

# The Disproportionate Effect of Mutual Restraining Orders on Same-Sex Domestic Violence Victims

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*This Note will discuss how the erasure of LGBT victims from the domestic violence narrative has perpetuated the overuse of dual arrest and mutual restraining orders in domestic violence cases with same-sex couples despite the minimal use of these legal tools in the general population. Both the social narrative of domestic violence as well as homophobia and misinformation have contributed to exclude LGBT victims from increasingly mainstream knowledge about domestic violence. These factors have informed law enforcement statutes and policies that increase the likelihood that LGBT domestic violence victims will be subject to unfair arrest, legal restraint, and a myriad of collateral consequences. This Note suggests that remedying this disparate treatment can begin with the creation of laws and policies that emphasize reasoned deliberation for both police officers and judges when faced with LGBT victims.*

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#### INTRODUCTION

Taylor and Michael were arguing over the phone bill the first time it happened. Michael had never been hit by anyone. Not his parents, not an intimate partner; he'd never even gotten in a bar fight or a schoolyard scuffle. As soon as it happened, Taylor was apologetic. While Michael stared in utter shock, Taylor began to cry, beg, and make promises. Michael would have never called the cops, but the neighbors must have heard, because before he could recover, officers were at the door. Taylor, not wanting to take the blame, told the cops that Michael had become physical. Michael showed the officers the red mark on his face, but before Michael knew what was happening, both men were cuffed and in the back of a patrol vehicle. Later, finding that the police had failed to identify the primary aggressor, a judge would sign off on a mutual restraining order, applying to both Taylor and Michael.<sup>1</sup>

The situation described above is not particularly common among heterosexual couples. In general, dual arrests in domestic violence incidents, and the entering of mutual restraining orders that often follow, happen in about 1 percent of cases.<sup>2</sup> This number, however, jumps to almost 30 percent in cases of same-sex domestic violence.<sup>3</sup>

In recent decades, domestic violence has come to the forefront of the American social conscience.<sup>4</sup> What was once considered a private issue between

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1. This description is not based on any particular couple.

2. Alexandra Masri, *Equal Rights, Unequal Protection: Institutional Failures in Protecting and Advocating for Victims of Same-Sex Domestic Violence in Post-Marriage Equality Era*, 27 TUL. J.L. & SEXUALITY 75, 84 (2018).

3. DAVID HIRSCHL, NAT'L CRIMINAL JUSTICE REFERENCE SERV., DOMESTIC VIOLENCE CASES: WHAT RESEARCH SHOWS ABOUT ARREST AND DUAL ARREST RATES (2008).

4. See Elizabeth Topliffe, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1040 (1992).

a man and his wife is now subject to massive government spending, criminal prosecution, and efforts by numerous local and national non-profit organizations. This focus is warranted: across the United States, more than one in three women will experience rape, physical violence, or stalking in her lifetime.<sup>5</sup> Despite this national attention, many activists have routinely ignored the effects of our systemic approach to domestic violence in the lesbian, gay, bisexual, and transgender (LGBT) community. LGBT<sup>6</sup> victims of domestic abuse<sup>7</sup> are too often forgotten, not only by the criminal justice system but also by many within the LGBT community. This Note will discuss how the erasure of LGBT victims from the domestic violence narrative has perpetuated the overuse of dual arrest and mutual restraining orders in domestic violence cases with same-sex couples<sup>8</sup> despite the minimal use of these legal tools in the general population. This overuse disadvantages both LGBT victims and the LGBT community as a whole.

Part I of this Note discusses the prevalence of domestic violence in LGBT relationships and some of the reasons for its erasure from social consciousness. Part II discusses dual arrests and mutual restraining orders as tools of law enforcement and the courts, the different types of mutual restraining order legislation, and the disproportionate use of mutual restraining orders in cases of same-sex domestic violence. Part III identifies some of the negative effects of dual arrests and misusing mutual restraining orders, both for individual victims and for the LGBT community. Part IV considers what factors may be driving this lopsided use of mutual restraining orders and dual arrests, focusing on the “primary aggressor” factors that many states use to guide both police and court activity. Part V offers some possible solutions for reducing the use of unnecessary and unfair dual arrests and mutual restraining orders in cases of same-sex domestic violence.

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5. NAT’L NETWORK TO END DOMESTIC VIOLENCE, DOMESTIC AND SEXUAL VIOLENCE FACT SHEET (2017).

6. This Note focuses on the effects of mutual restraining orders on lesbian, gay, bisexual, and transgender people when they are in same-sex relationships (or perceived as being in a same-sex relationship). It is important to recognize that people identifying as any of the preceding labels can also be in different-sex relationships. The scope of this Note prohibits a full examination of those dynamics, but we should keep in mind that such relationships can be affected by similar prejudices and assumptions even when LGBT people are in different-sex relationships. This is particularly true of transgender individuals and LGBT people of color, who are both likely to face a multitude of unfair biases.

7. I will use domestic violence and domestic abuse interchangeably.

8. While the LGBT community is not limited to same-sex couples, most research surrounding mutual restraining orders is limited to same-sex and different-sex couples. More research is needed to understand the ways in which ignorance, bigotry, and misinformed statutory requirements affect other non-heterosexual (e.g., bisexual, gender-non-conforming, etc.) and non-monogamous victims of domestic abuse.

## I.

## ERASING QUEER VICTIMS, AGAIN

While domestic violence among same-sex couples is rarely discussed,<sup>9</sup> this does not mean that such violence does not happen. In fact, numerous studies have suggested that domestic violence occurs in LGBT relationships at about the same rate, or higher, as in heterosexual relationships.<sup>10</sup> And although the methods of abuse vary,<sup>11</sup> the basic cycle of abuse is the same in both same-sex and heterosexual relationships.<sup>12</sup> Abusers of LGBT victims employ similar tactics to gain power and control over their victim, often in combination with threats or explanations targeting the victim's sexual orientation or gender identity.<sup>13</sup> For example, abusers may threaten to "out" their victim or convince the victim that abuse is normal in a same-sex relationship.<sup>14</sup>

Despite the prevalence of abuse in same-sex relationships and the growing consciousness surrounding domestic violence in general, courts and activists have largely ignored LGBT domestic violence.<sup>15</sup> The legal system's neglect of LGBT victims can be traced back to the common narrative about domestic violence: that of female victim and male abuser. Domestic violence and LGBT advocates' depictions of the phenomenon also contribute to this neglect.

As awareness about domestic violence increased, ideas about who could be a victim of domestic violence quickly formed. Activists, law enforcement officers, and others portrayed victims of this kind of violence as meek, helpless, and feminine.<sup>16</sup> In some ways, this stereotyping galvanized support for domestic violence victims because it engendered an image of these victims as needing the state's protection.<sup>17</sup> But the image of an "ideal" battered woman also served to alienate victims who do not fit squarely into the role.<sup>18</sup> For example, for many

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9. Patrick Letellier, *Gay and Bisexual Male Domestic Violence Victimization: Challenges to Feminist Theory and Responses to Violence*, 9 VIOLENCE & VICTIMS 95, 97 (1994).

10. Shannon Little, *Challenging Changing Legal Definitions of Family in Same-Sex Domestic Violence*, 19 HASTINGS WOMEN'S L.J. 259, 260–61 (2008).

11. Numerous scholars have described the ways in which same-sex abusers often use additional "methods" of abuse, such as threatening to "out" their partner. See Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & C.R. L. REV. 325, 337 (1999); Little, *supra* note 10, at 261–62; Caitlin Valiulis, *Domestic Violence*, 15 GEO. J. GENDER & L. 123, 151 (2014).

12. Leonard D. Pertnoy, *Same Violence, Same Sex, Different Standard: An Examination of Same-Sex Domestic Violence and the Use of Expert Testimony on Battered Woman's Syndrome in Same-Sex Domestic Violence Cases*, 24 ST. THOMAS L. REV. 544, 551 (2012).

13. *Id.* at 552.

14. *Id.*

15. Letellier, *supra* note 9, at 97.

16. See Valiulis, *supra* note 11, at 150.

17. *Id.* at 134–35 n.86 (explaining that "learned helplessness"—the idea that a woman will believe she cannot leave her situation, even if it might be physically possible to do so—was a defining characteristic of a battered woman).

18. See FAMILY VIOLENCE APPELLATE PROJECT, QUEER AND/OR TRANS DOMESTIC VIOLENCE: A PRIMER FOR LAWYERS, ADVOCATES, AND DV VICTIMS 2 (2018). Notably, the image of the ideal victim has not only erased LGBT victims but also victims who are people of color, male,

years, domestic violence statutes only protected married women,<sup>19</sup> ignoring entirely that men and unmarried women are also victims of domestic violence.<sup>20</sup>

Experts have described the psychological effects of domestic abuse for many years as “Battered Women’s Syndrome.”<sup>21</sup> Testimony about this “syndrome” has been instrumental in helping courts and juries understand the way that domestic abuse can cause victims to behave in ways that may seem counterintuitive to the average person.<sup>22</sup> But the very title of the term suggests that only women can be victims of domestic abuse.<sup>23</sup> This term frequently excludes LGBT victims because they “do not often fit the traditional stereotypes of dependent or weak females.”<sup>24</sup> While many domestic violence experts and advocates have begun using different terminology, such as “intimate partner battering and its effects,”<sup>25</sup> Battered Women’s Syndrome has become well known and will likely require many years of undoing.

Popular misconceptions about victims of domestic violence have also gone hand-in-hand with misconceptions about the perpetrators of abuse. One explanation for this is the understanding of domestic violence as rooted in patriarchy<sup>26</sup> that has served to further exclude LGBT victims of domestic violence. Domestic violence advocates have often described domestic abuse as a phenomenon that reflects the deep-rooted misogyny of our society.<sup>27</sup> Early in the feminist movement, activists promulgated “an understanding of domestic violence as a product of patriarchy.”<sup>28</sup> In its most simplistic version, this understanding of domestic violence posited that men commit domestic violence because they are misogynistic, and that women are victims of domestic violence because they are oppressed by the patriarchal regime.<sup>29</sup> This understanding was borne out by the fact that women do account for the largest percentage of victims

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impoverished, or undocumented. *See generally* NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED INTIMATE PARTNER VIOLENCE IN 2015 (2016) (detailing the unique challenges for survivors of domestic violence who are members of these communities).

19. Masri, *supra* note 2, at 88.

20. Valiulis, *supra* note 11, at 149.

21. *Id.* at 134–35.

22. For example, Battered Women’s Syndrome helps to explain why victims of domestic abuse frequently do not leave their abusers, or why victims may act out violently at a time when they are not in immediate risk of physical harm. *Id.*

23. The title also problematically pathologizes victimhood by labeling it a “syndrome.” Valiulis, *supra* note 11, at 150.

24. *Id.* at 152.

25. “Intimate partner battering and its effects” is typical. *See, e.g.*, CAL. EVID. CODE § 1107(a) (2005).

26. Patriarchy in this sense reflects the societal valuing of traits that are typically considered masculine and dominant, e.g., violence, physical strength, and aggression.

27. *See* Valiulis, *supra* note 11, at 149 (describing the trivialization of domestic violence as a “reflection of gender bias and cultural attitudes towards women”). *See also* Little, *supra* note 10, at 259 (describing how 1970s feminists approached domestic violence as a symptom of the patriarchy).

28. Little, *supra* note 10, at 259.

29. *Id.*

of domestic violence, sustain more serious injuries than men overall, and are more likely to be killed by their partners.<sup>30</sup> Further, abusers use power, control, and aggression—characteristics that are typically associated with masculinity.<sup>31</sup> But this explanation of domestic violence left little room for victims who do not appear stereotypically feminine or abusers who are not stereotypically masculine.<sup>32</sup> In this way, feminist domestic violence activists who sought to attribute the abuse to patriarchal biases may have in fact perpetuated those biases by excluding heterosexual male and LGBT victims.

Feminist theorists and domestic violence advocates are not the only activists that have played a role in keeping LGBT domestic abuse in the dark. Many LGBT activists themselves have shied away from discussing inter-partner violence within the community.<sup>33</sup> LGBT activists may have political objections to acknowledging abuse between same-sex partners because such abuse derails the notion that there is a queer “utopia” or that the LGBT community is fully egalitarian.<sup>34</sup> Furthermore, many in the LGBT community may believe that acknowledging abuse will reinforce commonly held negative stereotypes about same-sex relationships and deter efforts towards legal and social equality for LGBT people.<sup>35</sup> For example, anti-LGBT groups often point to domestic abuse between same-sex couples as evidence that such relationships are inherently volatile, violent, and unnatural.<sup>36</sup> LGBT activists may also subscribe to the conception of an “ideal victim” discussed above: that women are victims of abuse, not abusers, and that men are abusers, not victims. Although it was clearly not the goal of feminists and LGBT activists to disenfranchise victims of same-sex domestic violence, the narratives that these groups have bolstered have resulted in the erasure of victims who do not fit into the accepted paradigm.

However, the domestic violence movement need not divorce itself from these theories to be inclusive. In fact, the data on same-sex domestic violence fits squarely with the concept that domestic violence is a reflection of a society that promotes and values masculine aggression and dominance.<sup>37</sup> A recent study

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30. NAT'L NETWORK TO END DOMESTIC VIOLENCE, *supra* note 5. See *Statistics*, NAT'L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/resources/statistics/> [<https://perma.cc/3B86-VQKP>]; *The Scope of the Problem: Intimate Partner Homicide Statistics*, NAT'L RES. CTR. ON DOMESTIC VIOLENCE, <https://vawnet.org/sc/scope-problem-intimate-partner-homicide-statistics/> [<https://perma.cc/AJ8P-7A3C>].

31. See Sharon Stapel & Virginia M. Goggin, *Lesbian, Gay, Bisexual, Transgender and Queer Victims of Intimate Partner Violence*, in *LAWYER'S MANUAL ON DOMESTIC VIOLENCE: REPRESENTING THE VICTIM* 241, 244 (Mary Rothwell Davis et al. eds., 6th ed. 2015).

32. See Valiulis, *supra* note 11, at 152.

33. Knauer, *supra* note 11, at 331.

34. *Id.*

35. *Id.* at 325.

36. *Id.*

37. See NAT'L COALITION OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED INTIMATE PARTNER VIOLENCE IN 2012 38 (2013) (showing that the majority of domestic violence perpetrators are men and the majority of victims are women).

concluded that men are more likely to perpetrate violence, regardless of whether they are in a same-sex or different-sex relationship.<sup>38</sup> In general, it is true that men are more likely to be abusers than women are. But this also means that men in same-sex relationships are more likely to be abused than men in heterosexual relationships.<sup>39</sup> Furthermore, women are most likely to be victimized by both men and women.<sup>40</sup> This should signify that patriarchal gender bias does play a significant role in causing domestic violence, but that this does not dictate the gender of the abuser or the victim.

The deeply ingrained stereotypes about who can be a victim of domestic violence erase LGBT victims from the narrative. This erasure has dire consequences because it affects the way that police and courts treat LGBT victims. When government actors lack the proper statutory tools to evaluate domestic violence situations carefully, they rely heavily on their own biases and common understandings.

## II.

### MUTUAL RESTRAINING ORDERS AND THEIR PREVALENCE AMONG SAME-SEX COUPLES

Because LGBT victims are not represented in the popular domestic violence narrative, police and courts fail to conceptualize them as “real victims.” LGBT victims are thus subject to significantly higher rates of dual arrest and mutual restraining orders. This perpetuates a cycle of criminalization of LGBT victims, reinforces negative stereotypes, and disproportionately limits the freedom of queer victims. This Section first describes the common statutory schemes surrounding mutual restraining orders. Then it discusses the disparate rates of dual arrests and mutual restraining orders for same-sex domestic violence victims.

#### A. Statutory Schemes Addressing Mutual Restraining Orders

Today, restraining orders are an extremely common legal tool used to combat domestic violence.<sup>41</sup> Restraining orders are relatively easy and inexpensive to obtain,<sup>42</sup> they do not inherently trigger criminal prosecution, and they ostensibly provide victims with a measure of security against their assailants. For this reason, law enforcement and courts routinely respond to domestic violence issues by issuing restraining orders. When police officers

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38. *Id.*

39. FAMILY VIOLENCE APPELLATE PROJECT, *supra* note 18, at 8.

40. *Id.* at 5.

41. Christopher T. Benitez et al., *Do Protection Orders Protect?*, 38 J. AM. ACAD. PSYCHIATRY L. 376, 376 (2010).

42. Most states do not permit charging a filing fee for protective orders. See BATTERED WOMEN’S JUSTICE PROJECT: NAT’L CTR. ON PROTECTIVE ORDERS AND FULL FAITH & CREDIT, STATE PROTECTION ORDER STATUTES: PROHIBITING FEES FOR FILING, ISSUANCE, REGISTRATION AND SERVICE OF PROCESS (2015).

respond to domestic violence incidents, they often request an emergency protective order (EPO) from the on-call judge to protect the person that they deem to be the victim.<sup>43</sup> A victim can then apply for a temporary restraining order (TRO). This results in a hearing where the court can enter a permanent protective order, which will typically be in effect for a specified number of years.<sup>44</sup>

Restraining orders of this kind are particularly flexible. They are designed to allow a judge reviewing the motion to add or subtract terms of the order as they see fit in the particular situation.<sup>45</sup> Beyond physical separation, restraining orders can also govern issues such as custody arrangements and financial issues, although courts can defer to the decision of a family court on custody matters if one is pending.<sup>46</sup> While the flexibility of restraining orders is typically seen as one of their benefits, in some circumstances, this deference to judicial discretion allows judges to let their biases impact their decision-making.

One concern with judicial discretion is that judges can issue mutual restraining orders *sua sponte* even without request from the respondent.<sup>47</sup> Mutual restraining orders prevent both the petitioner and the respondent from being in physical proximity or contacting one another.<sup>48</sup> Judges may think that mutual restraining orders are not substantially different from regular restraining orders<sup>49</sup>—after all, the goal is to keep the parties away from one another so that the violence will not continue. Judges may also feel that issuing a mutual restraining order saves time because they do not have to hear testimony and make a finding regarding which party is a primary aggressor or even that one party has committed domestic violence.<sup>50</sup> These judicial assessments have often led to the issuance of unmerited mutual restraining orders, namely in situations where one party is the abuser and the other party is a victim.<sup>51</sup>

Some state legislatures have enacted statutes to combat the overuse of mutual restraining orders. However, such legislation has been largely ineffective because it bans mutual restraining orders in name only, rather than in substance. According to a 2015 report detailing state laws regarding the use of mutual restraining orders, just four states have enacted laws prohibiting or limiting the

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43. Topliffe, *supra* note 4, at 1043 (explaining that “[e]mergency orders can be issued in all of the jurisdictions that have protection order legislation”).

44. *Id.*

45. Benitez et al., *supra* note 41, at 376.

46. *Id.* at 376–77.

47. Topliffe, *supra* note 4, at 1055; *see, e.g.*, *J.J. v. M.F.*, 223 Cal. App. 4th 968 (2014) (reversing a trial court’s issuance of a *sua sponte* mutual restraining order).

48. *See* Benitez et al., *supra* note 41, at 376.

49. Topliffe, *supra* note 4, at 1056.

50. *Id.*

51. *See, e.g.*, *Isidora M. v. Silvino M.*, 239 Cal. App. 4th 11 (2015); *J.J.*, 223 Cal. App. 4th at 968.

use of mutual restraining orders and cross-orders without cause.<sup>52</sup> Thirty-four states have adopted language that prohibits mutual restraining orders but explicitly permits courts to enter cross-orders, which are separate and identical restraining orders, upon the respondent's petition.<sup>53</sup> While these statutes cure some of the issues that mutual restraining orders implicate, they fail to eradicate the end result, which is that both parties are restrained even if only one is an abuser.

Many state restraining order statutes also incorporate provisions required under the Violence Against Women Act (VAWA) Full Faith and Credit Clause. This clause requires that states give "full faith and credit" to restraining orders issued in other states only where each party has entered a formal request for an order and the court has made a finding that each party acted primarily as an aggressor.<sup>54</sup> However, it is not clear that this provision has been enforced, and unjustified mutual restraining orders are likely enforced even in states with statutes that explicitly prohibit them.

Most state statutes that allow cross-orders make enforcement of justified orders more difficult. In these states, entering cross-orders may seem to be an expedient solution. While *sua sponte* mutual restraining orders are prohibited, the court can enter cross-orders, which are equivalent to mutual restraining orders, as long as the respondent requests it. Thus, if an abuser files his own petition for a restraining order in response to the victim's petition, the court can consider both petitions in the same hearing and grant them both. These state statutes often do not mandate that courts "clearly provide law enforcement with sufficient direction when determining if a violation of the order has occurred," giving law enforcement inadequate guidance on how to respond.<sup>55</sup> Because these statutes do not require that the court specifically state prohibited behavior or instructions for enforcement, the court can easily grant cross-orders. In this way, state legislatures have done little to protect victims from being unjustly restrained, although they have required that the court use a separate piece of paper to do so.

Furthermore, in some states, such as New Hampshire, a court is justified in issuing a cross-order of restraint even if it does not make a specific finding that the other party has committed abuse.<sup>56</sup> Courts can enter such orders if "[t]he

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52. BATTERED WOMEN'S JUSTICE PROJECT: NAT'L CTR. ON PROTECTIVE ORDERS AND FULL FAITH & CREDIT, *supra* note 42; *see, e.g.*, CAL. FAM. CODE § 6305 (2016) (requiring a judge to make specific findings of fact before a mutual restraining order will issue).

53. *See* BATTERED WOMEN'S JUSTICE PROJECT: NAT'L CTR. ON PROTECTIVE ORDERS AND FULL FAITH & CREDIT, *supra* note 42.

54. 18 U.S.C. § 2265 (2018).

55. *See* BATTERED WOMEN'S JUSTICE PROJECT: NAT'L CTR. ON PROTECTIVE ORDERS AND FULL FAITH & CREDIT, *supra* note 42; *see, e.g.*, FLA. STAT. ANN. § 741-30(i) (West 2015); IOWA CODE § 236.20 (2013); LA. CHILD. CODE ANN. art. 1570(I) (2014) (allowing separate restraining orders for each party but not requiring the court to provide any direction for enforcing such orders).

56. N.H. REV. STAT. ANN. § 173-B:5(V) (2014).

court cannot determine who is the primary physical aggressor.”<sup>57</sup> This essentially renders the statute prohibiting mutual restraining orders useless, as the court can avoid the rule by finding that the primary aggressor is unclear and then entering cross-orders.

Finally, ten states have statutes that explicitly allow mutual restraining orders or are silent on the issue entirely.<sup>58</sup> In these states, courts can issue mutual restraining orders *sua sponte*, often without any particular factual findings of abuse, in one combined order.

*B. The Disparate Impact of Dual Arrest and Mutual Restraining Orders on Same-Sex Victims*

Unmerited mutual restraining orders often exacerbate the problem of domestic violence rather than solve it. Domestic violence activists have recognized the problem of mutual restraining orders,<sup>59</sup> and many states have passed statutes prohibiting such orders, if only in name. However, mutual restraining orders are not employed very often among the general population of domestic violence cases.<sup>60</sup> Mutual restraining orders are largely prevalent in cases involving same-sex relationships.<sup>61</sup> Notably, little research has been done to quantify the use of mutual restraining orders in situations of same-sex domestic violence. This is likely because such cases are not often appealed and thus not typically published.

In making determinations about primary aggressors, courts often rely on police reports and findings.<sup>62</sup> Even if no police reports exist, in many states, courts use the same factors that police officers use in determining the primary aggressor.<sup>63</sup> For this reason, data on police dual arrests can be a helpful proxy for understanding the difficulty that law enforcement and courts have in identifying primary aggressors, since dual arrest cases are similar to cases where mutual restraining orders are issued. In domestic violence cases, dual arrests most typically occur when law enforcement is unable to identify the primary aggressor in a given situation.<sup>64</sup> In states with mandatory arrest laws, such arrests

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57. *Id.*

58. BATTERED WOMEN’S JUSTICE PROJECT: NAT’L CTR. ON PROTECTIVE ORDERS AND FULL FAITH & CREDIT, *supra* note 42.

59. See FAMILY VIOLENCE APPELLATE PROJECT, *supra* note 18, at 11.

60. *Id.*; see HIRSCHL, *supra* note 3 (finding that only 2 percent of domestic violence assaults ended in dual arrest).

61. HIRSCHL, *supra* note 3 (“Dual arrest rates for same-sex couples were 10 times the rate observed in cases with male victims and female offenders and 30 times the rate observed in cases with female victims and male offenders.”).

62. See FAMILY VIOLENCE APPELLATE PROJECT, *supra* note 18, at 124.

63. See BATTERED WOMEN’S JUSTICE PROJECT: NAT’L CTR. ON PROTECTIVE ORDERS AND FULL FAITH & CREDIT, *supra* note 42.

64. See Valiulis, *supra* note 11, at 140.

occur more frequently, especially when the state also provides no guidelines about identifying a primary aggressor.<sup>65</sup>

While approximately 1.3 percent of all intimate partner violence cases involve dual arrests, 26–27 percent of domestic violence incidents involving same-sex couples result in dual arrest.<sup>66</sup> Notably, this disproportionate use of dual arrests for same-sex couples is further differentiated among female and male couples. According to the National Criminal Justice Reference Service, dual arrests involving female couples occurred at twice the rate of those involving male couples.<sup>67</sup> Furthermore, the dual arrest rate for all same-sex couples, regardless of gender, was ten times higher than the dual arrest rate for heterosexual couples with male victims, and thirty times higher than the rate for heterosexual couples with female victims.<sup>68</sup> These figures shed light on how societal factors impact arrest rates: the lowest rates of dual arrest occur when the victim is a woman in a heterosexual relationship, where the situation fits the “ideal” victim narrative. The highest rates occur among female same-sex couples, where the narrative is broken on two different axes: first, the couple is “deviant” because it breaks the heteronormative mode, and second, the offender is “deviant” because she breaks the gender stereotype of females being victims, but not abusers.<sup>69</sup>

Race also plays a factor in dual arrest rates. Dual arrests in all domestic violence cases decreased by 40 percent when the offender was white, indicating that officers may conceptualize people of color as inherently more violent and thus more likely to engage in “mutual abuse.”<sup>70</sup> These statistics show that law enforcement’s preconceived notions of the domestic violence narrative significantly impact when they resort to mutual arrests.

### III.

#### EFFECTS OF MUTUAL RESTRAINING ORDERS

Although mutual restraining orders are relatively easy to invoke, they are exceedingly powerful tools. Restraining orders limit their subject’s freedom immensely and create adverse consequences for large swaths of a person’s life, impacting future employment, housing, and child custody arrangements. The disproportionate use of mutual restraining orders on LGBT couples, discussed above, may have a compounding effect on LGBT victims, who may already suffer stigma and prejudice. Furthermore, mutual restraining orders often counteract the purpose of the order itself, which is to protect the victim, because they render the order essentially ineffective. Mutual restraining orders can in fact

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65. HIRSCHTEL, *supra* note 3.

66. Mastri, *supra* note 2, at 84.

67. HIRSCHTEL, *supra* note 3.

68. *Id.*

69. *Id.*

70. *Id.*

create more danger for LGBT victims and can also have severe consequences for employment, housing, custody, and other areas where LGBT individuals are already at a disadvantage. Further, such orders frequently violate due process and perpetuate violence by sowing distrust for the justice system and perpetuating harmful homophobic stereotypes.

#### A. Lack of Enforcement

Perhaps the most obvious adverse effect of mutual restraining orders on LGBT victims of domestic violence is the difficulty they create for enforcement. Restraining orders are intended to protect the victim. But when a court enters a mutual restraining order, it legally restrains both victim and abuser from contacting one another.<sup>71</sup> When the police are called for a violation of that mutual restraining order, officers are often uncertain how to proceed, since issuing courts are rarely required to provide guidance on how to enforce mutual restraining orders.<sup>72</sup> Particularly if no violence has occurred, officers may be unable to tell who is in violation of the order and who is not.<sup>73</sup> While identifying primary aggressors is already difficult in same-sex cases of mutual restraining order violations, the lack of training officers receive regarding LGBT domestic violence makes the challenge even harder.<sup>74</sup> The result is a feedback loop in which dual arrests, caused by law enforcement's inability to identify a primary aggressor in same-sex couple situations, can lead to mutual restraining orders, which then lend themselves to either a second dual arrest or no arrest at all.

Mutual restraining orders also perpetuate the idea that same-sex couples are "just fighting," such that law enforcement may take calls about same-sex domestic violence less seriously.<sup>75</sup> Because mutual restraining orders do not place responsibility on the primary aggressor, they indicate to future responding officers (and victims) that both parties are equally to blame.<sup>76</sup> In turn, officers are more apt to view future violence as "mutual or consensual abuse"<sup>77</sup> and to therefore downplay the seriousness of the situation.<sup>78</sup> As we repeatedly see, downplaying domestic violence can eventually be fatal.<sup>79</sup> For example, in *Town of Castle Rock, Colorado v. Gonzales*, police refused to enforce a woman's

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71. Valiulis, *supra* note 11, at 144–45.

72. Topliffe, *supra* note 4, at 1061.

73. *See id.* at 1061–62.

74. Caroline Morin, *Re-Traumatized: How Gendered Laws Exacerbate the Harm for Same-Sex Victims of Intimate Partner Violence*, 40 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 477, 484 (2014).

75. *See Little, supra* note 10, at 263.

76. Topliffe, *supra* note 4, at 1058.

77. Pertnoy, *supra* note 12, at 562 (quoting NAT'L COALITION OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, AND TRANSGENDER DOMESTIC VIOLENCE IN 2000, at 7 (Preliminary ed. 2001)).

78. *Id.* Officers may neglect to enforce a restraining order or may fail to report the incident as a domestic violence incident.

79. Knauer, *supra* note 11, at 349.

restraining order against her husband, despite multiple calls.<sup>80</sup> The man subsequently murdered the woman's three daughters and opened fire on a police station.<sup>81</sup>

Finally, victims who are subject to mutual restraining orders may face prosecution if the police do arrest them. This merely continues the cycle of control and abuse against the victim and leaves victims in worse situations than if they had not reported the abuse at all.

### B. Custody Issues

Mutual restraining orders do not just implicate the physical safety of an LGBT victim but also have broader consequences in many parts of the victim's life. For example, a mutual restraining order may include an order for custody of a shared child. If the custody issue is deferred to a later decision in family court, the court may rely on the mutual restraining order to grant shared custody, giving the abuser both access to a child that they may have abused and continued access to their victim.<sup>82</sup> Custody issues may be further complicated with LGBT parents because often one parent is not the biological or adoptive parent of the child.<sup>83</sup> The non-biological parent's legal standing with relation to the child is therefore particularly tenuous.<sup>84</sup> Abusers may use this to their advantage by threatening to take the child away from the victim unless the victim stays in the relationship.<sup>85</sup> Although, after *Obergefell v. Hodges*,<sup>86</sup> children born to married same-sex couples have a legal relationship with both parents, the decision did not create a legally recognized parent-child relationship for children of unmarried couples.<sup>87</sup> This legal gap leaves many unmarried same-sex parents in fear of losing their child, particularly if the abuser will not allow them to adopt the child or they cannot adopt for another reason.<sup>88</sup>

Mutual restraining orders exacerbate the difficulty of establishing custody arrangements after domestic violence has occurred. Courts in every state except Montana are required by state law to consider domestic violence when

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80. 545 U.S. 748 (2005).

81. *Id.* at 753–54.

82. Topliffe, *supra* note 4, at 1064. Note that CAL. FAM. CODE § 3044(a) states that any finding of domestic violence in the last five years (including a restraining order) creates a rebuttable presumption against custody for the abuser. About twenty-four US jurisdictions have such statutes. A.B.A. COMM'N ON DOMESTIC & SEXUAL VIOLENCE, JOINT CUSTODY PRESUMPTIONS AND DOMESTIC VIOLENCE EXCEPTIONS (2014).

83. Abby R. Rubinfeld et al., *LGBT Issues beyond Obergefell*, 34 GPSOLO 36, 38 (2017).

84. Satoko Harada, *Additional Barriers to Breaking the Silence: Issues to Consider When Representing a Victim of Same-Sex Domestic Violence*, 41 U. BALT. L.F. 150, 158 (2011).

85. *Id.*

86. *Obergefell v. Hodges* held that state laws prohibiting same-sex marriage were unconstitutional. 135 S. Ct. 2584 (2015). This means that same-sex marriages are legally recognized as identical to a heterosexual marriage, including for purposes of child custody. *Id.* at 2601.

87. Rubinfeld et al., *supra* note 83, at 39; *Obergefell*, 135 S. Ct. 2584.

88. The biological parent retains custody. Harada, *supra* note 84, at 158.

determining custody arrangements.<sup>89</sup> Approximately half of these state laws include a presumption against granting custody to an abuser.<sup>90</sup> In cases where mutual restraining orders have been entered, however, this protection is inadequate, since a non-abusive parent will also have a restraining order on their record, providing little guidance to the court about which parent would be the most appropriate recipient of custody. Because courts typically prefer joint custody,<sup>91</sup> custody is likely to be shared between the abuser and victim. At worst, the victim may have no legal access to their child if they do not have a legally recognized parent-child relationship. This could happen in cases where the victim is unmarried and is not the biological parent of the child.

Furthermore, homophobia can often impact custody decisions involving an LGBT parent, especially if the other parent is heterosexual. Family courts sometimes consider a parent's "moral fitness" as a factor in determining what custody arrangement is in the best interest of a child.<sup>92</sup> This can include a parent's sexual conduct,<sup>93</sup> which may be used to inject homophobic attitudes into the proceedings.<sup>94</sup> For example, in *D.H. v. H.H.*, the Alabama Supreme Court affirmed a trial court ruling that denied custody to a mother who identified as a lesbian.<sup>95</sup> Chief Justice Roy Moore's concurring opinion described the mother's sexual orientation as an "inherent evil, and an act so heinous that it defies one's ability to describe it."<sup>96</sup> Even in cases where there is no heterosexual biological parent, courts have expressed a belief that LGBT parents are inherently unfit.<sup>97</sup> Mutual restraining orders reinforce these biases because they can indicate to judges that LGBT parents are violent, even if in reality they are victims.<sup>98</sup>

### C. Employment and Housing Access

Mutual restraining orders can also constrain the victim's access to necessities such as employment and housing. Typical background checks, like those used during hiring processes, will often note whether a person has ever

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89. In Montana, "[d]omestic violence against a family member, regardless of whether it affected or was witnessed by the child, is a discretionary factor to be considered when determining the child's best interests." A.B.A. COMM'N ON DOMESTIC & SEXUAL VIOLENCE, *supra* note 82.

90. *Id.*; see, e.g., CAL. FAM. CODE § 3044(a) (2016) (stating that any finding of domestic violence in the last five years, including a restraining order, creates a rebuttable presumption against custody for the abuser).

91. See A.B.A. COMM'N ON DOMESTIC & SEXUAL VIOLENCE, *supra* note 82 (2014).

92. Mark Joseph Stern et al., *A Test to Identify and Remedy Anti-Gay Bias in Child Custody Decisions after Obergefell*, 23 UCLA WOMEN'S L.J. 79, 86–87 (2016).

93. *Id.*

94. *Id.* at 95.

95. 830 So. 2d 21, 22, 25–26 (2002).

96. *Id.* at 37 (Moore, C.J., concurring).

97. Stern et al., *supra* note 92, at 90 ("[A] Utah judge ordered a baby girl removed from her foster parents—a lesbian couple—declaring that the mothers' sexual orientation would be detrimental to the child's wellbeing.").

98. See Mary U. O'Brien, *Mutual Restraining Orders in Domestic Violence Civil Cases*, 30 CLEARINGHOUSE REV. 231, 232 (1996).

been subject to a restraining order.<sup>99</sup> This can create problems for victims who are seeking employment or whose workplaces frequently run background checks.<sup>100</sup> Having a domestic violence restraining order can also prevent victims from receiving professional licenses<sup>101</sup> or from entering universities and colleges.<sup>102</sup> In states where restraining orders include provisions that prevent the restrained party from having a gun, victims with mutual restraining orders are immediately disqualified from any position that would require use of a weapon.<sup>103</sup>

Mutual restraining orders also often adversely affect a victim's housing situation. Landlords can evict tenants with restraining orders because they fear the tenant may create a danger or nuisance to other residents.<sup>104</sup> Further, victims who are subject to mutual restraining orders may be denied the housing protections designated for victims of domestic violence under VAWA. VAWA prevents public housing agencies from denying applicants or evicting tenants because of domestic violence perpetrated against them.<sup>105</sup> However, these protections may not apply when the victim is subject to a mutual restraining order, because it is difficult to show that they are actually the victim in the situation. Problems in seeking employment and housing make it much more difficult for a victim to successfully leave their abuser, and a batterer may use the threat of showing others the restraining order to further control and intimidate the victim.<sup>106</sup> The disproportionate issuance of mutual restraining orders thus compounds barriers to employment and housing for LGBT victims, who may already face discrimination in these areas.<sup>107</sup>

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99. See, e.g., *Domestic Violence Restraining Order Information for the Restrained Party*, SACRAMENTO SUPERIOR COURT (2018), <https://www.saccourt.ca.gov/restraining-orders/domestic-violence-restrained-party.aspx/> [<https://perma.cc/2XFE-4B7H>].

100. *Id.*

101. For example, the American Bar Association (ABA) lists violation of a restraining order as conduct that could negatively impact a determination of moral fitness for bar licensing. A.B.A., *ARE YOU FIT TO BE A LAWYER* (2018).

102. See Rebecca Vallas et al., *CTR. FOR AM. PROGRESS, REMOVING BARRIERS TO OPPORTUNITY FOR PARENTS WITH CRIMINAL RECORDS AND THEIR CHILDREN, A TWO-GENERATION APPROACH* 1, 8 (2015) (“[A]n estimated 66 percent of colleges and universities use background checks in the admissions process . . .”).

103. See, e.g., JUDICIAL COUNCIL OF CAL., FORM DV-130: RESTRAINING ORDER AFTER HEARING 6 (2016) (“You cannot have guns, firearms, and/or ammunition.”) (boldface omitted).

104. See, e.g., CAL. CIV. PRACTICE REAL PROPERTY LITIGATION § 26:19 (2019); see also CAL CIV. CODE § 1161.3 (2019) (providing that a landlord may terminate or decline to renew a tenancy if the tenant poses a threat to other tenants, guests, invitees, or licensees). While California also has statutes protecting victims of domestic violence from being wrongly evicted, the tenant or qualified third-party would need to provide documentation of the domestic violation. *Id.* § 1161.3(a)(1).

105. NAT'L HOUS. LAW PROJECT, *KNOW YOUR RIGHTS: DOMESTIC VIOLENCE AND FEDERALLY ASSISTED HOUSING* (2014).

106. Sandra E. Lundy, *Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts*, 28 NEW ENG. L. REV. 273, 297 (1993).

107. NAT'L COALITION OF ANTI-VIOLENCE PROGRAMS, *supra* note 18.

*D. Due Process*

Unmerited mutual restraining orders may also violate a victim's right to due process. There is a constitutional right to be free from arbitrary restraint,<sup>108</sup> and when a court issues an unmerited restraining order against a survivor of domestic violence, it unduly restricts that right.<sup>109</sup> Professor Elizabeth Topliffe argues that "[b]ecause the states protect individuals from restraint absent an evidentiary showing, they have created a liberty interest in not being restrained unless there is a formal hearing that shows potential danger."<sup>110</sup> In other words, mutual restraining orders that courts issue, either *sua sponte* or without sufficient findings of fact, violate a victim's due process right to freedom from restraint.

Indeed, the Supreme Court has held that due process requires findings of fact prior to imposing restrictions on an individual's liberty interest.<sup>111</sup> Interpreting this requirement, appellate courts in California have consistently held that trial courts abuse their discretion when they issue mutual restraining orders without making requisite findings of fact that both of the individuals have committed abuse and were not acting in self-defense.<sup>112</sup> Yet only a few states require family courts to make such findings, raising serious doubt that use of mutual restraining orders broadly adheres to due process principles.<sup>113</sup>

*E. Eroding Trust and Perpetuating Harmful Stereotypes and Homophobia*

Mutual restraining orders issued against LGBT domestic violence victims also exacerbate law enforcement challenges facing the LGBT community. First, dual arrests and mutual restraining orders reinforce the LGBT community's distrust of both law enforcement and the courts. This distrust exists because the legal system has historically treated LGBT persons with brutality, homophobia, and unfairness.<sup>114</sup> Mutual restraining orders indicate to LGBT victims that society believes they are responsible for the violence against them, or that the abuse they face is not important to law enforcement or the courts.<sup>115</sup> As a result, same-sex victims are significantly less likely than different-sex victims to report incidences of violence or to seek legal recourse.<sup>116</sup> This is particularly true because, when a victim is subject to a mutual restraining order, they put

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108. Topliffe, *supra* note 4, at 1058.

109. *See id.* at 1058.

110. *Id.*

111. *See* Wolff v. McDonnell, 418 U.S. 539, 563 (1974) (holding that prisoners are entitled to written findings of fact and the evidence against them in revocation of parole hearings).

112. *See, e.g.,* J.J. v. M.F., 223 Cal. App. 4th 968, 974 (2014); Monterroso v. Moran, 135 Cal. App. 4th 732, 736 (2006); Nora v. Kaddo, 116 Cal. App. 4th 1026, 1028–29 (2004).

113. BATTERED WOMEN'S JUSTICE PROJECT: NAT'L CTR. ON PROTECTIVE ORDERS AND FULL FAITH & CREDIT, *supra* note 42.

114. Masri, *supra* note 2, at 85.

115. *See* Topliffe, *supra* note 4, at 1058.

116. Pertnoy, *supra* note 12, at 561.

themselves at risk of re-arrest, fines, and even prosecution if they report another incident of domestic violence or a violation of the restraining order, since the police may consider them a co-perpetrator, rather than a victim.<sup>117</sup>

Second, mutual restraining orders issued against LGBT victims of domestic violence reinforce harmful and homophobic stereotypes. These stereotypes, discussed in Part I, include perceptions that LGBT relationships are inherently violent, volatile, and unhealthy.<sup>118</sup> Many homophobic organizations have used domestic violence among same-sex couples as evidence to bolster their arguments that same-sex relationships are undesirable and deviant.<sup>119</sup> For example, The Family Research Council, an anti-gay conservative organization, has cited same-sex domestic violence rates to support its conclusion that “committed” same-sex relationships are radically different from heterosexual relationships, and thus not deserving of equal treatment under the law.<sup>120</sup> Mutual restraining orders feed into these homophobic stereotypes by implying that both parties are equally violent. In this way, they create a feedback loop that perpetuates harmful anti-LGBT rhetoric.

Similarly, mutual restraining orders reinforce internalized homophobia. LGBT persons often feel that their sexual orientation is somehow wrong, bad, or criminal.<sup>121</sup> Receiving a restraining order from a court of law can affirm the victim’s self-doubt and guilt, or convince them that they are a batterer because they acted in self-defense.<sup>122</sup> Batterers can also use mutual restraining orders to convince their victims that the behavior is not domestic violence because it is occurring in a same-sex relationship.<sup>123</sup> And, as discussed above, the LGBT community may refuse to acknowledge abuse for fear that it perpetuates harmful stereotypes and detracts from efforts to gain acceptance and legal protections.<sup>124</sup> Mutual restraining orders tell LGBT victims that they are not worth protecting. This contravenes the purpose of restraining orders and puts an already marginalized group at even greater risk of violence.

#### IV.

##### FACTORS LEADING TO ISSUANCE OF MUTUAL RESTRAINING ORDERS

To combat the negative effects of mutual restraining orders on LGBT individuals, it is necessary to understand the factors that contribute to their disproportionate use in cases of same-sex domestic violence. First, statutes often provide insufficient guidance to police officers and judges, rarely requiring them to deliberate and make reasoned decisions when deciding who the primary

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117. Topliffe, *supra* note 4, at 1062.

118. Letellier, *supra* note 9, at 100–01.

119. Knauer, *supra* note 11, at 326.

120. Little, *supra* note 10, at 277.

121. Letellier, *supra* note 9, at 99–100.

122. Little, *supra* note 10, at 263.

123. Pertnoy, *supra* note 12, at 557.

124. Little, *supra* note 10, at 262.

aggressor is and issuing mutual restraining orders. Second, inadequate guidance leads decision-makers to fill the gaps using harmful stereotypes and narratives about who can be a victim of domestic violence. Finally, these harmful narratives reinforce homophobia and impact victims and abusers, who are also likely to be influenced by internalized homophobia.

### A. Statutory Failures

One factor contributing to the prevalence of mutual restraining orders is law enforcement officers' lack of proper tools or statutory guidance to protect LGBT victims. Tasked with responding to volatile situations where there may be conflicting accounts, officers must make quick decisions and may let biases come into play if they lack sufficient guidance. Police officers must decide, typically based solely on information provided by those in the relationship, who, if anyone, has committed a crime.<sup>125</sup> This lack of guidance stems, in part, from how states treat the determination of who is the primary aggressor: in thirty-one states, statutes explicitly task officers with identifying the "primary aggressor"<sup>126</sup> in a domestic violence situation. About half of these statutes declare that the person who is not the primary aggressor need not be arrested,<sup>127</sup> but do not mandate that officers only arrest the primary aggressor. This language offers broad discretion to police officers who may think of same-sex victims as equally culpable.

Nineteen states do not have specific primary aggressor language, although many use language indicating that the police should try to identify whom to arrest using particular factors.<sup>128</sup> While states with no primary aggressor language or equivalent policy may have individual police departments that have adopted guidance directing officers how to respond to domestic violence incidents, police receive no statewide statutory guidance on how to approach a domestic violence situation appropriately.

Three states explicitly discourage mutual arrest,<sup>129</sup> and four states have enacted statutory presumptions that arrest is not appropriate for the person who is not the primary aggressor.<sup>130</sup> Only four states forbid officers from arresting

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125. See RES. CTR. ON DOMESTIC VIOLENCE: CHILD PROTECTION AND CUSTODY, PRIMARY AGGRESSOR STATUTES (2014) (compiling a list of all state laws concerning primary aggressors).

126. Some statutes use terms like "principal aggressor" or "dominant aggressor." *Id.* For purposes of this Note, all terminology (primary, dominant, principal, etc.) is taken to mean the primary aggressor.

127. The primary aggressor statutes often do not label this person the "victim." *Id.*

128. For example, a New Jersey statute states, "[i]n determining which party in a domestic violence incident is the victim where both parties exhibit signs of injury, the officer should consider the comparative extent of the injuries, the history of domestic violence between the parties, if any, and any other relevant factors." N.J. STAT. ANN. § 2C:25-21 (West 2004).

129. CAL. PENAL CODE § 13701(b) (2019); MINN. STAT. § 629.342(2)(a) (2014); TEX. OCC. CODE ANN. § 1701.253(f) (West 2019).

130. FLA. STAT. § 741.29(2)(b) (2017); MISS. CODE ANN. § 99-3-7 (2017); TENN. CODE ANN. § 36-3-619 (2017); WIS. STAT. § 968.075 (2016).

someone who is not the primary aggressor.<sup>131</sup> Nebraska and Massachusetts require that officers make a written report of their grounds for arrest if they make a dual arrest.<sup>132</sup> These statutes, while clearly preferable to no guidance at all or entirely discretionary policies, still fall short because they direct action only *if* the responding officer has made a determination of the primary aggressor. In other words, when an officer fails to make an initial determination that one person is an abuser and the other person is a victim, any guidance about dual arrests is rendered ineffectual.

While there is some variation among statutes, it is clear that in most states police officers are, at most, asked to make a primary aggressor determination. While the most robust statutes indicate to officers that dual arrest should be a last resort, this kind of language is rare. The vast majority of states instead have provisions indicating that arrest of both parties is an acceptable solution, even when the officer has identified a primary aggressor, and especially if they are unable to do so. Such language may not make much of a difference in cases that fit the stereotypical narrative of a domestic violence situation, but as noted above, when same-sex couples are involved, officers are less sure of how to proceed. They may fall back on guidance from statutory policies to address the situation.

In same-sex domestic violence cases, statutory language that permits and perhaps even encourages dual arrest, or that does not require officers to identify the primary aggressor, can have dire consequences for victims subject to wrongful arrest. Arrest can put victims in immediate danger, for example, in “cases in which both parties were arrested and placed in the same jail cell, where the victim was subsequently reassaulted.”<sup>133</sup> The lack of guidance for mutual arrest can also interact with other policies *requiring* arrest. Connecticut, for example, has a mandatory arrest law for domestic violence incidents, but no law stating that officers should arrest only the primary aggressor. As a consequence, Connecticut has the highest dual arrest rate of any state, as officers unable to identify a primary aggressor are obligated to arrest both parties.<sup>134</sup>

#### *B. How Statutory Factors Can Create Bias Against Same-Sex Couples*

Even when states provide policies to direct officers in identifying a primary aggressor, this guidance can still reflect harmful stereotypes. In states where statutory policies direct officers to determine a primary aggressor, the statute often provides a list of factors that the officer should consider in making this

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131. MICH. COMP. LAWS § 776.22 (2005); MONT. CODE ANN. § 46-6-311 (2017); N.J. STAT. ANN. § 2C:25-21 (West 2004); S.C. CODE ANN. § 16-25-70 (2015).

132. MASS. GEN. LAWS ch. 209A § 6 (2010); NEB. REV. STAT. § 29-439 (2004).

133. Harada, *supra* note 84, at 161.

134. HIRSCHER, *supra* note 3, at 11.

determination.<sup>135</sup> Most states require police to consider some form of the following four factors:<sup>136</sup>

1. Prior complaints of domestic violence;
2. Relative severity of injuries inflicted on each party;
3. Likelihood of future injury to each party; and
4. Whether one party used self-defense

However, several states include a fifth factor, which often encompasses a catch-all phrase such as “any other relevant factor.”<sup>137</sup> At least one state explicitly includes the relative size and strength of each party and the appearance of fear as factors.<sup>138</sup>

One factor resulting in dual arrest is that law enforcement may view same-sex partners as physical equals. This confuses the narrative of physical intimidation and overpowering that officers may associate with domestic violence.<sup>139</sup> Officers often make assumptions about the identity of the primary aggressor in situations where they can rely on the stereotypical narrative of a female victim and male abuser. When a same-sex couple is involved, however, officers cannot fall back on this understanding of domestic violence, and thus find it harder to determine a presumed aggressor.<sup>140</sup> Furthermore, studies have shown that both male and female same-sex victims of domestic violence are more likely than heterosexual women to use physical force to defend against their abusers.<sup>141</sup> If victims admit to using force in self-defense, or if law enforcement finds evidence of injury to both parties, officers may be further misled or confused about which party was the primary aggressor.<sup>142</sup> Due to this uncertainty, officers often arrest both individuals.<sup>143</sup> If these individuals seek restraining orders, the court will need to decide which party is the primary aggressor—and will often have to do so with confusing and misleading information from police reports. Under these circumstances, the court may simply issue a mutual restraining order.<sup>144</sup> Factors that implicate the size of victims, inquire into the severity and likelihood of injury, and allow for the full discretion of officers perpetuate the heteronormative domestic violence narrative because officers often have difficulty squaring these factors with situations in which same-sex victims may be more likely to both defend themselves and be

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135. RES. CTR. ON DOMESTIC VIOLENCE: CHILD PROTECTION AND CUSTODY, *supra* note 125.

136. *See id.*

137. *Id.*; *see, e.g.*, LA. STAT. § 46:2140(C)(2) (2015); NEV. REV. STAT. § 171.137(2)(e) (2019); N.J. STAT. ANN. § 2C:25-21(c)(2) (West 2004).

138. MONT. CODE ANN. § 46-6-311(2)(b) (2017).

139. Valiulis, *supra* note 11, at 152.

140. Little, *supra* note 10, at 263.

141. *See* Lundy, *supra* note 106, at 283.

142. *See id.* at 295–96.

143. *See id.* at 297.

144. Little, *supra* note 10, at 263.

seen as physically “equal” to their abuser.<sup>145</sup> Furthermore, because same-sex victims are more likely to fight back, and may be closer in size and strength to their abuser, assessing the relative severity of the injuries can often be misleading.<sup>146</sup>

These bias-invoking factors can carry over into courtrooms, where petitioners for restraining orders may be required to show that they are in fear in order to obtain favorable judgments.<sup>147</sup> If the court does not believe that someone is in fear of their abuser, the victim may not be able to receive a restraining order.

### C. False Narratives Reinforce Homophobia

The narrative of the “ideal” domestic violence victim casts a long shadow on LGBT victims, who, by definition, cannot fit the heterosexual mold. While statutory construction and advocates within the domestic violence community can perpetuate that narrative, it is also upheld by continued homophobia from law enforcement and courts. Scholars have suggested that, in many jurisdictions, officers are not required to identify a primary aggressor and may have little interest in doing so.<sup>148</sup> Officers who harbor homophobic ideas may believe that domestic violence between same-sex couples is less severe, or perhaps that mutual physical violence is a natural or typical part of a “deviant” homosexual lifestyle.<sup>149</sup> Homosexuality is often falsely equated with other types of social deviance, such as BDSM.<sup>150</sup> Officers may consciously or subconsciously make heteronormative inferences and consequently give less attention to the nature of the specific situation when the altercation involves a same-sex couple.<sup>151</sup>

A chilling example of this phenomenon is the case of 14-year-old Konerak Sinthasomphone. In this incident, Milwaukee police officers responded to a 911 call for domestic violence. When they arrived, they found Sinthasomphone, who appeared drunk. Despite the boy’s age and clear intoxication, officers on the scene simply returned Sinthasomphone to his “sober boyfriend,” Jeffrey Dahmer.<sup>152</sup> If the police had taken the time to investigate Dahmer’s apartment, they would have found the remains of Dahmer’s twelfth victim. Instead, Dahmer went on to kill five more people before he was caught. Sinthasomphone was his thirteenth and youngest victim.<sup>153</sup>

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145. Letellier, *supra* note 9, at 101; Lundy, *supra* note 106, at 284.

146. Lundy, *supra* note 106, at 284. See Letellier, *supra* note 9, at 101.

147. One judge questioned why a victim would be intimidated by someone her same size and weight. This kind of question misses the mark and ignores the power and control dynamics that are the hallmark of domestic violence. Lundy, *supra* note 106, at 296.

148. Pertnoy, *supra* note 12, at 562.

149. Letellier, *supra* note 9, at 101.

150. *Id.* at 99.

151. Pertnoy, *supra* note 12, at 562.

152. Knauer, *supra* note 11, at 349.

153. *Id.*

Further, the narrative of the “ideal” domestic violence victim damages the credibility of LGBT victims in court. In order to obtain a restraining order, victims are often required to testify about the abuse that occurred.<sup>154</sup> But same-sex victims’ testimony often deviates from the accepted narrative that domestic violence features a physically smaller female victim and a physically larger male abuser.<sup>155</sup> Judges as well as police officers have internalized biases. A heterosexual judge who is presented with a same-sex couple that has already been subjected to dual arrest may categorize domestic violence accusations as “mutual abuse,” a “cat fight,” or rough-housing.<sup>156</sup> These biases are particularly likely to occur when the victim fights back in self-defense, because self-defense contravenes the typical heteronormative narrative of passive victimhood.<sup>157</sup> Furthermore, LGBT persons are already at a disadvantage in the courtroom because of homophobic perceptions that paint members of the LGBT community as less credible or trustworthy.<sup>158</sup> Perceptions of LGBT persons as “untrustworthy, unsuited for long-term intimacy, self-absorbed, and hypersexual” may also influence the judge’s ruling.<sup>159</sup> A Lambda Legal survey reported that 19 percent of LGBT respondents involved in domestic violence court proceedings had heard negative comments about gender identity or gender expression from judges, attorneys, or court staff.<sup>160</sup>

Judges and law enforcement may also fail to recognize situations of domestic violence entirely if the parties are unwilling to divulge their relationship status due to fear of homophobia and unfair treatment.<sup>161</sup> Officers who are unaccustomed to the idea of same-sex relationships may be unable to identify domestic violence between two men or two women, and may treat the situation as one of mutual violence. The misidentification of same-sex relationships can lead to disproportionate dual arrests and mutual restraining orders in same-sex cases.

For example, in a 2001 Massachusetts case, the Appeals Court vacated mutual restraining orders against Richard Sommi and Samuel Ayer.<sup>162</sup> Sommi and Ayer filed requests for restraining orders in separate courts.<sup>163</sup> The first district court issued a restraining order against Ayer based on allegations of physical and emotional abuse. On the following day, the second court issued an

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154. Topliffe, *supra* note 4, at 1045.

155. Lundy, *supra* note 106, at 289.

156. *Id.*

157. FAMILY VIOLENCE APPELLATE PROJECT, *supra* note 18, at 5.

158. Surveys have shown that LGBT witnesses are viewed as less trustworthy, merely because of their sexual orientation. Michael D. Braunstein, *The Five Stages of LGBTQ Discrimination and its Effects on Mass Incarceration*, 7 U. MIAMI RACE & SOC. JUST. L. REV. 217, 229 (2017).

159. See Dara E. Purvis, *The Sexual Orientation of Fatherhood*, 2013 MICH. ST. L. REV. 983, 999 (2013).

160. FAMILY VIOLENCE APPELLATE PROJECT, *supra* note 18, at 3.

161. CTR. FOR AM. PROGRESS, LGBT DOMESTIC VIOLENCE FACT SHEET 2 (2012).

162. *Sommi v. Ayer*, 744 N.E.2d 679, 680 (Mass. 2001).

163. *Id.*

order restraining Sommi.<sup>164</sup> The court of appeals held that this was essentially a mutual restraining order, and thus required specific findings of fact and a detailed order sufficient to “apprise a law enforcement officer as to which party has violated the order in the event that a violation occurs.”<sup>165</sup> Although the court of appeals reversed the issuance of the mutual restraining order, the judge acknowledged that the record was sufficient to make a finding of abuse, which would merit two separate restraining orders.<sup>166</sup> The court’s decision might indicate that the appellate court perceived this as a case of “mutual abuse.” Notably, the court failed to address the parties’ relationship or the allegations of domestic violence at any time, simply calling them “co-habitants.”<sup>167</sup>

Finally, internalized homophobia on the part of both victims and abusers may contribute to the prevalence of mutual restraining orders in cases of same-sex domestic violence. In same-sex relationships that involve domestic violence, just as in heterosexual relationships, victims are often belittled and criticized by their partners.<sup>168</sup> This psychological abuse can create feelings of shame, helplessness, and self-loathing.<sup>169</sup> This individual abuse is combined with the socialized homophobia that is internalized by many LGBT persons.<sup>170</sup> Abusers may convince victims that they are not deserving of help because they are living a deviant lifestyle, or that this kind of abuse is normal within same-sex relationships.<sup>171</sup> In turn, victims are less likely to call police themselves, seek help, or trust a system that in all other aspects has oppressed them.<sup>172</sup>

## V.

### CHANGING THE NARRATIVE

Dual arrests and mutual restraining orders are a product of society’s misunderstanding of who can be a victim of domestic violence. This misunderstanding is reflected both in the laws that instruct police and courts on how to proceed and in judicial and law enforcement attitudes towards LGBT victims of domestic violence. Thus, solving the problem of mutual restraining orders will require changes in many facets of our system, both legal and cultural. I propose that we begin these changes by creating clear statutory guidelines for both police and courts to follow. These guidelines should rely on objective characteristics, not on stereotypes, and should encourage reasoned deliberation.

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164. *Id.*

165. *Id.* at 681–82.

166. *Id.* at 682.

167. *Id.* at 679. The parties were in a sexual relationship for over a year. Ayers accused Sommi and his partners of rape and eventually received a permanent restraining order against them. *See Doe v. Keller*, 786 N.E.2d 786 (Mass. 2003).

168. Pertnoy, *supra* note 12, at 549.

169. *Id.*

170. *See id.* at 556–57; Letellier, *supra* note 9, at 100.

171. Pertnoy, *supra* note 12, at 556–57.

172. *Id.* at 559–61.

These guidelines should both address primary aggressor determinations and prohibit the issuance of mutual restraining orders without specific factual findings of mutual abuse. Along with statutory reform, we should educate judges and law enforcement so that they can properly use the statutory tools created to protect victims, regardless of the victim's gender or sexuality.

*A. Primary Aggressor Law Reform*

Primary aggressor factors carry considerable weight because courts often rely on police reports or statutorily defined factors when making determinations about domestic violence restraining orders. For this reason, states should be deliberate in ensuring that the factors included in legislation help to discourage dual arrest and reduce bias against same-sex couples. Current state laws do not adequately protect same-sex victims. Rather, states should adopt something similar to the model policy set forth by the International Association of Chiefs of Police (IACP). This policy defines the predominant aggressor as “[t]he individual who poses the most serious, ongoing threat, who might not necessarily be the initial aggressor in a specific incident.”<sup>173</sup> The policy also states that “[d]ual arrests are strongly discouraged. If an officer has probable cause to believe that two or more persons committed a crime and probable cause exists to arrest both parties, the arresting officer shall contact their supervisor before proceeding with the arrests.”<sup>174</sup> The ideal statute would adopt this language in large part. By explicitly stating that dual arrests are “strongly discouraged” and requiring officers to call their supervisor before making such a decision, the policy takes a hard stance against using dual arrest out of convenience. Finally, the policy states that “[i]n the event of a dual arrest, a separate report for each arrest should be written and filed and should include a detailed explanation indicating the probable cause for each arrest.”<sup>175</sup> States should make this language even stronger by requiring written findings related to each factor in the officer's primary aggressor analysis. While this may seem stringent, it is important that officers be required to spend time considering this decision. Scholars have suggested that the effects of implicit bias may be countered, or at least interrupted, when the individual is engaged in deliberate processing.<sup>176</sup> By requiring that officers take extra steps to make dual arrests, including calling a superior and writing a report, this policy can help ensure that such decisions are not made on an improper basis.

One issue with the IACP's model policy is that it espouses a preferred arrest response policy. The provision states the following:

*Preferred Arrest Response:* Law enforcement officers are *expected* to

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173. INT'L ASS'N OF CHIEFS OF POLICE LAW ENF'T POLICY CTR., DOMESTIC VIOLENCE MODEL POLICY 1 (2019).

174. *Id.* at 5.

175. *Id.* at 5.

176. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1177 (2012).

arrest *any* person who commits a crime related to domestic violence as defined by law, unless there is a clear and compelling reason not to arrest, such as self-defense or lack of probable cause, after a comprehensive investigation to identify the predominant aggressor.<sup>177</sup>

The problem with this language is that it may give officers the impression that an arrest of someone who committed an act of violence is preferred, even if the individual is not the predominant aggressor. This seems to run contrary to the provision of the policy that discourages dual arrest. This language is similar to the language adopted by a number of states that says that the person who is not the primary aggressor need not be arrested.<sup>178</sup> An ideal policy would reject this kind of language in favor of a provision that states that the victim or person who is not the primary aggressor must not be arrested.<sup>179</sup> This language would reinforce the importance of treating victims as victims, regardless of whether they also used violence in self-defense.

An ideal policy would also list explicit factors that law enforcement and courts must consider when making a predominant aggressor determination. The IACP policy, along with many state statutes, fails to enumerate guidelines for such an analysis.<sup>180</sup> Many states, while providing some factors as guides, also allow consideration of “any other relevant factor.”<sup>181</sup> These options leave too much room for homophobia and bias to play a role in these decisions. The ideal policy proposed here would enumerate the following factors that *shall* be considered:

1. The need to protect victims of domestic abuse
2. History of domestic abuse
3. Observable dynamics of power and control
4. Whether one person acted in self-defense
5. Statements of the parties and witnesses (e.g., whether one party is afraid of the other)

This set enumeration of factors would help decision-makers adequately assess domestic violence situations, without relying on biased narratives of who can, or cannot, be a domestic violence victim. The list eliminates factors that reinforce stereotypes of the ideal victim, such as severity of injury or relative size.<sup>182</sup> This list also contains factors that are gender and orientation neutral, such as power and control dynamics and the history of abuse. It also prioritizes consideration of self-defense, which is more likely to occur among LGBT

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177. INT’L ASS’N OF CHIEFS OF POLICE LAW ENF’T POLICY CTR., *supra* note 173, at 1 (emphasis added).

178. *See supra* note 127 and accompanying text.

179. S.C. CODE ANN. § 16-25-70 (2014).

180. *See* INT’L ASS’N OF CHIEFS OF POLICE LAW ENF’T POLICY CTR., *supra* note 173, at 1; *see, e.g.,* ARIZ. REV. STAT. ANN. § 13-3601 (West 2014).

181. *See, e.g.,* ARK. CODE ANN. § 16-81-113(2)B(ii) (West 2007).

182. *See* Letellier, *supra* note 9, at 101.

victims of domestic violence. Finally, the ideal policy would eliminate the “if” language used in many statutes, which implies that the rest of the mandate is dependent on the decision-maker’s ability to discern the primary aggressor. This revision should indicate to law enforcement that dual arrest should almost always be avoided, even in cases where they cannot identify a primary aggressor.

### B. Mutual Restraining Order Prohibitions

States and the federal government should update their statutes concerning the issuance and enforcement of mutual restraining orders. Currently, states take a wide variety of approaches to mutual restraining orders.<sup>183</sup> Some states still allow mutual restraining orders to be issued *sua sponte*,<sup>184</sup> while others allow “cross-orders” only if they are petitioned for separately and the court has made written findings on the record.<sup>185</sup> At the federal level, the Violence Against Women Act (VAWA) requires that, for mutual restraining orders to be afforded “full faith and credit” among other states, the following conditions must be met:

1. The respondent filed a written pleading seeking a protection order from the tribunal of the issuing state.
2. The tribunal of the issuing state made specific findings in favor of the respondent.

While these provisions are a good start, they do not provide guidance for officers on how to enforce an order if and when a mutual restraining order is entered. Even at its best, the VAWA provision can only reach orders that are enforced in other states. For this reason, states must adopt comprehensive statutes that incorporate the VAWA provisions to ensure their enforcement. Alabama’s statutes surrounding mutual restraining orders can serve as a model for ideal construction. They read in relevant part:

The court shall not enter mutual orders. The court shall issue separate orders that specifically and independently state the prohibited behavior and relief granted in order to clearly provide law enforcement with sufficient direction when determining if a violation of the order has occurred. For the purpose of judicial economy, a court may consolidate two separately filed petitions into a single case.<sup>186</sup>

The Alabama code sections also incorporate the VAWA provisions into their law. This kind of policy is effective for several reasons. First, the policy explicitly prohibits courts from issuing mutual restraining orders *sua sponte*. When mutual restraining orders (or more accurately, cross-orders) may only be entered into upon respondent’s written request, courts are less likely to use such orders as a convenient solution if they are unmerited. Second, the policy requires

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183. BATTERED WOMEN’S JUSTICE PROJECT: NAT’L CTR. ON PROTECTIVE ORDERS AND FULL FAITH & CREDIT, *supra* note 42.

184. S.C. CODE ANN. § 20-4-60(E) (2014).

185. COLO. REV. STAT. § 13-14-106(3) (2018).

186. ALA. CODE §30-5-5(c) (2014).

that a judge give meaningful written direction to law enforcement officers on how to enforce a mutual restraining order once it is entered. This provision helps to break the self-perpetuating cycle of dual arrests that might otherwise occur in the rare case where a mutual restraining order is issued.

An ideal policy would also explicitly require a judge to make written findings of fact that each party had committed domestic violence and not acted in self-defense. This additional provision, as well as those already contained in the Alabama statute, requires a judge to take the time to deliberate and reason through each decision, which can be important in combatting implicit bias.<sup>187</sup> Another benefit of requiring clear written reasons for issuing mutual restraining orders is that mutual restraining orders are more easily appealed when there is a robust record of factual findings. In cases in which a judge may still unjustly issue a mutual restraining order, this provision gives the victim a better chance of using the judicial system to correct the mistake. Finally, the Alabama code incorporates the VAWA provisions, which helps ensure their enforcement.

Adopting statutes that incorporate these provisions, as well as the provisions in VAWA, will go a long way toward protecting LGBT victims from the adverse effects of mutual restraining orders.

### C. Education of Law Enforcement and Judges

Finally, additional education, training, and inclusivity among law enforcement and judges is needed to prevent the use of unmerited mutual restraining orders. As explored at length above, there are two major non-statutory factors that contribute to the disproportionate issuance of these orders to LGBT individuals. First, same-sex relationships do not fit the narrative of the “ideal” victim. And second, judges and law enforcement personnel may harbor explicit or implicit biases. Both of these factors lead courts and law enforcement to dismiss cases of LGBT domestic violence, or believe in the myth of “mutual battering” in same-sex relationships.<sup>188</sup> Much of this false belief can be attributed to a lack of training on the dynamics of same-sex domestic violence and the ways in which this training compares to heterosexual domestic violence.<sup>189</sup>

Although legal recognition of same-sex relationships has come a long way,<sup>190</sup> there is still much to be done to convince the nation, and courts in particular, that such relationships are not only valid but also as genuine and healthy as heterosexual relationships. For this reason, Congress should amend VAWA so that a portion of the funding allocated to each state is directed towards education programs for judges and law enforcement. These programs should focus on the dynamics of same-sex domestic violence and appropriate responses

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187. See Kang et al., *supra* note 176, at 1177.

188. Letellier, *supra* note 9, at 101.

189. Pertnoy, *supra* note 12, at 562.

190. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that same-sex marriage is legal).

to the problem. Furthermore, state and local governments should invest funding in providing services specifically for LGBT victims of domestic violence, including legal services that can help them navigate the judicial process.

#### CONCLUSION

Mutual restraining orders and dual arrests have a disproportionately large impact on the LGBT community. In LGBT domestic violence cases, these orders are often entered into without sufficient justification. Mutual restraining orders can lead to severe consequences for LGBT victims who are more likely to be endangered by the court's actions. These far-reaching consequences range from future enforcement and safety issues to employment and housing access. Such orders may also make LGBT victims less likely to rely on the justice system in the future. While it may take some time to eliminate the homophobia and disinformation that causes this disparity, state legislators can take immediate action to curb its effects on domestic violence victims. By enacting comprehensive policies surrounding dual arrests and mutual restraining orders, legislators can reduce the mistreatment of LGBT domestic violence victims and help ensure their future safety and survival.