore the potential for unjust consequences that exists when the current framework of formal equality is applied to gender-specific legislation, and urges the incorporation of difference into a more nuanced and substantive equality review.

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10. For a discussion of relevant Court decisions, see discussion *infra* Part III. For an introduction to the feminist debate, see, e.g., Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-85); Littleton, *supra* note 7; MacKinnon, *supra* note 2.

11. Coalition of Free Men v. State, Case No. BC288096.

Part I of this Comment describes the *Free Men* case. It looks at both the California statutes and the state law equal protection challenges pressed by the *Free Men* plaintiffs. Part II examines the California Equal Protection Clause and also canvasses the influence of Proposition 209 on the state's constitutional law framework. Part III explores the history of equal protection challenges brought against gender-based classifications under federal law. It focuses specifically on the development of the similarly situated requirement and the difficulty inherent in its application to laws that differentiate on the basis of gender. Finally, Part IV critiques the merits of the *Free Men* plaintiffs' arguments.

This Comment concludes that the shelter legislation can and should survive equal protection scrutiny under both California state and federal law. The argument may proceed under either one of two strands of analysis. In the first instance, this Comment argues that the Equal Protection Clause can be understood to allow compensatory differences in treatment between the sexes where women and men are *not* similarly situated. Assuming that women and men are not similarly situated with regard to seeking shelter from domestic violence, such a finding should not preclude further Equal Protection review. Instead, the differences that informed the lawmakers' decision to craft such statutes should similarly inform a court's analysis in upholding the statute's differential treatment of women and men. Alternatively, even if women and men are found to be similarly situated, the legislation passes muster under the strict scrutiny standard of review required by the California Constitution and the less stringent level of intermediate scrutiny applied by federal law. In either instance, a thorough and necessary analysis of why and how differences are relevant to the unequal treatment afforded by the statute reveals that such programs actually further the potential for a substantively equal outcome.

The argument is circumscribed in two major ways. First, although there are several programs under attack in this case, this Comment focuses exclusively on the government-funded shelters. Second, this Comment is not intended to suggest that the resources, counseling, and treatment necessary to address instances of domestic violence should be denied to male victims. Instead, it argues that the existing shelters should be sustained in order to validate the resources currently allocated to women victims. Put another way, this Comment proposes that the differ-

ences between women and men with regard to seeking shelter from domestic violence help illustrate the need to *preserve* the benefits that the statutes legitimately and constitutionally confer to women. Instead of seeking access to shelters established after decades of hard work and lobbying by the women's movement, men should establish programs specifically tailored to help male victims of domestic violence.

I. THE *FREE MEN* EQUAL PROTECTION CLAIM

A. *Coalition of Free Men v. State of California*

In Spring 2003, a Los Angeles man filed suit against ten Southern California shelters for battered women and children.[12] The initial compliant alleged that the plaintiff had called each shelter and reported that he "needed shelter from domestic violence perpetrated against him."[13] Because it was the policy of all of the shelters to only provide refuge to battered women and their children, none were willing to accept him. Although the plaintiff was referred several times to a nearby shelter that was equipped to admit men, the plaintiff apparently did not seek its services. That shelter, located in Los Angeles County, is the only shelter in California that is currently equipped to admit men for overnight stays.[14]

The case is openly supported by the National Coalition of Free Men, one of the nation's largest "men's rights" groups.[15] Similar suits have been brought by similar groups in other parts of the country.[16] However, this was the first case of its kind wherein the plaintiff initially sued the shelters directly, rather than the government source of funding for them.

The shelters demurred to the original complaint and a California Superior Court sustained the demurrers with leave to

12. *See* Plaintiff's Original Complaint, Blumhorst v. Haven Hill, Inc., No. BC291977 (Los Angeles County Sup. Ct. C.D. filed Mar. 12, 2003).

13. *Id.* at 2.

14. Suing Shelters for Battered Women Fails to Promote the Rights of Men *at* http://www.cwlc.org/ShelterPressRelease.pdf (last visited Feb. 11, 2005) (on file with the UCLA Women's Law Journal).

15. The National Coalition of Free Men is "a non-profit organization that examines the ways sex discrimination affects men." The National Coalition of Free Men *at* http://www.ncfm.org (last visited Jan. 25, 2005) (on file with the UCLA Women's Law Journal).

16. *See* Shannon M. Garrett, *Battered By Equality: Could Minnesota's Domestic Violence Statutes Survive a "Fathers' Rights" Assault?*, 21 LAW & INEQ. 341 (2003).

amend. In the amended complaint, the plaintiff added the County of Los Angeles and the State of California Department of Health Services as defendants, alleging that each violated the Equal Protection Clauses of the California Constitution by funding the shelters in a gender-specific manner. A California Superior Court Judge denied the plaintiffs' request to issue a permanent injunction or to declare the laws to be unconstitutional. The case is currently on appeal to the California Court of Appeal, Second District.

B. *The Challenged Laws: California Battered Women's Shelter Legislation*

The shelters targeted by the Free Men plaintiffs all receive state funding under the California Battered Women's Shelter Program. Created in 1994 by the state legislature, the Program is aimed specifically to provide aid to battered women and their children. In duplicate causes of action, the *Free Men* plaintiffs contend that two separate sections of the California Health and Safety Code, which both address the Program, are unconstitutional because they assist battered women's shelters and provide no equivalent assistance to battered men.

California's Health and Safety Code section 124250 establishes state grants for battered women's shelters.[17] The terms "domestic violence," "shelter-based," and "emergency shelter" are all defined in gender-specific language.[18] In authorizing direct financial assistance, the statute designates four primary areas of need: emergency shelter services for women and their children escaping violent family situations, transitional housing programs, legal and other types of advocacy, and "other support

17. *See* CAL. HEALTH & SAFETY CODE § 124250.

18. *Id.* The Code provides:

> (1) "Domestic violence" means 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 a part of a pattern of assaultive, coercive, and controlling behaviors directed at achieving compliance from or control over, that woman. (2) "Shelter-based" means an established system of services where battered women and their children may be provided safe or confidential emergency housing on a 24-hour basis, including, but not limited to, hotel or motel arrangements, haven, and safe houses. (3) "Emergency shelter" means a confidential or safe location that provides emergency housing on a 24-hour basis for battered women and their children.

Id.

systems."[19] Each area of need is specifically focused on "women and their children."[20]

Similarly, California's Health and Safety Code section 124251 permits the State Department of Health Services to fund a state or local agency to provide technical assistance to groups operating domestic violence programs.[21] Technical assistance is to consist of training on domestic violence issues and building agency capacity in order to obtain more funding through grant writing and coalition building.[22] The statute also authorizes the Department to fund a state or local agency to evaluate the services funded through section 124250.[23]

Since shifting the focus of the lawsuit from the shelters themselves to the governmental agencies that fund them, the Coalition of Free Men, suing as taxpayers, contend that numerous statutes and regulations similar to the two provisions outlined above unconstitutionally deny men equal protection of law. Besides those that sanction funding for battered women's shelters, the other challenged statutes provide a variety of governmental benefits to women, including medical services, funding to research women's health issues, the creation of task forces to study violent crimes against women, the establishment of a Deputy Secretary for Women Veterans Affairs, and the provision of assistance and training to women in nontraditional occupations. The *Free Men* plaintiffs argue the legislation violates the Equal Protection Clause of the California Constitution by funding the shelters in a gender-specific manner that affords preferential treatment to women. Moreover, they argue that strict scrutiny review should be applied to all statutes that draw distinctions on the basis of gender.

II. STATE LAW: GENDER SPECIFIC LEGISLATION AND EQUAL PROTECTION UNDER THE CALIFORNIA CONSTITUTION

A. *Equal Protection Under the California Constitution*

The Equal Protection Clause of the California Constitution is similar to the Equal Protection Clause of the United States

19. *Id.*
20. *Id.*
21. *See* CAL. HEALTH & SAFETY CODE § 124251.
22. *Id.*
23. *Id.*

Constitution, in that both are premised on the formal equality notion of sameness. Comment I, section 7, subsection (a) of the California Constitution guarantees "[a] person . . . may not be denied equal protection of the laws."[24] Similar to the guarantee set forth in the Fourteenth Amendment, courts have construed the Clause to require "persons similarly situated with respect to the legitimate purpose of the law receive like treatment."[25]

B. *Section 31(a)*

In addition to the state's equal protection guarantee, the California Constitution's Equal Protection Clause provision is supplemented by additional language resulting from voter initiative. In November 1996, California voters approved Proposition 209 in a general election. Once adopted, the ballot initiative amended the California Constitution. Subdivision (a) of section 31 now provides: "The 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."[26]

The language of the amendment reaffirms preexisting prohibitions on race and gender discrimination contained in the United States and California Constitutions, and in the employment discrimination provisions of Title VII of the Civil Rights Act of 1964. However, it also goes beyond these restrictions and adds a new prohibition on affirmative action by explicitly precluding the state from granting race or gender preferences to any individual or group. The additional prohibition is applied to three categories of state action: public employment, public education, and public contracting.

As a practical matter, in the context of gender-specific legislative schemes, Section 31 imposes additional restrictions on state agencies seeking to provide differential treatment to men and women. In addition to state and federal principles of equal protection, programs operating in California now must be cognizant of their use of a prohibited criterion like sex. If a legislative scheme is characterized as being "discriminatory" or awarding "preferential treatment" to any one group or individual, the con-

24. CAL. CONST. art. I, § 7(a) (amended 1979).
25. Purdy v. State, 456 P.2d 645, 654 (Cal. 1969).
26. CAL. CONST. art. I, § 31(a).

sequences to the governmental program may be fatal under equal protection analysis.

1. The Exceptions

Section 31 provides for a number of exceptions to the general ban against discriminatory or preferential treatment:

> (c) Nothing 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. (d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section. (e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

Notably, the Bona Fide Qualification exception set forth in clause (c) provides an explicit exception to the general ban against preference. The clause exempts those classifications which are "reasonably necessary to the normal operation of public employment, public education, or public contracting."[27]

2. California Cases: The Influence of Section 31 on Governmental Programs

The primary prohibition set forth under Cal. Const. Art. I, § 31(a) states that government agencies may not discriminate or grant preferential treatment based on race, sex, color, ethnicity, or national origin in public employment, education, and contracting. After its approval as a ballot initiative, Proposition 209 withstood a facial federal constitutional challenge in *Coalition for Economic Equality v. Wilson*.[28] Since that case, the constitutional provision has been authoritatively construed in *Hi-Voltage Wire Works, Inc. v. City of San Jose*,[29] but the ban has been applied in only three intermediate court decisions.[30] Although instructive, none of the decisions have addressed a classificatory scheme which differentiates *solely* on the basis of gender.

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27. CAL. CONST. art I, § 31(c).

28. Coalition for Econ. Equal. v. Wilson, 122 F.3d 692 (9th Cir. 1997).

29. Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068 (Cal. 2000).

30. *See* Crawford v. Huntington Beach Union High Sch. Dist., 121 Cal. Rptr. 2d 96 (Ct. App. 2002); Connerly v. State Personnel Bd., 112 Cal. Rptr. 2d 5 (Ct. App. 2001); Kidd v. California, 72 Cal. Rptr. 2d 758 (Ct. App. 1998).

In *Hi-Voltage*, the California Supreme Court assessed whether the City of San Jose's minority and women public contracting "participation and outreach" program violated Section 31.[31] As part of its analysis, the court offered judicial interpretations of the terms "discriminate" and "preferential treatment."[32] The court construed "discriminate" to mean "'to make distinctions in treatment; show partiality (*in favor of*) or prejudice (*against*) . . . .'"[33] Giving preferential treatment was defined as "giving 'preference,' which is 'a giving of priority or advantage to one person . . . over others.'"[34] The court applied this definition to the City's program and found that "the essential structure . . . discriminates on an impermissible basis . . ., and [ ] grants preferential treatment."[35] Hence, the program was held unconstitutional.

Following *Hi-Voltage*, in *Connerly*, a California Appeals Court heard a challenge to the affirmative action component of several state statutes relating to the State Lottery Commission, the sale of state bonds, the state civil service, state community colleges, and state contracting.[36] The court found several statutory schemes that operated to the benefit of women and minorities to be in violation of Section 31.[37] In rejecting some but not all of the statutes, the court's reasoning is instructive.

First, the court made explicit that the California Constitution mandates strict scrutiny review of both racial and *gender* classifications.[38] Despite the presumptive validity that attaches to legislative classifications,[39] schemes that rely on race or gender classifications trigger a heightened form of scrutiny in light of

31. The city's program required that contractors bidding on city projects either utilize a specified percentage of minority and women subcontractors or document their efforts to include minority and women subcontractors in their bids. *High Voltage*, 12 P.3d at 1068.

32. *Id.*

33. *Id.* at 1082.

34. *Id.*

35. *Id.* at 1084. The court found that because the program instituted "what amounts to discriminatory quotas or set-asides, or at least race- and sex-conscious numerical goals" it had therefore drawn an unconstitutional line on the basis of race and gender. *Id.*

36. *Connerly,* 112 Cal. Rptr. 2d at 5.

37. *Id.*

38. *Id.* at 25.

39. The court first set out the general principle that "[a] legislative classification satisfies equal protection of law so long as persons similarly situated with respect to the legitimate purpose of the law receive like treatment." *Id.* at 14.

Section 31.[40] More importantly, the court introduced the critical distinction between what the federal equal protection clause permits and what it requires as it relates to the application of Section 31. "To the extent the federal equal protection clause would permit, but not require, the state to grant preferential treatment to suspect classes," *Connerly* found that Section 31 precludes such action.[41] Only when the federal equal protection clause is deemed to *require* differential treatment will remedial programs pass muster under the California Constitution.[42]

Most recently, in *Crawford*, a California Appeals Court found a racial and ethnic balancing component of a school district's open transfer policy to be unconstitutional.[43] In defense of the transfer policy, the school district relied on *Connerly* to argue that such a program is *required* under the federal Equal Protection Clause.[44] In rejecting that argument, the court found that "'[r]acial isolation' or 'imbalance' that is not the result of segregative intent does not require a racially discriminatory 'desegregation' plan."[45] Accordingly, the court held the racial and ethnic balancing portion of district's policy as applied to the school violated Section 31's prohibition against discrimination or preferential treatment on the basis of race in operation of public education.[46]

Two key interpretative points emerge from these California cases. First, it is clear that statutes which differentiate on the basis of gender will be subjected to strict scrutiny review, not the less stringent form of intermediate or heightened scrutiny afforded by federal law. Second, California courts have repeatedly stated that in order to comport with the California Constitution, a governmental program that affords treatment deemed "prefer-

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40. *Id.* at 31.

41. *Id.* at 42.

42. "Proposition 209 yields where federal law requires the state to engage in particular action, but not where it would merely permit such action." *Id.* at 43 n.5.

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

44. *Id.* at 103.

45. *Id.*

> While there can be no question the United States Constitution prohibits a school district from acting to segregate schools, there is no federal constitutional mandate necessitating the implementation of a proactive program of integration. The United States Supreme Court has made it clear that such a plan is *not required* by the federal Equal Protection Clause.

Id.

46. *Id.* at 104-05.

ential" under Section 31 must be required, not merely permitted, by the federal Equal Protection Clause.

Finally, it is interesting to note that the traditional exceptions have not been utilized as defensive arguments in suits brought against governmental programs under Section 31. In *Connerly*, the court mentioned the exception for actions that result in a loss of federal funding briefly in dicta, stating only that "[i]f the failure to employ the scheme authorized . . . would result in ineligibility for a federal program with a loss of federal funds . . . Proposition 209 would not preclude it."[47] At least one scholar has speculated on the influence of subsection (c), the Bona Fide Qualification exception, on gender-specific legislation. Professor Eugene Volokh specifically addresses subsection (c) in the context of "women's centers and similar programs."[48] Volokh first states that a battered women's shelter linked to governmental services would not trigger Section 31's general ban so long as the program is open to men and women alike.[49] Interestingly, however, he further suggests that battered women's shelters could refuse to admit men under the exception set forth in subsection (c), "if there's evidence that the presence of men might exacerbate the psychological trauma caused by the abuse."[50]

III. FEDERAL EQUAL PROTECTION CHALLENGES TO GENDER-CONSCIOUS CLASSIFICATIONS

A. *Requirements of Equal Protection under the United States Constitution*

As originally drafted, the Constitution had no provision that ensured its citizens equal protection under the law. As part of the Fourteenth Amendment passed in the wake of the Civil War, the Equal Protection Clause provides that "no state shall make or enforce any law which shall . . . deny to any person within its jurisdiction equal protection of the laws."[51] In *Bolling v. Sharpe*,

47. *Connerly*, 112 Cal. Rptr. 2d at 39 (citing CAL. CONST. art. I, § 31(e), (h)).

48. Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1385 (1997). "If the program is linked to public employment or education and does discriminate based on sex, then the question will be whether sex is a bona fide qualification." *Id.*

49. *Id.*

50. *Id.*

51. U.S. CONST. amend. XIV.

the protection was held to apply to the federal government through the due process clause of the Fifth Amendment.[52]

Consistent with the pervasive notion of formal equality in modern equal protection jurisprudence, the Equal Protection Clause is construed to require that people who are similarly situated will be treated the same.[53] Referred to simply as the "similarly situated requirement," this condition has been applied to claims brought under the Clause in primarily two ways. In some contexts, courts demand that individuals bringing suit under the Clause make an initial, threshold showing of "sameness" as a prerequisite to any further review.[54] Yet in other cases, notably those involving challenges to gender-based classifications, courts often consider the requirement as a foundational inquiry — wherein a finding of difference does not necessarily foreclose further analysis under the Clause.[55]

Under the former interpretation, equal protection analysis is construed to require that the Fourteenth Amendment be applied only to groups that are similarly situated.[56] Accordingly, in that context, an initial finding of difference between two individuals is fatal to an equal protection claim. For instance, in order to succeed on a claim of racial discrimination brought under Title VII of the Civil Rights Act of 1964, the plaintiff must satisfy the similarly situated requirement as part of his or her prima facie case.[57] Specifically, the plaintiff is required to show that he or she was a member of the protected class, was similarly situated to members of the unprotected class, and was treated differently from the unprotected class.[58] Similarly, in order to prove a gender-based claim of discrimination, a plaintiff must, as a threshold matter, demonstrate that he or she has been treated differently than others who are similarly situated simply because the plaintiff belongs to a particular class.[59]

In contrast, in cases where a court does not make a finding that the litigants are similarly situated, or proceeds with equal protection analysis despite a finding of difference, the challenged

52. Bolling v. Sharpe, 347 U.S. 497 (1954).

53. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

54. *See* cases discussed *supra,* Part II.

55. *See* Michael M. v. Superior Court, 450 U.S. 464 (1981); Rostker v. Goldberg, 453 U.S. 57 (1981).

56. *See, e.g.*, Pargo v. Elliott, 894 F. Supp. 1243 (S.D. Iowa 1995).

57. *See, e.g.,* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

58. *Id.* at 802.

59. *See, e.g.*, Keevan v. Smith, 100 F.3d 644 (8th Cir. 1996).

law is subjected to review under one of three standards: strict scrutiny, heightened or intermediate scrutiny, or rational basis. Laws found to unjustifiably provide for differential treatment of two individuals who are the same (for purposes of the court's analysis) are invalidated as unconstitutional violations of equal protection. Hence, it seems clear that where two people are deemed similarly situated, courts require additional justification of a law that seemingly treats those two people differently.

Yet it is not at all clear what the law requires — indeed, if it requires anything whatsoever — where two individuals are deemed not to be similarly situated with respect to the challenged legislation. As discussed above, in many contexts a failure to meet the similarly situated requirement will result in dismissal of an equal protection claim. Yet interestingly, in other cases courts have been willing to proceed with equality review despite such a finding.

Specifically, where a statute differentiates on the basis of gender, or there are indications of invidious discrimination, courts routinely proceed beyond a threshold finding of difference between the sexes to scrutinize the legitimacy of the distinction — oftentimes under a highly deferential standard of review.[60] Treatment of the similarly situated requirement under this interpretation presents a new challenge for courts facing equal protection challenges to gender-based laws. That is, in what instances does the similarly situated requirement prevent meaningful review of classifications which differentiate on the basis of gender, and under what circumstances do such laws survive equal protection scrutiny?

B. *Federal Equal Protection Challenges to Gender Specific Classifications*

The Supreme Court upheld all gender classifications that were challenged under the Equal Protection Clause until 1971.[61]

60. *See Michael M.*, 450 U.S. 464; *Rostker*, 453 U.S. 57.

61. In Reed v. Reed, 404 U.S. 71 (1971), the Supreme Court struck a gender classification for the first time. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding a state law that prevented women from attaining a bartending license unless she was the wife or daughter of a male bar owner); Hoyt v. Florida, 368 U.S. 57 (1961); Muller v. Oregon, 208 U.S. 412 (1908) (upholding a maximum hours law for women factory workers); Minor v. Happersett, 88 U.S. 162 (1874) (upholding state law which excluded women from voting); Bradwell v. Illinois, 83 U.S. 130 (1872) (upholding state law that prohibited women from being licensed to practice law); *see also Ex parte* Lockwood, 154 U.S. 116 (1894) (reaffirming *Bradwell*).

In these early cases, the Court adopted a highly deferential standard of review and continuously found that because women and men operated in separate spheres, a more thorough review of such statutes was unnecessary.[62] The separate spheres ideology, coupled with the rational basis standard of review, permitted the Court to repeatedly approve of gender discrimination based on stereotypes. Because women were never deemed similarly situated to men during this time, they also were not afforded a meaningful application of the Equal Protection Clause.[63]

Although the Court made great gains by proceeding to invalidate a gender classification under the Equal Protection Clause for the first time in *Reed v. Reed*, the official standard of review utilized in that case was rational basis.[64] In *Reed*, the Court invalidated an Idaho law which stated that males were to be preferred over females to administer the estates of people who died intestate. Although the Court articulated the traditional rational basis standard of review, in truth it applied a slightly more searching analysis that would allow for invalidation of the law.[65]

Subsequent to *Reed*, in *Frontiero v. Richardson*, Justices Brennan, Douglas, White, and Marshall all asserted that gender classifications warranted strict scrutiny.[66] Justices Powell, Burger, and Blackmun concurred in the judgment of the case but wrote separately to disagree that strict scrutiny should be applied to gender.[67] In so doing, they also suggested that the Court should wait and see whether the Equal Rights Amendment would be ratified before ruling on the appropriate standard of review. The Equal Rights Amendment was subsequently de-

62. "[C]ivil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman." *Bradwell*, 83 U.S. at 141.

63. *See* Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 14 WOMEN'S RTS. L. REP. 151 (1992).

64. "[A] classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed*, 404 U.S. at 75 (citation omitted).

65. *See generally* Gunther, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection in the Supreme Court, 1971 Term, 86 HARV. L. REV. 1, 18-19 (1972).

66. "[C]lassifications based upon sex, like classifications based upon race, alienage or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion).

67. *Id.*

feated, and in several cases after *Frontiero*, the level of scrutiny for gender classifications seemed uncertain. In some cases, the Court failed to articulate any standard of review whatsoever.[68]

In 1976, the Court announced a principle of intermediate scrutiny: gender classifications must bear a substantial relationship to an important governmental purpose.[69] In *Craig v. Boren*, an equal protection challenge was brought against a state law that allowed women to buy low alcohol beer at age 18 but required men to be age 21.[70] In holding the law unconstitutional, the Court found that although traffic safety was a sufficiently important governmental interest, the gender discrimination was not substantially related to that objective.[71]

Intermediate scrutiny today is quite difficult to meet. In 1996, the Court declared that "[p]arties who seek to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action .... The burden of justification is demanding and it rests entirely on the State."[72] In *United States v. Virginia*, the Court held the exclusion of women by the Virginia Military Institute ("VMI") unconstitutional. Virginia had previously created a parallel institute designed solely for the admission of women: the Virginia Women's Institute for Leadership at Mary Baldwin College. In reviewing the two institutions, the Court found VMI's exclusion of women unconstitutional because it was based entirely on gender stereotypes and because the parallel institute was an insufficient substitute for the unique opportunities inherent in the VMI experience.[73]

The Court has held that the heightened intermediate standard of review shall apply to those classifications that discriminate against women and those that discriminate against men.[74] Yet in two cases, *Michael M. v. Superior Court* and *Rostker v.*

68. *Compare* Taylor v. Louisiana, 419 U.S. 522 (1975), *and* Stanton v. Stanton, 421 U.S. 7 (1975), *with* Kahn v. Shevin, 416 U.S. 351 (1974).

69. "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976), *overruled by* Wilson v. McBeath, No. A-90-CA-736, 1991 U.S. Dist. LEXIS 21124 (W.D. Tex.).

70. *Id.*

71. *Id.* at 201-02.

72. United States v. Virginia, 518 U.S. 515 (1996).

73. *Id.*

74. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (applying intermediate scrutiny to strike state nursing school admission scheme which excluded men).

Goldberg, the Court has shown a greater deference to the government in its decisions to uphold gender-conscious classifications.[75] In *Rostker*, the Court sustained, against an equal protection challenge, a federal law requiring only men to register for the draft.[76] In *Michael M.*, the Court upheld a statutory rape law making men alone criminally liable.[77] In both cases, women were deemed not similarly situated to men with regard to the subject matter of the classification at hand.

For instance, in addressing the explicitly gender-based nature of the statute in *Michael M.*, the Court reasoned that:

> [B]ecause the Equal Protection Clause does not 'demand that a statute necessarily apply equally to all persons' *or require 'things which are different in fact . . . to be treated in law as though they were the same,'* this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances. As the Court has stated, a legislature may 'provide for the special problems of women.'[78]

Applying those principles to the facts, a plurality of the Court accepted the state's proposition that the purpose of the law was to prevent teenage pregnancies, and found the differential treatment provided for under the statute to be justified.[79] More precisely, the statute passed constitutional muster because men and women were deemed not similarly situated with respect to this purpose.

The case is controversial for its heavy reliance on stereotypes, but it also is critical for two doctrinal points of general application. First, and most fundamentally, it symbolizes development in the application of formal equal protection principles to gender-specific classifications. It is clear that the Court initially found the man challenging the statute to be differently situated from the women excluded from its scope. Yet, the Court's method suggests a willingness to engage in a discussion of why and how these differences were relevant to a finding that the differential treatment was justified. In the case, the deferential review and lack of an expressly articulated standard rendered the potential for that discussion a dead letter. Nevertheless, under

75. *See Michael M.*, 450 U.S. at 464; Rostker v. Goldberg, 453 U.S. 57 (1981).
76. *Rostker*, 453 U.S. at 57.
77. *Michael M.*, 450 U.S. at 464.
78. *Id.* at 469 (citations omitted) (emphasis added).
79. *Id.* at 473.

the analytical framework of *Michael M.*, when placed in the context of the heightened scrutiny adopted in *Virginia*, it seems women and men can, under certain circumstances, be differently situated for constitutional purposes and still demand a meaningful level of constitutional protection.

A second, related point focuses on the Court's upholding of the law. Broadly, this holding can be seen to validate one legislature's attempt to craft requirements that respond to those differences — however misguided they may be. To that end, subsequent interpretations of the case by lower courts may shed light on what equal protection will be interpreted to require of laws which differentiate between the sexes in the future, and whether cases that uphold governmental classifications based on gender may be read to approve of various governmental responses to the differential situations of men and women.

C. *When Difference Demands Equal Protection, What Does the Law Require?*

In the pivotal case of *California Federal Savings & Loan Ass'n. v. Guerra*, the Court held that a state may require employers to provide women with a specified amount of time for maternity leave.[80] Previous to *California Federal Savings & Loan Ass'n*, in *Geduldig v. Aiello* the Court considered whether a state disability scheme that covered all disabilities except those related to pregnancy and childbirth violated the Equal Protection Clause.[81] By holding the statute was not a gender classification, the Court was able to uphold the law under rational basis review.[82] *Geduldig* was effectively overruled by statute when Congress enacted the Pregnancy Discrimination Act ("PDA").[83] The PDA defined sex discrimination to include pregnancy discrimination and prohibited discrimination on that basis.[84]

In *California Federal Savings & Loan Ass'n*, a young woman named Lillian Garland filed a complaint with the Department of Fair Employment and Housing when the savings and loan association where she worked — Cal. Fed. — did not reinstate her after the birth of her child. She focused her argument on a California statute which mandated that employees disabled by

80. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987).
81. Geduldig v. Aiello, 417 U.S. 484 (1974).
82. *Id.* at 496-97.
83. 42 U.S.C. § 2000(e)(k) (2000).
84. *Id.*

pregnancy had a qualified right to reinstatement following childbirth. Cal. Fed. immediately sought an injunction against enforcement of the statute and claimed it was preempted by Title VII.

In holding the California statute was not preempted, the Court found that, unlike the "protectionist" gender classifications of the past, the law provided a limited and constitutional benefit to insure that pregnant women were not at a disadvantage in the workplace vis-à-vis men.[85] *California Federal Savings & Loan Ass'n* is best understood not as a preemption case, but as a case of great doctrinal significance; in terms of equal protection analysis, it moves the doctrine towards a more nuanced form of substantive equality review. In refusing to hold that the state law was preempted by Title VII, the Court also sketched what it may consider to be the Equal Protection Clause to substantively require where women and men are not similarly situated.

In light of these Supreme Court cases, it seems safe to assume that some laws which reflect the fact that women and men are not similarly situated in certain circumstances stand a good chance of passing constitutional muster. The relevant inquiry next becomes, what are the contours of this tentative guarantee? In canvassing federal and state case law since *Michael M.* and *California Federal Savings & Loan Ass'n*, it appears that upon a finding of difference, courts facing challenges to gender-based classifications will require the differential treatment (1) be free of invidious discrimination and not based on role stereotypes, and (2) relevant to the statutory purpose of the legislation. Beyond those threshold requirements, there are several factors which may lead courts to conclude that differential treatment of women and men is justified. These include, but are not limited to, (1) remedial purpose, (2) physiological differences, (3) prevention of physical injury, and (4) avoidance of mental and/or emotional trauma.

1. Not Invidious Discrimination

As an initial matter, the Court in *Michael M.* made clear that although intermediate scrutiny review would not be fatal in that case, it would be when applied to expressions of invidious dis-

85. *Cal. Fed. Sav. & Loan Ass'n*, 479 U.S. at 285. "By 'taking pregnancy into account,' California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs." *Id.* at 289.

crimination. The Court has explicitly stated that the legislature may not make overbroad generalizations based on sex that are entirely unrelated to any differences between men and women or that demean the ability or social status of the affected class.[86] Accordingly, statutes and policies that are shown to be the product of traditional stereotyping or archaic notions of appropriate gender roles are routinely found to be constitutionally flawed.[87]

2. Relevant to Statutory Purpose

Although it is not unconstitutional for a statute to treat different classes of persons in different ways, it is unconstitutional for a statute to afford different treatment to those who are classified on the basis of criteria wholly unrelated to its objective.[88] In the context of gender, statutes that are justified as requiring differential treatment are usually constructed with regard to some more pervasive institutional or social differentiation between the sexes. Hence, where men and women are not similarly situated, courts will require that differential treatment be relevant to the statutory purpose of the challenged legislation. For instance, in *Michael M.*, the Court placed particular emphasis on the difference between men and women with regard to the risks inherent in sexual intercourse:

> We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity. The statute at issue here protects women from sexual intercourse at an age when those consequence are particularly severe.[89]

The principles of *Michael M.* have been applied to justify requirements of differential treatment on the basis of sex in a number of contexts.[90] In each case, equal protection analysis was

86. Michael M. v. Superior Court, 450 U.S. 464 (1981).

87. *See, e.g., Ex rel.* Joseph T., 430 S.E.2d 523 (S.C. 1993) (finding statute making it unlawful to communicate certain messages to women to based upon "old notions" that women should be afforded special protection from "rough talk" based upon perceived "special sensitivities").

88. *See, e.g.*, Kellems v. Brown, 313 A.2d 53 (Conn. 1972).

89. *Michael M.*, 450 U.S. at 471-72.

90. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981); Parham v. Hughes, 441 U.S. 347 (1979), Califano v. Webster, 430 U.S. 313 (1977), Schlesinger v. Ballard, 419 U.S. 498 (1975).

extended to cover a situation where the relevant law required differential treatment of differently situated individuals.

3. Remedial Purpose

Interestingly, the Court has generally sanctioned gender classifications which benefit women that contain a remedial purpose or address a lack of opportunities. Unlike racial classifications, in which context the Court has flatly rejected the notion of remedying past discrimination as a compelling governmental objective, in cases of gender, the Court has paid selective attention to a desire to achieve equal treatment of women.

For instance, in *Califano v. Webster*,[91] the Court upheld a provision in the Social Security Act that allowed women to calculate retirement benefits by excluding a number of lower-earning years. In that case, the Court found the "redressing [of] our society's longstanding disparate treatment of women" to be a valid objective.[92] Because the formula "operated directly to compensate women for past economic discrimination" the Court found it substantially related to achieving that objective.[93]

Similarly, in *Schlesinger v. Ballard*, the Court addressed the lack of opportunities afforded to women to advance in the Navy.[94] In that case, the Court upheld a regulation that required male officers who had gone nine years without a promotion to be discharged, but allowed women to remain thirteen years without promotion. The Court upheld the regulation and based its reasoning on the notion that men had more opportunities for combat and thus more opportunities for promotion than women. The Court explained: "Congress may thus quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with fair and equitable career advancement programs."[95]

4. Appreciation of Physiological Difference

Classifications designed to address the physiological differences between men and women are generally upheld as requiring

91. *Califano*, 430 U.S. at 313.
92. *Id.* at 317.
93. *Id.* at 318.
94. *Schlesinger*, 419 U.S. at 498.
95. *Id.* at 508.

differential treatment. In his concurrence in *Michael M.*, Justice Stewart found the relevant differences between men and women with regard to the statutory rape law to be primarily physiological in nature.[96] This view has been mainly applied by lower state and federal courts in the same context: criminal statutes which assign liability solely to men.[97]

Similarly, in *Nguyen v. INS*, the Court examined a statute that imposed different requirements for a child's acquisition of citizenship depending upon whether the citizen parent was the mother or the father.[98] In finding the use of gender-specific terms to mark a permissible distinction, the Court found the required differential treatment "inherent in a sensible statutory scheme . . . [that] takes into account a biological difference between the parents."[99] Thus it appears that where a gender-based classification can be tied to a physiological difference, albeit typically the woman's weakness in relation to the man, the statute will likely be upheld.

5. Prevention of Physical Injury

Several state criminal courts, and even some military courts, have identified the prevention of physical injury to be sufficient justification to require gender-based legislation. Most courts have been willing to uphold criminal statutes which seek to punish men — and not women — for violent crimes like sexual assault on this basis. In such cases, the potential harm from such crimes is often described as not only running to the individual victim, but to society.[100]

96. Michael M. v. Superior Court, 450 U.S. 481 (1981) (J. Stewart, concurring) ("[T]he Equal Protection Clause does not mean that the physiological differences between men and women must be disregarded.").

97. *See, e.g.*, People v. Silva, 33 Cal. Rptr. 2d 181 (Ct. App. 1994) (upholding criminal domestic abuse statute; noting the distinction that women are physically less able to defend themselves against their husbands than vice-versa); Washington v. Toomey, 690 P.2d 1175 (Wash. Ct. App. 1984) (rejecting notion that consideration of physical characteristics or conditions attributable to only one sex amounts to a violation of equal protection).

98. Nguyen v. INS, 533 U.S. 53 (2001).

99. *Id.* at 65.

100. *See, e.g.*, Baynes v. State, 423 So. 2d 307 (Ala. Crim. App. 1982); Smith v. State, 409 So. 2d 455, 460 (Ala. Crim. App. 1981); *see also* United States v. Parini, 12 M.J. 679 (1981).

6. Avoidance of Mental and Emotional Trauma

Statutes which seek to protect women from the emotional trauma caused by sexual intercourse with men are usually upheld as requiring differential treatment, so long as the evidence of trauma is verifiable. Indeed, it seems that what began as a narrow "unwanted pregnancy risk" in *Michael M.* has been expanded upon to include a wide spectrum of negative repercussions which can result from sexual intercourse. These dangers have been utilized by courts as justification to require the differential application of criminal schemes to men and women for such crimes.

Rape, for example, is a context in which it is well established that men and women are not similarly situated.[101] Accordingly, the "verified attendant physical and psychological trauma" produced by the "real problem [of] rape of women by men" has been used to buttress criminal statutes which require only men be punished for this crime.[102] Indecent assault has also been a subject deemed to require differential treatment on this basis.[103] In *United States v. Parini*, an Army Court of Military Review found a criminal statute which punished only men for the crime to "serve to protect the female from not only the physical, but from emotional and psychological dangers inherent in the proscribed conduct."[104]

Courts generally require tangible evidence of trauma to support this argument. For instance, in *Navedo v. Preisser*, the court was dismissive of the argument that a young female is more likely than a young male to suffer emotional effects from sexual intercourse with an older partner.[105] The court reasoned that the state's lack of "evidence of any kind — legislative history, statistical, or medical" to support the argument rendered it unpersuasive.[106]

Thus, when the issue is sexual assault, threatened or actual, it seems that courts are especially willing to recognize that the impact of abuse far exceeds the initial encounter. One court listed the consequences to a female victim of nonconsensual sexual intercourse as "medical, physical, sociological, moral, and

101. Liberta v. Kelly, 839 F.2d 77 (2d Cir. 1988).
102. *Id.* at 83; *see also* State v. Greensweig, 644 P.2d 372 (Idaho Ct. App. 1982).
103. *Parini*, 12 M.J. at 679.
104. *Id.* at 683.
105. Navedo v. Preisser, 630 F.2d 636 (8th Cir. 1980).
106. *Id.*

psychological problems . . . in addition to the physical injuries and psychological traumas."[107]

IV. Requiring Equality Across Difference: The Constitutionality of Shelters which Refuse to Admit Men

Turning now to the facts of the *Free Men* case, it becomes apparent that the traditional formal model of equality — catered to at both the state and federal level — will render one of two methods of analysis appropriate. First, the court could find men and women are not similarly situated in terms of seeking shelter from domestic violence and halt further equal protection review. Yet, it seems just as possible that a court could proceed with equal protection review under a heightened or, in California, strict, standard of review, despite an initial finding of difference.[108] Finally, in light of recent judicial interpretations of Section 31, a California court will pay particular attention to whether the law *requires* the sanctioned governmental treatment.

Under any of the above approaches, the constitutionality of the legislation can and should be upheld. More fundamentally, the women in need of such governmental programs should not be punished for their difference from men by formal notions of equality. In order for substance to prevail over form, the court should make relevant and legitimate the difference between women and men in order to uphold the statutes as constitutionally valid exercises of equal protection under law. For instance, it may elect to find the claim entirely unwarranted given the difference in women and men's experiences in seeking shelter from domestic violence. Alternatively, it may find that women and men are not similarly situated in terms of seeking shelter from domestic violence and elaborate on how and why the legislation is constitutional despite that difference. Such an approach would make explicit the notion that equality can traverse a finding of difference to require just treatment of those not similarly situated.

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107. *Baynes*, 423 So. 2d at 308.

108. Indeed, in denying the Plaintiffs' request to issue a permanent injunction or to declare the laws to be unconstitutional, Judge Mackey recognized first that "classifications on the basis of gender alone does not trigger strict scrutiny . . . [without] a showing of discrimination or persons similarly situated on the basis of gender . . . ." The opinion went on to find "[t]he gender classification is necessary to the statutory scheme and is justified by a compelling government interest and [is] narrowly tailored to serve that interest." *See* Coalition of Free Men v. State of California at 2, 4.

A. *Women and Men are Not Similarly Situated in Terms of Seeking Shelter From Domestic Violence*

1. The Difference Gender Makes at Separation

A woman's decision to leave an abusive relationship with a man, her problem of transition,[109] and her resulting move from her home into a shelter, are each fundamentally gendered actions. The social facts that influence her choices are oriented in women's and men's asymmetrical relationship to the institutions of marriage, the family, and the social and economic realities which manifest themselves therein.[110] Importantly, these facts are oftentimes highlighted and wielded as weapons of intimidation in the construction of domestic abuse. To the extent, then, that the consequences of these differences are immediately absorbed by women who are abused, and they are, nowhere is a separate benefit more necessary in order to address those differences than that which is utilized at the outset of a woman's choice to leave.

The first indicia that men and women are not similarly situated with respect to their need for such benefits is illustrated by sheer demand — put another way, it is women who leave. In California and across the nation, women are overwhelmingly seeking shelter from domestic abuse.[111] Even with the protection of shelters that receive public financial assistance, each year more than 23,000 women are turned away from overcrowded shelters in California.[112] As of 1997, statistics showed approximately one domestic violence program for every 2,170 battered women nationwide, and one shelter bed for every 160 battered women.[113] In contrast, it has been reported that only 9% of domestic violence victims who seek shelter services are men.[114] The governmental programs that seek to afford women a place to go can and should be described as a reaction to this disparity. In requiring the structure of such a program to solely reflect the

109. *See* Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23.

110. *See* MacKinnon, *supra* note 2.

111. *Reports on Arrests for Domestic Violence in California*, Cal. Attorney General, Bureau of Criminal Justice Information and Analysis (August 1999)

112. *Id.*

113. Plichta, S., *Community Based Domestic Violence Programs for Women: What is Out There*, Report to the Commonwealth Fund Commission on Women's Health, Sep. 1997.

114. *Id.*

needs of women, the statutes recognize and attempt to remedy the asymmetrical need between women and men for such refuge.

This justification has previously been utilized to thwart an equal protection challenge brought to similar governmental programs. In 2001, several men brought a suit in federal court challenging certain Minnesota laws that fund services and shelters for victims of domestic violence.[115] In finding men and women were not similarly situated with respect to a need for shelter from domestic violence, the district court emphasized that state legislatures simply did not find an immediate need for shelters among men.[116] By contrast, the legislative debate over the gendered language of the statute revealed actual testimony and statistical proof that showed an overwhelming need for emergency shelters for women in particular.[117] As a result, the district court dismissed the case with prejudice. Notably, the Eighth Circuit Court of Appeals later affirmed, and the Supreme Court denied certiorari.

2. The Consequences of Difference to a Battered Woman

A woman who flees an abusive relationship must be located within the institutions which contextualize her abuse. The women who turn to government-funded shelters for relief are often poor, non-income earners, and from a low socio-economic status.[118] One recent study concluded that violence against women in intimate relationships occurred more than twice as often and was more severe in economically disadvantaged neighborhoods.[119] Hence, there would be a disproportionate impact on poor women if they are turned away from shelters which become strained due to the increased resources required for male pa-

115. Booth v. Hvaas, 2001 WL 1640141 (D. Minn. 2001); aff'd, 302 F.3d 849 (8th Cir. 2002); cert. denied, 537 U.S. 1108 (2003); *see also* Garrett, *supra* note 16.

116. *See id.*

117. *See id.*

118. *See* Laura Dugan et al., *Do Domestic Violence Services Save Lives?*, 250 Nat'l Inst. Just. 20 (2003); *see also* Recruitment and Retention in Intimate Partner Violence, Final Report, *available at* http://www.ncjrs.org/pdffiles1/nig/grants/201943 (last visited Jan. 25, 2005) (on file with the UCLA Women's Law Journal). Even the California Legislature recognized in 1977 that "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." CAL. WELF. & INST. CODE § 18290.

119. Benson, M.L. & Fox, *When Violence Hits Home: How Economics and Neighborhood Play a Role*, *available at* http://www.ojp.usdoj.gov/nij/pubs-sum/205004.htm (last visited Feb. 11, 2005) (on file with the UCLA Women's Law Journal).

tients. Poor women not only have fewer resources than other women, they are also less likely to have friends or family able to assist them financially.[120] Economic realities thus make the potential costs of separation result in dissimilar disadvantages between the sexes.[121] A shelter's denial of services can therefore have a devastating impact on a woman without adequate independent resources.

At the moment of separation, the powerful consequences of these differences come to bear on women. It is well-established that the risk of homicide is highest when a victim of domestic violence attempts to leave the relationship.[122] Known as "separation assault," the initial separation of the victim from the batterer is often the time when the victim is at the greatest risk of physical violence.[123]

B. *Even if Similarly Situated, the Shelter Legislation Achieves Equality Despite its Provision of Differential Treatment*

The difference inherent in a woman's choice to leave an abusive relationship when compared with that of a man is created by social facts that are perpetuated by abuse. Yet, it is critical to analyze whether same-sex shelters contribute towards achieving equality in light of — not despite of — this difference, given that a court may refuse to find women and men not similarly situated in this context. If a court finds men and women to be similarly situated with regard to the need for shelter in cases of domestic violence, the women-only shelters nevertheless survive equal protection scrutiny.

In California, such statutes would be subjected to strict scrutiny review: the classification must be necessary to achieve a compelling governmental objective. The heightened level of scrutiny demanded at the federal level is necessarily met by achieving the strict scrutiny standard of review that a California court will adopt in reviewing this case. As such, this argument is circumscribed in that it will focus on strict scrutiny.

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120. GONDOLF, E. & FISHER, E.R., BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS 13-14 (1988).

121. Littleton, *supra* note 7.

122. Dugan et al., *supra* note 118; *see also* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 49-50 (1991).

123. *Id.*

1. Domestic Violence Shelter Legislation Serves A Compelling Governmental Objective

In creating federal funding for governmental programs offering battered women's shelter services, the government has furthered a compelling interest in compensating women victims of domestic violence for their unequal access to resources vis-à-vis men. Moreover, the fact that women and men are differentially situated makes a shelter a critical refuge for a woman victim of domestic violence.

In the narrowest sense, then, the objective seeks to provide safety to women fleeing violence and abuse. The provision of public funding to women-only shelters is an effective and practical method for combating one of the nation's most pervasive and deadly social problems. In its most broad sense, the compensatory purpose serves to alleviate the present effects of *present* discrimination: a social inequity that has relegated women to the status of frequent victim in cases of domestic violence. Importantly, the Court has sanctioned gender classifications which benefit women that contain a remedial purpose or address a lack of opportunities before, and the same reasoning should apply to the shelter legislation.[124]

2. Gender Conscious Legislation is Narrowly Tailored to Achieve the Compelling Governmental Objective

Having identified the compelling state interest in providing safety to battered women and, more generally, remedying the past economic and social inequalities that are made manifest in a violent relationship, it is important to examine the means adopted to achieve the law's purpose. The differentiation is related to statutory purpose: the language of the statute is gender-specific and acts to provide shelter to female victims of domestic violence and their children on an emergency, temporary basis. Similarly, as previously mentioned, it also is critical to acknowledge that the law does not operate under archaic notions of gender stereotypes. Importantly, the notion that a woman needs to be protected from a man's presence does not derive from a stereotyped notion of female delicacy in the context of domestic violence.[125] To the contrary, where a woman has just separated from an abusive man, the need for freedom from men's presence

124. *See* discussion *supra*, Part III.C.3.
125. *See* Littleton, *supra* note 7.

is based on compelling concerns of need, psychological trauma, and safety. Positively, for women in shelters, these same feelings can result in a sense of community and hope for increased opportunity in the face of abuse.

Moving to legitimatize the gender-specific nature of these means, there are several factors that demonstrate the narrowly tailored nature of the policy and the necessity of the women-only policies to achieve these goals. First and foremost, it is critical to understand that domestic violence is overwhelmingly a crime against women. Indeed, methodological studies consistently demonstrate that over 85% of all domestic violence victims are women.[126] According to a California gender bias report, "[n]inety-five percent of all victims of domestic violence are women."[127] Nationwide, battering may be the single most common source of serious injury to women. Domestic violence is the a cause of injury to women that is more common among women between the ages of 15 to 44 than automobile accidents, rapes, muggings, and cancer deaths combined.[128] Importantly, women are five to eight times more likely than men to be victimized by an intimate partner.[129]

Second is the battered woman's psychological reaction to men in light of a recent act of domestic violence. The behaviors, cognitions, and beliefs which grow from abuse are influenced by gender and militate against inclusion of men in the period immediately following separation. The body of research concerning the short and long-term psychological effects of violence against women is simply enormous.[130] Fundamental to an understanding of the need to accommodate the mental state of female victims by providing a non-threatening, all-female environment is the re-

126. Greenfield, L.A., et al., *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends and Girlfriends*, U.S. Dept. of Justice, Bureau of Justice Statistics (March 1998); Rennison, C.M. & Welchans, S., *Special Report: Intimate Partner Violence*, U.S. Dept. of Justice, Bureau of Justice Statistics (May 2000).

127. Judicial Council of California Advisory Committee on Gender Bias in the Courts, Achieving Equal Justice for Women and Men in the California Courts: Final Report of the Judicial Council of California Advisory Committee on Gender Bias in the Courts 160 (1996).

128. Violent Crimes Committed Against Women and Children *at* http://ag.ca.gov/publications/womansrights/ch7.htm (last visited Feb. 11, 2005) (on file with the UCLA Women's Law Journal).

129. Greenfield, *supra* note 126.

130. *See, e.g.*, Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1225-26 (1993).

search centering on the nature of post-traumatic reactions of battered women to persons in (even seemingly benign) positions of authority.[131] It has been found that even when a legal service provider, social service worker, or mental health professional is acting within the norms of his or her profession, that individual "may not recognize the powerful impact that even inadvertent gestures may have on someone experiencing post-traumatic effects resulting from violent abuse at the hands of someone thought to be trustworthy."[132] In this sense, then, the victimization of a woman by a man can have a detrimental impact on a woman who is forced into contact with a man in the close confines of a supposedly safe space. Particularly, if a woman has traveled directly from an abusive encounter to the shelter, her feelings will only be heightened given the recent incidence of the abuse. Studies have shown that current or recent victims of domestic violence are typically coping with traumatic reactions and making difficult transitions in their lives.[133] Such a confrontation may likely result in feelings that range from intimidation to an eventual sense of re-victimization by the very environment to which she sought refuge.

Further reasons that women-only policies are necessary to achieving the compelling state interest include the battered woman's feelings of safety, confidentiality, and trust within the shelter walls. Advocates of woman-only policies emphasize the need for a battered woman living in a shelter not only to be physically safe, but to feel psychologically unafraid, as a necessary step towards healing.[134] In that sense, the presence of men is thought to alter the dynamic of the shelter and place a female victim on edge because of her recent experience with male violence.[135] More serious may be the actual threat of violence and the realization that ultimately, there is simply no way for such shelters to effectively screen out men who may be posing as victims. In actuality, to attempt to do so would undermine the confidentiality that is so integral to the operation of the shelter. At the best-case scenario, the hypothetical imposter could be a man seeking the identification of the women residing at the shelter. At the worst-case scenario, he could be the batterer himself. In either

131. *See id.*
132. *Id.* at 1224.
133. *See* Dugan et al., *supra* note 118.
134. *See* Littleton, *supra* note 7.
135. *Id.*

instance, the shelter is hard-pressed to perform the actual and psychological safety function it owes to women victims if men are present.

Finally, many feminists argue that a same-sex shelter is necessary to achieve the larger goal of ending violence in all relationships because of the feeling of community that is developed within shelter walls.[136] Women's groups and spaces provide a support system by allowing members to discuss their experiences and comfort one another.[137] In this sense, the woman-only policy of the shelter itself helps to foster a feeling of autonomy and independence to women that may ultimately help to break the larger cycle of abuse. The more general feeling that women can talk freely, without fear of male judgments, is central to the belief that the shelter environment should be all female. Oftentimes, shelters provide therapeutic group services wherein the collective nature of women's experience with and resistance against violence perpetrated by men is explored. Including men in shelters would detract from the free flow of ideas in group therapy sessions and would often intimate the women into silence. In short, the efficacy of sheltering requires privacy and confidentiality ensured by the current all female environment at battered women's shelters in California.

V. CONCLUSION

Both women and men have a fundamental right to leave an abusive relationship; however, their choices to do so are categorically different, and that difference is colored by gender. Although domestic violence plagues both men and women, the number of battered men has not escalated to the level of a public concern. The sheer number and prevalence of battered women in society, in contrast, has prompted gender-specific legislation in California. In recognizing domestic violence as different from other sources of governmental benefits, women-only shelters are actually supportive of an effort to substantively equalize the position of women and men with respect to this fundamental right. More importantly, the women and men impacted by such statutes have an interest in contributing discussion of those differences to an equality debate. So long as the differences between

136. *See, e.g.*, MORGAN, R., SISTERHOOD IS POWERFUL: AN ANTHOLOGY OF WRITINGS FROM THE WOMEN'S LIBERATION MOVEMENT 379-433 (1970).

137. *Id.*

women and men remain subsumed under the precepts of formal equality review, meaningful analysis of the differences inherent in gender-specific legislation like the type in the *Free Men* case will be in jeopardy. At the heart of formal analysis lies substantive equality; in order to reach that principle, courts facing such challenges can and should be willing to reach across difference.